The Senate

# Standing Committee on Environment, Communications, Information Technology and the Arts

Broadcasting Services Amendment (Media Ownership) Bill 2006

Broadcasting Legislation Amendment (Digital Television) Bill 2006

Communications Legislation Amendment (Enforcement Powers) Bill 2006 [Provisions]

Television Licence Fees Amendment Bill 2006 [Provisions]

and

discussion paper by the Minister for Communications, Information Technology and the Arts on the two channels of spectrum for new digital services

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# Abbreviations

| | |
|---|---|
| ABA | Australian Broadcasting Authority |
| ABC | Australian Broadcasting Corporation |
| ACCC | Australian Competition and Consumer Commission |
| ACMA | Australian Communications and Media Authority |
| BSA | *Broadcasting Services Act 1992* |
| BSB | broadcasting services bands of spectrum |
| CCBA | Community Broadcasting Association of Australia |
| CCITA | House of Representatives Standing Committee on Communications, Information Technology and the Arts. |
| DCITA | Department of Communications, Information Technology and the Arts |
| Department | Department of Communications, Information Technology and the Arts |
| Digital Television Bill | Broadcasting Legislation Amendment (Digital Television) Bill 2006 |
| DPP | Commonwealth Director of Public Prosecutions |
| Enforcement Powers Bill | Communications Legislation Amendment (Enforcement Powers) Bill 2006 |
| FTA | free-to-air |
| HDTV | high definition television |
| Licence Fees Bill | Television Licence Fees Amendment Bill 2006 |
| MEAA | Media Entertainment and Arts Alliance |
| Media Ownership Bill | Broadcasting Services Amendment (Media Ownership) Bill 2006 |

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|---|---|
| Minister | Minister for Communications, Information Technology and the Arts |
| non-BSB | non-broadcasting services bands of the spectrum |
| Radiocommunications Act | *Radiocommunications Act 1992* |
| Register | Register of Controlled Media Groups |
| SBS | Special Broadcasting Service |
| SDTV | standard definition television |
| SPAA | Screen Producers Association of Australia |
| TPA | *Trade Practices Act 1974* |

# Glossary[1]

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| **3G** | Third generation of mobile systems. Provide high-speed data transmission and supporting multimedia applications such as full-motion video, video-conferencing and Internet access.[2] |
| **Analogue transmission** | A method of broadcasting based on wave patterns. |
| **Apparatus licence** | Grants a right to use spectrum. It is relatively prescriptive, restricting use of spectrum to a particular type of equipment (or apparatus) using a particular frequency in a particular region. |
| **Bandwidth** | The difference between the lowest and highest frequencies being used. The range of frequencies occupied by a signal, or passed by a channel. More generally, the information carrying capacity of a band or service. |
| **Broadcasting licence categories** | Categories specified under the Broadcasting Services Act 1992 (BSA):<br>• national television and radio;<br>• commercial television and radio;<br>• community television and radio;<br>• subscription television;<br>• subscription broadcasting and narrowcasting (which includes subscription radio); and<br>• datacasting. |
| **Broadcasting services bands (BSB)** | The broadcasting services bands are the designated parts of the radiofrequency |

1 Unless otherwise indicated, definitions are sourced from the Productivity Commission's Inquiry Report, *Broadcasting*, Report no. 11, 3 March 2000, pp XIX-XXIII, http://www.pc.gov.au/inquiry/broadcst/finalreport/broadcst.pdf (accessed 3 October 2006).

2 Office of Communications, *The Communications Market 2006*, 10 August 2006, pp 279-285, http://www.ofcom.org.uk/research/cm/cm06/glossary.pdf (accessed 4 October 2006).

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| | spectrum which have been referred to the ACMA for planning under section 31 of the Radiocommunications Act 1992. Normal analogue commercial broadcasting services (AM and FM radio services and free-to-air UHF and VHF television services) are provided on the broadcasting services bands.[3] |
| **Datacasting** | The delivery of content via the BSB in a variety of forms, including: text, data, speech, sound and visual images. Content that is datacast can also be interactive, in the form of computer games or internet-style services. However, genre conditions stipulated in schedule 6 of the Broadcasting Services Act 1992, restrict the type of material that can be datacast.[4] |
| **Digital television** | A replacement technology for existing free-to-air analogue services. It provides better picture quality and reception, plus a variety of new features that enhance the viewing experience.[5] |
| **Digital transmission** | Transmission of data in encoded binary form as zeroes and ones. Digital signals are less prone to distortion and interference than are analogue signals; they are easily encrypted and compressed; and they require less bandwidth. |
| **Free to air (FTA)** | Radio and television broadcasts that are intended to be received by viewers free of charge at the point of consumption. |

3 The ACMA website, http://www.acma.gov.au/ACMAINTER.852114:STANDARD::pc=PC_90188#bsb, accessed 5 October 2006.

4 *Broadcasting Services Act 1992*, s. 6; Chowns J., Parliamentary Library Service, *Bills Digest ServiceBills Digest No. 26 2005–06: Broadcasting Legislation Amendment Bill (No. 1) 2005*, 17 August 2005, http://www.aph.gov.au/library/pubs/bd/2005-06/06bd026.htm#gg (accessed 4 October 2006).

5 Digital Broadcasting Australia website, *Digital TV Glossary,* http://www.dba.org.au/index.asp?sectionID=9 (accessed 4 October 2006).

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| **High definition television (HDTV)** | HDTV refers to pictures that contain significantly more detail than other pictures as they contain a larger number of pixels. The minimum HDTV picture resolution is 576 lines x 720 pixels at 50Hz progressive scan (576p). HDTV pictures have an image resolution which is superior to SDTV pictures and existing analogue pictures, with up to six times the improvement in detail. HDTV pictures are also ghost free and in widescreen format. A HD set-top box or an HD integrated television set is required to receive HDTV signals.[6] |
| **Mobile television** | Television broadcast to mobile devices, primarily mobile phones, capable of receiving television signals.[7] |
| **Multi-channelling** | The transmission of more than one stream of programming over a television channel. The ABC may broadcast three programs at the same time, for example. |
| **Non-broadcasting services bands (non-BSB)** | Remaining radiofrequency spectrum [outside of the BSB] which is unreserved, and may be used for other services. This [spectrum] is also regulated by ACMA.[8] |
| **Open narrowcasting services** | Broadcasting services whose reception is limited:<br>• by being targeted to special interest groups; or<br>• by being intended only for limited locations, for example, arenas or business premises; or |

6 House of Representatives Standing Committee on Communications, Information Technology and the Arts, *Digital Television: Who's buying it*, February 2006, p. 10.

7 Mr Brian Currie, General Manager, Regulatory Affairs, Hutchison Telecommunications (Australia) Ltd, *Committee Hansard*, 28 September 2006, pp 67, and 76–77.

8 See the Australian Communication and Media Authority website, under *Non-broadcasting services band licences*, http://www.acma.gov.au/ACMAINTER:STANDARD::pc=PC_90188#bsb (accessed 4 October 2006).

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| | • by being provided during a limited period or to cover a special event; or<br>• because they provide programs of limited appeal.[9] |
| **Spectrum** | Bandwidth expressed in terms of the frequencies the system can carry. |
| **Spectrum licence** | Grants a right to use a precisely defined piece of spectrum for any purpose, using any type of apparatus, subject to only broad technical requirements designed to minimise interference with other spectrum users. |
| **Standard definition television (SDTV)** | The digital television signal, carried in about one quarter of the spectrum capacity of an analogue signal and broadcasting at the same (or similar) resolution as analogue systems, is referred to as standard definition digital television or SDTV. SDTV in 4:3 aspect ratio has the same appearance as analogue television, minus the ghosting, snowy images and static noises.14 The SDTV picture resolution is 576 lines x 720 pixels @ 50Hz interlaced (576i).[10] |

9 *Broadcasting Services Act 1992*, ss. 18(1).

10 House of Representatives Standing Committee on Communications, Information Technology and the Arts, *Digital Television: Who's buying it*, February 2006, p. 9.

# Chapter 1

# Introduction

## Media reform bills

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

1.2 The bills referred were:

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

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

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

## Conduct of the inquiry

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

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

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

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

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

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

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

## Structure of the Report

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

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

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

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

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

## Purpose of the bills

### *Television Licence Fees Amendment Bill 2006*

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

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

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

*Provisions of the bill*

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

1.20 Item 1 amends the definition of 'gross earnings' in subsection 4(1) of the *Television Licence Fees Act 1964* and is related to the amendments to be made in the Digital Television Bill. The bill provides that a commercial television broadcasting licence will authorise the provision of more than one service (or 'channel' of programming) from 1 January 2007.[3]

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

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

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

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

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

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

***Communications Legislation Amendment (Enforcement Powers) Bill 2006***

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

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

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

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

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

*Civil penalties*

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

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

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

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

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

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

*Injunctions*

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

*Enforceable undertakings*

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

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

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

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

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

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

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

*Infringement notices*

1.36 The bill will provide the ACMA with the power and flexibility to issue infringement notices (rather than employ the process of criminal sanctions) in relation to the following types of breaches[9]:

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

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

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

*Guidelines*

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

*Remaining provisions of the bill*

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

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

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

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

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

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

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

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

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

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

# 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*.

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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

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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.

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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

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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

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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]

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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]

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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]

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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

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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.

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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:

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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.**

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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

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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

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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

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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;

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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**

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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

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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]

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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

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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.

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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.

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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]

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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:

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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.

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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.

# Chapter 3

# Broadcasting Legislation Amendment (Digital Television) Bill 2006

## Introduction

3.1 The Broadcasting Legislation Amendment (Digital Television) Bill 2006 (Digital Television Bill) further develops the Government's regulatory framework for digital television. The focus of the Digital Television Bill is the provision of additional digital television services to consumers and to increase the take up of digital television technology in Australia.[1]

3.2 The transition from analogue to digital television broadcasting began in Australia in 2001, following the enactment of amendments to the *Broadcasting Services Act 1992* (BSA) and the *Radiocommunications Act 1992* in 1998 and 2000.[2]

3.3 The measures induced by the Bill result from a series of statutory reviews and public consultation conducted by the Department of Communications, Information Technology and the Arts (the Department).

3.4 The Digital Television Bill makes amendments to the regulation of digital television broadcasting with the objective of providing additional digital services to consumers and promoting the up take of digital television in Australia.[3] The Digital Television Bill covers the following aspects of the regulation of digital television:

- **multi-channelling**: the immediate removal of genre restrictions on the national broadcasters (ABC and SBS) and permitting multi-channelling by commercial television broadcasters (also known as the commercial free-to-air (FTA) broadcasters) from 1 January 2009;
- **high definition television (HDTV)**: removing the requirement, from 1 January 2007, that broadcasters provide a HDTV simulcast of their analogue and standard definition television service (SDTV) and the removing the HDTV quota at the end of the simulcast period;
- **anti-siphoning regime**: the continuation of the anti-siphoning list regime with a review of the regime before 31 December 2009;
- **commercial television broadcasting licences**: the lifting of the moratorium on the grant of new commercial television broadcasting licences in the

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1 Explanatory Memorandum, p. 1.

2 See *Television Broadcasting Services (Digital Conversion) Act 1998* and the *Broadcasting Services Amendment (Digital Television and Datacasting) Act 2000*.

3 Explanatory Memorandum, p. 1.

broadcasting services band (BSB) and the introduction of a decision-making role for the Government in the granting of new commercial television broadcasting licences in the BSB;

- **non-broadcasting band television licences**: providing a power of veto for the Minister over the grant of commercial television broadcast licenses in the non-broadcasting services band (non-BSB) where the grant of the licence would be contrary to the public interest;
- **content and program standards**: multi-channels will not to be subject to Australian or children's content requirements and certain standard licence conditions and program standards will not apply to commercial television broadcasters operating in the non-BSB.

3.5 In addition to the measures set out in the Digital Television Bill, the Government has announced its intention, as part of the current media reform package, to allocate two currently unassigned channels of television broadcasting spectrum for new digital services.[4]

3.6 This chapter of the report:

- sets out the legislative and policy background to the Digital Television Bill and the allocation of the two new digital television channels;
- outlines the main provisions in the Digital Television Bill and the key points of the Government's proposal to allocate two new digital television channels; and
- discusses the issues raised in submissions and at hearings in relation to the Digital Television Bill and the allocation of the two new digital television channels.

## Policy and Legislative Background

### *The ABA's Digital Terrestrial Television Specialist Group*

3.7 In 1992 the Australian Broadcasting Authority's (ABA's) Digital Terrestrial Television Specialist Group (Specialist Group) was convened. The Specialist Group was made up of representatives of the broadcasting and manufacturing sectors and was tasked with advising the ABA on:

- the technical systems standards and planning implications of digital television broadcast technologies under development world-wide; and

4 See Senator Helen Coonan, 'New Services on Digital Spectrum', tabled in the Senate on 14 September 2006. This document has also been referred to the committee as part of the current inquiry and will be considered in this chapter of the Report.

- the impact on broadcasting spectrum planning of digital television broadcasts, with particular emphasis on their integration into the existing BSB.[5]

3.8 The Specialist Group presented its final report, 'Digital Terrestrial Television Broadcasting in Australia', to the ABA in January 1997. In July 1997, drawing from the recommendations in the Specialist Group's report, the ABA recommended that the Government support the early introduction of digital television in Australia and that digital television be introduced as a HDTV system.[6]

### *Television Broadcasting Services (Digital Conversion) Act 1998*

3.9 The *Television Broadcasting Services (Digital Conversion) Act 1998* (Digital Conversion Act) put in place a regulatory framework for the transition from analogue to digital television broadcasting in Australia. The key features of the regulatory framework were:[7]

- a single technical standard for terrestrial digital television;
- the commencement of digital transmission on 1 January 2001 in capital cities, and then in regional areas. All areas to have digital broadcasting by 1 January 2004;
- the loan of spectrum without additional charge to existing broadcasters to allow the required simulcast of analogue and digital transmissions for eight years or longer in each licence area. This period can be extended by regulation in each area;
- mandatory HDTV transmissions for some portion of transmission time to be determined – effectively a HDTV minimum quota;
- the possibility of multi-channelling by the national broadcasters, but not the commercial broadcasters, subject to review;
- additional 'datacasting' services, to be provided by new entrants and incumbent broadcasters. Datacasting was defined in the Digital Conversion

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5 'Digital Terrestrial Television Broadcasting in Australia: Final Report of the Australian Broadcasting Authority Digital Terrestrial Television Specialist Group', Australian Broadcasting Authority, Canberra, 1997.

6 Australian Broadcasting Authority, *Media Release*, 'ABA backs introduction of digital television', 22 July 1997, available at http://www.aba.gov.au/newspubs/news_releases/archive/1997/70nr97.shtml, accessed 22 September 2006. It is not the intention of this report to give a detailed background to the technical aspects of digital television. For this type of information readers are directed to: Productivity Commission 'Inquiry into Broadcasting Report' (Productivity Commission Report), March 2000, in particular pp 222 – 229; and Digital Television Australia, 'What is Digital Television', available at http://www.dba.org.au/index.asp?sectionID=9#What_is_multi-channelling, accessed 20 September 2006.

7 The following points are an abbreviated list drawn from the Productivity Commission Report, pp 230 – 231.

Act as an information service other than a broadcasting service. The details of this definition were left to subsequent review and legislation; and

- no new commercial television licences to be allocated in any licence area before 31 December 2006.

***Broadcasting Services Amendment (Digital Television and Datacasting) Act 2000***

3.10 In December 1999 the Government announced further details to its digital broadcast conversion policy. In the policy announcement, the Government:

- reaffirmed its commitment to HDTV broadcasts; and
- clarified the definition of 'datacasting' to ensure that the services offered by datacast were distinct from the television services that were currently available.[8]

3.11 In 2000 the *Broadcasting Services Amendment (Digital Television and Datacasting) Act 2000* was passed, implementing the Government's policy announcement from December 1999. The key elements of the Act in relation to the conversion to digital television were:[9]

- the requirement for broadcasters to transmit a standard definition digital television (SDTV) signal at all times and at least 20 hours per week of HDTV;
- provisions to enable the ABC and SBS to multi-channel certain kinds of programs; and
- provisions to permit digital program enhancement content and electronic program guides.

3.12 The legislation also added a new Schedule 6 to the BSA, which established a regulatory regime for datacasting services. In summary, these provisions ensured that datacasting licensees would not broadcast matter that would be equivalent to a television news, drama, sports, documentary, lifestyle or entertainment program, or a commercial radio program. Datacasters were allowed to transmit information and education programs, parliamentary and court proceedings, text and still images, interactive computer games and Internet-style services.[10]

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8 See Senator the Hon Richard Alston, Minister for Communications, Information Technology and the Arts, 'Digital – new choices, better services for Australians', Media Release 166/99, 21 December 1999.

9 The following points are taken from Kim Jackson, Digital Television and Datacasting, Parliamentary Library E-Brief, 16 June 2003, available at http://www.aph.gov.au/library/intguide/sp/digital_television.htm.

10 This paragraph summarises material contained in Kim Jackson, Digital Television and Datacasting, Parliamentary Library E-Brief, 16 June 2003, available at http://www.aph.gov.au/library/intguide/sp/digital_television.htm.

***Statutory reviews of digital broadcasting policy and legislation***

3.13 A number of provisions in the BSA required the Minister to conduct reviews into digital broadcasting policy and legislation, with the reports for these reviews due throughout 2005-06. These reviews were done during 2004 and 2005 by the Department as a series of 'thematic' reviews, and covered the following issues:[11]

- restrictions on programming provided by FTA broadcasters, including multi-channelling;
- whether the prohibition on FTA broadcasters offering other types of services, such as pay TV channels, should be modified;
- the end of the moratorium on the allocation of new commercial TV broadcasting licences on 31 December 2006;
- the Government's intention to give the government of the day responsibility for making decisions about allocating these licences;
- arrangements for the use of datacasting transmitter licences after 2007;
- the efficient allocation of spectrum for digital TV;
- under-served markets (1-2 commercial TV broadcasters);
- HDTV requirements; and
- duration of the digital simulcast period.

***House of Representatives Inquiry***

3.14 In February 2006 the House of Representatives Standing Committee on Communications Information Technology and the Arts (CCITA) tabled its report 'Digital Television: Who's buying it'. The terms of reference for that inquiry were:

- the rollout process for digital television, including progress to date and future plans;
- options for further encouraging consumer interest in the uptake of digital television;
- technological issues relevant to the uptake of digital television;
- future options.

3.15 The House of Representatives CCITA made 12 recommendations on various aspects of the digital television regime, including:

- the nationwide switch off of the analogue network by 1 January 2010;
- that an independent study be conducted into Australia's spectrum allocation and future requirements;

11 Explanatory Memorandum, pp 22-23.

- removing all multi-channelling restrictions on commercial television broadcasters on 1 January 2008; and
- the maintenance of the HDTV quota until 1 January 2011, with a review of the quota, and whether it needs to be removed, increased or decreased, to be conducted before 1 January 2011.

### *Meeting the Digital Challenge Discussion Paper*

3.16 In March 2006 the Department released a discussion paper, 'Meeting the Digital Challenge: Reforming Australia's media in the digital age' (Meeting the Digital Challenge Discussion paper which canvassed options for media reform to address issues in relation to digital broadcasting and Australia's media ownership laws.[12] Submissions on the discussion paper were invited from the public.

### *Digital Television Bill*

3.17 According to the Explanatory Memorandum, the Digital Television Bill implements the Government's policies in relation to digital television broadcasting in response to those statutory reviews and submissions made on the Meeting the Digital Challenge discussion paper.[13]

## Main Provisions

### *Digital Television Bill*

3.18 The Digital Television Bill amends the BSA and the Radiocommunications Act. The Digital Television Bill is divided into three Schedules: Schedule 1 sets out the amendments that commence the day after the Bill receives Royal Assent; Schedule 2 sets out the amendments that commence on 1 January 2007; and Schedule 3 sets out the amendments that commence on 1 January 2009.

*Schedule 1 – Amendments commencing on the day after Royal Assent*

3.19 The amendments in Schedule 1 of the Digital Television Bill will remove the genre restriction on the national television broadcasters' (the ABC and SBS) multi-channel broadcasts (see **item 10 of Schedule 1**).[14]

3.20 Currently, clause 5A of Schedule 4 of the BSA defines 'multi-channelled national television broadcasting service' in a way that restricts the genre of programs that can be broadcast by a national television broadcaster on a multi-channel. The Digital Television Bill will repeal clause 5A of Schedule 4 of the BSA, effectively

12 Meeting the Digital Challenge discussion paper, p. 3.

13 Explanatory Memorandum, p. 1.

14 Explanatory Memorandum, p. 33.

removing the current genre restrictions placed on the national television broadcasters' multi-channels.

