MINORITY REPORT BY LABOR SENATORS

A FLAWED INQUIRY

The media plays a fundamentally important role in Australian society. The media is not just a form of entertainment, it is the primary means by which the major issues of the day are discussed and debated. It is simply not possible to have a healthy democratic system without a vibrant, diverse and competitive media sector.

This committee was given the task of examining the most significant changes to the media landscape in Australia since the introduction of the cross media ownership laws in 1987.

Unfortunately, despite the significance of the matters involved, the Government demonstrated from the outset that it wanted little more than a perfunctory inquiry.

As was evidenced in last years' disgraceful one day Telstra inquiry, this is a Government that pays mere lip service to notions of Senate scrutiny and public accountability.

This is not a matter that can seriously be contested. Labor Senators would like to catalogue the series of abuses associated with this inquiry:

- In violation of established precedent, the Minister nominated the reporting date of the inquiry before the committee had even met to consider the proposed inquiry.
- The Minister dictated that the committee would have just three weeks to conduct its inquiry.
- Members of the public were given just over a week to make a submission on the legislation. In contrast, the Government has spent well in excess of 12 months negotiating its plan with the media moguls.
- In the ultimate display of contempt, the Minister failed to even table the legislation dealing with one of the key elements of the Government’s plan, namely the proposals for the establishment of two new digital broadcasting services, the so-called Channel A and Channel B.

Such was the Minister’s haste to ram these changes through the Senate committee and the Parliament that the commencement of the inquiry could not wait until the Government had finished drafting the legislation.

Undeterred, the Minister asked the committee to inquire into her two page press release which was renamed a “discussion paper” in a vain attempt to add some credibility to the exercise.

The hearing itself was nothing short of a farce. The committee was forced to cram more than 30 witnesses into just two days.

Witnesses were asked to limit their opening statements to just five minutes. In most cases, Labor Senators were given just 10 minutes to ask questions of each witness.

Several witnesses, who would have liked the opportunity to give evidence, were unable to do so because of the truncated timetable and the fact that the Government did not allow the inquiry to travel beyond Canberra.

In a unprecedented move, Government Senators rejected funding the airfare for one witness from the not-for-profit sector. Government Senators insisted that the witness should join a phone conference.

The abuse of process also extended to consideration of the Chair's draft report. Opposition Senators were given just 40 minutes to consider its contents before being asked to endorse it.

Labor Senators believe that the conduct of this inquiry was completely unsatisfactory. The constraints imposed by the Government made it impossible for the committee to subject these significant proposals to the degree of careful scrutiny that they require and that the people of Australia are entitled to expect.

Despite the severe shortcomings of the process, the evidence received by the committee did highlight a number of significant weaknesses with the Government's proposals. It is to those matters that we now turn.

BROADCASTING SERVICES (MEDIA OWNERSHIP) BILL 2006

The centrepiece of the Government's package is its plan to relax the media ownership provisions in the Broadcasting Services Act (BSA).

The *Media Ownership Bill* makes two key changes in this regard. Firstly, it proposes the repeal of the specific foreign ownership provisions in the BSA that relate to commercial and subscription television. The Government will retain the ability to screen foreign investment in the Australian media under the *Foreign Acquisitions and Takeovers Act 1975* to ensure that it is in the national interest.

This proposal attracted widespread support in submissions and evidence to the committee.

Labor Senators support these provisions of the Bill. There is already substantial foreign investment in the radio sector, in newspapers and television. Foreign investment offers the potential to introduce new players into the market and to increase media diversity.

In contrast, Labor Senators oppose the provisions of the Bill which weaken the current cross media ownership laws.

The Bill proposes a regime that would permit media mergers provided that at least five ‘voices’ remained in mainland state capital city markets and 4 ‘voices’ remained in regional markets. Transactions would also be subject to the prohibition in the *Trade Practices Act 1974* on mergers and acquisitions that substantially lessen competition.

Labor Senators believe that the Bill would facilitate a massive concentration in the ownership of the most influential media. As the Explanatory Memorandum for the Bill states there are currently 12 owners of the major media in Sydney, there are 11 in Melbourne, 10 in Brisbane, 8 in Perth and 7 in Adelaide.

