Chapter 2

Media Ownership

2.1 The Broadcasting Services Amendment (Media Ownership) Bill 2006 (Media Ownership Bill) proposes two significant changes to Australia's media ownership laws. Firstly, it proposes new media diversity rules which would amend the *cross-media ownership* laws by allowing 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 media-specific restrictions on *foreign ownership* and control of commercial television and subscription television under the *Broadcasting Services Act 1992* (BSA). A number of special *regional protections* are also included as part of the bill in recognition of the unique circumstances of many regional media markets.

2.2 The Explanatory Memorandum explained the rationale for the proposed changes:

> [The current restrictions] limit competition in the media sector and restrict access to capital, expertise and opportunities for growth. The proposed changes will encourage greater competition and allow media companies to achieve economies of scale and scope, while protecting the diversity of Australia's media.[1]

2.3 The following main features of the Media Ownership Bill will be considered in turn:

- Cross-media ownership
- Foreign media ownership
- Regional protections

Cross-media ownership

2.4 The framework for the existing cross-media ownership rules were enacted in the late 1980s. It was introduced to restrict the common ownership of media operations, which at that time were dominated by television, radio and newspaper.

2.5 Cross-media mergers and acquisitions are regulated through the BSA and monitored and enforced by the Australian Communications and Media Authority (ACMA). These rules apply in addition to general competition law contained in the *Trade Practices Act 1974*.

---

1 Explanatory Memorandum, Broadcasting Services Amendment (Media Ownership) Bill 2006, p. 1.

2.6 The major effect of the existing cross-media ownership laws is to prevent the common ownership of newspapers, television and radio broadcasting licences that serve the same region. This restriction, set out in section 60 of the BSA, specifies that a person must not control:

- a commercial television broadcasting licence and a commercial radio broadcasting licence having the same licence area;
- a commercial television broadcasting licence and a newspaper associated with that licence area; or
- a commercial radio broadcasting licence and newspaper associated with that licence area.[2]

2.7 In addition to the cross-media ownership rules the BSA prescribes a number of 'statutory control rules'. These rules specify that:

- a person must not control television broadcasting licences whose combined licence area exceeds 75 per cent of the population of Australia;[3]
- a person must not control more than one television licence, or more than two radio licences in the same licence area;[4]
- a person must not control a commercial television broadcasting licence and a datacasting transmitter licence;[5] and
- various limitations apply to the number of directorships a person can hold in relation to commercial television, radio and datacasting.[6]

The new media diversity rules

2.8 The Media Ownership Bill proposes the inclusion of a new Media Diversity Division in the BSA which would implement the Government's policy to liberalise the current restrictions on cross-media ownership. The statutory control rules outlined above would be retained and the bill would provide additional protections in regional licence areas (discussed below).

The 5/4 rule

The Media Ownership Bill proposes a 5/4 rule in order to allow cross-media transaction and increase competition in Australian commercial media markets. The 5/4 rule provides for a minimum of five separate traditional media 'voices' in

---

2 In this context 'associated newspaper' means that at least 50 per cent of the circulation of the newspaper is in the relevant broadcasting licence area.

3 *Broadcasting Services Act 1992*, ss. 53(1).

4 *Broadcasting Services Act 1992*, ss. 53(2) and s. 54.

5 *Broadcasting Services Act 1992*, s. 54A.

6 *Broadcasting Services Act 1992*, ss. 55–56A.

metropolitan radio licence areas and four in regional radio licence areas.[7] A 'voice' would be a media group controlling a commercial television licence, commercial radio licence or associated newspaper, or any combination of these. The ABC and SBS, and other licence holders such as narrowcasters and community TV do not constitute a voice for the purpose of the test. The 5/4 rule is said to achieve a better balance between competition and diversity in a rapidly changing media landscape.

2.9 The Media Ownership Bill introduces the concept of an 'unacceptable media diversity situation' which would arise if a person undertakes a transaction that results in the number of media groups dropping below the prescribed 5/4 levels. It would be both a civil and criminal offence to cause an unacceptable media diversity situation to come into existence, or to reduce the numbers voices in a licence area where an unacceptable media diversity situation already exists.[8] The ACMA would be responsible for enforcing the 5/4 rule, using statutory powers such as remedial directions and enforceable undertakings (discussed at paragraphs 2.12–2.14).

Register of Controlled Media Groups

2.10 A points test is set out to enable the media industry and the ACMA to monitor compliance with the 5/4 rule.[9] The relevant number of points from each licence area would be entered into a publicly available Register of Controlled Media Groups (the Register) to be established and maintained by the ACMA.[10] The Register would also contain other relevant information such as registered media groups and the controller(s) of particular media operations. A number of technically complex new sections would govern the circumstances in which, and in what form, certain information would be entered in the Register.

Prior approval for temporary breaches

2.11 The Media Ownership Bill would allow for the prior approval, by the ACMA, of transactions that temporarily breach the 5/4 rule. If the ACMA is satisfied that remedial action would be taken by the applicant or a third party, it may approve the transaction for a period of between one month and two years. The ACMA may grant a one-off extension of up to one year.[11]

Remedial directions

2.12 Where the ACMA is satisfied that an unacceptable media diversity situation exists the ACMA may give remedial directions to a person (excluding a controller of a

7 Broadcasting Services Amendment (Media Ownership) Bill 2006, new section 61AB.

8 Explanatory Memorandum, Broadcasting Services Amendment (Media Ownership) Bill 2006, p. 54.

9 Broadcasting Services Amendment (Media Ownership) Bill 2006, new section 61AC.

10 Broadcasting Services Amendment (Media Ownership) Bill 2006, new sections 61AU–61AZH.

11 Broadcasting Services Amendment (Media Ownership) Bill 2006, new sections 61AJ–AK.

registered media group) to ensure that the situation ceases to exist. New section 61AN would provide for a period of up to two years within which a person must remedy the situation as directed by ACMA. It would allow a person who innocently breaches the 5/4 rule prohibition through the actions of a third party to be granted the maximum permitted period of two years to correct the situation whereas a person who flagrantly breached the prohibition would only be allowed one month to rectify the situation.

Enforceable undertakings

2.13 The Media Ownership Bill would bring the ACMA in line with many other Commonwealth regulatory authorities by giving it the ability to accept enforceable undertakings. New section 61AS would give the ACMA the ability to accept undertakings offered by a person to the effect that the person will take specified action to ensure that an unacceptable media diversity situation does not exist. This new ACMA power is in addition to the general enforceable undertaking powers contained in new part 14D of the Communications Legislation Amendment (Enforcement Powers) Bill 2006 (outlined in Chapter 1).

2.14 Once accepted by the ACMA, undertakings would be enforceable by the Federal Court. Breaches of enforceable undertakings would be subject to a range of binding court orders.[12]

Public disclosure

2.15 A public disclosure requirement would be introduced for the broadcasting or publishing of matter promoting a cross-controlled media organisation.[13] The default method of disclosure would be the 'business affairs model'. This would require media outlets to disclose a cross-media relationship at the time they broadcast or publish matter, other than journalistic acknowledgements and advertising material, that is wholly or partly about the business affairs of a cross-controlled media organisation.

2.16 Although the disclosure requirement would place some compliance obligations on media companies and some monitoring and enforcement obligations on the ACMA, disclosure requirement are seen as valuable in providing comfort regarding the impact of media ownership reforms on the accuracy of news and information.

Foreign Media Ownership

2.17 Under existing arrangements there are a number of controls on foreign media ownership in Australia. These apply across the entire media sector through the Government's Foreign Investment Policy, under which the media is a prescribed 'sensitive sector', and specifically to television licences through the BSA.

---

12 Broadcasting Services Amendment (Media Ownership) Bill 2006, new section 61AT.

13 Broadcasting Services Amendment (Media Ownership) Bill 2006, new sections 61BA–BH.

2.18 Foreign investment in media assets (radio, newspaper and television) are monitored under special Foreign Investment Policy arrangements which are contained in the *Foreign Acquisitions and Takeovers Act 1975* (FATA). In relation to media assets the FATA empowers the Treasurer to examine acquisition proposals of all direct (i.e. non-portfolio) foreign investment proposals irrespective of size. Proposals involving portfolio share holdings of five per cent or more must also be approved. If the Treasurer determines that such an acquisition would result in control of the company by a foreign person, and that such control is contrary to the national interest, then the acquisition may be blocked.[14]

2.19 Further limitations are placed on foreign ownership of newspaper assets under the Foreign Investment Policy. The maximum permitted aggregate foreign (non-portfolio) interest in national and metropolitan newspapers is 30 per cent, with a 25 per cent limit on any single foreign shareholder. The aggregate non-portfolio limit for provincial and suburban newspapers is 50 per cent.[15]

2.20 In addition to the limitations contained in the FATA, the BSA contains restrictions which relate expressly to commercial and subscription television licences. The BSA applies no special rules to radio or newspapers reflecting the presumption that television is the most influential medium.