3.21 Schedule 1 does introduce one limitation to the programs that can be broadcast by national television broadcasters on their multi-channels (see **item 18 of Schedule 1** which inserts a new Part 4A into Schedule 4 of the BSA). New Part 4A of Schedule 4 provides that events on the anti-siphoning list can not be televised on the national television broadcasters' multi-channel unless:

- the anti-siphoning event has previously been televised on the national broadcasters' simulcast service; or
- the national broadcaster televises the anti-siphoning event simultaneously on the simulcast and multi-channel services.

*Schedule 2 – Amendments commencing on 1 January 2007*

3.22 The amendments in Schedule 2 can be broadly divided into four categories:

- amendments which impact on broadcasters' HDTV obligations;
- amendments relating to the grant of new commercial television broadcast licences;
- amendments in relation to non-broadcasting services band (non-BSB) licences; and
- amendments in relation to the application of Australian content and children's televisions standards to the commercial television broadcasters' multi-channels.

**Amendments in relation to HDTV obligations**

3.23 Amendments in Schedule 2 of the Digital Television Bill remove the requirement that commercial television broadcast licensees provide a HDTV simulcast version of their analogue and SDTV services (see i**tem 16 of Schedule 2**). New section 41A of the BSA authorises commercial television broadcast licensees to provide:

- the core service, comprising either:
  - simulcast in analogue and digital mode; or
  - a single SDTV service (for new digital licences allocated after 1 January 2007); and
- a HDTV multi-channel.

3.24 While new section 41A of the BSA requires that commercial television broadcast licensees provide a HDTV multi-channel service, it does not stipulate that programming on the multi-channel must differ from the core service. Therefore,

licensees may choose to provide the HDTV service as a simulcast of the core service.[15]

3.25 **Item 29 of Schedule 2** inserts new paragraphs 7(1)(ma) and (mb) into Schedule 2 of the BSA. These new paragraphs amend the licence conditions for commercial television broadcasting licensees to require them to provide a HDTV multi-channel during the simulcast period (or simulcast equivalent period).

3.26 The amendments in Schedule 2 of the Digital Television Bill will, from the end of the simulcast period, remove the requirement that commercial television broadcast licensees and national broadcasters meet an annual HDTV quota (see items **70 and 74 of Schedule 2**). Currently, broadcasters in non-remote areas are required to transmit 1040 hours of HDTV programming a year (see subclause 37E and 37F of Schedule 4 of the BSA).

**Amendments in relation to the grant of new commercial television broadcast licences**

3.27 There is currently a moratorium on the Australian Communications and Media Authority (the ACMA) allocating new commercial television broadcasting licences in any licence area until 31 December 2006 (see section 28 of the BSA). The Digital Television Bill repeals section 28 of the BSA (see i**tem 7 of Schedule 2)**.

3.28 Although the moratorium on the grant of new commercial television broadcasting licences will be lifted from 1 January 2007, the Government has previously stated that it considers that a clear case for allocation of a new commercial FTA network has not been established at this stage. Therefore, the Government does not propose to allocate any new commercial television broadcasting licences at the end of the current moratorium period.[16]

3.29 Currently, section 36 of the BSA provides that the ACMA is responsible for allocating commercial television broadcasting licences in the broadcasting services band of the spectrum (BSB) using a price-based allocation system. Schedule 2 of the Digital Television Bill contains amendments that would give the Government a decision-making role in the allocation of commercial television broadcasting licences (see **item 8 of Schedule 2**).

3.30 New section 35A provides that, before the end of the simulcast period, the Minister must cause a review to be conducted into (subsection 35A(1)):

- whether new commercial television licences should be allocated and
- if so, what variation should be made to licence area plans.

15 Explanatory Memorandum, p. 46.

16 Meeting the Digital Challenge, pp 20-21.

3.31 The Minister has the power to conduct subsequent reviews, following completion of the report into the initial review conducted under subsection 35A(1) (see new subsection 35A(2)).

3.32 In conducting a review under new subsections 35A(1) or (2) a number of matters must be taken into account, including (new subsection 35A(4)):

(a) the objects of the BSA;

(b) where relevant, the planning criteria for the BSB referred to in section 23 of the BSA;

(c) the availability of radiofrequency spectrum; and

(d) any other relevant matters.

3.33 New subsection 35A(5) requires that reviews be conducted in a manner that provides for wide public consultation.

3.34 A report of a review carried out under subsections 35A(1) and (2) must be prepared (subsection 35A(7)), and tabled in Parliament within 15 sittings days of completion of the report (subsection 35A(8)).

3.35 New section 35B provides that, if after completion of the report of a review conducted under section 35A, the Minister is satisfied that a new commercial television broadcasting licence should be allocated, the Minister may, within 3 years, give the ACMA a written direction requiring that the ACMA allocate the licence (new subsection 35B(1)).

3.36 The ACMA must comply with a direction by the Minister to allocate a new commercial television broadcasting licence, and the ACMA must not allocate a licence unless directed to do so (new subsections 35B(2) and (3)).

**Amendments relating to non-broadcasting services band licences**

3.37 Section 40 of the BSA provides that the ACMA may allocate licences for commercial television or radio broadcasting for the non-BSB spectrum.

3.38 The Digital Television Bill inserts additional provisions into section 40 of the BSA, which give the Minister a decision-making role in the grant of non-BSB licences (see **item 15 of Schedule 2**). The amendments provide that, where the ACMA proposes to allocate a commercial television broadcasting licence under section 40 of the BSA, the ACMA must refer the application to the Minister (new subsection 40(5)).

3.39 The Minister must consider the application for the non-BSB licence in terms of the public interest. If the Minister is of the opinion that the proposed television service is likely to be contrary to the public interest, the Minister must direct the ACMA not to allocate the licence (new subsection 40(7)). The ACMA must comply with directions given by the Minister under subsection 40(7).

3.40 If the Minister is of the opinion that the proposed television service is not likely to be contrary to the public interest, the Minister must notify the ACMA that they have no objection to the allocation of the licence (new subsection 40(9)).

**Application of Australian content and children's televisions standards to multi-channels**

3.41 The amendments in **item 17 of Schedule 2** insert new subsections into section 122 of the BSA, which deals with Australian content and children's television standards. The new provisions provide that standards made by the ACMA under section 122 of the BSA do not apply to a commercial television broadcasting service, unless the service is the broadcaster's core service.

3.42 The Digital Television Bill inserts a new clause 60C into Schedule 4 of the BSA (see **item 88 of Schedule 2**). The new clause 60C requires that the Minister cause a review to be undertaken of the regulation of SDTV and HDTV. The review must be done at least one year before the end of the simulcast period and must specifically consider the application of program and captioning standards to SDTV and HDTV multi-channel services.

*Schedule 3 – Amendments commencing on 1 January 2009*

3.43 Schedule 3 of the Digital Television Bill deals with:

- the provision of SDTV and HDTV multi-channel television services from 1 January 2009; and
- a review of the anti-siphoning regime.

3.44 The Explanatory Memorandum, in the introduction to Schedule 3, also foreshadows an extension of the simulcast period.[17] Currently, for metropolitan licence areas the simulcast period ends on 31 December 2008, and for other licence areas the simulcast period varies. It is anticipated that changes to the regulations will be made so that the end of the simulcast period will commence in the period 2010-2012.[18]

3.45 The Digital Television Bill inserts new sections 41B and 41C into the BSA (see **item 3 of Schedule 3**). New section 41B provides that, from 1 January 2009, during the remaining simulcast period, existing television broadcasting licences will authorise the licensee to provide:

- the core service (comprising either an analogue and SDTV simulcast; or an SDTV service where the licence was granted after 1 January 2007);
- a HDTV multi-channel; and

17 Explanatory Memorandum, p. 61.

18 Explanatory Memorandum, p. 61; and Senator Sandy Macdonald, Parliamentary Secretary to the Minister for Defence, *Senate Hansard*, 14 September 2006, p. 7.

- a SDTV multi-channel.

3.46 New section 41C provides that after the simulcast period, commercial television licences will authorise the licensee to provide:

- one or more HDTV multi-channels; and
- one or more SDTV multi-channels.

3.47 The Digital Television Bill also inserts a new section 115A into the BSA (see **item 4 of Schedule 3**). The new section 115A requires that the Minister cause a review to be undertaken of the operation of the anti-siphoning provisions in section 115 of the BSA. The review must be conducted before 31 December 2009 and must include a review of the operation of Part 4A of Schedule 4 of the BSA (inserted by item 18 of Schedule 1 of the Digital Television Bill, see discussion above at paragraph 3.21).

### *Allocation of two new digital channels*

3.48 Legislation has yet to be introduced into Parliament providing for the allocation of two currently unassigned channels of the BSB spectrum for new digital services. The following summary is taken from the background document 'News Service on Digital Spectrum' tabled in the Senate on 14 September 2006.

3.49 The Government intends to release two channels, 'Channel A' and 'Channel B', as separate national licences. The channels will be allocated through an auction process. Neither channel will be permitted to be used for traditional commercial FTA TV services or subscription TV services.

3.50 Channel A will be authorised to transmit FTA services which can be received on a standard digital TV receivers (an in-home service). Services which can be offered on Channel A include datacasting and narrowcasting. Incumbent FTA broadcasters will be prohibited from bidding for Channel A.

3.51 Channel B will be permitted to be used for a wider range of services, including emerging new digital services such as mobile TV. Incumbent FTA broadcasters will be permitted to bid for Channel B, however, they will not be permitted to use the channel to provide an in-home service.

3.52 The Government states that the allocation process for the licences for Channel A and B will be conducted by the ACMA, and will commence as soon as possible in 2007, subject to the passage of the necessary legislation.

## Main Issues

3.53 From submissions and evidence at hearings, the committee understands that many of the issues raised by this Bill are interrelated, and it is difficult to discuss particular issues in isolation. Nonetheless, the committee has considered the issues under the following topics:

- the extension of the analogue switch off date to 2010-2012 and whether the measures in the Digital Television Bill will promote the uptake of digital television services such that this is a feasible timeframe for the switch-off of the analogue network;
- the allocation of two new digital channels on the broadcasting spectrum, in particular who can bid for the new channels and what services can be provided on those channels;
- continuation of the anti-siphoning regime, particularly the proposed "use it or lose it" test and the restrictions on anti-siphoning events being broadcast on FTA broadcasters' multi-channels;
- the removal of genre restrictions from the national broadcasters' multi-channels enabling them to offer more diverse content on their digital channels;
- multi-channelling by the commercial television broadcasters, including the imposition of television licence fees on multi-channels, the restrictions on anti-siphoning events being shown on multi-channels, and the application of content and programming standards and captioning requirements to multi-channels;
- the future for HDTV broadcasting given the removal of the HDTV quota from the end of the simulcast period; and
- the introduction of a role for Government in the decision-making process in relation to the grant of new BSB licences.

***Analogue switch off date and the uptake of digital services***

3.54 The transition from analogue to digital television is being facilitated through a 'simulcast period' – a period where commercial and national television broadcasters transmit their programs in both analogue and SDTV digital mode. During the simulcast period, broadcasters are also required to transmit a limited amount of HDTV programs.

3.55 In order that broadcasters could meet their obligations for simulcasting in analogue and digital modes, the Government lent broadcasters additional spectrum at no extra charge. Television broadcasters must return the spectrum currently being used for the transmission of analogue services at the end of the simulcast period when the analogue network is due to be been switched off.[19]

3.56 In metropolitan areas the simulcast period commenced on 1 January 2001. In regional areas the simulcast period commenced at specified dates before 1 January

19 See DCTIA website: 'Broadcasting and Online Regulation, Digital Television, Information for Industry stakeholders: Regulatory Framework', available at http://www.dcita.gov.au/broad/digital_television/information_for_industry_stakeholders/regulatory_framework, accessed 3 October 2006.

2004, so that all areas had digital television by 1 January 2004. Commercial and national television broadcasters are required to continue analogue transmissions in these areas for at least eight years after the start of the simulcast period, for metropolitan areas that is until the end of 2008.

3.57 The Government has announced that the simulcast period will now be extended via regulations, so that the switch-over period will commence in the period 2010-2012.[20]

3.58 The Digital Television Bill contains several measures, such as removing genre restrictions on the national broadcasters' multi-channels and phasing in multi-channelling for commercial television broadcasters, which are aimed at driving the uptake of digital television which 'will bring significant benefits to consumers and Australian society'.[21] The committee heard a range of evidence on whether the measures in the Digital Television Bill were sufficient to drive the uptake of digital television to allow for an analogue switch-off date of 2010-2012.

3.59 In its 'Meeting the Digital Challenge' discussion paper the Department estimated that, as of 31 December 2005, only 15.5 per cent of Australian households had FTA digital television capability.[22] The House of Representatives CCITA looked at some of the factors which have been cited as contributing to the slow uptake of digital television in Australia, including:[23]

- that there were no clear technological benefits of switching to digital television;
- the lack of new content available on digital services;
- poor consumer awareness that digital television would one day replace analogue television;
- the lack of certainty about the analogue switch off date; and
- bad experiences with using digital television equipment.

20 Explanatory Memorandum, p. 61; and Senator Sandy Macdonald, Parliamentary Secretary to the Minister for Defence, *Senate Hansard*, 14 September 2006, p. 7.

21 Senator Sandy Macdonald, Parliamentary Secretary to the Minister for Defence, *Senate Hansard*, 14 September 2006, p. 7.

22 Meeting the Digital Challenge discussion paper, p. 15.

23 See House of Representatives CCITA Report, 'Digital Television: Who's buying it?' pp 33–37.

3.60 Some of these factors, particularly the lack of new content and new services offered by digital television, were also highlighted to the committee by witnesses.[24]

3.61 Both the Media Entertainment and Arts Alliance (MEAA) and the Seven Network indicated that the Government's current policies were not enough to drive the uptake of digital technology to allow for a switch off date of 2012.[25]

3.62 Mr Jock Given stated that in his opinion the introduction of Channel B for mobile television would do nothing for the uptake of digital FTA television.[26] In contrast, Ms Jane Van Beelen, Deputy Director Regulatory, Telstra, believed that mobile television represented an indirect means of driving take up of digital television in the home because it would encourage the digital content industry and demonstrate the opportunities and the benefits available from new services.[27]

3.63 The Seven Network was unsure as to whether the gradual removal of restrictions on multi-channelling by the commercial FTA broadcasters in 2007 and 2009, and new datacasting and narrowcasting services on Channel A would drive the uptake of digital television. However, Ms Godwin, Manager of Regulatory and Business Affairs for the Seven Network was certain that allowing the commercial television broadcasters unrestricted multi-channelling from 2007 would ensure that an analogue switch off date of 2012 was achieved:

> We cannot see the reason why it would be okay to have unlimited multi-channelling on ABC and SBS and not to allow the same for commercial broadcasters if we are serious about reaching the switchover target of 2012. It is clearly the most effective mechanism to get us to that point.[28]

3.64 A number of submissions and witnesses before the committee indicated that the end of 2012 was a feasible timeframe for the switch off of the analogue television network.[29]

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24 See Ms Bridget Godwin, Manager, Regulatory and Business Affairs, Seven Network, *Committee Hansard*, 28 September 2006, p. 50; Mr Bruce Meagher, Director, Strategy and Communications Division, Special Broadcasting Service, *Committee Hansard*, 29 September 2006, p. 53; and Mr Jock Given *Committee Hansard*, 29 October 2006, p. 68 who all highlighted the need for new content on digital services in order to drive the take up of digital television.

25 Mr Christopher Warren, Federal Secretary, MEAA, *Committee Hansard*, 28 September 2006, p. 21; and Ms Bridget Godwin, Manager, Regulatory and Business Affairs, Seven Network, *Committee Hansard*, 28 September 2006, p. 50.

26 *Committee Hansard*, 29 September 2006, p. 69; see also Mr Christopher Warren, Federal Secretary, MEAA, *Committee Hansard*, 28 September 2006, p. 23.

27 *Committee Hansard*, 28 September 2006, p. 63.

28 *Committee Hansard*, 28 September 2006, p. 54.

29 See Mr Kim Williams, Chief Executive Officer, Foxtel, *Committee Hansard*, 29 September 2006, p. 39;

*Committee view*

3.65 In considering the extension of the simulcast period, while the committee accepts the Government is committed to the take up of digital television, it recognises the competing factors in the commercial television market that need to be taken into account.

***Allocation of two new digital channels***

3.66 In its discussion paper 'Meeting the Digital Challenge', the Government outlined the option of allocating two currently unassigned channels (Channel A and Channel B) of the television broadcasting spectrum for new digital services. In announcing the two new channels, the Minister stated that the allocation of the spectrum is a significant step towards accessing new and innovative digital services. Accordingly, neither of the new channels will be able to be used for traditional in-home commercial television services or subscription broadcasting services.[30]

3.67 As a preliminary point, the current details of the two new channels outlined in the paper tabled in the Senate on 14 September 2006, differ from options for the unallocated spectrum that had been previously canvassed in the 'Meeting the Digital Challenge' discussion paper. Previously, incumbent FTA broadcasters had been prohibited from controlling licences to use additional datacasting spectrum, and the Government had signalled its preference to continue this probation.[31] However, in its current form, FTA broadcasters are able to control Channel B.

3.68 At the hearing a representative from the Department indicated that the rationale for this change in policy came down to a balancing of policy considerations in relation to 'the desirability of having more competition for certain types of services vis-à-vis other policy considerations'.[32]

3.69 The key issues which the committee considered in relation to these new channels are those of control and use of the channels, specifically access to the new digital channels, and control of the new licences for Channels A and B.

3.70 Channel A is proposed to be used for in-home FTA services such as datacasting and narrowcasting services. Incumbent FTA broadcasters cannot bid for Channel A. At present it is anticipated that Channel B will be permitted to be used for a wider range of services than Channel A, including mobile television services. There are no restrictions on who may bid for the Channel B licence.

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30 See 'New services on Digital Spectrum', tabled in the Senate, 14 September 2006.

31 'Meeting the Digital Challenge' discussion paper, pp 22-23.

32 Dr Simon Pelling, Acting Chief General Manager, Content and Media Division, DCITA, *Committee Hansard*, 28 September 2006, p. 125.

3.71 The committee received substantial evidence on how access to the new digital channels should be regulated to ensure that the services provided on these channels are new and innovative. The committee also heard evidence on why certain groups should be excluded from controlling the licences for Channel B.

3.72 The community television sector has a cumulative monthly audience of three million viewers a month.[33] In its submission the Community Broadcasting Association of Australia (CBAA) outlined why converting to digital television was so important to its members:

> Over the next 3 years implementation of digital terrestrial broadcasting is a pressing priority for community broadcasters. From the perspective of the CBAA its member stations cannot simply remain analogue broadcasters only. Community broadcasting is not just about FM radio. Add to the mix 7 independent community television services, internet-delivered content and the CBAA's own satellite delivered Digital Delivery Network and you begin to see the scope we have for diversity and strength in digital content production and delivery.[34]

3.73 Mr Barry Melville, General Manager, CBAA, noted that the Digital Television Bill lacked any substantive provision for the digital rollout of community television.[35] Mr Melville pointed out that when the Government announced digital reforms in 1999-2000, it was suggested that community broadcasters would have free carriage on the unallocated spectrum on the back of datacasting services.[36] Mr Melville indicated that his organisation would like to see a 'must carry' obligation imposed on the licence of Channel A which would ensure spectrum would be available for the transmission of community television in digital mode.[37]

3.74 Representatives from the Department indicated that no decision has been made as to where spectrum would come from for the transmission of digital services by community television broadcasters, but there is a range of potential options for community broadcasters obtaining carriage on the unallocated channels.[38]

*Committee view*

3.75 The committee is sympathetic to the needs of the community broadcasting sector. Community television broadcasters are keen to make the transition to digital television services, however, as yet, no spectrum has been made available for this purpose.

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33 Community Broadcasting Association of Australia, *Submission 42*, p. 2.

34 *Submission 42*, p. 1.

35 *Committee Hansard*, 28 September 2006, p. 82.

36 *Committee Hansard*, 28 September 2006, p. 85.

37 See *Committee Hansard*, 28 September 2006, p. 83.

38 Dr Simon Pelling, *Committee Hansard*, 28 September 2006, p. 126.

3.76 The committee was convinced that there is a strong public demand for the allocation of digital spectrum to community television broadcasters.