In regional Australia, in places like Cairns, Newcastle and Mackay the number of owners could fall from 7 to 4. In a further 15 regional markets the number of owners could fall from 6 to 4.

The Bill increases the power of some of the most powerful companies in the country to influence Australia's public and political agenda. Labor Senators do not believe that this is in the national interest.

It is important to remember that Australia already has a media market that is highly concentrated by world standards.

It has long been recognised both in Australia and in other democracies that the ownership of the media can have a significant impact on the public debate.

In its review of broadcasting regulation the Productivity Commission observed:

> The likelihood that a proprietor’s business and editorial interests will influence the content and opinion of their media outlets is of major significance. The public interest in ensuring diversity of information and opinion leads to a strong preference for more media proprietors rather than fewer. This is particularly important given the wide business interests of some media proprietors.[1]

During the course of the current media law debate, the Government has failed to advance a convincing justification for why it is pursuing such an extreme approach.

The Explanatory Memorandum on the Bill concedes that the benefits of cross media reform are ‘unclear’ but suggests that they are likely to be obtained from a reduction in expenditure by media companies.[2]

The Minister has repeatedly stated that the Bill is designed to allow media companies to realise 'economies of scale'. Labor Senators believe that if cross media mergers are able to proceed media companies will move to consolidate newsrooms across their organisations.

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1 Productivity Commission, Broadcasting, report no.11, Ausinfo, Canberrra 2000, p.314.

2 Explanatory Memorandum, Broadcasting Services Amendment (Media Ownership Bill) 2006, p.26.

It is likely that both the number of journalists and the range of local content will be reduced.

There is no evidence that the reductions in 'expenditure' flagged by the Explanatory Memorandum to the Bill will be of any benefit to consumers.

The Department was asked to identify any benefit other than these "economies of scale" but was unable to do so.

It is important to remember that the media sector in Australia is highly profitable. There is no suggestion that the sector requires the ability to enter into cross media mergers to remain viable.

As Mr Beecher told the inquiry:

> In the past year, profits in the media industry were higher than ever before. This is a booming industry. It is an industry that makes profit margins—that is, the percentage of profits to revenue—that are higher than almost all other industries in Australia.
>
> The average profit margin of public companies in this country is around 15 to 17 per cent—that is, $15 to $17 in every $100 of revenue is profit. The media industry average is 24 per cent.[3]

Contrary to the claims of the Government, there is also no basis to believe that the cross media laws are in any way inhibiting investment and innovation in the Australian media. To even a casual observer of the media landscape, it is apparent that the cross media laws have not prevented traditional media companies from investing in a range of new media opportunities, including the Internet, pay TV and mobile phones.

Leading media academic, Mr Jock Given told the committee:

> I think the cross-media rules are now driving diversity rather than constraining it. It is absolutely plain over the last couple of years, as internet and mobile platforms are allowing people to do more by way of delivery of audio and video, that there is nothing to stop players who claim to be restricted to one media by the cross-media rules from getting out and doing new things ….I think that the cross-media rules are now driving players like Fairfax, radio stations and others to do more interesting things than they would do if they were allowed to simply consolidate into a three-media group.[4]

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3 Mr Beecher, Partner, Private Media Partners, *Committee Hansard*, 28 September 2006, p.108.108.

4 Mr Given, *Committee Hansard*, 29 September 2006 p. 69.

New Media

It has been suggested by the Minister that the emergence of new media renders the current cross media ownership restrictions irrelevant. It is true that the emergence of digital technology has led to a proliferation of platforms. Consumers now have the option of accessing news on the internet, iPods or 3G phones.

Labor Senators believe however that diversity of platforms or devices does not equal diversity of content.

As Fairfax told the committee the mere fact that someone can watch 'Dancing With the Stars' on a mobile telephone device is not diversity.[5]

The sources of the most influential content remain the traditional media companies. Indeed, new platforms have allowed traditional media companies to extend their reach.

While there are thousands of blogs, their influence is minuscule in comparison to the nightly news bulletins from the major networks or the daily readership of metropolitan papers.