2.21 For commercial television licences, foreign persons are prevented from being in a position to exercise control of a licence, and two or more foreign persons are restricted to having combined interests of 20 per cent.[16] Foreign persons must not have company interests in a subscription television licence that exceed 20 per cent in the case of an individual or 35 per cent in the aggregate.[17] In addition, a restriction of foreign directors of up to 20 per cent is also placed on commercial television licences.[18]

2.22 Schedule 2 of the Media Ownership Bill would amend the BSA by removing all provisions that currently restrict foreign ownership of commercial television and subscription television interests. The current newspaper-specific foreign ownership restrictions in the government's Foreign Investment Policy under the FATA would also be removed.[19] As a result of these changes proposals by foreign interests to

---

14 *Foreign Acquisitions and Takeovers Act 1975*, section 17H and *Foreign Acquisitions and Takeovers Regulations 1989*, Regulation 12.

15 Foreign Investment Review Board, *Foreign Investment Policy*, http://www.firb.gov.au/content/other/sensitive/media.asp?NavID=54 (accessed 6 October 2006).

16 *Broadcasting Services Act 1992*, s. 57.

17 *Broadcasting Services Act 1992*, s. 109.

18 *Broadcasting Services Act 1992*, s. 58.

19 Senator The Hon Helen Coonan, Minister for Communications, Information Technology and the Arts, 'New Media Framework for Australia', Press release 068/06, 13 July 2006, p. 6.

directly invest in the media sector, irrespective of size, would remain subject to prior approval by the Treasurer. According to the explanatory memorandum:

> [t]he effect of removing all restrictions on foreign ownership from the BSA is that foreign ownership of commercial and subscription television interests will be regulated only by the Government's Foreign Investment Policy... That is, the situation in relation to commercial and subscription television interests will be the same as for commercial radio and newspapers.[20]

2.23 Schedule 2 does not affect the requirement that a commercial or subscription television broadcasting licensee must be a company formed in Australia.[21] A foreign owner would therefore need to establish an Australian subsidiary to be the licensee company.

2.24 The current foreign ownership restrictions would be lifted when the new provisions commence on a day to be fixed by Proclamation. However, if the provisions do not commence before 1 January 2008, they would commence on that day.[22]

Regional protections

2.25 Apart from establishing a minimum of four traditional media groups in each regional radio licence area, the Media Ownership Bill contains two additional protections in recognition that 'a reduction in the number of separate media operations [in regional areas] may have a more significant impact on both competition and diversity than in metropolitan areas.'[23] The first additional protection relates to three-way mergers while the second relates to licensing conditions on local content for commercial television and radio.

Competition and Diversity – Three-way mergers

2.26 New section 61AZJ provides that where a transaction involves a merger of all three of the regulated media platforms (television, radio and newspapers) within a regional radio licence area the transaction must be subject to a prior competition review by the Australian Competition and Consumer Commission (ACCC). The intention of this new element of protection is to subject mergers with the potential to

---

20 Explanatory Memorandum, Broadcasting Services Amendment (Media Ownership) Bill 2006, p. 77.

21 *Broadcasting Services Act 1992*, ss. 37 and 95 respectively.

22 Broadcasting Services Amendment (Media Ownership) Bill 2006, cl. 2.

23 Explanatory Memorandum, Broadcasting Services Amendment (Media Ownership) Bill 2006, p. 56.

significantly reduce levels of competition and diversity in regional markets to an ACCC competition review.[24]

2.27 Although it is common practice for parties to major mergers in practice approach the ACCC to obtain *informal clearance*, three-way mergers in regional licence areas would be required to obtain *formal clearance* from the ACCC prior to the transaction taking place. According to the Explanatory Memorandum:

> [t]his will ensure that those media mergers likely to have the greatest impact on diversity and competition – three way mergers in regional markets, which have fewer media groups than metropolitan markets – are considered in terms of their compliance with the [*Trades Practices Act 1974*], and in particular [the prohibition of mergers that would result in a substantial lessening of competition].'[25]

Local content

2.28 One of the objectives of the BSA is 'to encourage providers of commercial and community broadcasting services to be responsive to the need...for an appropriate coverage of matters of local significance.'[26] With the proposed liberalisation of media ownership rules, additional licence conditions would be introduced to ensure minimum local content levels for regional commercial television and radio.

Regional commercial television

2.29 The Media Ownership Bill would introduce new section 43A requiring the ACMA to impose licence conditions that require all commercial television broadcasters in the regional aggregated commercial markets of Northern and Southern New South Wales, Regional Victoria, Regional Queensland and Tasmania to broadcast at least minimum levels of material of local significance. Apart from new introduction into Tasmania, these requirements would essentially mirror the requirements already imposed by the ACMA.

2.30 The ACMA would be required to include a definition of 'local area' and 'material of local significance' in the licence condition. The definition of 'material of local significance' must be broad enough to cover news that relates directly to the local area concerned.[27]

---

24 Explanatory Memorandum, Broadcasting Services Amendment (Media Ownership) Bill 2006, p. 72.

25 Explanatory Memorandum, Broadcasting Services Amendment (Media Ownership) Bill 2006, p. 30. The prohibition of mergers that would result in a substantial lessening of competition is contained in section 50 of the *Trades Practices Act 1974*.

26 *Broadcasting Services Act 1992*, para. 3(1)(g).

27 Broadcasting Services Amendment (Media Ownership) Bill 2006, new subsection 43A(3).

Regional commercial radio

2.31 New Division 5C provides for minimum local news and information requirements to be imposed on regional commercial radio broadcasting licensees where a 'trigger event' occurs. A trigger event occurs where:

- the commercial radio licence is transferred to a third party;
- a new media group is brought into existence with a regional commercial radio broadcasting licence in the group; or
- there is a change in controller of a media group, of which the commercial radio licence is a part.[28]

2.32 The consequence of a trigger event occurring would be two fold. Firstly, it would require several *local content obligations* to be met and secondly for a *Local Content Plan* to be approved by the ACMA.

2.33 In terms of local content obligations, a licensee would have to meet minimum service standards for:

- local news (at least five bulletins per week, broadcast during prime-time hours);
- local community service announcements (at least one per week);
- emergency warnings (to be broadcast as requested by emergency service agencies); and
- designated local content programs (during a particular week if a declaration has been made by the Minister).[29]

2.34 A licensee must submit a draft local content plan to the ACMA for approval and registration within 90 days after a trigger event.[30] A draft Local Content Plan must specify how a licensee will comply with the local content obligations for the minimum service standards described above.[31] The ACMA would be required to approve or refuse to approve the Local Content Plan.[32] There is no timeframe specified for ACMA's approval. All approved Local Content Plans must be included in a register which must be made publicly accessible via the Internet.[33]

---

28 Broadcasting Services Amendment (Media Ownership) Bill 2006, new section 61CB.

29 Broadcasting Services Amendment (Media Ownership) Bill 2006, new section 61CD.

30 Broadcasting Services Amendment (Media Ownership) Bill 2006, new subsection 61CF(1).

31 Broadcasting Services Amendment (Media Ownership) Bill 2006, new section 61CG. The local content obligations which would specify minimum service standards are contained in new section 61CE.

32 Broadcasting Services Amendment (Media Ownership) Bill 2006, new section 61CH.

33 Broadcasting Services Amendment (Media Ownership) Bill 2006, new section 61CJ.

2.35 If the licensee fails to comply with specified informational requirements timeframes or the ACMA refuses to approve the draft Local Content Plan, the ACMA may determine a plan for the licensee by legislative instrument.[34]

2.36 A licensee is required to take all reasonable steps to comply with the approved Local Content Plan and compliance with an approved Plan would be a licence condition.[35]

2.37 The Minister may also direct the ACMA to conduct an investigation into whether additional licence conditions should be imposed on regional radio broadcasting licensees in relation to local content.[36] It is intended that such an investigation might inform the Minister's decision whether to impose additional local content obligations under new subsection 61CE(6).