3.77 The community television sector comprises seven locally owned, licensed stations in Adelaide, Brisbane, Lismore, Melbourne, Mount Gambier, Sydney and Perth, with more than 260 member groups, 3,200 volunteers and 50 paid staff. The community television sector provides training in all areas of television production to more than 500 Australians every year and has a combined annual turnover of more than $5 million.

3.78 Over 3.7 million viewers watch community television in Australia, according to Oztam survey results in August 2006. This is a significant proportion of the national viewing market and indications are that this audience is growing.

3.79 Community television broadcasts a diverse array of programming made by and for local and regional communities. As the FTA television broadcasters and viewing audience moves to digital television, it is vital that community television be given the opportunity to retain its audience by also transitioning to digital. Given the limited financial resources of community television, it is essential that a significant lead time be provided, to enable this transition.

**Recommendation 1**

**3.80 The committee recommends the provision of digital television spectrum to community television broadcasters.**

3.81 The committee was also interested in why companies might be interested in using Channel B as a mobile television service, given that a number of telecommunications companies provide, or have plans to soon provide, 3G mobile phone services.

3.82 Hutchison noted that it supported the allocation of spectrum for mobile television. However, Hutchison raised concerns that in the absence of appropriate regulatory settings, if a vertically and horizontally integrated telecommunications company or a pay TV broadcaster were to control Channel B, then competition in the supply of important existing and emerging services, such as 3G services would be undermined:

> For the short term and medium term - that is, until 2012, when more spectrum will be available, we would expect, with the analogue turn-off - the creation of a monopoly provider for mobile TV is a likely outcome. Under this arrangement, there is the ability to exclude competitors. In the absence of appropriately regulated access requirements, a single monopoly provider of mobile TV services would be in a position to act as a gatekeeper. They will determine whether end users access mobile TV or whether these services may only be acquired by customers of a particular mobile carrier. The industry is at a critical development stage with regard to the take-up of 3G services. If only one mobile carrier is able to offer mobile TV services during this critical phase of the development of 3G networks,

> this may have a tipping effect on the various markets that may be impossible to reverse.[39]

3.83 Mr James Hooke, Managing Director, New South Wales, Fairfax, expressed the view that Channel B will not generate a 'diversity dividend' – that is diversity being generated through allowing new entrants to the media market – if FTA broadcasters, Foxtel, and the owners of Foxtel are allowed to bid on the channel.[40] Mr Hooke explained why Fairfax believe the issue of control of Channel B is so critical to the balance of the current legislation:

> …channel B is the only source through which new content will have a distribution channel … The only way you will get diversity is if new content is generated. If all you have is the piping down of existing content through a new distribution channel there is no diversity. Yes, there is a diversity of reception point, of handheld device and of screen size, but there is no diversity in the content. Our view from the start has been that, in terms of public policy, it is diversity of content and potential outlet channels for that content that are essential.[41]

3.84 Ms Julie Flynn, Chief Executive Officer, Free TV Australia, stated her organisation's view that if FTA television broadcasters were excluded from controlling the licence for Channel B, then all potential providers with access to a content library should also be excluded from controlling that licence.[42] Mr Kim Williams of Foxtel indicated that his organisation would be happy to be excluded from bidding for Channel B, as long as the FTA broadcasters were not able to access Channel B.[43]

3.85 News Limited indicated that it opposed allowing FTA broadcasters to bid for the datacasting spectrum while those operators still retained spectrum which they could use for multi-channelling.[44]

3.86 In his supplementary submission, Mr Jock Given proposed the following solution for the concerns raised about access to, and control of, the new channels. Mr Given suggested prohibiting joint control of the transmission and content licences for these frequencies. In Mr Given's view, proposals to impose 'possibly capricious' restrictions on who could bid for these licences may serve immediate commercial

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39 Mr Brian Currie, General Manager Regulatory Affairs, Hutchison Telecommunications (Australia) Ltd, *Committee Hansard*, 28 September 2006, p. 69.

40 *Committee Hansard*, 28 September 2006, p. 2.

41 *Committee Hansard*, 28 September 2006, p. 3.

42 *Committee Hansard*, 28 September 2006, p. 60.

43 *Committee Hansard*, 29 September 2006, p. 43.

44 *Submission 23*, p. 1.

interests, but will be less useful as a precedent for the long-term planning of allocation of more spectrum as it becomes available.[45]

3.87 The committee was also interested in the interplay between 3G mobile phone services and mobile television services. The committee noted that there have been reports that Telstra will be rolling out mobile television services to its 3G customers in the next month. To this end, the committee was interested in why Telstra would be interested in the Channel B licence. Ms Jane Van Beelen of Telstra explained that Telstra's interest in the Channel B licence was due to the limited capacity of 3G mobile television services.[46] Of particular concern to the committee was the possibility that if a provider which operated its own 3G service was to also control the Channel B licence, there would be little incentive for them to develop the Channel B service, because it would compete with the providers 3G service. Ms Van Beelen of Telstra made the following observation on this scenario, citing specifically the limitations on the 3G capacity:

> I would have thought that, if anyone had invested in acquiring this licence and, potentially, in the equipment required to supply services using it, then they would be aiming to maximise the return on their investment, which would involve maximising the use of the channel capacity.
>
> … Once demand gets to a certain point, there will be a need for additional capacity to be able to provide services at the right quality, and meet the demand for broadcast video services over 3G.[47]

*Committee view*

3.88 The committee notes the advice of the Department that it is not technically possible to split up each of the unallocated channels into smaller portions to sell separately. The committee notes that the Department has indicated that an access regime is something that would need to be considered prior to the allocation of the channels. To that end, the Department has had preliminary discussions with the ACCC on rules and competition issues that would apply to the spectrum.[48]

**Recommendation 2**

**3.89 The committee recommends that the Government consider whether access arrangements for 'Channel B' would be appropriate in order to maximise the opportunities for a diverse range of players to provide content on this service.**

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45 *Submission 25A*, pp 3-4.

46 *Committee Hansard*, 28 September 2006, p. 63.

47 *Committee Hansard*, 28 September 2006, p. 65.

48 See Dr Simon Pelling, *Committee Hansard*, 28 September 2006, pp 125-126.

### *Anti-siphoning regime*

3.90 The anti-siphoning scheme ensures that certain events are available to the whole viewing public by preventing pay TV licensees from acquiring exclusive rights to listed events. The Minister may gazette a list of events, or events of a kind, which the Minister believes should be available free to the general public. The current anti-siphoning list comprises domestic and international sporting events in twelve categories including cricket, tennis, golf, motor sports and the football codes. Pay TV licensees are prevented from acquiring a right to televise a listed event until a right has first been acquired by the ABC, the SBS or commercial FTA broadcasters reaching more than 50 per cent of the Australian population.[49]

3.91 The anti-siphoning regime has been a constant source of tension between those with interests in subscription television services and the FTA broadcasters. Subscription television broadcasters argue the anti-siphoning provisions unfairly advantage the FTA broadcasters and that many listed events are not shown at all or shown as a delayed broadcast. For example ASTRA had the following comments to make about the anti-siphoning regime in its submission:

> While the scheme was ostensibly set up to guarantee continued free-to-air coverage of events of national importance and cultural significance, the evidence of the lack of broadcast coverage of listed events by the free-to-air broadcasters proves it has only ever guaranteed an unfair competitive advantage, exploited primarily by the commercial free-to-air networks to the detriment of the growth and potential future development of subscription television in Australia; of sporting codes and their various representative sports bodies and of the Australian viewing public.[50]

3.92 In its submission Free TV expressed its confidence that commercial FTA broadcasters use the listed sports that they acquire, and 'anything else is available to pay TV'.[51]

3.93 Currently there are 12 categories of sporting events on the anti-siphoning regime, namely: the Olympic Games, the Commonwealth Games, horse racing, Australian rules football, rugby league football, rugby union football, cricket, soccer, tennis, netball, golf and motor sports. The scope of events listed within each category varies significantly. For example, under horse racing, the only event listed is the Melbourne Cup; for the Olympic Games, the listing is for 'every event held as part of the Olympic Games'; and tennis includes every match of the Australian Open and

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49 DCITA website, Broadcasting and online regulation > Television > Anti-siphoning and anti-hoarding, available at http://www.dcita.gov.au/broad/television/anti-siphoning_and_anti-hoarding, accessed 3 October 2006.

50 *Submission 38*, p. 8. See also Foxtel, *Submission 39*, p. 5.

51 Free TV Australia, *Submission 41*, p. 5.

Wimbledon and specific matches from the French Open, the US Open and Davis Cup matches.[52]

3.94 In its 'Meeting the Digital Challenge' discussion paper, the Government also acknowledged that the anti-siphoning list gave protection to a number of events in their entirety, despite not all of the events being broadcast, particularly tournaments comprising multiple rounds, such as golf or tennis. The Government's preferred option of dealing with this issue is to apply a 'use it or lose it' approach, where, in the event that FTA broadcasters fail to provide adequate coverage of a listed event, the event would be considered for removal from the list.[53]

3.95 To this end, the committee considered two issues in relation to the anti-siphoning list:

- the proposed 'use it or lose it' approach; and
- the breadth of events covered by the anti-siphoning list.

3.96 Before moving on to those issues however, the committee would briefly like to draw attention to concerns raised by Premier Media Group in its submission and in the course of the hearing. Premier Media Group believe there is a technical oversight in the Bill which would permit anti-siphoning events being shown on FTA broadcasters multi-channels before they were premiered on the FTA broadcaster's main channel.[54] The committee makes no comment as to whether this matter is a technical oversight or not, however, it believes the Department may wish to further consider the concerns raised by Premier Media Group.

*'use it or lose it'*

3.97 The 'Meeting the Digital Challenge' discussion paper set out how the Government's proposed 'use it or lose it' approach would work in relation to the anti-siphoning list.

3.98 Commencing 1 January 2006, the 'use' of events on the anti-siphoning list by commercial FTA and national broadcasters would be monitored by the ACMA. Every six months the ACMA would then report to the Minister the events that had been acquired by FTA commercial or national broadcasters, how those rights were used, and whether unused or partially-used rights were offered to other broadcasters, including subscription television. The Government proposes to make use of this information to consider, from 1 January 2007 and on an ongoing basis, the need to

52 See Broadcasting Services (Events) Notice (No. 1) 2004 as amended.

53 Meeting the Digital Challenge discussion paper, p. 32.

54 See Mr Jon Marquard, Premier Media Group, *Committee Hansard*, 28 September 2006, pp 27-28; and *Submission 45*, pp 2-3.

retain events on the anti-siphoning list that may not have been adequately utilised by the FTA broadcasters.[55]

3.99 The Government is considering the following criteria for determining 'adequate usage' of events on the anti-siphoning list:

- what broadcast rights had been acquired by the FTA broadcaster;
- whether the event or events which make up an item were shown by broadcasters able to reach at least 50 per cent of the population;
- an event would be considered to have been broadcast if at least half of the total event was broadcast;
- whether the event or events that make up the item were shown live, or near live (commencing within one hour of the start of the event);
- whether a delay in showing the event or events that make up the item was intended to allow the event to be broadcast at a time of, or in a form, that would provide greater audience interest;
- relevant contractual obligations with the rights holder;
- in cases where FTA rights were not fully utilised, whether those rights were made available to another FTA broadcaster and whether any subscription TV rights held by the broadcasters were made available to a subscription TV operator on a reasonable basis; and
- other matters that may be relevant in individual circumstances.

3.100 There were mixed views amongst witnesses and submittors as to whether the 'use it or lose it' scheme should be backed by legislation. Broadly speaking, those with an association with pay television supported the scheme being included in legislation[56] and FTA broadcasters did not think the scheme required any legislative backing.[57]

3.101 Representatives from the Department gave evidence that the 'use it or lose it' scheme did not need to be included in the legislation:

> The 'use it or lose it' scheme can be implemented under the current act. The minister creates the list and amends the list …

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55 Meeting the Digital Challenge discussion paper, p. 33.

56 See Mr Kim Williams, Chief Executive Officer, Foxtel, *Committee Hansard*, 29 September 2006, p. 37, and Mr Jon Marquard, Chief Operating Officer, Premier Media Group, *Committee Hansard*, 28 September 2006, p. 26.

57 See Ms Bridget Godwin, Manager, Regulatory and Business Affairs, Seven Network, *Committee Hansard*, 28 September 2006, p. 53; Ms Julie Flynn, Chief Executive Officer, Free TV Australia, *Committee Hansard*, 28 September 2006, p. 57, although Ms Flynn did indicate Free TV Australia did not oppose a mechanism where the rules were contained in regulation that was a disallowable instrument, see *Committee Hansard*, 28 September 2006, pp 57-58.

> [The 'use it or lose it' scheme does not need legislation to be enacted for it to start-up on 1 January 2007 because] it is entirely a matter for the minister or the government …
>
> The minister already has all the necessary powers to implement the 'use it or lose it' list.[58]

3.102 The committee also heard evidence on how various stakeholders raised concerns with the criteria for assessing 'use' in the proposed 'use it or lose it' scheme.

3.103 Mr Bruce Meagher, Director, Strategy and Communications Division, SBS, is of the view that the concept of 'use' is difficult to assess in tournaments where there are multiple events or games:

> My point was simply that it would be very easy to identify whether, for example, a broadcaster had, having acquired the rights, used the Melbourne Cup. That is just an on-off switch. At the other extreme, with something like the Olympic Games, where there are obviously multiple events under the umbrella of the one larger event, it is very hard to determine. Then in the intermediate phases, like football competitions, where there are multiple games within a round, you have to determine how many games you have to use.[59]

3.104 Ms Julie Flynn of Free TV Australia noted that her organisation believed that in applying the 'use it or lose it' rules, the ACMA should look at the acquisition and use of sporting rights by both the FTA networks and the pay television providers.[60]

3.105 Representatives from the Department indicated that consultation was continuing with stakeholders on the guidelines for the 'use it or lose it' scheme:

> In the media reform discussion paper released in March this year, [the Minister] indicated several guidelines for ‘'use it or lose it'’, which were obviously, given it was a discussion paper, intended to be for the purposes of discussion. Since the announcement of the government’s media reform package in July, the minister has been in discussion with rights holders and broadcasters about those guidelines. That process is continuing.[61]

3.106 The committee notes the potential difficulties in determining whether FTA broadcasters have 'used' an event on the anti-siphoning list. The committee is confident that those issues will be taken into account as the Government continues its consultations on the guidelines for the 'use it or lose it' scheme.

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58 See Dr Bernard Keane, Acting General Manager, Media Industries Branch, DCITA and Dr Rod Badger, Deputy Secretary, Strategy and Content, DCITA, *Committee Hansard*, 29 September 2006, p. 87.

59 *Committee Hansard*, 29 September 2006, p. 56.

60 *Committee Hansard*, 28 September 2006, p. 56.

61 Dr Bernard Keane, *Committee Hansard*, 29 September 2006, p. 92.

*Breadth of the anti-siphoning list*

3.107 A number of witnesses commented on the breadth of events covered under some of the categories on the anti-siphoning list. Mr Jon Marquard, Chief Operating Officer of Premier Media Group, cited the Rugby World Cup as an example of how the list is too broadly drafted:

> …every single match of the Rugby World Cup is listed, so that a match between Namibia and Canada is caught under the Australian anti-siphoning laws. We say that should be pared back to events involving Australia, semifinals and finals and those sorts of things. That makes much more sense. Do not just capture the entire tournament or event.[62]

3.108 In contrast to the Australian scheme, Mr Marquard noted that other countries have anti-siphoning lists which only cover events in which a team of that particular country is playing:

> If I can just use a very recent practical example: in Italy and France they both have anti-siphoning schemes as well, but Italy's scheme in relation to soccer only lists matches involving Italy and the final, and in France—curiously enough - they cover matches involving France and the final. Yet, in Australia, we cover every single match, and that again goes to the point of depth.[63]

3.109 Premier Media Group did not propose any changes to the Minister having the discretion to add or remove events from the anti-siphoning list.[64]

3.110 In the course of Free TV Australia giving evidence, the committee's attention was drawn to an anomaly in the extent of the anti-siphoning list. Currently, the list covers each match at the Wimbledon tennis tournament. However, as Ms Julie Flynn of Free TV Australia pointed out, half the matches at Wimbledon are not covered by the host broadcaster, and so are not available to anyone.[65]

*Committee view*

3.111 The committee accepts the Department's advice that the 'use it or lose it' scheme can proceed from 1 January 2007 without any need for it to be provided for in legislation. Further the committee agrees with the view expressed by Free TV Australia in its supplementary submission that a legislated scheme lacks the flexibility required to deal with complex sports rights negotiations and will inevitably result in events being wrongly delisted.[66]

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62 *Committee Hansard*, 28 September 2006, p. 29.

63 *Committee Hansard*, 28 September 2006, p. 30.

64 Mr Jon Marquard, *Committee Hansard*, 28 September 2006, p. 30.

65 *Committee Hansard*, 28 September 2006, p. 58.

66 *Submission 41A*, p. 1.

3.112 The committee recognises the confusion as to what constitutes an 'event' for the purposes of the anti-siphoning regime, particularly with multi-day and multi-round competitions. To this end, the committee recommends that a clarification be made of the definition of 'event' for the purposes of the anti-siphoning list.

**Recommendation 3**

**3.113 The committee recommends that the Minister retain control over anti-siphoning regulations, and that clarification be made in relation to the definition of 'event' for the purposes of the anti-siphoning list.**

***Removal of genre restrictions on the national television broadcasters' multi-channels***

3.114 Currently the national television broadcasters (ABC and SBS) can only broadcast a limited range of programs on their multi-channels. Examples of the types of programs that can be broadcast include: programs which wholly or principally deal with regional matters; educational programs; science programs; religious programs; health programs; and arts-related programs.

3.115 The Digital Television Bill provides that the national television broadcasters will have the genre restrictions lifted from their multi-channels once the Bill receives Royal Assent. The Explanatory Memorandum noted that very little concern was raised in relation to this issue when it was proposed in the 'Meeting the Digital Challenge' discussion paper.[67] Although this position was reflected in submissions[68] and evidence to the current inquiry, there are some concerns raised that the committee believe are worth highlighting.

3.116 The ABC welcomed the lifting of the genre restrictions on its multi-channel. In particular the ABC believes that lifting the genre restrictions will allow it to offer viewers greater access to the full range of publicly-funded programs, including archival material.[69]

3.117 However, the ABC believes that sport is a key driver of digital television uptake, and that there are clear consumer benefits to making more live sport available on the ABC's multi-channel. This point is discussed further in this chapter in the section dealing with multi-channelling by commercial broadcasters (see paragraph 3.136).

3.118 SBS noted that it has previously argued for the lifting of genre restrictions. SBS believes that the key driver of digital technology uptake is the availability of new content, rather than improved picture quality. SBS is developing plans for a new

67 Explanatory Memorandum, p. 25.

68 See for example Media, Entertainment and Arts Alliance, *Submission 32*, pp 4-5.

69 *Submission 19*, p. 1.

digital multi-channel service which would include a significant amount of new and original Australian news, drama and entertainment programs.[70]

3.119 However, SBS cautioned that whether its multi-channel would reach its full potential would depend on the provision of adequate funding:

> The question really is one of funding … We believe that to make the multi-channel successful we do need additional funding; we do not have the revenues to fund it to the extent that we would like. Obviously we can get a perfectly good channel up even under existing budgets, but we would like to do a lot more …In order to get a reasonable quality - obviously if we were given several hundred million dollars we could make a fantastic channel - we are looking at of the order of $20 million. It obviously depends upon how much we get as to what we could do.[71]

3.120 Mr Christopher Warren of the MEAA also highlighted the importance of adequate funding for the national broadcasters to enable them to provide digital services and drive the uptake of digital television.[72]

3.121 The committee welcomes the removal of genre restrictions on the national broadcasters. The question of funding for the national broadcasters is for the Government to determine in the light of its policy objectives.

***Multi-channelling by commercial television broadcasters***

3.122 The Digital Television Bill provides for the removal, from 1 January 2007, of the requirement that commercial television broadcasters provide a HDTV version of the analogue and SDTV simulcast service. From 1 January 2009 the commercial television broadcast licensees will be able to broadcast a single SDTV digital multi-channel in addition to the simulcast service and the HDTV multi-channel service.