In evidence to the committee, the ACCC poured cold water on suggestions that the rise of the Internet negated concerns about media diversity.

ACCC Chairman, Mr Samuel stated in evidence that:

> We think the internet is simply a distribution channel. It has not shown any significant signs at this point in time of providing a greater diversity of credible information and news and commentary.[6]

Relaxing the media ownership laws in the way proposed by the Bill will not only have the effect of increasing concentration of ownership in the traditional media, it will also lead to a sharp concentration in the ownership of the most influential news and opinion content accessed by Australians on new media platforms.

The 5/4 test

While the Government pays lip service to the importance of protecting diversity, it has proposed a regime that is designed to facilitate increased concentration.

The Bill replaces the current cross media rules with provisions permitting media mergers under the BSA so as five ‘voices’ remain in metropolitan areas and 4 in regional Australia.

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5 Mr James Hooke, Managing Director, New South Wales, Fairfax, *Committee Hansard*, 28 September 2006, p.1.

6 Mr Samuel, Chairman, ACCC, *Committee Hansard*, 28 September 2006, p.32.

The Government has provided no explanation why it believes that 5 commercial media groups in major cities and four groups in the regional Australia represents an acceptable level of diversity.

It is important to remember that the so-called diversity test gives no weighting to the relative influence of various media players.

As the Seven network observed in its submission:

> The proposed “voices” test is not an adequate protection for diversity in the media sector. This test would equate an operator the size of PBL with an outlet such as 2KY.[7]

Labor Senators believe that the 5/4 test manifestly fails to guarantee that there will be a sufficient number of independently owned sources of journalism.

Notwithstanding our opposition to replacement of the cross media rules, Labor Senators believe that if the 5/4 test is to be introduced, it needs to be effectively enforced.

Consequently, Labor Senators support the majority report's proposal that ACMA should be given an injunctive power to stop transactions that would breach the 5/4 rule.

Labor Senators are perplexed however by the commentary at paragraph 2.74 of the Chair's report which suggests the criteria according to which "alleged breaches of the new diversity provisions are to be assessed" may need to be specified. The Bill is quite clear that the ACMA is not required to undertake any qualitative assessment of whether there is sufficient media diversity.

At paragraph 2.101 the majority report states that 'the role of ACMA is to assess diversity'. ACMA has no such role under the Bill. Its task is to ensure that a merger does not result in less than 5 voices in metropolitan markets and 4 voices in regional Australia.

If Government Senators do not support such a limited role for ACMA then they should not be supporting the Bill.

The ACCC

The Government has also asserted that the ACCC's administration of the *Trade Practices Act* (TPA) will be an effective safeguard against excessive concentration in media markets.

Labor Senators do not accept that the merger provision in section 50 of the *Trade Practices Act* can be relied on as a substitute for the current cross media laws.

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7 Seven Network, *Submission. 30*, p. 14.

Under the TPA, the ACCC is tasked with protecting competition. As the Commission itself has conceded, it has no responsibility for protecting diversity in media markets. It is not able to take 'public interest' considerations into account in assessing mergers under section 50.

Historically, the ACCC has taken the view that newspapers, radio and television operate in separate markets. Consequently, a merger between any of these businesses would not give rise to competition concerns. In recently released guidelines however, the ACCC has suggested that these traditional boundaries may have blurred. The ACCC Chairman, Mr Samuel told the committee that the Commission is focusing on the content that is distributed to consumers rather than the distribution channels.[8]

The ACCC's evidence to the committee made clear that in order to find that a merger of newspaper, radio or television assets lessened competition in a market for news or opinion, it would be necessary for the Commission to demonstrate that news products produced by different media types were substitutes for each other.

The common way of testing whether products are substitutes, and therefore whether they are in the same market, is to examine whether consumers will switch to alternative product B if there is an increase in the price of product A.

The ACCC has noted that there ar e difficulties in applying this sort of analysis to news markets. In November 2005 the Chairman of the ACCC, Mr Samuel, told the Senate Estimates Committee that "News and current affairs is not priced. It is not a market that you can economically test according to price."[9] The ACCC told the committee that in order to determine whether, for example, radio and television news services were substitutes, it would undertake research into consumer attitudes and conduct surveys.