Key issues

2.38 Submissions to the inquiry raised a number of issues in relation to the Media Ownership Bill. Amongst these, the key issues were:

- Competition and concentration of ownership
  - Cross-media ownership
  - Foreign media ownership
  - Metropolitan and regional differences
- The Australian Communications and Media Authority's role
- The Australian Competition and Consumer Commission's role
- Diversity
  - Definition of a 'voice'
- Regional protections
  - The two-out-of-three proposal
  - Three-way mergers
  - Local content requirements

Competition and concentration of ownership

2.39 The proposed media diversity rules can be seen as aiming to balance two objectives of the BSA: 'to facilitate the development of a broadcasting industry in

34 Broadcasting Services Amendment (Media Ownership) Bill 2006, new subsections 61CF(2) and 61CH(5).

35 Broadcasting Services Amendment (Media Ownership) Bill 2006, new section 61CP and Item 25 of Schedule 2.

36 Broadcasting Services Amendment (Media Ownership) Bill 2006, new subsection 61CR(1).

Australia that is efficient, competitive and responsive...'; and 'to encourage diversity in control of the more influential broadcasting services'.[37]

2.40 There was a range of views expressed regarding the impact of the media reform package on competition and concentration of ownership. This was due to a number of countervailing factors within the legislative package; for example amendments to cross-media ownership, foreign ownership, the new digital channel licences, the restrictions on a fourth free-to-air commercial television broadcaster, the changes to multi-channelling and anti-siphoning as well as external influences such as rapid technological change, online services and the global trend towards greater concentration.

2.41 In particular, modern communications technology has blurred the lines between the traditional media platforms. Television broadcasters are able to provide print media through Internet sites and many newspapers now provide video and audio streaming through the Internet.

2.42 The discussion in this chapter is limited to cross and foreign media ownership issues. Chapter 3 discusses each of the other key items listed at paragraph 2.40.

2.43 Private Media Partners told the committee that in Australia there has been a long-standing trend of consolidation amongst traditional media organisations. Mr Beecher gave the example of the newspaper sector where:

> In the 1980s there were 13 daily newspapers in the five capital cities and they had nine different owners. Today there are seven daily newspapers—almost half—and they have four owners.[38]

Cross-media ownership

2.44 It is generally accepted that the proposed cross-media ownership changes would result in some degree of consolidation amongst Australian media firms through mergers and acquisition. For example, the Explanatory Memorandum describes some possible scenarios that commentators have speculated on for the consolidation of Australia's media market:

- purchase of existing newspapers by television networks or vice versa;
- acquisition of radio networks by television networks; and
- mergers between regional media groups.[39]

---

37 *Broadcasting Services Act 1992*, para. 3(1)(b) and para. 3(1)(c) respectively.

38 Mr Eric Anthony Beecher, Partner, Private Media Partners, *Committee Hansard*, 28 September 2006, p. 108.

39 Explanatory Memorandum, Broadcasting Services Amendment (Media Ownership) Bill 2006, p. 24.

2.45 Several media owners and representative organisation such as Fairfax, the Seven Network and the Media Entertainment and Arts Alliance raised concerns about a concentration of ownership. For example Fairfax stated:

> The media legislation will lead to some consolidation in the industry. Many argue that there is already too much concentration in the industry and these Bills will result in still more of it.[40]

2.46 Those with concerns about the potential for increased concentration suggested that it could lead to a reduction in media diversity and would risk large players becoming more dominant.

2.47 Although criticised by groups such as the Australian Press Council for being arbitrary[41], Mr Jock Given for being unsophisticated[42], and by the Institute of Public Affairs for being unnecessary[43], the proposed 5/4 rule would provide a safety net for both concentration of ownership and diversity of opinion. In combination with the ACCC's competition review (discussed below) it would limit the level of merger activity that is possible in any distinct media market.

2.48 The Explanatory Memorandum acknowledges that the introduction of the 5/4 rule may act as a driver towards concentration by initiating a, '"race for the threshold" in those markets where the number of separate media organisations is greater than the proposed [5/4] limit...'[44] Several commentators have expressed similar views. For example Mr Stuart Simson, Associate Commissioner on the Productivity Commission inquiry into Broadcasting suggested that there will be a 'lot of activity', a 'feeding frenzy' and a concern amongst some media organisations of being 'left at the altar'.[45]

2.49 Officials from the Department of Communications, Information Technology and the Arts (DCITA) gave evidence that in theory the number of media groups in a particular area could fall below the 5/4 minimum.[46] DCITA officials confirmed for example that it was theoretically possible, even if unlikely in reality, that in a regional

---

40 Fairfax Media, *Submission 22*, p. 1.

41 Australian Press Council, *Submission 12*, p. 4.

42 Mr Jock Given, private capacity, *Committee Hansard*, 29 September 2006, p. 67.

43 Mr Christopher Berg, Research Fellow, Institute of Public Affairs, *Committee Hansard*, 28 September 2006, p. 12.

44 Explanatory Memorandum, Broadcasting Services Amendment (Media Ownership) Bill 2006, p. 29.

45 Mr Stuart Simson, Associate Commissioner on the Productivity Commission Broadcasting inquiry, *The new media laws*, The Media Report, ABC Radio National, 20 July 2006, www.abc.net.au/rn/mediareport/stories/2006/1689458.htm# (accessed 21 September 2006).

46 Dr Rod Badger, Deputy Secretary, Strategy and Content, Dr Bernard Keane, acting General Manager, Media Industries Branch, and Dr Simon Pelling, acting Chief General Manager, Content and Media Division, Department of Communications, Information Technology and the Arts, *Committee Hansard*, 28 September 2006, pp 123–124.

area with six media groups that underwent a three-way merger, and subsequently the three remaining media groups for whatever reason collapsed, then there would be no requirement for divestiture on the merged organisation. As the ACCC put it, there would be no 'unscrambling of the egg'.[47] Under this scenario, because the initial three-way merger would be permitted (assuming that it received ACCC approval) by the 5/4 rule, the grandfathering provisions would protect the merger even if the three remaining organisations were to collapse.[48]

2.50 An official from the ACMA explained the rationale for the new provisions which would give the ACMA the ability to grant prior approval to transactions that would breach the 5/4 rule for up to three years:

> ...it is quite similar to temporary breach provisions that [the ACMA has] under the existing legislation which allow organisations looking to take certain actions to come forward and have some certainty from the regulator up front before they transact.[49]

2.51 Asked what criteria the ACMA would use in considering an application for a temporary breach Mr Chapman, the ACMA Chairman responded:

> That would be a matter of our professional assessment of the framework that was put, the timetable that was put, the business plans and proposals... They would be the matters that we would take on a case-by-case basis, looking at timetable, proposed corporate activity to remedy the situation, funding capacity, execution capacity, bona fides of the parties—just a general professional assessment of those matters. I do not believe I would be capable of drilling down to any greater detail other than to give you those generalities. It is exercising a professional judgement.[50]

2.52 Supporters of the new cross-media ownership proposal however, point out that there are sufficient safeguards included in the broader legislative package to counterbalance the potential negative impacts of a degree of consolidation in the media sector. For example the Ten Network stated:

> As a medium sized media company with a single free-to-air television channel to market, Ten would have concerns about the potential for the changes to allow Australia's largest media companies to increase their dominance, particularly if an open slather regime was put in place without the appropriate checks and balances.

---

47 Mr Graeme Samuel, Chairman, Australian Competition and Consumer Commission, *Committee Hansard*, 28 September 2006, p. 41.

48 An example of the grandfathering provision is contained in new subsection 61AN(4) of the Broadcasting Services Amendment (Media Ownership) Bill 2006.

49 Ms Nerida O'Loughlin, General Manager, Industry Outputs Australian Communications and Media Authority, *Committee Hansard*, 29 September 2006, p. 77.

50 Mr Christopher Chapman, Chairman, Australian Communications and Media Authority, *Committee Hansard*, 29 September 2006, p. 81.

> However, we are reassured by the Government's approach of balancing cross-media ownership reform with new competition and content safeguards to ensure diversity.
>
> For companies like Ten trying to compete with the dominant players, the alternative of leaving the rules the way they are is far worse.
>
> Without access to capital and resources and without the ability to create scale, Ten will not be able to provide real competition to Australia's media giants, particularly in an increasingly fragmenting media market.[51]

Committee view

2.53 The committee recognises that the proposed changes to the cross-media ownership rules are a highly sensitive aspect of the Media Ownership Bill.

2.54 The committee notes the range of safeguards that will accompany the relaxation of the cross-media rules including the 5/4 rule, the ACCC's competition review and regional local content protections. The committee also notes the definition of 'voices' under the 5/4 rule is limited to traditional media (discussed in paragraphs 2.114–2.124), and does not take into account the content and diversity provided by voices such as subscription television, community broadcasters, online sources and the national broadcasters. In the committee's view these safeguards (discussed in detail below), in combination with several additional safeguards recommended later in this report, will ensure a balance between a more competitive media sector and the need for diversity of content.

2.55 On balance, the committee believes that with these appropriate safeguards in place, the proposed relaxation of the cross-media ownership rules should proceed.