3.123 The Government states that lifting the prohibition on multi-channelling by commercial broadcasters recognises the need for a balanced approach to reform and ensures industry stability:

> This approach recognises that while multi-channelling restrictions have provided a period of stability during the transition period to digital, analogue switchover provides a natural end point for these restrictions …[73]

3.124 The Explanatory Memorandum noted that in response to the Government's 'Meeting the Digital Challenge' discussion paper, there had been no clear consensus

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70 *Submission 63*, p. 2.

71 Mr Bruce Meagher, *Committee Hansard*, 29 September 2006, p. 54.

72 *Committee Hansard*, 28 September 2006, pp 21 and 24.

73 Explanatory Memorandum, p. 29.

amongst respondents on whether multi-channelling for commercial television broadcasters should be allowed.[74]

3.125 The committee heard a range of views on these proposals. Some of the aspects of concern about the proposal were:

- the imposition of television licence fees on the multi-channels;
- the restrictions on showing anti-siphoning events on multi-channels;
- that content and programming standards do not apply to the multi-channels;

3.126 There was no clear consensus in submissions or amongst witnesses supporting or opposing the multi-channelling proposals for commercial television broadcasters.

3.127 The committee notes the evidence from Free TV Australia that there is a difference of opinion between its members as to whether there was the technical capacity for broadcasters to provide multi-channels while also meeting HDTV obligations.[75]

3.128 Ms Bridget Godwin of the Seven Network explained that, given the potential benefits for viewers from multi-channelling, the commercial broadcasters should be allowed to transmit unrestricted multi-channels from 1 January 2007:

> Multi-channelling would offer clear benefits to the community, providing more free content choices for viewers, many of whom would never be able to afford pay TV, and new opportunities for small businesses traditionally unable to access mainstream television advertising. The government has proposed that commercial broadcasters will be able to provide only a single multi-channel from 1 January 2009 and an HD channel from 1 January 2007. Given the clear public policy benefits, we cannot understand why we would not be treated on equal terms with the ABC and SBS, who will be able to provide unlimited multi-channels from 1 January 2007.[76]

3.129 Ms Bridget Godwin referred to the introduction of digital television in the United Kingdom as an example of how SDTV multi-channelling could increase the uptake of digital television services.[77]

3.130 Mr Nicholas Falloon stated that previously Network Ten had supported subscription multi-channelling. Network Ten does not support purely FTA multi-channelling.[78] The committee notes that although Publishing and Broadcasting Ltd

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74 Explanatory Memorandum, p. 23.

75 Ms Julie Flynn, *Committee Hansard*, 28 September 2006, p. 59.

76 *Committee Hansard*, 28 September 2006, p. 50.

77 *Committee Hansard*, 28 September 2006, p. 51.

78 *Committee Hansard*, 29 September 2006, p. 32.

(PBL) did not make a submission to this inquiry, it has previously indicated its opposition to multi-channelling.[79]

3.131 Representatives of the Department noted that the commercial broadcasters were not in agreement about bringing forward multi-channelling. Therefore, the Department's view is that unrestricted multi-channelling by commercial broadcasters should not be brought forward to 2007, as there is no guarantee that all broadcasters would participate in multi-channelling.[80]

3.132 The committee notes that some witnesses and submissions with an interest in subscription television broadcasters oppose relaxing the prohibitions on multi-channelling by the commercial FTA broadcasters, unless the anti-siphoning regime is reformed to enable subscription TV providers to freely compete for sporting rights.[81]

*Imposition of licence fees on multi-channels*

3.133 As set out in Chapter 1, the Television Licence Fees Amendment Bill 2006, which is part of the current package of reforms, amends the definition of 'gross earnings' to include all sources of revenue from commercial television broadcasting when calculating the licence fee.

3.134 The effect of this amendment is that all revenue derived by a commercial television broadcasting licensee from the televising of advertisements (or other matter) on all services provided by the licensee, will be included for the purposes of calculating the licence fees payable for the commercial television broadcasting licence.

3.135 A number of organisations, including Free TV Australia and Channel 7, indicated opposition to the proposal. They argue that as multi-channelling is a new and emerging service, it should be able to establish itself without the constraints of fees:

> … a moratorium on licence fees is consistent with the way that other new and emerging services, like pay TV, have been treated from the outset.[82]

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79 See PBL's submission to DCITA's Meeting the Digital Challenge discussion paper, p. 5, available at http://www.dcita.gov.au/__data/assets/word_doc/40099/PBL_submission.doc, accessed 4 October 2006.

80 Dr Bernard Keane, *Committee Hansard*, 28 September 2006, p. 124.

81 See Mr Jon Marquard, *Committee Hansard*, 28 September 2006, p. 29; and News Limited, *Submission 23*, p.3.

82 Ms Bridget Godwin , Seven Network, *Committee Hansard*, 28 September 2006, p. 52.

*Restrictions on showing anti-siphoning events on the multi-channels*[83]

3.136 A number of witnesses voiced their opposition to the provisions of the Bill which would prevent broadcasters from showing anti-siphoning events on their multi-channels unless it has previously been shown on its main channel, or is simulcast on the main channel and the multi-channel.

3.137 The ABC cited the example of its broadcast of regional and state-based netball competitions as a demonstration of the advantages offered by allowing anti-siphoning listed events to be shown on its multi-channel prior to being made available on the main channel:

> For example, in May 2006 the ABC began broadcasting matches from the regional and state-based netball competition live on ABC2 on Friday nights and then replaying them on Saturday afternoons on its main television channel. This allows the Corporation to provide live coverage of the matches while keeping faith with its loyal audiences for longstanding programs on its main channel. The ABC believes it would be appropriate if it was in a position to similarly broadcast the international netball Test matches live on ABC2 prior to their re-broadcast on the ABC main channel. However, the proposed anti-siphoning restrictions on its multi-channel services would prevent this.[84]

*Content standards and captioning requirements for multi-channels*

3.138 The Digital Television Bill provides that Australian content standards will not apply to the commercial television broadcasters' multi-channels. The legislation also provides for a review to be conducted at least one year before the end of the simulcast period to consider the application of content and captioning standards to multi-channels. The Explanatory Memorandum provides the following explanation for not applying Australian content standards to the multi-channels:

> These provisions ensure that the Australian content and children's television quotas cannot be satisfied by programming provided on multi-channels. By excluding multi-channels, the standards will be required to be satisfied by programming provided on the simulcast or main channel, thereby ensuring the free availability of this content to the widest possible audiences during the simulcast period. This will also provide time for multi-channels to be developed and become established before they are subject to the full suite of regulatory obligations.[85]

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83 The committee notes that these restrictions also apply to the national broadcasters' multi-channels, and the discussion in this section covers the debate as it applies to ABC and SBS's multi-channels.

84 ABC, *Submission 19*, p. 3. See also Ms Bridget Godwin, Network Seven, *Committee Hansard*, 28 September 2006, p. 50; and Mr Bruce Meagher, SBS, *Committee Hansard*, 29 September 2006, p. 53.

85 Explanatory Memorandum, pp 46-47.

3.139 The Screen Producers Association of Australia (SPAA) stated in its submission that its support for commercial FTA multi-channels was dependent on Australian content requirements being introduced at the same time as the new services.[86] At the hearing, Mr Geoffrey Brown of the SPAA detailed why his organisation was concerned about waiting until the end of the simulcast period to apply Australian content requirements to the multi-channels:

> The idea of revisiting the issue in 2010 or 2012 we think is a bit naive, given the market forces there at the moment and the influence of the networks. The networks are already extremely resistant to the idea of any level of content regulation. The resistance to showing first-run Australian children's programming is there for all to see. We think the only way the government can address it is to establish a regime at the beginning and then perhaps modify that as time progresses—seeing where the economics of these multi-channels take us. But to let it slip at the beginning is problematic.[87]

3.140 Mr Jock Given was of the opinion that the review of the application of content and captioning standards should occur as part of the introduction of the multi-channelling services, and not at the end of the simulcast.[88] In his submission, Mr Given went on to make the following observation about the volume of Australian content that should be required on the multi-channels:

> The standards for multi-channel services need not be the same as those for existing services, but, at the very least, the legislation should make it clear that a substantial commitment to additional, original Australian content is expected from free-to-air broadcasters as part of the additional flexibility they will get in their ability to use their digital capacity.[89]

3.141 Network Seven stated that although it had a strong commitment to local and Australian content, it did not support mandated levels of Australian content on the multi-channels, because those channels will be launched into an uncertain environment.[90]

*Committee view*

3.142 The committee notes the opposition of some organisations to the relaxation of the prohibitions on commercial broadcasters multi-channelling in the absence of any reform to the anti-siphoning regime. The committee has already considered the anti-siphoning regime and the specific issues that it believes need to be addressed through the Digital Television Bill.

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86 SPAA, *Submission 18*, p. 3.

87 *Committee Hansard*, 28 September 2006, p. 89.

88 *Submission 25*, p. 5.

89 *Submission 25*, p. 6.

90 Ms Bridget Godwin, Network Seven, *Committee Hansard*, 28 September 2006, p. 51.

3.143 The committee notes the concerns raised in relation to the imposition of television licence fees on multi-channels.

3.144 The committee supports the Government view that anti-siphoning events should be broadcast first on the commercial television main channels.

3.145 The committee notes that little feedback was received in relation to the captioning requirements for commercial broadcasters' multi-channels. The committee however recognises that the Government intends to review whether and how captioning obligations, Australian and children's content standards and codes of practice should apply to multi-channels. The review should be timed to allow for any necessary changes to the regulation of multi-channels prior to the end of the simulcast period.

***High Definition Television***

3.146 Compared with SDTV, HDTV is spectrum intensive. On the seven MHz channels that have been allocated to the FTA TV providers it is possible to transmit one HDTV signal or four SDTV signals.[91] The high demand for broadcasting spectrum therefore puts pressure on broadcasters' use of limited spectrum.

3.147 The proposed amendments to the HDTV obligations would require the 1040 hours per year HDTV quota to continue during the simulcast period, but will be removed once the simulcast period ends. Essentially this would allow the market to decide the preferred use of the digital spectrum beyond the simulcast period.

3.148 The Explanatory Memorandum notes that there was no clear consensus amongst respondents to the 'Meeting the Digital Challenge' discussion paper as to whether the quota should be retained.[92] This lack of consensus was apparent in the evidence and submissions before the committee.

3.149 Submitters in favour of retaining the HDTV quota argued that it provides certainty to consumers and FTA broadcasters should be obliged to provide it as it was the basis upon which they were allocated additional spectrum.

3.150 For example ASTRA, which was critical of the initial allocation of the seven MHz channel for the broadcast of digital terrestrial television stated:

> True HDTV must be showcased and promoted by the commercial broadcasters on their primary digital channel. As the overriding reason for the grant of additional 7 MHz of spectrum to each of the free-to-air broadcasters, HDTV should not be 'siphoned' off to a secondary channel via proposed multi-channelling.[93]

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91 Productivity Commission Report, p. 228.

92 Explanatory Memorandum, p. 25.

93 *Submission 38*, p. 7.

3.151 Broadcast Australia also supported the retention of the HDTV quota for the protection of consumers who had already purchased HD equipment:

> The continuation of this measure will ensure that Australia gains the benefit from a rapidly emerging global trend towards HD production of television programming, particularly in the US and now also in the UK and elsewhere in Europe. In addition, it is important to recognise that both broadcasters and consumers in Australia have already invested significant sums in HD and HD-capable equipment and that it would be both oppressive and premature for this to be jeopardised while the international television production environment is still in a transitional stage...[94]

3.152 Submitters in support of removing the HDTV quota suggested that by the end of the simulcast period the HDTV market will be sufficiently sophisticated that regulatory control would no longer be required. For example the Seven Network told the committee:

> There are many broadcasters who advocate HDTV content and say that they believe that that is what consumers want and they will continue to provide it. We certainly believe that HDTV has a place in the digital television spectrum. But we believe that mandating a quota, firstly, just requires people to do something they say they are going to do anyway in many cases and, secondly, stops the market from operating to let the consumer decide which they would prefer—whether they want more content or whether they want more HD content.[95]

3.153 The Special Broadcasting Service also favoured a consumer driven approach:

> We do believe that, over time, there will be increased high definition and that people will come to value high definition. If you look at the UK, it is quite interesting. They started with a model driven by multi-channelling, and now that has been quite well established there are substantial amounts of high definition, and that is often the point of differentiation for channels and providers. But we agree with you that, over time at least, removing the quota obligation would be a sensible move...
>
> [I]ncreasingly, content will be created in high definition, particularly out of Europe. A lot of stuff is coming out now that is just in high definition. I think there will be a pressure on providers to deliver in high definition, but I think the issue over time is whether they are required to do two channels, as we are now—a standard definition channel and a high-definition one—or whether they should not just have one channel with the flexibility, when they have a good quality program in high definition, to show it in that form.[96]

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94 *Submission 35*, p. 6.

95 Ms Bridget Godwin, Seven Network, *Committee Hansard*, 28 September 2006, p. 52.

96 Mr Bruce Meagher, SBS, *Committee Hansard*, 29 September 2006, p. 55.

3.154 On a related topic, the committee also heard from a number of witnesses concerned that the current regulatory framework allowed Australian broadcasters to transmit 'substandard' HDTV services. FOXTEL described the problem in the following way:

> The Bill...does not specify an internationally accepted HDTV standard and therefore ensures that one of the commercial broadcasters will continue to broadcast in a substandard HDTV standard [576p high definition format]. FOXTEL believes that the Bill should specify an internationally accepted HDTV standard (i.e. 720p or 1080i [high definition format]).[97]

3.155 The particular concern with this issue was that by including the transmission of services that are not HDTV in the quota for HDTV services, effectively allows spectrum which should be used for 'true' HDTV services to be used for other purposes.

3.156 The committee supports the removal of the mandated HDTV quota at switchover.

3.157 The committee notes the concerns expressed regarding the lack of an internationally accepted HDTV standard in force in Australia and draws this to the Minister's attention.

***New commercial television broadcast licences***

3.158 The Digital Television Bill makes several changes in relation to the grant of new commercial television licences within the BSB. Firstly, the Bill lifts the moratorium on the grant of new commercial television licences in the BSA. Secondly, the Bill transfers the decision-making power in relation to these licences from the ACMA to the Government. Thirdly, the Bill provides for a review to be conducted before the end of the simulcast period into the need for another commercial television broadcast licence.

3.159 According to the Explanatory Memorandum, transferring the decision making powers in relation to the grant of a new commercial television licence could provide the Government with a direct role in addressing the policy questions associated with the allocation of a commercial television licence, while the ACMA would undertake the technical investigations and planning exercises as well as allocating the licence subject to finalisation of the review report by the Minister.[98]

3.160 The committee received some feedback on these proposals, particularly in relation to the transfer of decision-making power from the ACMA to the Government.

3.161 In its submission, Free TV supports the decision to transfer decision making on new licences from the ACMA to a higher level. However, Free TV Australia

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97 *Submission 39*, p. 10.

98 Explanatory Memorandum, p. 21.

argues that the decision to grant a new licence should be made by both houses of Parliament, and not the Minister.[99]

3.162 MEAA is opposed to the Government having a role in the grant of TV licences. MEAA are of the view that the grant of licences is central to the ACMA's role as an independent regulator.[100]

3.163 The committee notes that the transfer of decision making power in relation to the grant of new commercial television licences for the BSB from the ACMA to the Government represents an election commitment.[101] The committee also notes that there are some concerns over this proposal. The committee notes that the proposal to transfer decision making power from the ACMA to the Government, represents a significant change to the process from granting commercial television broadcasting licences. Nonetheless the committee has not been provided with submissions or evidence which it considers provide a persuasive or convincing argument for preventing these amendments being passed by the Senate.

### *A fourth commercial free-to-air*

3.164 Despite the Digital Television Bill lifting the moratorium on the grant of a new commercial television broadcasting licence, the Government has indicated that it does not believe a clear case has been established for a new commercial FTA network to be established at this stage.[102] The committee heard evidence from various stakeholders on the issue of the so-called 'fourth commercial FTA channel'.

3.165 Mr Geoffrey Brown, Executive Director of the Screen Producers Association of Australia (SPAA), stated that his organisation would prefer a fourth commercial FTA channel, instead of the new Channel B. The SPAA believe that a fourth commercial FTA channel broadcasting initially in analogue/digital simulcast, and then only in digital from 2010, could be a driver for digital take up:

> There would be a fourth free-to-air network, which would be simultaneous analogue and digital to, say, 2010 and then there would be a switch to digital two years before the incumbents—in other words, it would switch in 2010 and 9, 7 and 10 would cross over in 2012. We think that is a way of addressing the digital landscape …. Unless we create that awareness out there we are just going to plod along, trying to sell the technology by itself. It is not selling by itself. It has not sold by itself from day one. Content will drive that. An option to channels 7, 10 and 9 that disappears off the

99 *Submission 41*, p. 4.

100 *Submission 32*, p. 6.

101 Explanatory Memorandum, p. 6.

102 Meeting the Digital Challenge, discussion paper, pp 20-21.

> analogue service in 2010 tells them that, if they want that service, they should go out and get a digital receiver.[103]

3.166 Mr Kim Williams of Foxtel, noting that his organisation did not have a formal position on whether a fourth commercial television licence should be granted, highlighted the potential for increased competition and content choice resulting from the introduction of a fourth commercial FTA network.[104]

3.167 News Limited argued in its submission that there is no basis for the argument that the market cannot support an independently owned fourth commercial FTA network, but can support up to eight new FTA multi-channels.[105]

3.168 Network Ten stated in the course of hearings that it does not support the introduction of a fourth commercial FTA channel.[106]

3.169 Free TV Australia considered the issue in a much broader context in its submission. Free TV Australia noted that the Government's position that there was no case for the allocation of a new FTA commercial television licence within the BSB at least until the end of the simulcast period. Free TV Australia then extrapolated this reasoning to conclude that there is no case for another FTA licence on any delivery platform. Free TV Australia submitted that any decision to grant a new television licence should be based on a comprehensive review examining the public interest in granting a new licence and should consider the impact on existing FTA broadcasters.[107]

3.170 Given the diverse views the committee supports the Government's contention that no clear case has been established for a new commercial FTA network.

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103 *Committee Hansard*, 28 September 2006, p. 90. See also Mr Christopher Warren, Federal Secretary, MEAA, *Committee Hansard*, 28 September 2006, p. 21.

104 *Committee Hansard*, 29 September 2006, p. 37.

105 News Limited, *Submission 23*, p. 2.

106 Mr Nicholas Falloon, Executive Chairman, Network Ten, *Committee Hansard*, 29 September 2006, p. 35.

107 *Submission 41*, pp 3-4.

# Chapter 4

## Summary and Conclusion

4.1 The committee considered all the evidence put to it regarding the many issues canvassed by the package of Bills.

4.2 With respect to reforms to cross-media ownership and foreign media ownership, the committee notes that there are few objections, so long as diversity and Australian content are protected.

4.3 It is the view of the committee that such protections are present in these Bills, and that taken as a whole, these reforms strike a balance between regulation of content and diversity and recognition of the fundamental changes in the technology of media.

4.4 The committee believes special provisions for the protection of rural and regional media are justified, given the unique economic and geographic challenges in those areas. However, additional regulation with regard to local content on regional radio could have a negative effect on media quality and diversity in rural and regional areas. Greater consultation with regional radio is required prior to any introduction of such regulation.

4.5 The reforms with regard to digital television recognise that uptake of digital television has not progressed as quickly as anticipated and provide for a more flexible approach to the eventual switching off of the analogue television service.

4.6 It is the view of the committee that the competing interests in the existing television market are balanced against the need for competition, new content and new services.

4.7 Some concern was expressed regarding the opportunity for access to the "Channel B" spectrum. The committee believes that this needs to be addressed to ensure diversity of content.

4.8 There is a demonstrated demand in the community to provide digital spectrum to community television broadcasters, which the committee believes should be met.

4.9 The committee accepts that control of the anti-siphoning list should remain with Minister, with clarification of the definition of "event" for the purposes of the anti-siphoning list, in particular with regard to multi-day and multi-round competitions.

4.10 Taken as a whole, these reforms provide for a more flexible, responsive and technologically advanced Australian media, while protecting diversity, local content and accessibility. It is the view of the committee that this legislation should be passed, subject to the recommendations contained in this report.

## Summary of Recommendations

### *Reform of cross-media ownership rules*

4.11 The Government Senators support the reforms as outlined by the Minister.

4.12 There was no significant opposition to these changes expressed in the submissions to the inquiry, with concerns revolving around the number and quality of media "voices" and levels of local content, rather than cross-media issues.