Labor Senators are concerned that several competition lawyers have cast doubt on the Commission's ability to stop cross media mergers on the basis that it would lessen competition in the market for news.[10] One lawyer described the ACCC's approach as "fairly speculative, brave new world territory".

It is important to remember that the ACCC's interpretation of the definition of the relevant market is subject to challenge in the Federal Court. It is not unprecedented for the Federal Court to permit a transaction that the ACCC believes to be anti-competitive.[11]

In its review of broadcasting regulation, the Productivity Commission stated that:

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8 Mr Samuel, Chairman, ACCC, *Committee Hansard*, 28 September 2006, p.32

9 Mr Samuel, *Committee Hansard*, 2 November 2005 p.83.

10 See Jane Schulze, "Watch dog unlikely to show its teeth", *The Australian*, 17 August 2006.

11 See Australian Gas Light Company v Australian Competition & Consumer Commission (No 2) [2003] FCA 1229.

> It is clear that the *Trade Practices Act* as it stands would be unable to prevent many cross media mergers or acquisitions which may reduce diversity. It is also clear that the adoption by the ACCC of a broader definition of the media market would not adequately address the social dimensions of the policy problem, and would be open to legal challenge.[12]

Labor Senators believe that this critique of the capacity of the *Trade Practices Act* to adequately deal with issues of media diversity remains convincing.

In its Media Mergers Guidance the ACCC conceded that "ultimately, 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 merger investigations is known."[13]

Labor Senators believe that media diversity is too important to be left to chance. The current cross media laws provide a guarantee of media diversity that the ACCC's enforcement of the TPA is simply unable to deliver.

The 2 out of 3 rule

Despite expressing the view that the 5/4 test and the ACCC represent satisfactory safeguards against excessive concentration of ownership, the majority report recommends that the Bill be amended to prevent more than two of the three traditional media being owned by one proprietor or company in regional markets.

This recommendation fails to address the fundamental problems with the Media Ownership Bill.

In particular Labor Senators note that:

- The proposal does nothing to protect media diversity in metropolitan Australia where a majority of Australians live and work.
- The proposal does nothing to protect diversity in the 17 regional markets where there are only five major media voices. These areas include major centres like Bathurst, Bendigo, Coffs Harbour, Grafton, Lismore, Tamworth, Mildura.
- Under the two out of three rule it would still be possible for the number of owners to fall from six to four in many regional markets like Bundaberg, Townsville and Rockhampton.
- In regional markets a person in control of both the local newspaper and the television station would still be able to exercise an unhealthy degree of influence.

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12 Productivity Commission, *Broadcasting*, report no. 11, Ausinfo, Canberra 2000, p. 361.

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

These points were broadly acknowledged by Mr Neville MP during the committee's hearing.[14]

Fairfax told the committee:

> Regional media already is challenged from a diversity perspective. There is already a shortage of media diversity.[15]

Given this reality, it is hard to understand how anyone concerned about media diversity could support the measures in this Bill which effectively guarantee further consolidation.

These provisions cannot be fixed by an amendment introducing a 2 out of 3 rule, they must be rejected.

Local Radio

The Broadcasting Service Amendment (Media Ownership) Bill 2006 introduces measures imposing obligations on regional broadcasters to comply with local content licence conditions and to demonstrate in a local content plan how they will meet those conditions. ACMA will have the ability to impose its own local content plan if it is of the view that the local content plan submitted by a broadcaster is inadequate.

Licence conditions will set minimum levels of local news, weather bulletins, community service announcements or other types of local content.

These local content licence conditions will not only apply where there is a cross media merger. They will also apply where control of a commercial radio licence is transferred, if the format of a radio service is narrowed or if the Minister directs ACMA to consider imposing them.

There is no doubt that the provision of local content on radio services is of great importance to regional communities. Labor Senators are concerned however that the measures in this Bill have been proposed without any consultation with broadcasters.

Ms Warner from Commercial Radio Australia, told the committee:

> 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.[16]

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14 Mr Neville MP, *Committee Hansard*, 29 September p. 3.