Recommendation 1

2.56 The committee recommends that the legislation, as it applies to the cross-media ownership rules, stand as drafted.

Foreign media ownership

2.57 The proposed changes to the foreign media ownership arrangements could work to both enhance and reduce competition. They may allow foreign owners that are already participants in the Australian market to increase their current level of ownership. Conversely, it may encourage new overseas competitors to enter the Australian media market, thus providing access to foreign capital and increasing competition and diversity of ownership.

2.58 In its submission, APN News & Media outlined its positive experience of foreign ownership in the radio sector both in Australia and New Zealand. It stated:

---

51 Ten Network, *Submission 31*, p. 3.

> APN has a particular interest in foreign ownership restrictions, as it is a company with a significant foreign shareholding through a major international newspaper group, Independent News & Media. It is also a 50% owner of Australian Radio Network [ARN], with its joint venture partner Clear Channel Communications of the US and a 50% owner of radio stations in Brisbane and Perth with Daily Mail and General Trust Group (DMG).
>
> The case for relaxation of foreign ownership restrictions on Australian media is overwhelming. For example, in commercial radio foreign ownership relaxation has seen the creation of both ARN and DMG, now two of the major forces in Australian radio. Between them, these groups have invested well in excess of a billion dollars in Australia. The multiplier effect on employment, the advertising market and through it, promotion of trade in goods and services, has been enormous. Most importantly, the creation of these groups has transformed the Australian radio market, both commercially and in terms of the quality of broadcasting, making it extremely competitive in a way that would not have been possible without that investment.[52]

2.59 Most submitters supported the proposed changes to the foreign ownership rules. The Seven Network for example summed up its support for the proposed foreign media ownership changes in the following way:

> ...the repeal of these restrictions would improve access to capital, increase the pool of potential media owners and act as a safeguard on media concentration. It allows scope for the entry of additional media players or for support for existing operations that might otherwise become the target of merger proposals.[53]

Committee view

2.60 The committee is of the view that the proposed relaxation of the foreign media ownership rules will increase competition and diversity within the Australian media industry by allowing new entrants to come into the market. It will also enable existing market participants to gain greater access to foreign capital which will allow media businesses to pursue new growth opportunities. For these reason the committee supports the proposed foreign ownership changes.

Recommendation 2

2.61 The Committee recommends that the legislation, as it applies to foreign ownership regulations, stand as drafted.

---

52 APN News & Media, *Submission 36*, p. 2.

53 Seven Network, *Submission 30*, p. 13.

Metropolitan and regional differences

2.62 Another theme that ran through the inquiry was the different impacts the proposed changes may have on metropolitan and regional markets.

2.63 In large metropolitan areas there would be a higher potential for consolidation as typically these areas currently have many more voices than the prescribed minimum. For example the largest two Australian markets, Melbourne and Sydney currently have 11 and 12 media groups respectively.[54] In theory at least, these markets could be consolidated to five media groups. The Explanatory Memorandum gives the following assessment of the likely impacts in metropolitan areas:

> In metropolitan areas, requiring a minimum of five media groups strikes a balance between setting too high a threshold, which would enable only a small number of mergers to occur, and undermining diversity by establishing too low a threshold. In Sydney and Melbourne, due to the operation of the radio licence limits, there must be a minimum of six media groups. A minimum of five media groups will permit several mergers in Brisbane, Adelaide and Perth; however, it should be noted that as a consequence of common ownership of assets in the capital cities by large media companies (the three metropolitan television networks, News Ltd, ARN, DMG, Austereo, Southern Cross and, to a lesser extent, Fairfax), mergers undertaken based in the dominant Sydney and Melbourne markets will lead to consequential mergers in the smaller capitals.
>
> Establishing a minimum of six groups would in effect place the other capitals on the same footing as Sydney and Melbourne, despite the much larger size of the latter two markets. Due to the common ownership of metropolitan assets, a minimum of six may prevent mergers in Sydney and Melbourne markets without divestiture of major assets to ensure that merged entities comply with a minimum requirement of six groups in markets such as Adelaide or Perth. Establishing a lower minimum, for example of four media groups, would in the Government's view undermine diversity of ownership in the largest and most important media markets.

2.64 In contrast the Explanatory Memorandum recognises that the four voices limit in regional areas would restrict mergers to larger regional centres:

> a minimum of 4 media groups acts as a break point separating larger regional centres from the majority of regional licence areas. A minimum of four media groups will ensure that 64 per cent of regional radio licence areas would be unable to bear any mergers without a new entrant.[55]

2.65 In regional areas which already have fewer than four media groups (26 regional radio licence areas) the Media Ownership Bill would prevent mergers

---

54 Explanatory Memorandum, Broadcasting Services Amendment (Media Ownership) Bill 2006, pp. 34–35.

55 Explanatory Memorandum, Broadcasting Services Amendment (Media Ownership) Bill 2006, p. 25.

that would result in a reduction of the number of media groups.[56] However as noted above there would be the theoretical possibility of a reduction below the 5/4 threshold if it was a result of a collapse of an existing media group rather than through a media merger. This situation could apply in both regional and metropolitan areas.

2.66 A number of submitters expressed the special circumstances that regional areas face in relation to media competition and diversity. For example Fairfax, which operates several regional newspapers, told the committee:

> Regional media already is challenged from a diversity perspective. There is already a shortage of media diversity.... I think there are concerns in regional Australia, which are expressed to our regional editors in the markets in which we participate, that further consolidation in those markets will further diminish diversity of content in those markets.[57]

2.67 The committee notes that the special circumstances of regional areas are recognised under the Media Ownership Bill by the inclusion of various special regional protections such as local content requirements and the three-way merger provision. These aspects of the bill are discussed below.

The Australian Communications and Media Authority's role

2.68 The ACMA's responsibility in the area of media ownership is conferred under the provisions of BSA which sets out the rules for ownership and control of broadcasting licensees and associated newspapers. Under the Media Ownership Bill, the ACMA would continue to have responsibility for protecting media diversity by enforcing the 5/4 rule. The ACMA would have the power to give remedial directions under new section 61AN for the purpose of ensuring that an unacceptable media diversity situation ceases to exist. Such a direction would include a direction requiring the divestment of shares or interests in shares. The ACMA will also be able to seek civil penalties against parties that cause an unacceptable media diversity situation to occur, and to accept enforceable undertakings in relation to such situations.

2.69 Concerns were raised during the hearings that the Communications Legislation Amendment (Enforcement Powers) Bill 2006 does not give the ACMA a general power to move for an injunction to restrain a merger or a general power to seek divestiture after an unlawful merger under the 5/4 test.[58] As a result it would appear that the ACMA powers do not extend to injunctive powers either to move the

---

56 Broadcasting Services Amendment (Media Ownership) Bill 2006, new subparagraphs 61AG(a)(ii) and 61AH(a)(ii).

57 Mr James Hooke, Managing Director, New South Wales, Fairfax, *Committee Hansard*, 28 September 2006, p. 6.

58 New section 205Q, contained in the Communications Legislation Amendment (Enforcement Powers) Bill 2006, would allow the ACMA to apply to the Federal Court for injunctions but only in the limited circumstances of contravention of the unlicensed services provisions under new sections 121FG and 136A–136E.

Federal Court to restrain the unlawful merger or to seek divestiture of assets acquired which would be a breach of the 5/4 test.

2.70 The ACMA indicated in its response to a question on notice that:

> ACMA also understands that the Minister for Communications, Information Technology and the Arts is considering amendments to the Bill enabling ACMA to seek injunctions to prevent transactions that may cause an unacceptable media diversity situation.[59]

Committee view

2.71 The committee notes that the proposed amendments to the BSA do not extend to giving ACMA powers to enforce, by way of injunction or divestiture orders, breaches of the 5/4 rule. Nor are there suitable pre-existing powers in the BSA.

2.72 The committee heard evidence that the matter could be dealt with under s. 50 of the TPA. There are two problems with that approach. First, injunctions and divestiture orders to restrain or deal with breaches of section 50 of the TPA may not be sought by the ACMA, but by the ACCC. The committee does not consider that the ACCC is the appropriate body to regulate media diversity, and does not favour industry-specific amendments to the TPA.

2.73 Secondly, section 50 only prohibits mergers which have the effect of 'substantially lessening competition'. It is perfectly clear from subsection 50(3) (which defines the criteria according to which substantial lessening of competition is assessed) and subsection 50(6) (which defines 'market' for the purposes of section 50 as a market in goods or services) that the only relevant criteria are economic criteria. That is hardly surprising in an economic statute such as the TPA. Nevertheless, it is important to recognise that media diversity is a different, and broader, concept than economic competition. In enforcing section 50 of the TPA, the ACCC may only have regard to the latter. The policy of this suite of legislation, as the committee understands it, is to have regard to much broader considerations, including considerations of public interest and social utility, rather than merely market concentration in a narrow economic sense. Proceedings under section 50 of the TPA cannot do this.