4.13 The consensus is that the advent of modern communications technology has blurred the lines between the various media forms to such an extent that the traditional distinctions are essentially meaningless.

4.14 Television broadcasters essentially provide print media through Internet sites and many newspapers now provide video and audio streaming through the Internet.

4.15 The ease of providing print, audio and video messages via the Internet, as well as through mobile phone services, and the ability to provide additional information through digital and subscription television, has made the artificial distinction between the traditional media of television, radio and press anachronistic and unnecessarily restrictive.

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

### *Reform of foreign ownership regulations*

4.17 The Government Senators support the reforms as outlined by the Minister.

4.18 There was no significant opposition to these changes expressed in the submissions to the inquiry, given that local content will remain protected and that foreign ownership of business generally is under the control of the Foreign Investment Review Board.

**4.19 The committee recommends that the legislation, as it applies to foreign ownership regulations, stand as drafted.**

### *ACMA regulation of local content plans*

4.20 Many witnesses were concerned that there had been little or no consultation regarding the implementation of local content plans and the regulation and enforcement of these plans by ACMA.

4.21 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.

4.22 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. It was also pointed out that there was no suggestion that similar local content requirements be applied to television and print media.

**4.23 The committee recommends that the Minister review local content requirements and regulation for regional radio broadcasters, after full and intensive consultation with regional radio.**

***Regional media diversity test***

4.24 While the committee supports the Government's proposed 4/5 rule for media diversity in metropolitan markets, the 4/5 rule has been criticised as insufficient to protect diversity of media in rural and regional markets.

4.25 However, many submissions supported a 2 of 3 rule for protecting media diversity in rural and regional areas. Put simply, this would permit an individual or corporation to own only 2 out of 3 media "voices" in any broadcast area, so long as an accepted minimum of 4 voices is maintained.

4.26 This acknowledges the need to remove the arbitrary distinctions between traditional media and allows for sufficient protection of media diversity.

4.27 Several witnesses suggested that there be some attempt to assess the nature and quality of media voices, rather than relying on a strictly numeric assessment of media diversity. There was however no suggestion of a reliable set of criteria or standards to enable this assessment to occur.

**4.28 The committee recommends that the 2 of 3 test be used for maintaining media diversity in rural and regional markets.**

***Reform of anti-siphoning regulations***

4.29 Many submissions were highly critical of the current anti-siphoning regime, arguing that it unfairly advantaged FTAs and resulted in many listed events not being shown at all, or shown as a delayed telecast.

4.30 While the argument that significant sporting events should be made available on FTA television is accepted, there is a compelling case for the 'use it or lose it' approach.

4.31 This approach strikes a balance between providing FTA live coverage of major sporting events and allowing for competition between subscription television and FTAs on the events not broadcast live.

4.32 However, given the varying popularity of individual sports and regular changes and additions to sporting competitions, the committee believes that enshrining the anti-siphoning list in legislation would be restrictive and result in an unresponsive framework.

4.33 There is also some confusion over what may constitute an 'event' for the purposes of anti-siphoning regulation, particularly with regard to multi-day and multi-competition events (eg. The Olympic Games, Tennis Opens). The committee believes the definition of 'single event' should be clarified.

**4.34 The committee recommends that the Minister retain control over anti-siphoning regulations, and that clarification be made of the definition of 'event' for the purposes of the anti-siphoning list.**

***Injunctive powers of the ACMA to preserve media diversity***

4.35 The committee notes that the proposed amendments to the *Broadcasting Services Act* do not extend to giving ACMA powers to enforce, by way of injunction or divestiture orders, breaches of the provisions aimed at enhancing greater diversity in media ownership. Nor are there suitable pre-existing powers in the *Broadcasting Services Act.*

4.36 The committee heard evidence that the matter could be dealt with under s. 50 of the *Trade Practices Act*. There are two problems with that approach. First, injunctions and divestiture orders to restrain or deal with breaches of s. 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 *Trade Practices Act*.

4.37 Secondly, s. 50 only prohibits mergers which have the effect of 'substantially lessening competition'. It is perfectly clear from s. 50(3) (which defines the criteria according to which substantial lessening of competition is assessed) and s. 50(6) (which defines 'market' for the purposes of s. 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 *Trade Practices Act (TPA)*. Nevertheless, it is important to recognise that media diversity is a different, and broader, concept than economic competition. In enforcing s. 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 s. 50 of the *TPA* cannot do this.

4.38 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 ss. 80 and 81 of the *TPA*, to enforce the legislation by injunctions (including interlocutory injunctions) and divestiture orders, in appropriate cases.

4.39 One question which then arises is whether the legislation should set out (by analogy with s. 50(3) of the *TPA*) the criteria according to which alleged breaches of the new diversity provisions of *Broadcasting Services Act* 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 s. 50 of the *TPA* is inappropriate and unworkable.

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

***Community television access to digital spectrum***

4.41 The committee was convinced that there is a strong public demand for the allocation of digital spectrum to community television broadcasters.

4.42 The community television sector comprises seven locally owned, licensed stations in Adelaide, Brisbane, Lismore, Melbourne, Mount Gambier, Sydney and Perth, with more than 260 member groups, 3,200 volunteers and 50 paid staff. The community television sector provides training in all areas of television production to more than 500 Australians every year and has a combined annual turnover of more than $5 million.

4.43 Over 3.7 million viewers watch community television in Australia, according to Oztam survey results in August 2006. This is a significant proportion of the national viewing market and indications are that this audience is growing.

4.44 Community television broadcasts a diverse array of programming made by and for local and regional communities. As the FTA television broadcasters and viewing audience move to digital television, it is vital that community television be given the opportunity to retain its audience by also transitioning to digital. Given the limited financial resources of community television, it is essential that a significant lead time be provided, to enable this transition.

**4.45 The committee recommends the prompt provision of digital television spectrum to community television broadcasters.**

***Usage of and access to "Channel B" spectrum***

4.46 The committee has noted the concerns of several witnesses regarding the allocation of the "Channel B" spectrum and the inclusion of FTAs in the allocation process.

4.47 The committee heard strong arguments regarding the anti-competitive effect of awarding the entirety of the spectrum to one broadcaster. This would provide an effective monopoly and may result in the spectrum being used to merely 're-broadcast' existing content.

4.48 While there may be technical and regulatory challenges in 'splitting' the spectrum, the committee considers that competition is essential for content development and therefore acceptance and uptake by the viewing public.

**4.1 The committee recommends the Minister address the issue of access to "Channel B" in order to provide opportunity for diversity of content.**

**Senator Alan Eggleston**
**Chair**

# The Nationals Senators Dissenting Report

The Nationals Senators do not support the Committee report in its entirety.

A major concern with the proposed media reforms remains the over centralisation of the media market and the lack of capacity of the ACCC to have effective oversight of media mergers and their effect on the democratic process of our nation.

The desire for the ACCC and ACMA to be able to curtail an inherent oligopoly may be there, but their legal powers to enforce this desire are not apparent. Concerns remain with regards to the channel B digital licence, the overcentralisation of regional markets and even the potential overcentralisation of metropolitan markets, despite measures to mitigate these issues.

The classic statement by the ACCC Chairman, Mr Samuel, is once the egg is scrambled you cannot unscramble it - the scrambled egg being overcentralisation of media power. The return on investment for the current major incumbents, in comparison to their overseas counterparts, is clear evidence of a current market manipulation which has inhibited true competition.

The ACCC has no powers to be, nor was it set up to be, the arbiter and protector of a diversity of public opinion. Currently, the public interest test is only relevant if a matter goes to authorisation. The public interest, therefore, is not taken into account when the ACCC considers whether a merger or acquisition will substantially lessen competition under section 50 of the Trade Practices Act. As mergers rarely go through the authorisation process (1 in around 700), it is clear, therefore, that the public interest will be rarely considered by the ACCC, under the current regime.

Even if the public interest was considered, it does not encompass the public interest of diversity of political opinion. This present lack of consideration of the public interest, by the ACCC, was noted by the Productivity Commission in its report on broadcasting. The Productivity Commission was clear in its view that the introduction of a public interest test, with particular emphasis on diversity of political and public opinion, in relation to media mergers or acquisitions, must be a central feature of any media reforms.

These concerns are evident in responses received from Mr Beecher of Private Media Partners during the Inquiry. When questioned as to whether he believes that the passage of this legislation, without amendment, could affect the democratic process in Australia, he responded “Absolutely.  We have no doubt about that. We may know very quickly, because there will be a flurry of takeovers. We are not trying to demonise the owners of the media. That is their role. But if you look at the track record of media owners in this country in terms of directing the information traffic, when they want to, on issues that they are interested in — on big political issues, on

societal issues — they have done that. The result of this legislation will be to give those same owners more media outlets with which to do that."

When questioned further in relation to the lack of powers within the ACCC to deal specifically with the protection of democracy as one of the underlying fundamental standards they are there to enforce, Mr Beecher expressed his belief that the ACCC cannot be an effective arbiter as it does not have the resources to be able to deal with the complex legal and other issues that will arise from certain mergers.

When questioned about the powers of the ACCC, in a democracy, to be able to balance up any retrograde steps that might come out of this legislation, Mr Beecher responded by saying "I am not an expert on the ACCC, but my understanding is that the ACCC's role is to regulate commercial marketplaces, so I do not understand how they can then look at the issue of diversity of news and current affairs and journalism separate from the commercial aspects of those. I do not understand how they can do that."

Mr Samuel, Chairman of the ACCC, when questioned in relation to the ability of the ACCC to protect the market, made the comment, "Perhaps it should be pointed out that, even under the law as it currently stands, we are not the final arbiter on mergers or, for that matter, anything else under the Trade Practices Act." He went on to say, "Everything we say, if you like, is prefaced by the fact that we are not the ultimate decision maker either now or if the Dawson changes were introduced." Mr Samuel's position obviously does call into question the ability of the ACCC to protect against the monopolisation of public opinion in a market.

An inherent scepticism remains, on the powers of this legislation, post implementation, as to its capacity to protect diversity in political opinion, public opinion and diversity of ownership with its ramification on such things as monopolistic or near monopolistic control on advertising. The powers that are presumed by the ACCC to cover this contingency, we feel, have not been adequately displayed through the Senate Inquiry format and, as such, these remain our concern prior to viewing any amendments.

Hand-in-hand with the strengthening of the role of the ACCC, we believe that the powers of ACMA should be strengthened with appropriate legislation that would allow ACMA to conduct its operations in a pro-active manner.

A further dimension of the regulation and control of a more concentrated media should include a transparent framework of ownership. We believe there should be an associated or related entities test, similar to that present in the Tax Act. At any time, the ultimate ownership of a media company should be quite clear and readily accessible. No media company should be able to exert influence by way of financial, programming arrangements or other mechanisms from their voice to others without the two voices being deemed as one.

Accordingly we also believe the definition of a 'voice' as it relates to these Bills needs to be more clearly defined. It is our view that a 'voice' is one that strongly reflects throughout the day exemplars of both a public opinion and local political views. Consideration should be given that a radio station that is almost exclusively reliant upon music or racing such as a TAB station should be excluded from the 'voice' definition as their effect on the political opinion is minimal.

**Recommendations**

Recommendation 1 (Chapter 2) is not supported. The legislation as drafted does not incorporate the 2/3 rule as contained in Recommendation 4.

Recommendation 2 (Chapter 2) is supported

Recommendation 3 (Chapter 2) is in part supported, with a further recommendation that:

1. The ACMA and ACCC's legal powers be further strengthened to account for the breadth of the legislation and the concerns raised by witnesses, with particular consideration given to the public interest test; and the introduction of a broader injunctive and divestiture power.

2. There be the inclusion of an associated or related entities test and tracing provisions relating to ultimate ownership of a media company.

Recommendation 4 (Chapter 2) is supported.

Recommendation 5 (Chapter 2) is not supported. It is recommended that:

1. The Minister agree to amend the legislation to provide for an immediate requirement that there be not less than 12 and a half minutes per day, Monday to Friday, of locally sourced and presented news, exclusive of weather reports, with scrolling repeats of the same bulletin prevented. The practice of 'ripping and reading' should also be prevented to ensure diversity of opinion and genuine locally devised content;

2. All radio stations be required to broadcast 'local and live' for a minimum of six (6) hours a day between the recognised 'industry' program times of Breakfast and Drive Time with programming locally sourced and presented;

3. Recognising that some views were expressed with regard to the requirement to comply with local content rules, we recommend that following legislative introduction and after a period of 12 months the committee further examine the issue of local content requirements in detail and report to the Senate; and

4. All amendments pertaining to 'local content' be legislative in nature and not regulatory.

Recommendation 6 is supported.

Recommendation 7 is not supported. It is recommended that the committee further examine the issue of access arrangements for Channel B in order to maximise the opportunities for a diverse range of players to provide content on this service in detail and report to the Senate before the legislation comes into effect.

Recommendation 8 is supported.

**Summary and Conclusions**

The summary and conclusions at Chapter 4 of the report need to be considered in light of this dissenting report.

**Barnaby Joyce**
**Senator for Queensland**

**Fiona Nash**
**Senator for New South Wales**

# 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**

# MINORITY REPORT

# Australian Democrats

**Broadcasting Services Amendment (Media Ownership) Bill 2006**

**Broadcasting Legislation Amendment (Digital Television) Bill 2006**

**Communications Legislation Amendment (Enforcement Powers) Bill 2006**

**Television Licence Fees Amendment Bill 2006**

## OUR DEMOCRACY IS NOT PROTECTED

### Key illustrations of the point

The Minister for Communications[1] and other Government figures have tried in various ways to answer the charge that the Coalition's proposed new weak cross-media rules will result in an excessive and dangerous concentration of media power in a few hands, by pointing to the Australian Competition and Consumer Commission (ACCC) as the safeguard. Under the existing provisions of the Trade Practices Act (TPA) preserving or enhancing the democratic institution of the fourth estate is not a matter that the ACCC will concern itself with:

> **Senator MURRAY**— … As you would be aware, a great deal of commentary, particularly political commentary, concerns the issue of whether further media concentration, or indeed these changes, would advance the health of our Australian democracy. Just so that we have it on the record, when you consider a merger proposition in the media industry in future you will not consider the issue of whether it will contribute to the health of our Australian democracy, will you?
>
> **Mr Samuel**—No, we will not.[2]

And for any members of the public foolish enough to think that corporate self-interest and manipulated information and opinion might be uncommon in the Australian media – here is a reality check:

> **Senator MURRAY**— … I want to know whether your alliance has done any research to establish to what extent media proprietors direct their editors and reporting staff to a particular line on matters which are of interest to those proprietors.

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1 See for instance ABC TV's '730 Report' on the 14 March 2006.

2 Mr Graeme Samuel, Chairman, ACCC, *Committee Hansard,* 28 September 2006 p. 46.

> **Mr Warren**—One of the interesting things that came out of the Roy Morgan Crikey! survey of journalists that we did … was on that subject. One of the questions asked people whether they had ever been requested to report in a way that favoured the political line of their employer, and then there was a second question about whether they had ever been required to report in a way that favoured the corporate line of their employer. About 50 per cent of people said that they had been required to report in a way that favoured the corporate line of their employer, and that does not surprise me. A much smaller group—less than 20 per cent, I think—said that they had been required to report in a way that favoured the political line of their employer, and that does not surprise me either.[3]

## Journalists are simply employees

There is a conflict between journalism and media, between a profession and a job, between a calling as a member of the fourth estate and the usual requirements of employment.

The community at large might sometimes expect too much from journalists, expecting them to behave in a manner consistent with a higher calling, the freedom of the press, and a willingness to pursue truth regardless of personal cost; and to behave in accordance with the ethics values and principles of the fourth estate. In contrast, the reality of life is that journalists have to make a living, and are required as employees to do the job required of them in an industry like any other, where business has to make a profit.

Of course not all media is a for-profit business, far from it, as the ABC, SBS and community media attest, but most journalists and editors are employees, subject to the usual pressures to make a living and to meet their family obligations. Such pressures constrain independence and freedom of action. That is why journalists' unions and codes of conduct are important safeguards. No one should be surprised either, that employees do as they are told. In any enterprise not to do as you are instructed risks your job. The following interchange was instructive, and amplifies the earlier quote I highlighted:

> **Senator MURRAY**—It can be said that journalists are simply employees and that employees do what they are told. It has been said to me by some journalists privately that they have been told to write and run a particular line with respect to interests that matter to the proprietors, which does not surprise me. I want to know whether your alliance has done any research to establish to what extent media proprietors direct their editors and reporting staff to a particular line on matters which are of interest to those proprietors.
>
> **Mr Warren**—One of the interesting things that came out of the Roy Morgan Crikey! survey of journalists that we did, that Senator Wortley talked about, was on that subject. One of the questions asked people

3 Mr Christopher Warren, Federal Secretary, Media, Entertainment and Arts Alliance, *Committee Hansard*, 28 September 2006, p. 23

> whether they had ever been requested to report in a way that favoured the political line of their employer, and then there was a second question about whether they had ever been required to report in a way that favoured the corporate line of their employer. About 50 per cent of people said that they had been required to report in a way that favoured the corporate line of their employer, and that does not surprise me. A much smaller group—less than 20 per cent, I think—said that they had been required to report in a way that favoured the political line of their employer, and that does not surprise me either. But it is very concrete evidence that there is a sense in the industry that people are expected to take particularly the corporate line—and it tends to be more the corporate line than a political line, except sometimes when the two overlap. So that is pretty compelling evidence, I think, that there is a deep belief within the industry that there is an expectation that people will understand what the corporate line is and will report accordingly.[4]

So about half of the journalists said that they had been required to report in a way that favoured the corporate line of their employer, and one in five had been required to report in a way that favoured the political line of their employer. I would give odds that the pressure on editors and management to 'toe the line' is much higher.

You only have to have observed the generally carefully managed media response to these Bills, with a few exceptions that do not reach the mass market, to realise that the media corporates overall are determined not to give this issue much play to mass audiences by alerting Australians to the importance of what is happening and how it will affect them.

It seems very hard to find ways to combat all this. So from the vital democratic 'fourth estate' perspective the only way to protect a diversity of opinion, news-gathering, information and influence, is to ensure a diversity of meaningful or real voices, a diversity of media types, and a diversity of journalists and owners, and by maximising competition and restricting, even reducing, cross-media ownership.

That requires parliamentarians to reject those elements of this package that are likely to reduce competition and reduce the variety of opinion, to recognise the long-term dangers and eschew any perceived short-term self interest.

> **Mr Beecher**—From experience, the cross-media rules are the only mechanism to guarantee diversity of journalism. We are talking about a diversity in this country that is already very fragile.[5]

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4 Mr Christopher Warren, Federal Secretary, Media, Entertainment and Arts Alliance, *Committee Hansard*, 28 September 2006, pp.23-24.

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

# THE BILLS

## Poor process

The Australian Democrats are and were very supportive of this Senate Committee inquiry into the Broadcasting Services Amendment (Media Ownership) Bill 2006 (the Media Ownership Bill) and related Bills. Although the Committee benefited from balanced judicious and considerate chairing from Senator Eggleston under constrained circumstances, nevertheless the inquiry process has been poor.

Since the Coalition won control of the Senate numbers in July 2005 the Government have moved to progressively reduce the effectiveness of previous Senate mechanisms of accountability and review. Knowing that it must at least satisfy some of its own backbenchers, the Executive does just enough to allow for some Committee review, but attitudinally, it is often quite apparent that it is just going through the motions.

This Inquiry, like many others under a now domineering Coalition, has been forced into too short a time frame.

The Inquiry has been characterised by too short a time for advertising and the writing of submissions; for Senators to read all the submissions; for the hearings themselves; for questions on notice to be answered; and for the writing of reports. The short time for submissions may be less of a problem for the mega-media groups that have been lobbying the Coalition and have ready material to hand. It may be less of a problem for witnesses with deep pockets and extensive resources, such as the business sector, so the big end of town is probably catered for. But this process effectively restricts the evidence that can be encouraged and adduced from academics, other interested parties, and members of the public.

Having been part of the Senate vote that allowed this disgraceful state of affairs, the Coalition members of the Committee came face to face with its consequences. For instance the disagreement between Senators Joyce and Brandis[6] was a direct consequence of the ridiculous state of affairs whereby the six Coalition members present shared ten or so minutes per witness.