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

16 *Committee Hansard*, 28 September 2006, p. 93.

Regional radio broadcasters consistently told the committee that they provided substantial levels of local content. A number broadcasters expressed concern about the impact of the proposed regulations on the value of their licence and their capacity to continue to provide services on a sustainable basis.

In its evidence to the committee, the Australian Communications and Media Authority indicated that it had not undertaken any “extensive work in terms of local content on regional radio”.

There is no hard data on the provision of local content to allow the committee to make an informed judgement about the adequacy of the services currently provided or the likely financial impact of these measures.

It is clear to Labor Senators that the measures on regional radio emerged as a last minute sop to the National Party in an attempt to win their support for the changes to the cross media ownership provisions.

Labor Senators believe that the development of policy in these areas requires a more considered approach.

Labor Senators endorse the majority report's recommendation that the Minister should reconsider the local content requirements for regional radio. These provisions should be withdrawn from the Bill. In addition, ACMA should be directed by the Minister to conduct a detailed study of adequacy of local content on regional radio.

If local content on regional radio needs to be strengthened it should be done on an independent basis. There is no reason that it should be tied to acceptance of a greater concentration of media ownership that will flow from the abolition of the cross media laws.

BROADCASTING LEGISLATION AMENDMENT (DIGITAL TELEVISION) BILL

The digital television policies that the Government has pursued to date have manifestly failed to rapidly move Australia to the point where analogue broadcasts can be switched off.

According to industry data only around 20 percent of households have purchased the necessary equipment to receive digital free to air broadcasts.

There is a range of factors that explain the poor level of take up. Undoubtedly however, a significant problem has been the fact that the regulatory regime has simply failed to provide consumers with significant incentives in terms of additional content.

Commercial multi-channelling has been prohibited, multi-channelling by the ABC and SBS has been subject to genre restrictions limiting the type of programs they can show and datacasting services were so narrowly confined that the auction to allocate licences to provide these services was abandoned due to a lack of interest.

The Digital Television Bill contains a number of measures which relax the regulatory regime and will increase the appeal of digital television to consumers. Labor Senators welcome these initiatives.

The decision to lift the genre restrictions on the multi-channels of the ABC and SBS is strongly supported by Labor Senators. This is a policy that the Opposition has advocated since before the last election.

In the UK, extra channels and interactive services offered by the BBC have made an important contribution to generating consumer demand for digital. Labor Senators believe that, if given the resources, the national broadcasters could play a significant role in developing the content that is likely to attract consumers to digital.

Labor Senators urge the Government to consider giving the ABC and SBS extra funds to drive take-up as part of the digital action plan that is under development.

Labor Senators also believe that the Government should reconsider its decision not to allow the ABC and SBS to show sport on the anti-siphoning list on its multi-channel, unless it has first been shown on its main channel or is simulcast.

The Managing Director of the ABC, Mr Scott made a persuasive case that such a change would be in the public interest. He told the committee:

> We think that netball is a great example of this. Netball tests are usually played in the evening, at a time when it would not be feasible to run them live on the ABC's main TV channel because it would interrupt the news and other key national programming that we have been running in that timeslot for 50 years. As a result, a delayed telecast is shown, usually on the main channel and usually well into the evening. But, if we were able to run the netball tests live on ABC2, viewers could choose to watch the netball live or the normal scheduled programs.[17]

Labor Senators also welcome the decision by the Government to allow commercial broadcasters to begin multi-channelling from 2007. The evidence from the UK experience with the Freeview service, which provides more than 30 free to air digital channels, indicates that multi-channelling is likely to have a significant positive effect on take up. Research conducted by the Interactive Television Research Centre in Perth also indicates that multi-channelling provides a strong incentive for consumers to take up digital.[18]

While the Digital Television Bill clearly represents an improvement over the current regime, Labor Senators remain concerned that the changes will not be sufficient to allow Australia to begin switching off analogue broadcasts by the Minister's revised timeframe of between 2010 and 2012.

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17 Mr Scott, Managing Director, ABC. *Committee Hansard*, 29 September p. 48.