2.74 Accordingly, the committee considers that there is a *lacuna* in the proposed enforcement provisions of the Bills. It recommends that the ACMA be given broad powers, analogous to those in sections 80 and 81 of the TPA, to enforce the legislation by injunctions (including interlocutory injunctions) and divestiture orders, in appropriate cases.

2.75 One question which then arises is whether the legislation should set out (by analogy with subsection 50(3) of the TPA) the criteria according to which alleged

---

59 Australian Communications and Media Authority, answer to question on notice, 29 September 2006 (received 3 October 2006).

breaches of the new diversity provisions of BSA are to be assessed, or whether the rather vague criterion of 'public interest' is sufficient. The Committee has an open mind on that question. But it is firmly of the view that the expedient of looking to the ACCC to, in effect, police the diversity provisions of the legislation through section 50 of the TPA is inappropriate and unworkable.

Recommendation 3

2.76 The Committee recommends that ACMA be given broad powers, analogous to those in sections 80 and 81 of the TPA, to enforce the legislation by injunctions (including interlocutory injunctions) and divestiture orders, in appropriate cases.

The Australian Competition and Consumer Commission's role

2.77 Under the proposed media reforms, mergers that satisfied the numerical 5/4 test would remain subject to the general mergers provisions of the *Trade Practices Act 1974* (TPA). The ACCC would continue to assess the competitive impacts of transactions, in accordance with the requirements of section 50 of the TPA.

2.78 The extent to which there is consolidation in Australia's media ownership landscape will therefore depend significantly on the ACCC's approach in assessing the impacts on competition of various merger proposals.

The ACCC's general approach to mergers

2.79 The ACCC administers and enforces the merger provisions under the *Trade Practices Act 1974* (TPA), which apply generally across all sectors of the economy. Although there is no compulsory pre-merger notification requirement in Australia, parties are encourage to approach the ACCC for an informal competition review prior to mergers proceeding. The ACCC has an established process for the informal review of proposed mergers that have the potential to raise concerns under the anti-competitive prohibition contained in section 50 of the TPA.

2.80 Section 50 prohibits mergers and acquisitions that would have the effect, or be likely to have the effect, of substantially lessening competition in the market in a substantial market in a state, territory or region of Australia. Consideration of merger proposals on an informal basis provides the merger parties with the ACCC's preliminary view on whether a particular proposal is likely to breach section 50 and whether the ACCC would challenge the merger in the Federal Court.

2.81 In assessing the likely competitive effects of proposed acquisitions, the ACCC will take into account the merger factors listed in subsection 50(3) of the TPA including, among other things, the height of barriers to entry, market concentration and the level of imports. To provide greater certainty to merger parties on the

information needed to assess an application, the ACCC has outlined its general approach to mergers in the publication *Merger Review Process Guidelines*.[60]

2.82 Once a proposed merger is made public the ACCC prepares a final view after conducting market inquiries and consulting with interested parties such as competitors, customers, suppliers, relevant government agencies and other relevant bodies. The ACCC may approve, reject or approve the application to merge subject to specific conditions. Reasons are generally made public with the final view.

2.83 If the ACCC considers that a merger contravenes section 50 of the TPA and the parties do not agree to modify or abandon the merger, the ACCC can apply to the Federal Court for an injunction, divestiture or penalties.

The ACCC's proposed assessment framework for cross-media mergers

2.84 Following the release of the Government's discussion paper, *Meeting the Digital Challenge: Reforming Australia's media in the digital age* in March 2006, the ACCC provided broad guidance on how future cross-media merger proposals might be assessed by the ACCC and the ACCC's approach to defining media markets.[61] In its paper simply titled *Media Mergers*, the ACCC highlights that each merger proposal would be considered on its competitive merits in accordance with its *Merger Review Process Guidelines*.

2.85 The paper recognises that recent technological advances such as the Internet and the digitisation of content are rapidly changing the nature of the media sector. These changes are leading to some convergence between the types of content that can be carried by the traditional delivery modes as well as the development of new types of content. The paper highlights that these changes may have a profound effect on the markets relevant for analysing some media mergers over the coming decade.

2.86 The Chairman of the ACCC, Mr Graeme Samuel, described how recent technological developments had broadened the ACCC's focus in relation to media mergers from the delivery mode to include the consideration of the distributed content:

> The issue that has been the focus of attention in media mergers in the past—and I am talking about the past two, three and four years and previously—has always been the distribution channel end of the media. By that I mean the means by which news, information, entertainment, audiovisual content or content that can be read can be distributed to consumers. There has been a focus on what I call the distribution channel end. The purpose of this paper is to examine the trend that has been observed by the commission and has been observed elsewhere in the world, which is that we ought to be focusing on more than the distribution

60 Australian Competition and Consumer Commission, *Merger Review Process Guidelines*, July 2006.

61 Australian Competition and Consumer Commission, *Media Mergers*, August 2006.

> channels; we also need to focus on the content that is actually distributed to consumers. The idea is to move the focus back up from those channels, up the transmission pipes, to that content that becomes relevant.[62]

2.87 The *Media Mergers* paper explains that in particular the ACCC would consider three main product classes as part of its assessment of media mergers:

- the supply of advertising opportunities to advertisers;
- the supply of content to consumers; and
- the acquisition of content from content providers.[63]

2.88 Other more specific products – such as premium content; classified and display advertising; and the delivery of news, information and opinion – may also be critical when considering particular mergers.

2.89 The unique circumstances of rural and regional markets are also highlighted:

> Consumers in regional areas rely heavily on local suppliers of news and information, as compared to consumers in urban areas who have greater access to a variety of media outlets, including new media. Competition in those local markets may be more vulnerable following a merger than competition in the larger cities. As such, the ACCC will continue to consider implications at the local and regional level when assessing mergers proposed for those areas.[64]

2.90 Mr Samuel gave evidence that the ACCC's analysis of regional markets would apply the same test as in metropolitan areas to determine whether there would be a lessening of competition. However because regional markets are limited to a smaller geographic market this would 'increase the sensitivity to a lessening of competition because of the narrowness of the geographic market.'[65]

2.91 Five main concerns were raised in relation to the ACCC's framework for assessing media mergers, whether:

- it would be possible for the ACCC to define the market for news and information;
- the ACCC would be able to protect diversity of opinion;
- there needs to be a public interest test;

---

62 Mr Graeme Samuel, Chairman, Australian Competition and Consumer Commission, *Committee Hansard*, 28 September 2006, p. 32.

63 Australian Competition and Consumer Commission, *Media Mergers*, August 2006, pp 4–5.

64 Australian Competition and Consumer Commission, *Media Mergers*, August 2006, p. 5.

65 Mr Graeme Samuel, Chairman, Australian Competition and Consumer Commission, *Committee Hansard*, 28 September 2006, p. 39.

- the ACCC is adequately funded to undertake an influx of merger assessments; and
- the framework could be circumvented if the Dawson amendments to the TPA were enacted.[66]

Definition of the market for news and information

2.92 In relation to defining the market for news and information, the concern revolved around the fact that news is not traded between consumers and media organisations except in rare circumstances. As a result, the Explanatory Memorandum states that: '[a]n assessment of the impact of media mergers on news and information therefore cannot rely on the tools employed to assess the competitive impacts of mergers.'[67]

2.93 Mr Brian Cassidy, the Chief Executive Officer of the ACCC, described the issue in the following terms:

> The point with news and current affairs is that it obviously quite often is not priced explicitly, so we cannot apply the normal sorts of pricing tests that we would use in defining markets.[68]

2.94 Mr Graeme Samuel explained that it was still possible to define a market for news and information:

> ...the process of analysing or defining a news, information and current affairs market [is] not necessarily the same as that of defining a market, say, for sporting content, because it tended not to be subject to the same economic considerations and economic analyses. That is not to say that it is not possible to apply the appropriate tests of substitutability.[69]

2.95 Mr Samuel went on to say that it would come down to the issue of substitutability and this would be determined by a process of analysing consumer preferences and consumer habits in the take-up of news, information and current affairs.

The ACCC's ability to protect diversity of opinion

---

66 The 'Dawson amendments' refers to the amendments proposed in the Trade Practices Legislation Amendment Bill (No. 1) 2005 which would implement changes to the trade practices amendments recommended by the Dawson Committee's *Review of the Competition Provisions of the Trade Practices Act 1974*, January 2003. This would include changes to the responsibilities of the ACCC and the Australian Competition Tribunal.