This is complex legislation that requires more time to assess. Secondly, the Senate deserves to be treated with more respect, not just because it represents the whole of the Australian people (unlike the Government, which is comprised of two political parties), but because when it performs its proper role it is a bulwark against excessive and self-interested Executive power.

Only two things can change this state of affairs – either for Coalition Senators (and by extension, all Senators) to promote the Parliament over Party, which seems unlikely, or for the Government to lose control of the Senate numbers at the next federal election.

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6 *Committee Hansard*, 28 September 2006, p. 99.

## The four bills as a package

Broadly speaking, the Media Ownership Bill will remove certain broadcasting-specific restrictions on foreign investment in Australia's media sector, and permit cross-media mergers that are currently prohibited. This is the Bill that is most contentious.

The Broadcasting Legislation Amendment (Digital Television) Bill 2006 (the Digital TV Bill) is a multi-faceted bill that seeks to advance technical and innovative aspects of the digital television and commercial television broadcasting regime.

The Communications Legislation Amendment (Enforcement Powers) Bill 2006 (the Enforcement Powers Bill) strengthens the enforcement and regulatory powers of the Australian Communication and Media Authority (ACMA).

The Television Licence Fees Amendment Bill 2006 (the Fees Bill) makes licence fee amendments consequent to the Digital TV Bill.

As the Australian Democrats have pointed out on a number of occasions, we do not oppose media industry reform. In fact we strongly support the modernisation and improvement of statute and regulation with respect to the media industry, predicated on the introduction of greater competition and meaningful diversity.

Much of the technology for media delivery in the future (and that future is not far distant) will be on telecommunications platforms. That being the case, it is essential that for telecommunications and media, we establish guaranteed, affordable services available to all but the remotest Australians and enforced through legislated customer service obligations.

For the rest, the market needs to be as free and open as possible. We need to distinguish between consumer needs and political or societal needs. Consumer needs are satisfied by a free rein being allowed for new technology and a maximum variety of product types. That is best guaranteed through few barriers to entry and through encouraging real competition.

# THE MEDIA OWNERSHIP BILL AND RELATED ISSUES

## Greater competition and diversity

We Democrats recognise that the technological and market changes which have occurred in the media industry over the past 10 years, (and in technology at increasing speed over the last five years), make it imperative that media law and regulation keep pace with the market and technology, and create a sensible and effective forward-looking regulatory environment for the future.

If we are to have media markets freed from oligopoly, this Government must pursue policies to increase diversity of views and voices. If we are to have a fair and open society, this Government must pursue policies to increase diversity of views and

voices. It must improve the use of and access to new technology, such as digital and broadband; it must ensure open access to media content; it must ensure that there is an adequate level of local and Australian content; and it must protect the independence and freedom of journalists and the media. Failure to protect diversity of viewpoints is a failure to protect the necessary public debate that makes our democracy function.

There is the question of whether these bills should be phased in. The Democrats believe there is a good case for arguing that the cross media laws should not be changed until full digitisation has been achieved and more spectrum is available to enable new entrants, and the range of new services provided by new technology is more mature and utilised by more consumers.

The Government has no evidence to support their assertion that these reforms will not lead to a concentration of the media market. They exaggerate the beneficial market impact that the internet and 'new media' has and will have on credible information supply in contrast to traditional media.

In November 2005, a Roy Morgan poll found that 48 per cent of Australians get their main source of information from television, 22 per cent from newspapers, 19 per cent from radio and only 8 per cent from the internet. The internet market share data from ACNeilsen shows that Australian content on the internet is now more concentrated than in the 'old' media of newspapers, magazines, radio and TV. Clearly an informed professional independent 'traditional' diverse media is still necessary:

> **Mr Samuel**—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. There is talk all the time, as we have discussed on previous occasions, of the establishment of web logs and the like, but in terms of credible news and information—I say this without having done what I said we would always do, which is conduct a detailed analysis—based on all the reports that one reads, you could probably conclude that at this point of time, at the early stages of the development of the internet, the primary sources of news, information and the like still are your mainstream sources: the ABC, News.com and Fairfax. They tend to be the primary sources of credible, timely news and information and discussion.[7]

The Government has tried to focus on how this package affects *consumers,* but more important is how it affects our *democracy*. Likewise the submissions before the Senate Committee from media owners overwhelmingly concentrated on *their* economic needs, not Australia's need for an energetic independent and diverse fourth estate. One witness' body language was something to behold in his barely suppressed rage that Senators were more concerned with fourth estate issues than media business issues.

The lesson is that media owners and investors' self-interest must be tempered by the national and public interest.

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7 Mr Graeme Samuel, Chairman, ACCC, Committee Hansard, 28 September 2006, p. 38.

The freedom of the press to report whatever and however they need has long been recognised as absolutely vital to democracy, and this freedom is most effective and relevant when there are a variety of diverse views of substance. Modern concentrated media power is such that if that power is not to be abused, it needs to be dispersed and multiplied, and not concentrated further.

Evidence to the Inquiry was that Australia already has one of the most concentrated media sectors in the democratic world:

> **Mr Beecher**—…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 families—and they are the gatekeepers of news and opinion in this country.
>
> ….
>
> The consolidation of the media industry in this country has been going on for years. 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. All the major regional city newspapers—Cairns, Townsville and all of those big places—are owned by four companies: News, Fairfax, APN and Rural Press. The last of the majors, in Albury, fell a few months ago. Most of the internet news and commentary sites—apart from Crikey, really—are owned by the same people. So they own the lot. It is the most concentrated media ownership in the Western world. We all know that, we talk about it, and yet we are sitting here talking about concentrating it even further. [8]

My clear impression of many media owners is that they fear too many competitors – witness their opposition to a fourth free-to-air TV channel – and many in the community fear too few media owners. Both from the perspective of consumers and our democracy the central issue is that we need more competition, less concentration and more diversity in all media markets.

Media diversity and independence are critical to the public debate that makes our democracy function well. Any concentration of the market in a few manipulative hands will reduce diversity in views and voices. It may also reduce quality and Australian content. If those were the outcomes then that would not be good for consumers or our democracy.

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8 Mr Eric Beecher, one of the owners of Crikey.com.au; former editor of the *Sydney Morning Herald*; former editor-in-chief of the *Herald Weekly Times*, so he has worked as the most senior editor for both the Fairfax and News Ltd media organisations. *Committee Hansard*, 28 September 2006, p. 108.

Therefore the starting point for revising these proposals has to be the regulators – the ACCC, whose role is to decide on mergers and acquisitions; ACMA, whose role is to apply and enforce standards; and the Foreign Investment Review Board (FIRB) whose role is to determine foreign ownership levels.

## A parable – measuring media power

From the Ezine Crikey.com.au[9] Item 12. Measuring media power

> *Christian Kerr writes:*
>
> …
>
> In dealing with media, they are dealing with powers much greater than they are.
>
> How do we know? Back in 2004, John McMillan and Pablo Zoido of the Stanford Graduate School of Business published an ingenious study of the checks and balances that underpin democracy. The abstract says it all:
>
> > Which of the democratic checks and balances – opposition parties, the judiciary, a free press – is the most critical? Peru has the full set of democratic institutions. In the 1990s, the secret-police chief Vladimiro Montesinos systematically undermined them all with bribes. We quantify the checks using the bribe prices. Montesinos paid television-channel owners about 100 times what he paid judges and politicians. One single television channel's bribe was four times larger than the total of the opposition politicians' bribes. By revealed preference, the strongest check on the government's power was the news media.
> >
> > Montesinos kept meticulous records. He required recipients of his bribes to sign receipts. He routinely videotaped himself doling out funds and explaining exactly what he expected of those whom he paid.
>
> McMillan and Zoida used the records to compile what they described as price list for bribery – a yardstick that could be used to measure the strength of the democratic countervailing forces that Montesinos was undermining.
>
> They discovered a clear hierarchy of power. A politician, for example, was worth slightly more than a judge. But the most powerful force of all was an owner of a television station. They commanded bribes about a hundred times higher than a politician's.
>
> "Each channel takes $2 million monthly, but it is the only way," Montesinos told one of his henchmen. "That is why we have won, because we have sacrificed in this way."
>
> Why did television matter so much? Montesinos explained on tape: "What do I care about *El Comercio*? They have an 80,000 print run. 80,000 newspapers is sh-t. What worries me is Channel Four...It reaches two million people."

9 15 September 2006.

> In the end, a small independent television station, one that Montesinos had never bribed, aired the tape that brought the regime down.
>
> The Senate committee is due to report back on 6 October. They should look at McMillan and Zoida as part of their deliberations. If they're not going to take public interest into account, they should consider their own self interest – and if they want to give more powers to forces already up to 100 times stronger than they are.

## Free to Air television (FTAs)

If television channels are the most powerful of all (as the parable above suggests) – or even if we just accept that television is a very powerful media market – should Australia be looking to increase competition in this market?

> **Senator MURRAY**—In one word, do you support having a fourth free-to-air channel introduced on television?
>
> **Mr Falloon**—We do not. [10]

The Productivity Commission (PC) supports the ban on entry of new television stations being lifted.[11] Other witnesses at the hearing were also of a different view to Mr Falloon and supported a fourth free-to-air channel:

> **Mr Warren**— … The second thing that could be done—and which we believe should be done—is that the free-to-air networks, who have been given this spectrum for nothing, should have a legislative mandate requiring them to broadcast different programming—not just time shifted programming—with all the normal quota restrictions and requirements that are on a free-to-air network on one of their digital bands. We also support a fourth commercial TV licence.[12]

> **Senator IAN MACDONALD**—As I understand your proposal, instead of having a B channel you would have a fourth free-to-air network.
>
> **Mr Brown**—Yes. There would be a fourth free-to-air network, which would be simultaneous analog and digital to, say, 2010 and then there would be a switch to digital two years before the incumbents—in other words, it would switch in 2010 and 9,7 and 10 would cross over in 2012.[13]

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10 Mr Nicholas Falloon, Executive Chairman, Network Ten, *Committee Hansard*, 29 September 2006, p. 35.

11 Productivity Commission: Broadcast Inquiry Report No. 11, 3 March 2000.

12 Mr Christopher Warren, Federal Secretary, Media, Entertainment and arts Alliance, *Committee Hansard*, 28 September 2006, p. 21

13 Mr Geoffrey Brown, Executive Director, Screen Producers Association of Australia, *Committee Hansard*, 28 September 2006, p. 90.

> **Senator MURRAY**—Mr Williams, it has been put to us by witnesses that a fourth free-to-air channel should be issued. Do you support that or not, or do you not have a view on it?
>
> **Mr Williams**—I have a personal view. My company does not have a formal view.
>
> **Ms Richards**—ASTA supports it.[14]

Rather shamelessly, the Government have made it quite clear that it will not agree to a fourth FTA channel, or allow the independent regulator ACMA to make that judgement on its merits.

It is hardly a matter of viability. As Mr Beecher said:

> **Mr Beecher**— … Are the media companies ailing? Do we have an industry that has economic malfunction? Here are some facts. 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. There is only one other industry in Australia with higher profit margins.
>
> 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. It is the second highest only after resources, and the reason resources is higher is that the capital requirement is stratospheric and therefore the risk-reward ratio is higher.[15]

If then a fourth FTA is out of the question under this Government, the only other option to introduce more competition in television is in community TV. Community and suburban/regional press and community broadcasting are able to supplement commercial radio and the big newspapers in an impressive manner. Community TV needs a 'leg-up' to do the same.

## Promoting Community Television

The main committee report strongly supports the community television sector and the Australian Democrats fully endorse the committee's recommendation in this regard.

The community television sector is a growing and alternative voice to Australia's mainstream media. It provides much needed diversity and local content in a market that will increasingly tend towards greater concentration and reduced competition as a result of the government's changes to media ownership. Community broadcasting is fundamentally different from the commercial and national broadcasting sectors. It is media produced by communities, for communities. It promotes the principles of

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14 Mr Kim Williams CEO Foxtel and Ms Debra Richards Australian Subscription Television and Radio Association, *Committee Hansard*, 29 September 2006, p. 45.

15 Mr Eric Beecher. *Committee Hansard*, 28 September 2006, p. 108.

access and participation, volunteerism, diversity, independence and localism. The sector caters to a diverse range of communities of interest, from core ethnic, indigenous, and gay and lesbian communities, to youth, religious, senior citizens, arts, fine music, Australian music and other special interest cohorts.

In March 2006, there were 7 licensed community television services. These are Channel 31 Adelaide, Briz 31 Brisbane, Linc TV Lismore, Channel 31 Melbourne, Bushvision Mount Gambier, TVS (Television Sydney) and Access 31 Perth. Community television in Australia has more than 260 member groups, 3200 volunteers and 50 paid staff; provides training in all areas of television production to more than 500 Australians every year; has a combined annual turnover of more than $5 million and a cumulative monthly audience reach of more than 3 million.

On numerous occasions the Government has expressed its support for community TV and in particular its role in providing local content. For example the (then) Minister for Communications, Information Technology and the Arts, Senator the Hon Richard Alston noted:

> CTV plays a valuable role in meeting local needs for information, education and entertainment, providing an outlet for innovative and niche programming, and opening opportunities for enthusiastic volunteers to train in television production, programming and management.[16]

According to the Community Broadcasting Association of Australia survey of the four metropolitan CTV stations on air for the duration of 2005 revealed that every week these stations broadcast:

- 164 hours of locally produced programming;
- 61 hours of news and current affairs programming;
- 37.5 hours of religious programming;
- 33 hours of Ethnic programming;
- 30.5 hours of youth programming;
- 27.5 hours of arts programming;
- 21 hours of programming for new, emerging and refugee communities;
- 19 hours of educational programming;
- 17 hours of sports programming;
- 7 hours of programming for people with a disability; and
- 6.5 hours of Indigenous programming.[17]

16 Press release, Senator, the Hon Richard Alston, 15 November, 2002.

17 http://www.cbaa.org.au/media/CTV_Submission_Part1.pdf

However, primarily due to the relatively high cost of producing audiovisual content, the community TV sector is not able to provide the same level of local content, news and information as community radio and community-based newspapers.

To complement the committee's community television recommendation I believe that the government should strongly support community television to drive a greater level of local content and diversity on community TV broadcasters. As the cost of producing local TV content and a lack of access to funding are the primary restraints on greater local content in community TV, I suggest that the government consider the following policy options.

***Firstly, Government grants to support local content on community TV*:** The Australian Democrats believe there is scope for some modest level of government financial support for the production of local TV content on community TV. Because of their limited financial capacity due to their non-profit and community based nature, the government should put in place a government grants scheme directed at supporting and promoting local TV content on community TV. By providing a modest level of funding to community TV providers the government would ensure that local communities have the ability to enhance the local content and diversity that is an inherent attribute of community TV.

***Second, an industry levy to support local content on community TV*:** Another policy option that the government should consider is a low level media industry levy aimed at supporting local content on community TV. The levy could be targeted at those commercial media organisations that merge as a result of the changes to the cross media rules as these organisations would benefit most from the government's decision to allow greater concentration of ownership. As the commercial media conglomerates would dwarf the size of the community TV providers the levy would necessarily be very small, perhaps a fraction of a percentage point.

***Third, broadening sponsorship arrangements on community TV*:** The Democrats believe that one way to increase the available funding to community TV providers is to allow greater flexibility in its sponsorship arrangements. The current arrangements allow community television licences to broadcast 7 minutes of sponsorship announcements in any hour of broadcasting.[18] Although it would not be desirable to see a large increase in the amount of time dedicated to sponsorship, allowing community TV providers some degree of flexibility in how that amount of sponsorship is allocated throughout its daily and weekly programs may attract a greater number of sponsors.

It is also worth noting that community television may be losing their current sponsors as a result of the uncertainty created by the government's indecision on community televisions access to digital spectrum. Asked whether the lack of a presence on digital

18 *Broadcasting Services Act 1992*, Schedule 2, subclause 9(2).

TV affected their current sponsorships, Mr Melville, General Manager, Community Broadcasting Association of Australia responded:

> ...from my discussions with station managers of community television stations I believe it to be true to say that the effect is starting to be felt. I think some of the more savvy businesses that are seeking to differentiate themselves in the [sponsorship market] are starting to ask questions about where they will be in six months to a year in terms of continuing exposure to audiences and whether they will have a place in digital. I do not know that it has actually stopped anyone coming forward and placing their sponsorship message on community television, but I know the question is beginning to be asked.[19]

In this regard the Community Broadcasting Association of Australia indicated in its submission:

> While the community television (CTV) sector is not currently broadcasting on digital, the Government has long been committed to providing the CTV sector with access to a digital channel free-of-charge.
>
> The Minister's discussion paper, released in March, says that the Government's Digital Action Plan will reveal how this access will be provided.[20]

The CBAA also reminded the committee of the generous support the government currently provides to the commercial TV industry regarding the conversion to digital TV:

> Because the sector cannot afford to meet the costs of both analogue and digital transmission, the CBAA has asked Government to fund the costs of digital transmission during the simulcast period. The Government currently provides $75 million per year to fund the national and commercial broadcasters' digital conversion costs.[21]

## The ACCC and improving media competition

The very first requirement in any matter of industry regulation is to ensure competition is protected. On the surface the assurances that further concentration in the Australian media industry cannot occur if the ACCC opposes mergers or acquisitions should be reassuring. They are not.

It is not credible for the Minister to assert that the ACCC and the Minister will control any proposed media mergers adequately, because there are insufficient safeguards. The 'Dawson' bill (the Trade Practices Legislation Amendment Bill (No. 1) 2005) will actually reduce safeguards because it allows for forum shopping and the

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19 Mr Melville, General Manager, Community Broadcasting Association of Australia, *Committee Hansard*, 28 September 2006, p. 83.

20 Community Broadcasting Association of Australia, *Submission 42*, p. 2.

21 Community Broadcasting Association of Australia, *Submission 42*, p. 2.

application of different principles between the ACCC and the Australian Competition Tribunal.

Without very significant strengthening of the Trade Practices Act (TPA), including section 46, and including divestiture provisions, plus the addition of a media-specific public interest test, any media market deregulation through this legislation seems bound to result in reductions in real competition, and a greater concentration of media power.

I have outlined elsewhere at length the weakness of the *Trade Practices Act 1974* (TPA) with respect to mergers and acquisitions, such as in these remarks three years ago:

> … a dynamic, modern market economy means that the efficiency and competitiveness of the market should be facilitated and that mergers, acquisitions and takeovers should be made easier. The flip side of easing the market for mergers, takeovers and acquisitions is a need to ensure that the overmighty and abusive are properly constrained. I have said before that big business roars approval at the dynamism of the American market but fiercely condemns a major contributor to that dynamism—that is, the effects of antitrust or divestiture laws. We need those regulatory tools in Australia. Balanced divestiture laws are the corollary of balanced merger laws. We do not have effective divestiture laws. It is a strange and illogical policy that can prevent mergers to maintain effective competition but cannot require divestiture also to maintain effective competition. [22]

The non-Government members of the March 2004 Senate Economics References Committee *Report into the effectiveness of the Trade Practices Act 1974 in protecting small business* accepted the proposition that divestiture powers were essential:

> **Divestiture**
>
> Divestiture powers are powers which enable a Court to order that a dominant corporation be broken up into several smaller corporations in order to prevent the anticompetitive domination of a market by one player.
>
> Such powers are currently available under s.81 of the Act, but cannot be applied to creeping acquisitions, nor to offences under s.46. The Committee considers that the application of s.81 should be expanded, so that divestiture becomes a remedy for other breaches of the Act, including section 46 (Misuse of market power) and any new section introduced in line with the Committee's recommendation 12 (relating to the regulation of creeping acquisitions).
>
> As divestiture is a quite severe remedy, it is appropriate to provide "warning mechanisms" to ensure that a corporation which is expanding its business is able to comply with its obligations under the Act. A suitable warning mechanism could be based around a "trigger" market concentration.

22 *Senate Hansard,* 13 August 2003, Senator Murray on adjournment.

> This trigger should not operate as a *de facto* cap on market share. Rather it would require companies proposing acquisitions in concentrated industries to notify the ACCC. The Commission would then assess whether the acquisition would result in a substantial lessening of competition. The Committee notes that this already occurs in the retail grocery industry.
>
> **Recommendation 13**
>
> **The Committee recommends that s.81(1) of the Act be amended so that s.81 can be applied where a corporation is found to have contravened section 46, section 46A, or any new section introduced to regulate creeping acquisitions.** [23]

Even the Government, which has hardly covered itself in glory in strengthening competition laws, has accepted the TPA needs strengthening, although it has done nothing to translate its in-principle acceptance into legislation. The Government accepted the Senate Economics References Committee recommendations 5, 8, 9, 16 and 17; and 3, 6 and 11 in part; all made well over two years ago.