18 See Interactive Television Research Institute, *Submission No. 14*.

The slow take-up of digital not only means that consumers are missing out of the benefits of the new services available on digital television, it also has significant economic consequences.

Digital broadcasting is far more efficient in its use of spectrum than analogue broadcasting. There are large gains to be made from freeing up the spectrum currently used for analogue broadcasting for alternative services like wireless broadband or new television channels. This digital dividend—the benefit of redeploying the spectrum currently used for analogue broadcasting—could be worth hundreds of millions of dollars. In Britain, the government has estimated that the digital dividend is worth up to £2.2 billion for the UK economy.

Labor Senators believe that the Minister should direct her department to prepare a report estimating the size of the digital dividend for Australia as a way of marshalling public support for achieving switchover.

Rapid transition to digital is important for the local television production industry. As consumers around the world move to embrace digital applications, like interactive television, Australian producers must keep up or risk losing export markets.

A lengthy transition to digital television also imposes a direct cost on the Commonwealth budget. According to the Government's own figures, it currently costs around $75 million to meet the analogue broadcasting costs of the ABC and SBS and to assist regional broadcasters.

There is a clear economic imperative to achieve digital switch-over as soon as practicable.

Even after the passage of this Bill, the regime will have a number of restrictions which do not appear to be conducive to accelerating the take-up of digital.

The most significant limitation is the fact that until 2009, commercial broadcasters will only be able to multi-channel in high-definition format rather than in standard definition.

Labor Senators are concerned that the market for HD services will be too small to entice broadcasters to begin multi-channelling. It is of note that the leading proponent of multi-channelling, the Seven Network, told the committee that:

> We do not have plans to commence an HD service at this stage. The reason is that high definition is only available to about five per cent of the population, making it very difficult to justify when you have to fund it through advertising revenue. Also, the cost of equipment to consumers is three times the cost of SD equipment.[19]

19 Ms Godwin, Manager, regulatory and Business Affairs, Seven Network,, 28 September, p.50.

Labor Senators believe that the effectiveness of HD multi-channelling in promoting digital take-up should be subject to review by 1 January 2008.

The proposed new regime still contains at its core a problem which has undermined the effectiveness of the current regulatory framework. Incumbent free to air broadcasters have little or no incentive to aggressively drive the transition to digital. This is because the Government has made clear that there will be no new terrestrial commercial free to air service until analogue switch off is achieved.

If the Government is successful in auctioning the currently unallocated spectrum for the proposed Channel A and Channel B services, there will be no capacity to introduce a fourth network.

In these circumstances, Labor Senators recommend the examination of the following options:

- Setting a firm date for switching off analogue broadcasting to provide certainty for the industry and consumers. It will also focus the minds of policy makers on the steps that need to be taken to make switch-off achievable.
- Lifting the prohibition on broadcasting sport that is on the anti-siphoning list on a multi-channel once the Minister certifies that the percentage of households able to receive digital broadcasts exceeds a specified trigger point.
- Exempting free to air broadcasters from license fees on the revenue generated by their multi-channels until they have been in operation for three years to provide additional incentives to invest in these services.

Community Television

Labor Senators endorse the majority report's recommendation that digital television spectrum should be made available to community television broadcasters.

It is a ridiculous situation that more than five years after digital broadcasts commenced in Australia, consumers still lose access to community television when they make the switch to digital.

Mr Melville, General Manager of the Community Broadcasting Association of Australia, told the committee of the dire impact of failure to secure access to digital spectrum for the sector:

> It will be one of erosion of audience by increment to a point of survivability, I guess. It may not look like there are many digital-only households at the moment, but who knows what it will be like in six months or a year? Even a 15 or 20 per cent erosion of the viability of these not-for-profit services puts them pretty much on the edge.[20]

20 Mr Melville, General Manager, CBAA, *Committee Hansard*, 28 September p. 82.

Community Broadcasters have heard promises of action on this issue from the Government going back to former Minister Alston in 1998. It is time that the Government fulfilled its commitment to the sector.

New Digital Channels

A key plank of the media package announced by the Government was the decision that unallocated spectrum would be auctioned to provide 'new and innovative' services.

In September, the Minister announced that this spectrum would be divided into Channel A and Channel B.