67 Explanatory Memorandum, Broadcasting Services Amendment (Media Ownership) Bill 2006, p. 22.

68 Mr Brian Cassidy, Chief Executive Officer, Australian Competition and Consumer Commission, *Committee Hansard*, 28 September 2006, p. 34.

69 Mr Graeme Samuel, Chairman, Australian Competition and Consumer Commission, *Committee Hansard*, 28 September 2006, p. 33.

2.96 Several submitters expressed concerns regarding the ACCC's ability to protect media diversity. For instance Professor Franco Papandrea stated:

> The application of the Trade Practices Act is confined to economic markets and, as things currently stand, impact on diversity of opinion is not a primary, if relevant, factor in the ACCC's consideration of whether the merger should be allowed. In other words, protection of diversity in the ideas market will only be incidental to, rather than part of, the assessment of a merger's impact on competition in relevant markets... Nonetheless, there would be a presumption that the suggested approach to defining media markets would have a less adverse impact on diversity than the more traditional approach used thus far [by the ACCC].[70]

2.97 The ACCC *Media Mergers* paper also casts some doubt over the ability of the ACCC to protect media diversity which is stated to be 'primarily protected by the restrictions on cross-media mergers in the Broadcasting Services Act.'[71] This view is confirmed by the Explanatory Memorandum which states 'the TPA does not permit the ACCC to consider the impact on media diversity of transactions in the media sector.'[72]

2.98 However, the *Media Mergers* paper goes onto explain that it may consider the issue of media diversity as part of its wider assessment of a proposed merger:

> The ACCC will also consider whether a merged media business could exercise market power by reducing the quality of the content it provides consumers, which could include reducing the diversity of the content it provides.[73]

2.99 The paper concludes that:

> [u]ltimately, whether or not protecting competition in media markets will maintain the current level of media diversity in Australia will not be clear until the outcome of actual media merger investigations is known.[74]

A public interest test

2.100 In relation to the need for a public interest test, a number of submitters raised this possibility. The concept stems from the Productivity Commission Broadcasting Inquiry finding that the Trade Practices Act is not equipped to deal with mergers in the 'market for ideas'.[75] DCITA officials confirmed that there is no public interest test

---

70 Professor Franco Papandrea, Director, Communication and Media Policy Institute, University of Canberra, *Attachment to Submission 8*, p. 309.

71 Australian Competition and Consumer Commission, *Media Mergers*, August 2006, p. 6.

72 Explanatory Memorandum, Broadcasting Services Amendment (Media Ownership) Bill 2006, p. 10.

73 Australian Competition and Consumer Commission, *Media Mergers*, August 2006, p. 8.

74 Australian Competition and Consumer Commission, *Media Mergers*, August 2006, p. 9.

75 Productivity Commission, *Broadcasting Inquiry Report*, March 2000, p. 24.

under section 50 of the TPA.[76] The introduction of a media-specific public interest test in the TPA would allow only mergers and acquisitions demonstrated to be in the public interest with regard to diversity of ownership and diversity of sources of opinion and information.

2.101 The Seven Network expressed its concerns in the following manner:

> We have concerns that clearly once the rules have been relaxed there will be greater consolidation between media players. Our experience in dealing with the ACCC has been that they are not always able to be an effective gatekeeper for issues of the public interest... We think that there should be legislated rules to protect diversity.[77]

2.102 However the Explanatory Memorandum dismisses the need for a public interest test stating that it:

> ...would not provide certainty or transparency for either for the industry or for the public, as it would rely on the subjective judgement of the regulator or other party charged with making the assessment.[78]

2.103 The Committee is of the view that the role of the ACCC is to assess competition and the role of the ACMA is to assess diversity. While these factors are measurable, 'public interest' is subjective and can vary with the assessor.

Whether the ACCC is adequately funded

2.104 In relation to the question of whether the ACCC is adequately funded to cope with a possible increase in media merger reviews, Mr Samuel responded:

> ...the Treasurer has been very good to us in terms of meeting our requirements for budgetary increases. I think in the three years that I have been chairman of the commission our budget has almost doubled to meet expanding responsibilities. But I would also say that your question is predicated on the assumption that there will be a vast wave of media mergers that will flow on from this legislation being passed. If that were to occur, and there was suddenly a need for a substantial expansion of resources, then I think (1) we would cope but (2) my CEO would be going to the Treasurer and saying, 'Look, we need some more resources to deal with the enormous increase in workload.'[79]

---

76 Dr Bernard Keane, acting General Manager, Media Industries Branch, Department of Communications, Information Technology and the Arts, *Committee Hansard*, 28 September 2006, p. 115.

77 Ms Bridget Godwin, Manager, Regulatory and Business Affairs, Seven Network, p. 52.

78 Explanatory Memorandum, Broadcasting Services Amendment (Media Ownership) Bill 2006, pp 28–29.

79 Mr Graeme Samuel, Chairman, Australian Competition and Consumer Commission, *Committee Hansard*, 28 September 2006, p. 41.

2.105 If the Treasurer refused a request for additional funding Mr Samuel added: '[w]e would do as we always do, and that is we would start reallocating resources around and...potentially work a lot harder.'[80]

The possibility of bypassing an ACCC competition review

2.106 Finally, concerns were raised by the possibility that another bill that is before the Parliament would allow merger parties to bypass an ACCC competition review and instead go direct to the Australian Competition Tribunal. Mr Samuel indicated that although the ACCC would have an opportunity present its case to the tribunal it does not have a vote on issues before the tribunal.

Committee view

2.107 The committee acknowledges several concerns raised by stakeholders in relation to the ACCC's role in making a competition review of proposed media mergers. The committee is of the view that the ACCC is the appropriate regulator to undertake such reviews. The ACCC also has the ability and capacity to undertake competition reviews within the media sector and thereby restrict mergers which would result in a substantial lessening of competition. The committee supports the ACCC's enhanced and more active role in the assessment of media mergers.

Diversity

2.108 The issue surrounding the diversity of the media is often expressed as one of fundamental importance to a well functioning representative democracy. For example the Australia Press Council stated:

> For the effective functioning of Australian democracy, there must be sufficient and sufficiently diverse sources of news and comment to ensure that members of the public are always promptly and well enough informed to make their own judgments about governance, regulation, sport, entertainment or other matters.

2.109 Some submitters expressed concerns regarding the existing level of diversity in the Australian media industry. Mr Beecher of Private Media Partners for instance stated:

> Currently in Australia most journalism of significance is in the hands of five families plus the Fairfax organisation. Let us be specific about that: in the regional areas, it is the O'Reilly family and the John B Fairfax family, and in the metropolitan areas it is the Murdoch, Packer and Stokes families and the Fairfax organisation, which used to be family owned and is now institutionally owned. So you have six unelected groups—five of them

80 Mr Graeme Samuel, Chairman, Australian Competition and Consumer Commission, *Committee Hansard*, 28 September 2006, p. 41.

> families—and they are the gatekeepers of news and opinion in this country.[81]

Distinction between diversity of ownership and diversity of content

2.110 Many submitters expressed the view that the replacement of the cross-media ownership rules with the 5/4 rule would further reduce diversity of ownership in Australia's media sector. These submitters were of the view that the introduction of the 5/4 rule would not strike an effective balance between competition and diversity.

2.111 Several submitters told the committee that concerns over the potential loss of diversity of opinion are unwarranted as there is not necessarily a correlation between the number of owners and the level of diversity. For example Mr Peter Harvie of the Austereo Group stated:

> there is an independence between the media, and they would remain independent, because it is in the senior management's best interests to let us get on with the job that we do best and not interfere or cut us back.[82]

2.112 In a similar vein, Mr Anthony Bell of Southern Cross argued that large media firms are too centralised to influence content at a regional level:

> ...the ownership these days is too far removed—the owners are just too big—to have the influence in those smaller communities on a community-by-community basis.[83]

2.113 At the heart of the question whether the 5/4 rule would or would not adequately protect diversity of opinion is the issue of what constitutes a media 'voice'.

Definition of a 'voice'

2.114 There are two significant exclusions on what would constitute a 'voice' for the purposes of the 5/4 rule. Firstly, the Media Ownership Bill contains a narrow definition of what would constitute a 'media operation'. The definition is restricted to *traditional* forms of media; that is commercial television broadcasting, commercial radio broadcasting or Associated Newspapers. As a result, significant *emerging* media voices such as online services, subscription television providers and community broadcasters are not considered 'voices'.