The point is the Government seems divorced from reality. It does not even recognise that it is simply bad policy to introduce much looser media concentration rules without simultaneously introducing legislation to bolster general competition law. And of course, strengthening the TPA will benefit competition in all other sectors too.

As I've emphasised earlier, the great concern with the Media Ownership Bill is the fear it will harm our democracy through excessive concentration, a loss of diversity, and increased abuse of media power. These are matters which concern society. These are values matters and political matters, requiring public interest judgements. It is worth repeating the quote at the start of this Minority Report:

> **Senator MURRAY**— … As you would be aware, a great deal of commentary, particularly political commentary, concerns the issue of whether further media concentration, or indeed these changes, would advance the health of our Australian democracy. Just so that we have it on the record, when you consider a merger proposition in the media industry in future you will not consider the issue of whether it will contribute to the health of our Australian democracy, will you?
>
> **Mr Samuel**—No, we will not.[24]

All is not lost, provided the Government comes to its senses. The ACCC and TPA as presently configured are simply not equipped to deal with these matters at present, but in his evidence Mr Samuel made it clear that the ACCC would be able to deal with public interest issues if there were a law change:

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23 Senate Economics References Committee, *Report into the effectiveness of the Trade Practices Act 1974 in protecting small business*. The Executive Summary is attached to the end of this Report.

24 Mr Graeme Samuel, Chairman, ACCC, *Committee Hansard*, 28 September 2006, p.46.

> **Senator MURRAY**— … the only way in which you could be obliged to take the public interest—which would include what I would classify as social considerations, such as the health of our democracy—into account would be for a provision to be specifically inserted into legislation, wouldn't it?
>
> **Mr Cassidy**—I take it that you are saying, 'Leave aside authorisation,' which is a public interest matter?
>
> **Senator MURRAY**—That is right.
>
> **Mr Cassidy**—In considering media mergers generally, the only way in which we could, or could be required to, take into account the public interest would be if that was specified in legislation.
>
> **Senator MURRAY**—My judgement of the media area is that the political class have always recognised that the ACCC is inadequate in determining these broader issues. That is why they have introduced rules which are specific to the media area and which are governed, effectively, from a political perspective. The restrictions on cross-media and foreign ownership and so on are quite different to those which apply in other industries. If you want to lessen that industry specific control, in my view you have to increase the capacity for the ACCC as a competition regulator to take matters like that into consideration. My question is this: do you think that if a public interest test was required of you in issues concerning media you would be able to develop and devise, with your usual ability … guidelines and methodologies which are appropriate to that task?
>
> **Mr Samuel**—Tests such as that would probably be no different to the sort of test the guidelines provide for us already in section 50. For example, we are required to take account of regional considerations as part of our determinations in dealing with merger matters. These are all factors that we take into account in many senses.[25]

The Australian Democrats position on these Bills is informed by the PC's broadcasting report of March 2000.[26] That report looked into a range of conflicting policy issues including convergence, media markets, protecting diversity and cultural identity. All these issues are of great concern to the Democrats and to many Australians.

The Government did not respond to the complexities of the PC's report, and certainly the Commission's recommendations are not reflected in the Discussion Papers issued by the Minister for Communications, or the legislation which the Government has presented to the Senate.

A key recommendation from the PC was that the cross-media ownership rules should not be repealed or changed until the following had been achieved:

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25 Mr Graeme Samuel, Chairman, ACCC, *Committee Hansard*, 28 September 2006, p.46.

26 Productivity Commission: Broadcast Inquiry Report No. 11, 3 March 2000.

- the removal of regulatory barriers to entry, including making spectrum available for new broadcasters;
- the repeal of restrictions on foreign investment, ownership and control; and
- amending the Trade Practices Act to provide for a media-specific public interest test to apply to mergers and acquisitions.[27]

The Democrats would add to the PC's list, the amendments to the TPA including the introduction of effective divestiture powers; clarification of the meaning of a 'substantial degree of power in a market' and 'take advantage' in section 46 to overcome existing deficiencies; introduction of a 'financial power' consideration; and strengthening the ACCC's powers to prevent creeping acquisitions.

Those recommendations, if implemented would give the TPA real teeth and afford enforceable protection from anti-competitive abuses of market power. If those recommendations were implemented there would be the opportunity to loosen up the present media rules quite considerably and allow greater competition.

Instead, under the proposed changes to the *Broadcasting Services Act 1992*, big media business will get the chance to accelerate the oligopolisation of the media market. The Democrats believe that some of the amendments in the Digital Television Bill are long overdue and have considerable merit, but the amendments proposed to the Media Ownership Bill cannot be agreed to until the Government implements the PC's recommendation regarding a public interest test, and strengthens the TPA as outlined above.

Many witnesses agree that a media-specific public interest test should be added to the TPA. The PC made a number of key points in this regard.

The PC said the TPA is unable to deal effectively with cross-media mergers and mergers between 'old' and 'new' media which could affect concentration and diversity in the 'market for ideas'. They said a media-specific public interest test should be added to the Act. [28]

The PC said that cross-media rules prevent mergers among 'old' media companies, and will impose increasingly severe constraints on them. They thought the rules' effectiveness will decline as convergence proceeds. Therefore they believed cross-media rules should be removed once a more competitive media environment is established, that is, when:

- the media-specific public interest test is in place;
- foreign investment is permitted under normal guidelines;

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27 Productivity Commission: Broadcast Inquiry Report No. 11, 3 March 2000, p. 33.

28 Productivity Commission: Broadcast Inquiry Report No. 11, 3 March 2000, p. 3.

- the ban on entry of new television stations is removed; and
- a significant amount of spectrum is available for new entry.[29]

It is useful to quote the Report in full:

> **[Productivity Commission] Overview**
> Australia could try to extend the cross-media rules to other media, but such an approach would become increasingly difficult to implement in a convergent world. The Australian community will be better served by policies that encourage contestability and entry. Given that ownership structures are changing rapidly, the Commission recommends that a media specific public interest test be inserted into the Trade Practices Act immediately (recommendation 10.3).[30]
>
> …
> Once the new media-specific public interest test is in place and new entry has established a more competitive atmosphere for Australian media, the cross-media rules should be repealed.[31]
>
> …
> **RECOMMENDATION 10.3**
> The Trade Practices Act 1974 should be amended immediately to include a media-specific public interest test which would apply to all proposed media mergers. The test would be administered by the Australian Competition and Consumer Commission, and require that the commission seek ABA input on social, cultural and political dimensions of the public interest.
>
> **RECOMMENDATION 10.4**
> After the following conditions have been met:
> - removal of regulatory barriers to entry in broadcasting (s. 28 and the s. 23 non-technical criteria), together with the availability of spectrum for new broadcasters;
> - repeal of BSA restrictions on foreign investment, ownership and control; and
> - amendment to the *Trade Practices Act 1974* to provide for a media-specific public interest test to apply to mergers and acquisitions; the cross-media rules should be removed.[32]

There is also the question of what will constitute a market in the new media landscape. ACCC Chairman Graeme Samuel has already suggested in a number of speeches that the definition of 'market' may have to be reviewed in some aspects of the media industry. Rather than dividing the industry into radio, television, newspapers and internet, he says it may have to be looked at in terms of sports markets, classified

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29 Productivity Commission: Broadcast Inquiry Report No. 11, 3 March 2000, p. 3.

30 Productivity Commission: Broadcast Inquiry Report No. 11, 3 March 2000, p. 24.

31 Productivity Commission: Broadcast Inquiry Report No. 11, 3 March 2000, p. 25.

32 Productivity Commission: Broadcast Inquiry Report No. 11, 3 March 2000, pp.38-39.

advertising markets, and so on, so that it revolves around a question of content rather than a question of delivery platform.

These issues remain unaddressed by this legislation and many of the provisions of the Bills are something of a knee-jerk reaction to certain examples of media failure in regional areas brought to the attention of the Liberal Party by their Coalition partners, the Nationals. In particular, this is true of the Local Content Plans, which require licensees to demonstrate how they are meeting local content licence conditions and includes provision for emergency warning broadcasts and other matters. Some regional witnesses warned against an ineffective bureaucratic approach here. Media commentator, Mr Jock Given 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.[33]

> **WARNER, Ms Joan** - A lot of our broadcasters—and you will hear from a number of them tomorrow, I believe—are quite concerned about going back to the bad old days where a bureaucrat comes in and demands a book of 10 pages and then decides with the stroke of a pen whether it is acceptable or not. … So we are just harking back to the pre-BSA days when everything was a beauty pageant and it was a lot of time and a lot of effort on every broadcaster to provide that so the bureaucrat would tick it off.[34]

## The FIRB and foreign ownership restrictions

In the media ownership bill, the Government proposes the removal of media-specific foreign ownership and control restrictions in the *Broadcasting Services Act 1992* (BSA), and the discontinuation of newspaper-specific foreign ownership limits under Australia's *Foreign Investment Policy*. The media would be retained as a 'sensitive sector' under the *Foreign Investment Policy*.

In principle the Australian Democrats could agree with the lifting of foreign ownership restrictions to enable more competition in the market, subject to some important caveats. We do agree that it is retained as a 'sensitive sector' under the Foreign Investment Policy.

There are many issues to consider here. Firstly, if other countries close out their media or parts of their media to competition from Australia, why should Australia allow

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33 Mr Jock Given Media Law lecturer University of Melbourne. *Submission* 25, p. 9.

34 Mrs Joan Warner, CEO, Commercial Radio Australia Ltd, *Committee Hansard* 28 September 2006, p. 94.

those countries to buy Australian media outlets? If non citizens in one country are prohibited from owning or operating TV stations or are subject to ownership caps or other barriers to entry, as they are reported to do, why should non-resident foreigners from those countries be allowed to run Australian TV stations or other media?.

The logic here is that only those countries that open their markets to us should get the reciprocal privileges here.

The next question is one that cannot be avoided. Nationalism is an issue in Australia. Australians do not seem to concern themselves much with foreign media ownership that already exists, from relatively similar countries like Canada, the USA and Great Britain. Based on what I read see and hear, I expect they may be less comfortable with some types of ownership from other countries.

Australia cannot discriminate by race or country. If foreign ownership is to be allowed it has to be open to all. This is well understood by some witnesses:

> **Senator MURRAY**— … The question I want to ask you concerns foreign ownership. It is your position, isn't it, that foreign ownership of media in Australia should not be restricted other than through the normal processes of the Foreign Investment Review Board?
>
> **Mr Falloon**—Correct.
>
> **Senator MURRAY**—And your position is, isn't it, that with respect to those issues that you might describe as nationalism they should be catered for by local content rules and rules about the coverage of news and information with respect to Australia? Is that correct?
>
> **Mr Falloon**—Again, correct.
>
> **Senator MURRAY**—And in principle, of course, opening the market to foreign owners means that it does not matter whether it is an owner from France, the United States, Great Britain, Canada, China, India or, indeed, Iran?
>
> **Mr Falloon**—Again, correct.[35]

Of course even the new rules will prevent one owner owning all TV media for instance but it would not prevent one owner owning a key or dominant TV station and 70% of the major newspapers:

> **Senator JOYCE**—With regard to your broader critique on globalisation and your belief that everything should be put up for sale and that anybody should be able to buy it, could I run this past you: if everything is up for sale and anybody can buy it, and al-Jazeera buys the lot—everything that is in Australia—would you be happy with that outcome?
>
> **Mr Berg**—No, not necessarily, but I do not think that could ever possibly happen.

35 Mr Nicholas Falloon, Executive Chairman, Network Ten, *Committee Hansard*, 29 September 2006, p. 35.

> **Senator JOYCE**—Under your proposal, yes, it could.
>
> **Mr Berg**—No, only if we fix a point in time. If al-Jazeera buys up absolutely everything, I am sure that there would be individuals who would like to break that al-Jazeera monopoly by setting up some other.[36]

Perhaps. I would only be comforted if there were changes to the TPA strengthening it and including divestiture provisions (see my comments on the TPA and the ACCC above).

## ACMA and standards

### *ACMA powers*

The Communications Legislation Amendment (Enforcement Powers) Bill 2006 is the bill that strengthens ACMA's powers.

The TPA is the legislation which regulates competition and consumer needs as enforced by the ACCC, and oversees mergers and acquisitions. However, ACMA as the media industry-specific regulator which must have the necessary powers to promote genuine real and meaningful diversity of economic, political, social and other media voices. If these two regulators are properly resourced, have interconnecting provisions where necessary and are given the appropriate powers then there is a chance that the media landscape of the future will adequately provide the information, social, political and entertainment needs of future generations.

Unfortunately this legislation does not give ACMA sufficient appropriate powers to achieve this and the TPA remains inadequate to deal with the competition and consumer issues which are raised by this legislation.

ACMA needs to have its role boosted, so that it can interlink with the ACCC more effectively, in mergers that it considers likely to be anti-competitive. The exchange below elucidates this point:

> **Senator BRANDIS**—It has to be the ACCC, doesn't it?
>
> **Ms Beal**—Not necessarily. In my view there is also a way to give stronger direction to ACMA in these reforms. I suggest that both regulators are given clear statutory guidance in relation to ensuring that their different roles—they have different roles, of course—are clear.
>
> **Senator BRANDIS**—Let me just make sure that we have this straight. At the moment, ACMA has no power to prevent an anti-competitive merger within any of the forms of media organisation over which it has jurisdiction and it is not proposed to give ACMA such powers in these bills, is it?
>
> **Ms Bea**l—No.

36 Mr Christopher Berg, Research Fellow, Institute of Public Affairs and Editor IPA Review, *Committee Hansard*, 28 September 2006, p. 12.

> **Senator BRANDIS**—So your understanding is that the only way in which that could be done is under the existing law with the ACCC seeking an injunction under section 80 of the Trade Practices Act for an apprehended breach of section 50 of the Trade Practices Act. Is that right?
>
> **Ms Beal**—I had not thought about it quite so technically. I had been striving to demonstrate ways that content could be brought into the picture when considering the point of mergers because it is so important to the public interest. If the quality and type of content that Australians have access to are going to be affected by a merger, that ought to be something that the ACCC can take into account and protect against. We have had preliminary consultations with the ACCC in exploring this issue which suggest that content would not be a key focus in the minds of the ACCC when carrying out their role of enforcing the Trade Practices Act in relation to competitive conduct.[37]

### *Local Content*

With respect to local Australian content the Australian Democrats support the submission put forward by the Screen Producers Association of Australia (SPAA) regarding assistance to produce local content. There is no point in regulating for a certain level of Australian content on television and radio, when the financial conditions surrounding the production of that local content are too difficult to make it a sensible business proposition.

Everyone accepts that cheap imported American product which has proven its ability to attract viewers in other marketplaces, is much more likely to be purchased by profit-conscious FTA broadcasters than perhaps more costly Australian locally written and produced content. Therefore if there is to be more and better local content for FTA television stations or digital channels to show on the different delivery platforms then conditions conducive to the production of such content should be implemented as soon as possible. As Bill Gates is said to have once pointed out, 'content is king' and although he was talking about the internet, he also acknowledged that it was true of broadcasting.

If Australians are to continue to hear Australian voices, across a range of media platforms, then the recommendations of the SPAA regarding changes to the taxation system need to be given consideration by the government:

> **Senator MURRAY**— …The question is: if you open up foreign ownership in the way we have just discussed, do you think that we need additional protection supplied to ensure that there is sufficient local content, localism and Australian character and that that area is protected more than it has been? I ask you to recognise in your response that there has been something, I think, of a community reaction to what is regarded as an

37 Ms Elizabeth Beal, Director, Communications Law Centre, *Committee Hansard*, 29 September 2006, pp. 66-67.

excessive Americanisation of our entertainment and information. I do not know what weight to put on it, but I get that feeling.

**Mr Falloon**—I think if you look at the free television industry first, on local content, you see that there are rules in place: the transmission plus the drama quota. We think they are essential; they have been an important part of the whole mix. The issue where there has been some debate in the past years, which unfortunately now is a matter of fact, is that in the new industries that are clearly growing, namely the internet and pay television, the local content requirements under those rules as part of the free trade agreement have been fixed at 20 per cent maximum. The rule on pay TV is only at 10 per cent currently, but it cannot go above 20 per cent. So, as I was saying to you before, it is important in these rules that we keep it vibrant. It is not just because of the debate you hear from some people about having completely free and open competition in every market. In the television industry in this country, regulation has played a part for 50 years to get a position where we are the envy of most countries for the amount of local content that is on free television for viewers for free. We have got a fantastic system; we should be very proud of that system.

As new technology is coming down the pipe, you will never get in the new media more than 20 per cent under legislation that has now passed. That is why I keep saying that we need to be mindful of what part local content plays in this package of rules. As we move through the transition, whether we continue to have localism and local content as part of our mix will continue to be an important part of consideration for legislators such as you. Going forward, free television is the only area that is going to be able to deliver that, by definition.[38]

## Telstra and telecommunications

The ACCC needs stronger regulatory powers, not just specific to media but to cover telecommunications, because the ACCC needs the power to regulate both the content and the pipes that deliver it, to achieve that. The media proposals package fails to acknowledge the pivotal role of the telecommunications industry in the provision of media content and access in the future, and that is a big hole that should have been addressed.

The big hole in the media proposals package is that there is no mention of Telstra and how its future privatisation feeds into this debate. You cannot debate media regulation, access and content in a vacuum that excludes telecommunications. You must also debate telecommunications infrastructure and access along with it.

Competition has improved in the telecommunications markets over the years, especially in mobile phones, but Telstra, with its ownership of the copper network and Hybrid Fibre Coax (HFC) cable (used for pay TV and broadband delivery), is still the

38 Mr Nicholas Falloon, Executive Chairman, network Ten, *Committee Hansard*, 29 September 2006, p. 35.

dominant player in most other telecommunications markets. Telstra also has a significant share in Foxtel, giving Telstra a potentially dominant position in the new media market.

In the 21st century one of the most important delivery systems of media content is the internet, which is why telecommunications and media are absolutely intertwined. It provides access to the most diverse range of media content, but much of rural and regional Australia will miss out on this access because of the lack of telecommunications infrastructure to deliver high speed broadband access. Recently Telecommunications expert Paul Budde told Meet the Press that it is likely Telstra will only roll out fibre to metropolitan areas, leaving rural areas in the lurch.

When the sale of Telstra was negotiated, the media side of Telstra was neglected. It is a pity nobody reminded the National Party negotiators that telecommunications is the way to deliver media diversity in the 21st century.

The Democrats have argued time and time again that Telstra should at a minimum be forced to divest Foxtel and its HFC cable. This stance supports the ACCC's view. This would open up more competition in the market. The ACCC has argued that Telstra, in protecting the revenue of both the copper wire and the HFC network, will only invest in services that would cannibalise the revenue of the other network.

Ideally the Democrats say that for fair and transparent competition and parity for rural Australians the Government must separate the wholesale access network from the retail business and retain ownership of the infrastructure. Ownership of the HFC cable could be retained in this case, or divested to raise revenue for fibre roll-out.

## THE DIGITAL TV BILL AND RELATED ISSUES

The motive behind the Broadcasting Legislation Act (Digital Television) Bill 2006 (Digital TV Bill) is to set up conditions which are, hopefully, conducive to the take up of digital television, and to open up media markets to some competition brought about by new technologies. These are laudable aims and the Australian Democrats agree with the majority report on some of the matters arising from this Bill which came before the Committee. However, although the Digital TV Bill contains some aspects with which the Australian Democrats agree, it also contains aspects which do not promote diversity of voices, or provide conditions in which an effective fourth estate can flourish as part of the democratic process.

The Australian Democrats wish to raise three issues that it believes are of great concern in relation to the Digital TV Bill, namely:

- the transfer of decision-making power from the ACMA to the Minister in relation to the grant of new commercial television licences;
- the Minister's power of veto over the grant of licences in the non-broadcasting services band; and

- the need for adequate funding for the national broadcasters to enable them to provide high quality multi-channel services now that genre restrictions have been lifted.

## Transfer of decision making power from ACMA to the Minister

The Australian Democrats strongly oppose this change. The decision to grant a commercial television broadcasting licence should be made by an independent regulatory body, it should not be something that the Minister can be lobbied on by the big media owners.

The Government has not articulated any good policy reason for a fourth commercial TV licence to be excluded from the discussion, except another station would impact negatively on the revenue streams of the FTA commercial networks in the market.