Channel A will be available to provide narrowcasting and datacasting services. The free to air networks will be prohibited from bidding to acquire this spectrum.

Channel B will be available for a wider range of uses. It has been widely speculated that this spectrum will be used to provide mobile television services.

The committee's capacity to analyse issues surrounding these new channels was severely limited because of failure of the Government to actually table the legislation implementing its policy decisions.

Labor Senators reserve their position on the proposal until there has been an opportunity to examine the legislation implementing the policy in detail.

In the meantime, Labor Senators make the following general observations about the proposals.

The services that will be made available on these new channels are likely to serve niche markets. They will in no way compensate consumers for the loss of media diversity that will inevitably result from the Government's plan to repeal the cross media ownership laws.

Labor Senators have grave concerns about whether there will be much demand by either broadcasters or consumers for the sort of content that will be made available on Channel A. The ethnic, religious or government services channels spoken of by the Minister are unlikely to significantly stimulate public demand for digital TV.

Labor Senators share the concerns expressed in the majority report about the competition issues surrounding the Channel B licence. These issues require much more substantial debate and analysis than was possible during the committee's hearing.

Labor Senators endorse the recommendation of the majority report that access arrangements for Channel B need to be addressed by the Government. Labor Senators believe that access provisions should be included in the legislation. It is not acceptable for the Parliament to be asked to vote to authorise the auction to provide these services if access arrangements are not specified.

Anti-Siphoning: 'use it or lose it' mechanism

The Government announced as part of its media package that it would introduce a 'use it or lose it' regime to apply to the anti-siphoning list.

This proposal can be implemented without legislation and consequently was not included in the Bills which were the subject of the committee's inquiry. Nevertheless, the operation of this regime is seen as an integral part of the Government's package and was the focus of passionate discussion by representatives of both the subscription and commercial television industry.

Labor Senators endorse the principle of 'use it or lose it'. If free to air broadcasters fail to take advantage of the privileged access that the anti-siphoning list gives them to listed sport, then subscription television providers should be free to take up the rights.

There is however considerable uncertainty about how the regime would be implemented in practice.

Free TV and Foxtel/ASTRA proposed radically different criteria for defining whether an event has been 'used'.

Despite the Minister having announced the Government's intention to introduce a 'use it or lose it' regime several months ago, the Government has failed to provide full details on the approach that it intends to take to the matter.

Labor Senators believe that it is essential that the 'use it or lose it' mechanism does not become a backdoor way to slash the anti-siphoning list.

There are millions of Australian families who cannot afford pay TV who rely on an effective anti-siphoning list.

Labor Senators are concerned that the Minister has so far refused to guarantee that her plan will not see Australian families having to pay hundreds of dollars a year to watch sporting events that they currently see for free.

Labor Senators do not believe that it is satisfactory to leave the implementation of the 'use it or lose it' regime completely in the hands of the Minister.

Labor Senators note that both Free TV and Foxtel have endorsed the concept that the rules specifying the operation of the regime should be set out in regulations.[21]

Labor Senators believe that the Digital Television Bill should be amended to provide that the anti-siphoning list is subject to a 'use it or lose it' mechanism. The details of that mechanism should be determined by regulation and be reviewable by the Parliament.

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21 Ms Flynn, CEO Free TV Australia, *Committee Hansard*, 28 September 2006 p.57; Mr Williams CEO, Foxtel, *Committee Hansard* 29 September p.40.

This would provide certainty to commercial and subscription broadcasters on the rules under which the scheme will operate. It will also greatly improve the transparency of the scheme.

CONCLUSION

The Chair's report endorses the Government's claim that this legislation must be taken as an entire package.

Labor Senators do not accept this view.

There is no reason why long overdue improvements to the regulatory regime for digital television should be tied to an acceptance of the Government's cross media ownership proposals.

The proposal to repeal the cross media laws and to replace them with a regime that will facilitate a massive concentration of media ownership is completely unacceptable to Labor Senators.

Labor Senators will seek to amend the legislation so that the current cross media ownership laws are retained.

Senator Lundy
Senator for the Australian Capital Territory

Senator Wortley
Senator for South Australia