2.115 Secondly, several major media operations would not be considered as 'voices' for the purposes of the 5/4 rule. Australia's two national broadcasters, the *Australian Broadcasting Corporation* and the *Special Broadcasting Service* are not commercial

---

81 Mr Eric Beecher, Partner, Private Media Partners, *Committee Hansard*, 28 September 2006, p. 108.

82 Mr Peter Harvie, Chairman, Austereo Group Ltd, *Committee Hansard*, 28 September 2006, p. 79.

83 Mr Anthony Bell, Managing Director, Southern Cross Broadcasting, *Committee Hansard*, 28 September 2006, p. 104.

operations and therefore are not counted under the 5/4 rule. Submissions from both national broadcasters reminded the committee of the important role they play in enhancing media diversity in Australia. Furthermore, because the definition of 'Associated Newspapers' requires that at least 50 per cent of the circulation of a newspaper must be within a particular licence area, national newspapers such as *The Australian*, the *Australian Financial Review*, and *The Land* are not considered 'voices'.[84]

2.116 The media organisations within these two categories of exceptions essentially provide additional diversity and local content above and beyond the minimum required by the 5/4 rule.

2.117 Several submitters made the point that the voices test does not recognising the varying levels of influence of different voices. For example DMG radio submitted:

> The proposed minimum voices test will not protect diversity in the media in a meaningful way *unless* the test requires there to be an adequate number of *real voices* in each market.
>
> It is unrealistic, for example, to suggest that a mega media conglomerate with one daily newspaper, one free to air television station and two radio stations in one market should be counted as a voice just the same as one small stand alone radio station in that market with an insignificant number of listeners. This belies reality.[85]

2.118 Factors such as size and content were cited by submitters as being important indicators to determine which media outlets were in fact opinion makers. Mr Paul Neville's analysis of the five metropolitan markets illustrated this point. It indicated that under the voices definition there are:

> Sydney 12 voices, Melbourne 11 voices, Brisbane 10 voices, Perth 8 voices, Adelaide 7 voices. However if you remove the TAB and (predominantly) music stations from the analysis, the picture becomes Sydney 7, Melbourne 6, Brisbane 6, Perth 5 and Adelaide 5.[86]

2.119 Mr Neville explained this led to only one opinion making radio station in all metropolitan markets except Sydney which in a three-way merger situation would lead to a very strong opinion-making concentration:

> the only market in which you potentially could get diversity with a measure of concentration is Sydney, because there you have both 2GB and 2UE, two powerful opinion makers in radio. But in all the other capital city markets, with 3AW [Melbourne], 4BC [Brisbane], 5AA [Adelaide] and 6PR [Perth], you only have one opinion maker. If someone already owns or buys up the local daily newspaper, one of the TV stations and the one opinion-making

84 *Broadcasting Services Act 1992*, s. 59.

85 DMG Radio (Australia) Pty Ltd, *Submission 28*, p. 1.

86 Mr Paul Neville MP, *Submission 21*, p. 4.

> radio station, they certainly have a very strong opinion-making concentration in that capital city market.[87]

2.120 Representatives of Fairfax gave the specific example of the Newcastle market and disputed the existence of seven media voices:

> A market like Newcastle is allegedly a market in which there are seven media players, Fairfax being one of those, with the *Newcastle Herald.* If you asked the lord mayor of Newcastle how many media players there were in Newcastle, I think he would be amazed to find there were seven. If he puts out a press release, probably only our newsroom, NBN's newsroom and maybe one of the local radio stations will contact him. The notion that there are seven independent voices in Newcastle is probably mathematically correct and statistically true, but it is substantively false.[88]

2.121 Other submitters suggested that the focus on traditional media players was too narrow and that the voices provided by new media such as the Internet, subscription television and community broadcasters should be included in any diversity test. For example APN News & Media submitted:

> However, APN questions whether [basing the 5/4 rule on the number of groups owning traditional media platforms] is the appropriate approach. Indeed, it seems unusual that legislation prompted by the arrival of 'new' forms of media should rely entirely on utilising 'old' forms of media in determining diversity by number of 'voices'.[89]

2.122 The APN News & Media submission went on to suggest that other publications such as freely distributed local newspapers are very relevant to local political and social debate and should be considered as voices under the 5/4 rule.

Committee view

2.123 The committee acknowledges the concerns raised by various groups regarding the potential impacts on media diversity of the changes contained within the Media Ownership Bill. The committee also notes that the media ownership changes must not be viewed in isolation from the rest of the media reform package which contains elements that are likely to increase media diversity in Australia.

2.124 With the introduction of the various safeguards proposed, the committee believes that the changes to the media ownership rules strike an appropriate balance between protecting media diversity and allowing media organisation to take advantage of new market opportunities.

---

87 Mr Paul Neville MP, private capacity, *Committee Hansard*, 29 September 2006, p. 4.

88 Mr James Hooke, Managing Director, New South Wales, Fairfax, *Committee Hansard*, 28 September 2006, p. 6.

89 APN News & Media, *Submission 36*, p. 4.

Regional Protections

2.125 The proposed media ownership changes raise two significant concerns in regional areas: the emergence of a large and dominant market participant in relatively small media markets; and a reduction of local content. The Media Ownership Bill introduces various mechanisms to address these concerns. The most prominent is the prescribed minimum of four media voices in any regional radio licence area. The majority of regional licence areas already have four or fewer separate media groups.[90] In these areas, unless prior approval was granted by the ACMA for a temporary breach, the 5/4 rule would effectively prevent any consolidation of the current media operators.

2.126 For the benefit of larger regional markets there are additional safeguards proposed by the Media Ownership Bill, for example the requirement for a competition review by the ACCC for *three-way mergers* and new licence requirements regarding *local content*. Another proposal to provide further protection in regional areas, which gained much attention during the inquiry, was the proposal put forward by Mr Paul Neville MP for a *two-out-of-three rule*. The following proposed regional protections are discussed below:

- A two-out-of-three rule;
- Three-way mergers; and
- Local content requirements for regional radio and television.

A two-out-of-three rule

2.127 A two-out-of-three rule would allow proposed mergers in regional areas that involved cross-ownership of only two of the three traditional media platforms of newspaper, radio and television. The proposal was originally recommended by this committee in 2002, stating that it would:

> be an appropriate response to the different economics experienced by regional media, and recognises concerns about undue concentration of ownership in regional Australia. It would help to secure the financial viability of regional media, by allowing for enhanced economies of scale and a larger revenue base and therefore greater profitability. Larger scale regional media companies would also have a greater capability to maintain local content.[91]

2.128 Mr Neville expressed his proposal as a two-out-of-three rule with an overriding four voices rule. Essentially, it would preclude three-way mergers in regional areas containing six or more media groups.

---

90 Explanatory Memorandum, Broadcasting Services Amendment (Media Ownership) Bill 2006, pp 34–35.

91 Senate Environment, Communications, Information Technology and the Arts Legislation Committee, *Report on the Broadcasting Services Amendment (Media Ownership) Bill 2002*, June 2002, p. xi.

2.129 Concentration of media ownership was Mr Neville's rationale for proposing a two-out-of-three rule which he described in the following way:

> I do not think it is acceptable that someone can own the local newspaper, two radio stations and a television station, perhaps the one with the local news. That is far too much concentration and it leaves only three other players in the market, probably the least influential radio station and the two television stations that do not have local news.[92]

2.130 He noted that it would be important to apply the rule not only to market of six or seven voices, but also to market of five voices as Mr Neville suggests that it would be possible to make five voices become six by selling off one of two radio stations owned by a single proprietor. It could also be argued that, given the ACMA would have the power to grant temporary breaches of the four regional voices rule of up to three years, the two-out-of-three rule should apply to regional areas more generally.

2.131 A number of submitters opposed the two-out-of-three rule. APN News & Media for example described it as 'a two-tier regime set across arbitrary lines on a map' and 'nonsensical and anti-competitive'.[93] It provided the example of the rapidly urbanising southeast corner of Queensland, stating that a two-out-of-three rule:

> would place media owners in the so-called regional markets surrounding the Brisbane CBD at a distinct competitive disadvantage to those operating in the Brisbane metropolitan market. The outcome would affect investment in the regional markets and ultimately produce a sub-optimal offering to consumers in those markets.[94]

2.132 Independent Regional Radio did not consider that the proposed two-out-of-three test would be an improvement on the possibility for three way mergers because it would still allow for the possibility of a merger between the two influential voices in a regional area, the local radio stations and local newspaper. Mr Foster told the committee:

> The area of influence of a television station is invariably many times bigger than that and covers other markets. Television stations do not really involve themselves in local issues down at the level that the radio station does. So their capacity for influence is very low, really. So, if you are left with a situation where, say, only the local radio station and the local newspaper have a common owner, that really is a position of very strong dominance in all of the areas in which we have expressed concern.[95]

---

92 Mr Paul Neville MP, private capacity, *Committee Hansard*, 29 September 2006, p. 2.

93 APN News & Media, *Submission 36*, p. 5.

94 APN News & Media, *Submission 36*, p. 5.

95 Mr Desmond Foster, Director, Independent Regional Radio, *Committee Hansard*, 29 September 2006, p. 24.

2.133 However this view does not canvas the possibility of a merger between a television station and either a radio station or a newspaper in which case, under a two-out-of-three rule, there would be no opportunity for a subsequent or simultaneous merger between the radio station and the newspaper.

2.134 The ACCC acknowledged that a two-out-of-three rule would provide greater certainty to regional communities than the requirement for a competition review in the event of a proposed three-way merger.[96]

Committee view

2.135 The committee stands by the view it expressed when it recommended the two-out-of-three rule in 2002; that is it would be an appropriate response to the different economics experienced by regional media, and recognises concerns about undue concentration of ownership in regional Australia. The committee also agrees with the ACCC that the two-out-of-three rule would provide a greater degree of certainty to media market participants and regional communities. Accordingly, the committee makes the following recommendation.

Recommendation 4

2.136 The Committee recommends that the two-out-of-three rule be used for maintaining media diversity in rural and regional markets.

Three-way mergers

2.137 If the above recommendation is accepted it would obviate the need for ACCC approval for three-way regional mergers. The following discussion is premised on the proposed Media Ownership Bill without the two-out-of-three rule.

2.138 In larger regional markets the requirement for an ACCC competition review of three-way mergers will provide an additional degree of diversity and competition protection to the requirement for a minimum number of media groups.

2.139 In many small and medium regional licence areas there is currently only one additional media operator than the minimum number required (that is five current media operators in a regional area with a minimum requirement of four). The Explanatory Memorandum indicates that in June 2006 there were 77 of regions with five or fewer separate media groups.[97] In such small and medium markets a three-way

96 Mr Brian Cassidy, Chief Executive Officer, Australian Competition and Consumer Commission, *Committee Hansard*, 28 September 2006, p. 41.

97 Explanatory Memorandum, Broadcasting Services Amendment (Media Ownership) Bill 2006, pp. 34–35. By comparison the number of regions with 6 or more separate media groups (where the three-way merger test would apply) in June 2006 was 19.

merger would not be permitted as it would constitute an 'unacceptable media diversity situation', because it would reduce the number of media groups below four.[98]

2.140 As a result, there is no legislative requirement for a competition review by the ACCC for two-way mergers in a five voices regional areas, even though it would represent a 20 per cent reduction (in purely numeric terms) in the number of media groups and may have a significant impact on media diversity and competition.

2.141 This point is recognised by the Explanatory Memorandum which states:

> '[t]he rule would also be redundant in a number of regional markets as they currently have only five separate media organizations, and a three-way merger would reduce the number of separate groups below four.'[99]

Committee view

2.142 Arguably, it is in these regional areas, due to their relatively small size and already limited media diversity, that the protection provided by an ACCC competition review is most important. Although there would be an informal requirement for any two-way merger that may substantially lessen competition, there would be no guarantee it would occur. If the government does not accept the committee's recommendation regarding the two-out-of-three rule, the committee would like to see the Media Ownership Bill amended so that an ACCC competition review is required for two-way mergers in regional areas that currently have five or fewer separate media owners.

Local content requirements for regional radio

2.143 There was a great deal of concern expressed by regional radio operators and their representatives regarding the proposed local content requirements for regional radio. There were strongly held views that regional radio had been unjustifiably and inexplicably singled out amongst other traditional media platforms. For example Bathurst Broadcasters, which owns two regional commercial radio licences, expressed concern over the additional burden that the new local content provisions would impose. It pointed out that the requirements were 'grossly unfair' to commercial regional radio licensees as they did not also apply to metropolitan radio, television or newspaper proprietors.[100]

2.144 Grant Broadcasters provided a similar assessment:

---

98 Broadcasting Services Amendment (Media Ownership) Bill 2006, new subsection 61AB(2).

99 Explanatory Memorandum, Broadcasting Services Amendment (Media Ownership) Bill 2006, p. 23. Although this quote refers to the '2 out of 3 rule' the principle is the same, that is, a three-way merger in a regional market that currently has 5 media groups is not possible under the 5/4 rule.

100 Bathurst Broadcasters, *Submission 2*, p. 1.

> The Explanatory Memorandum recognises that local content comes from press, television and radio, but places no restrictions on press and light restrictions on TV, whilst going to the extraordinary extent of mandating staffing levels and physical resources for radio. There is no explanation for this attention to radio other than the observation that it is radio assets that are more likely to change hands.[101]

2.145 Media commentator, Mr Jock Given highlighted the interventionist nature of the local content requirements. He acknowledged that while aimed at laudable goals, the regional radio localism requirements:

> …involve a troubling level of detailed intervention in the day-to-day operations of commercial broadcasters, including their physical facilities. They are framed negatively, to 'maintain' rather than 'enhance' or 'encourage' localism, and are activated not as part of a general policy applicable in all situations, but only where a trigger event occurs that might give rise to special fears about cutbacks in local content or presence.[102]

2.146 In general, submissions from regional radio broadcasters indicated that they were committed to broadcasting local content, and that the majority were providing more than the suggested minimum hours of local content.

2.147 Commercial Radio Australia pointed out that the some of the trigger events specified in the bill are not necessarily linked to mergers. For example it suggested that the Local Content Plan provisions could be triggered:

> ...in a situation where there was a corporate restructure within an existing commercial radio group. We think that that is probably not the intention of the legislation but it is there; that is the effect of the current drafting. We also have concerns that one of the trigger provisions is actually related to the controller of the registrable media group—it sees him to be a controller of that group. There are circumstances that could come about that have nothing to do with cross-media merger activity—for example, an individual might sell shares in a company, particularly a family company, or someone might pass away and cease to be a controller of the registrable media entity. We think there needs to be more work done on defining and narrowing the scope of the trigger events because, as the legislation is currently drafted, their scope is too broad.[103]

2.148 The major concern for regional radio broadcasters was that additional regulation would result in higher compliance costs and would, if anything, make local news and current affairs more costly to produce, deterring new and smaller players in the market.

---

101 Grant Broadcasters, *Attachment 1 of Submission 29*, p. 2.

102 Mr Jock Given, *Submission 25*, p. 9.

103 Mr Moses Kakaire, Manager, Legal and Regulatory, Commercial Radio Australia Ltd, *Committee Hansard*, 28 September 2006, p. 93.

2.149 Several submitters suggested that ultimately the proposed localism requirements could impact the ongoing viability of some regional radio stations which would undermine the intention of the provisions. Furthermore, it was often put to the committee that regional markets will drive demand for local news and content and media providers ignore that at their peril.

2.150 There was also criticism about the fact that the regional radio industry had not been consulted about the proposed localism requirements. Commercial Radio Australia expressed it this way:

> ...the commercial radio sector is very disappointed by what we believe is a lack of proper consultation on this particular aspect of the media reform bills. Even the explanatory memorandum to the media reform bills acknowledges that industry has been given very little time to comment directly on the detail of the local content and local presence proposals. This is very unlike the other aspects of media reform bills. We were given just over a week to review and comment on proposals that really impact on the commercial running of radio stations in regional Australia. We believe that kind of time frame is inadequate in the light of the significant impact which such proposals could have on the viability of regional commercial radio stations.[104]

2.151 Commercial Radio Australia requested that the committee consider the removal of the localism proposals from the current package of bills in order to allow the government to review them on a separate timetable which would allow more time for proper consultation.

Committee view

2.152 The committee notes the concerns expressed by many regional radio providers regarding the local content requirement specified in the Media Ownership Bill. The committee also notes that the regional radio industry has not been properly consulted about the proposed changes, which in the committee's view is regrettable. Given the serious concerns expressed by the regional radio industry the committee makes the following recommendation.

Recommendation 5

2.153 The Committee recommends that the Minister reconsider local content requirements and regulation for regional radio broadcasters, after full and intensive consultation with regional radio.

104 Ms Joan Warner, Chief Executive Officer, Commercial Radio Australia Ltd, *Committee Hansard*, 28 September 2006, p. 93.

Local content requirements for regional television

2.154 The new localism requirements for regional television are already provided for in ACMA standards, except that the bill would extend coverage of these requirements to Tasmania.

2.155 Representatives of the ACMA gave evidence that the organisation was considering whether television broadcasters in South Australia and Western Australia should be required to meet similar localism requirements. In doing so the effectiveness of the current conditions that apply to eastern states were being looked at before making a decision in relation to South Australia and Western Australia.[105]

105 Mr Christopher John Chapman, Chairman, and Ms Nerida O'Loughlin, General Manager, Industry Outputs, Australian Communications and Media Authority, *Committee Hansard*, 29 September 2006, p. 81.