The submission by the Media, Entertainment and Arts Alliance (MEAA) captured the folly of the Government's proposals:

> The Alliance does not support the Government removing the capacity for the regulator to determine licence allocation. It is a central part of ACMA's role as an independent regulator and it should retain this decision-making capacity.
>
> In announcing that it will assume the decision-making capacity to allocate a fourth licence, the Government has announced that it will not do so.
>
> Again, the Alliance is at a loss to understand why the Government is so averse to opening up the broadcasting industry to competition.
>
> The oft claimed arguments in defence of the Government's position rely on the assumption that to do so would threaten the viability of the incumbents because it would fracture the advertising pie, a pie that is already under threat from new media.
>
> These arguments fly in the face of reality.
>
> According to research undertaken by Free TV Australia – the association that represents the free to air commercial television broadcasters – 'seven out of ten media planners and buyers believe that there are even more opportunities to engage with viewers on Free TV than there were five years ago' and '80% also agree that having ads on free to air television strengthens the performance of [their] campaign in other media.[39]

The Government is again seen to be pandering to vested interests, and not dealing sufficiently with policy issues. The common perception is that while free and open competition is the claimed mantra of this government, in reality that only applies until it impacts on selected media mates.

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39 MEAA, *Submission 32*, p. 6.

The Australian Democrats do not believe there is a discretionary role for the Minister in competition matters. Evidence of the undesirability of this practice was recently borne out by the Treasurer's behaviour in relation to access to rail networks in the North West of Western Australia.[40]

ACMA is the regulator of media matters in Australia and it should be up to that body, which presumably is (or if not, should be) made up of appropriately skilled impartial and independent people, to investigate these types of matters and to come to an objective conclusion which is based on the application of evidence.

## The Minister's power of veto

The Digital TV Bill provides a power to the Minister to veto an application made to ACMA for a new commercial television broadcasting licence outside the BSB (under section 40 of the BSA) on the basis that the allocation of the licence would be likely to be contrary to the public interest.

Again this is a decision that should not be able to be vetoed by the Minister. Under existing provisions of the TPA this has shown to be a power that can be misused and work against new players entering a market when they are up against powerful and financially endowed incumbents (again, I refer to Fortescue Metals efforts to become a third player in the Pilbara iron ore industry). There is no reason why ACMA can not make these sorts of decisions itself, taking into account 'the public interest'.

Neither the BSA, or the Digital Television Bill, set out exactly what factors will be taken into account when the Minister considers whether the grant of a licence under section 40 is 'likely to be contrary to the public interest'.

There are a couple of differences between the media-specific test that the PC put forward and the proposal in the Digital TV Bill, namely that the power of veto would be exercised by the Minister, and not by the ACCC and it is being applied in relation to the grant of a broadcast licence, not in consideration of a media merger.

The Australian Democrats understand that this particular issue received little attention in submissions and at hearings. However, the Democrats believe that this is a reflection on the volume of other issues that needed to be considered in the legislative package, and not an indication that the informed public simply agrees with this measure. For example when the Government announced this proposal in its Meeting the Digital Challenge discussion paper, released earlier this year, the MEAA responded:

> The [MEAA] is strongly opposed to the plan for the Government to assume the regulatory and licensing functions of ACMA. ACMA is the statutory authority established at arm's length from Government to make such decisions. The Alliance does not consider that a case has been made to

40 See Barry Fitzgerald, 'Treasurer derails Pilbara track-sharing plan', *The Age*, 24 May 2006, p. 3. Also see Senator Murray, Senate Hansard 15 June 2006 p. 186.

> remove the licensing capacity from the communications and media regulator. [41]

Mr Jock Given, in his submission on the discussion paper, also opposed the transfer of this power from the ACMA to the Minister. Mr Given's reasons for opposing the proposal were outlined in his opposition to the transfer of decision-making power in respect of commercial television broadcast licences, namely:

> Why a practice put in place shortly after World War 2 should be equally appropriate for '21st Century Broadcasting' is not explained. When this policy was put in place, licences were awarded after a qualitative review of the merits of competing bids. Once granted, they were subject to a serious process of periodic review whereby there was a real possibility that they would not be renewed if performance was inadequate. This all changed in 1992. Commercial television licences are now awarded by price-based allocation, a highly inappropriate process for direct government involvement. The much more limited grounds on which renewal can be refused, or revocation undertaken, mean licences are now much more secure commodities than those handed out in the 1950s. They are very close to perpetual franchises. Lessons have been learned about communications regulatory processes since the 1950s. The separation from both industry participants and central government of telecommunications regulatory functions and spectrum allocation have been among the most important changes. They reflect the now widely accepted principle of independence in authorising the use of public resources. This is fundamental to the Rule of Law and due process, which underpin investment confidence in a modern economy. Australia has been an active and principled supporter of these ideas in international trade forums. The Discussion Paper's proposal would disrupt the careful balance of planning and licensing responsibilities without adequate justification, and contradict the 'convergence' of radiocommunications and broadcasting regulation that ACMA is supposed to be a response to, by creating yet another distinction in the way spectrum is allocated for different purposes. Regulation for the 21st century would be replaced with a discredited 1950s process.[42]

The Australian Democrats note that Mr Given did not make any comment in his submission to the committee on the proposal to grant the Minister a power of veto over the grant of commercial television broadcasting licences outside the BSB. Nonetheless, the Democrats believe that Mr Given's argument set out above is worthy of consideration in the current debate.

## Adequate funding for national broadcasters

Removing the genre restrictions on multi-channelling by national broadcasters will permit them to provide a broader range of digital services. The Australian Democrats

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41 MEAA submission to the Meeting the Digital Challenge discussion paper, p. 9.

42 Mr Jock Given's submission to the Meeting the Digital Challenge discussion paper.

support the lifting of genre restrictions on content for ABC and SBS so they can provide a broader range of digital services. The ABC has shown itself to be a great innovator in the area of radio broadcasting with podcasting, and they have also produced some popular VODcasts in the recent past.

This lifting of genre restrictions will enable the national broadcasters to broaden their ability to create new and innovative programming. However the Australian Democrats have reservations about this because of course there has been no increase in real funding for the ABC or SBS over the last decade so that raises the question of how will these new services be financed? The Government continues to expect the national broadcasters to produced quality news and current affairs on a diminishing budget. Many argue that there are few options available for the ABC now, except to introduce advertising in the same way that SBS has done, to meet the increasing costs of content production.

Even though it was not covered in this Committee's majority report, the Australian Democrats would like to record their opposition to the introduction of advertising to make up the Government shortfall in funding to the national broadcasters. The obvious reason for this is that it impacts on the independence of the broadcasters, and the media environment is already affected enough by commercial interests.

## High Definition Television

The proposed amendments to the HDTV obligations would require the 1040 hours per year HDTV quota to continue during the simulcast period, but will be removed once the simulcast period ends. Essentially this would allow the market to decide the preferred use of the digital spectrum beyond the simulcast period.

Although there was no clear consensus amongst submitters on this issue, the Democrats are persuaded by the argument made by those that support the early removal of the quota. For example SBS favoured an early transition:

> **Mr Meagher**—We certainly think that, come either the switch-off time or perhaps the time when multichannelling is provided, it would be appropriate to do away with the high-definition quota. We do believe that, over time, there will be increased high definition and that people will come to value high definition. If you look at the UK, it is quite interesting. They started with a model driven by multichannelling, and now that has been quite well established there are substantial amounts of high definition, and that is often the point of differentiation for channels and providers. But we agree with you that, over time at least, removing the quota obligation would be a sensible move.[43]

The Democrats believe that the mandated HDTV quota should be removed sooner than the end of the simulcast period in order to free up broadcasting spectrum for the other digital services.

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43 Mr Bruce Meagher, SBS, *Committee Hansard*, 29 September 2006, p. 55.

The Democrats also have a concern that, as the Government has previously failed to meet its simulcast deadline on a number of occasions and its lack of ingenuity to drive digital take-up, that the simulcast date may be further delayed. As a result, this would further extend the duration of the HDTV quota, which would be undesirable.

## Anti-siphoning

The anti-siphoning scheme ensures that certain events are available to the whole viewing public by preventing pay TV licensees from acquiring exclusive rights to listed events. The Minister may gazette a list of events, or events of a kind, which the Minister believes should be available free to the general public.

The current anti-siphoning list comprises domestic and international sporting events in twelve categories including cricket, tennis, golf, motor sports and the football codes. Pay TV licensees are prevented from acquiring a right to televise a listed event until a right has first been acquired by the ABC, the SBS or commercial free-to-air broadcasters reaching more than 50 per cent of the Australian population.[44]

The Government's preferred option of dealing with this issue is to apply a 'use it or lose it' approach, where, in the event that FTA broadcasters fail to provide adequate coverage of a listed event, the event would be considered for removal from the list.[45]

Amongst the criteria the Government is considering for determining 'adequate coverage' of events on the anti-siphoning list is whether the event or events that make up the item were shown live, or near live (commencing within one hour of the start of the event).

As highlighted in the Hearings the Democrats are concerned for communities outside the eastern seaboard states, as these areas often receive delayed broadcasts of major sporting events (as well as news and weather). The Democrats stress that 'live means live' and that the anti-siphoning regime should take greater account of the interests of those in non-east coast states. This issue should be considered during the review of the anti-siphoning scheme, scheduled to occur prior to 31 December 2009.

> **Mr Williams**—I think perhaps we have not made our position sufficiently clear. The issue is: if you have legislative commercial preferment, which is what we are talking about, we are saying there needs to be a rule around it. And the rule is: you must play it within one hour of the thing starting. Sports broadcasting is about live sport. It is not about starting the transmission of the Rugby League grand final on Sunday in Perth over three hours after the lap of honour around the ground will have been run. That is preposterous. There need to be proper rules. We are saying: if it is delayed by an hour, yes, it comes off the list. And, hopefully, the industry, which

44 DCITA website, Broadcasting and online regulation > Television > Anti-siphoning and anti-hoarding, available at http://www.dcita.gov.au/broad/television/anti-siphoning_and_anti-hoarding, accessed 3 October 2006.

45 Meeting the Digital Challenge discussion paper, p. 32.

> seem to hunt in a pack when it suits but then become guerrilla agents when it does not suit, will actually do something about it. Live means live. National means national. We are one nation. This is one parliament for the nation.[46]
>
> …
>
> **Senator MURRAY**—Mr Williams, as a general observation as a Western Australian, my experience has been that eastern staters do not pay enough attention to the real effects of time zones in this country. You saw me nod vigorously when you said 'live means live'. It is a strong issue in Western Australia. It is not just with respect to sport; we want real-time news, we want real-time weather—[47]

## THE LICENCE FEES BILL

As part of the general package of media bills being considered, the Television Licence Fees Amendment Bill 2006 amends the definition of 'gross earnings' (of the licensee, upon which fees payable are calculated) to take into account the fact that broadcasters will now be able to earn revenue from providing multiple services (ie. the new digital services and the existing services). Effectively, the Bill ensures that all revenue generated by the licensee will be taken into account in determining the relevant licence fee.

At the Senate hearing concern was raised about the detrimental burden that would be placed on these new services if they were forced to pay licence fees from the very beginning (with the licence fees currently being about nine per cent of gross revenues). Ms Julie Flynn, Chief Executive Officer of Free TV Australia, stated:

> In relation to the Television Licence Fees Amendment Bill, we are opposed, as you have just heard from Channel 7, to bundling multichannels with the main channel for the purpose of calculating licence fees. These are new services operating in an uncertain environment and should be exempt in the first instance, as new services have been in the past. We all agree that when fees are applied they should be levied separately from the main channel.[48]

I believe that Ms Flynn has a point. Some sort of 'break' is needed for those that choose to provide these new services. As Ms Flynn notes, these are new services operating in an uncertain market, and 'small' should also be added. It is not uncommon for infant industries to be allowed a transitional period before the fees kick in. Also, if other services, when first starting, have been given exemptions (as Ms Flynn notes), it is only fair and equitable that similar exemptions be granted.

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46 *Committee Hansard*, 29 September 2006, p. 41.

47 *Committee Hansard*, 29 September 2006, p. 44.

48 *Committee Hansard*, 28 September 2006, p. 56.

What is needed is some sort of transitional period, in which the success (or failure!) of the new services can be assessed, and the licence fee situation review accordingly. I would like to lend my support to the idea, as put forward by Ms Bridget Godwin (Manager, Regulatory and Business and Affairs, Seven Network) at the Senate Hearing, that a moratorium be placed on licence fees, until such time as it is appropriate to review the situation.

The possibility of separating out the main channel and the new digital service should also be considered, so that a sliding scale (as contained in the Television Licence Fees Act) could be used, with the new services paying in accordance with their revenues, and not the revenues of the channel as a whole.

## CONCLUSION

Given the ridiculously short time for this Inquiry, and the length and complexity of the four bills that comprise this media proposals package, it is inevitable that this Democrats' Minority has not covered all the material issues that arise from consideration of this legislation. We have just run out of time.

The Majority Report covers a number of issues more fully. We will support those Coalition Senators' initiatives that will have the effect of improving diversity, adding more real competition and enhancing regulatory process and oversight, as outlined in the Majority Report.

Naturally, my Minority concentrates on negatives or on shortcomings, but I have also attempted to suggest a number of improvements in policy that would positively contribute to greater diversity and competition, such as greater assistance for community TV.

I emphasise that the Democrats welcome a number of features of this package of legislation, including advancing technology and new media, and strengthening ACMA.

As stated at the outset of this Minority Report, our main problem is with the Media Ownership Bill. Without substantial and concurrent legislation to strengthen the ACCC in particular, ACMA and the FIRB; and to tighten the 'voices formula' to require a safety net of real meaningful voices in each significant media market, the Media Ownership Bill must be opposed outright.

**Senator Andrew Murray**
**Senator for Western Australia**

# Appendix A

March 2004: Senate Economics References Committee Report into the effectiveness of the *Trade Practices Act 1974* ('the Act') in protecting small business

# EXECUTIVE SUMMARY

# AND LIST OF RECOMMENDATIONS

1.1 The Senate Economics References Committee's inquiry into the effectiveness of the *Trade Practices Act 1974* ('the Act') in protecting small business is the latest in a long series of government and parliamentary inquiries into the operation of this Act.

1.2 The most recent of these, the *Review of the Competition Provisions of the Trade Practices Act* ('the Dawson Report'), canvassed a number of areas relevant to this inquiry, particularly regarding the 'misuse of market power' provisions in Section 46 of the Act. After the Dawson Committee had completed its consultations with interested parties, however, several decisions were handed down from the Full Federal Court and the High Court which have raised questions about the application and operation of Section 46 of the Act. The decision of the High Court in *Boral Besser Masonry Ltd v ACCC* (the *Boral* case), in particular, raised these issues and forms a significant backdrop to this Committee's inquiry.

1.3 An issue which has been raised during many of these inquiries is the question of whether the Act should seek to protect *competition* or *competitors*. The Committee considers that the Act can best protect competition by maintaining a range of competitors, who should rise and fall in accordance with the results of competitive rather than anticompetitive conduct. This means that the Act should protect businesses (large or small) against anticompetitive conduct, and it should not be amended to protect competitors against competitive conduct. This inquiry considered how well the Act achieves this goal.

## Misuse of market power

1.4 Section 46 of the Act prohibits corporations with a substantial degree of market power from taking advantage of that power for the purpose of eliminating or substantially damaging a competitor, preventing the entry of a competitor into the market or deterring or preventing a competitor from engaging in competitive conduct.

1.5 A number of submissions and witnesses argued in evidence that the High Court's decision in the *Boral* case has raised the threshold for determining that a corporation possesses a substantial degree of market power. They argued that the High Court's finding that Boral did not possess a substantial degree of market power means, effectively, that a corporation would have to be near dominant in the market to satisfy that element of section 46.

1.6 Accordingly, many including the ACCC argued that section 46 requires amendment to ensure that the lower threshold intended by Parliament is given effect in the legislation. The ACCC in fact informed the Committee that, as a consequence of the decision in *Boral*, it had discontinued four cases that had reached the 'second threshold' stage of its investigations in relation to section 46.

1.7 The Committee considers that the amendments suggested by the ACCC are consistent with the intention of Parliament in 1986, and that their inclusion in the Act would clarify the intentions of Parliament.

**Recommendation 1**

**The Committee recommends that the Act be amended to state that the threshold of 'a substantial degree of power in a market' is lower than the former threshold of substantial control; and to include a declaratory provision outlining matters to be considered by the courts for the purposes of determining whether a company has a substantial degree of power in a market. Those matters should be based upon the suggestions outlined by the ACCC in paragraph 2.16 of this report.**

1.8 The Committee received some evidence arguing that amendments are also required to section 46 in order to clarify what a court may have regard to in determining whether a corporation has 'taken advantage' of its market power.

1.9 Witnesses argued that the need for clarification arises from the Federal Court's decision in *Safeway,* which found that the business rationale for the conduct was relevant to considering whether the corporation had taken advantage of its market power. The ACCC was concerned that this reasoning left open the possibility of a defence on the grounds of 'rational business conduct' to corporations which had unfairly taken advantage of their market power.

1.10 The Committee considers that the Act should be amended to remove current uncertainty with regard to the meaning of 'take advantage.' The Committee considers that its proposed amendment would make clear and explicit the link between proscribed conduct and the possession of substantial market power, and would deal with the issue of 'rational business conduct.'

**Recommendation 2**

**The Committee recommends that the Act be amended to include a declaratory provision outlining the elements of 'take advantage' for the purposes of s.46(1). This provision should be based upon the suggestions outlined in paragraph 2.28 of this report.**

1.11 A number of submissions and witnesses expressed concern about predatory pricing activities which, they argued, are not adequately captured by section 46. The Committee notes that predatory pricing has proven difficult to define or establish.

Low, or below cost, prices may be evidence of predatory pricing but they may also occur as a consequence of normal, competitive behaviour.

1.12 The Committee considers that the Act would be strengthened by making predatory pricing a clearer target of section 46.

1.13 One factor which may indicate that the relevant pricing is predatory is where the price-cutting company plans to recoup its losses by increasing prices once its opponents have been driven from the market. However, there was dispute in the evidence before the Committee over whether recoupment is a *necessary* feature of predatory pricing.

1.14 The Committee considers that, while evidence of a corporation's intention to recoup losses may well contribute to the proof of an allegation of predatory pricing, there is nothing in s.46 which makes recoupment an element necessary to prove predatory pricing. The Committee considers that the Act could be improved by stating that recoupment is a factor which the courts *may* examine when considering allegations of predatory pricing.

**Recommendation 3**

**The Committee recommends that the Act be amended to provide that, without limiting the generality of s.46, in determining whether a corporation has breached s.46, the courts may have regard to:**

- **the capacity of the corporation to sell a good or service below its variable cost.**

**The Committee recommends that the Act be amended to state that:**

- **where the form of proscribed behaviour alleged under s.46(1) is predatory pricing, it is not necessary to demonstrate an capacity to subsequently recoup the losses experienced as a result of that predatory pricing strategy**

1.15 The Committee received some evidence suggesting amendments designed specifically to deal with the use of financial power to support predatory pricing. The proposed amendments set out to capture predatory pricing conduct of firms with financial power but not market power, that might otherwise fall outside the scope of section 46.

1.16 The importance of such amendments was highlighted by the outcome of the *Rural Press* case, handed down in December 2003. In that case, Rural Press pursued a clearly anticompetitive business strategy, but was not found to be in breach of the Act, partly because it relied on its "economic and financial power" and not its market power. An attempt by the trial judge to link economic, financial and market power was overturned on appeal.

1.17 The ACCC supported the use of the concept of financial power in regulating conduct contrary to s.46, but considered that rather than introducing a financial power threshold in s.46, financial power should be listed as one of the factors contributing to a determination of substantial power in a market.

**Recommendation 4**

**The Committee recommends that s.46 of the Act be amended to state that, in determining whether or not a corporation has a substantial degree of power in a market for the purpose of s.46(1), the court may have regard to whether the corporation has substantial financial power.**

**'Financial power' should be defined in terms of access to financial, technical and business resources.**

1.18 Evidence raised the issue of whether amendments are required to ensure that s.46 applies where a corporation uses market power in one market to engage in proscribed conduct in a second market. This issue was determined by the High Court late in the Committee's deliberations, when in the *Rural Press* judgment the Court clearly stated that misuse of market power in a second market is not a breach of the Act.

1.19 The Committee considers that this should not be the case. The possession of market power in one market should not become the base for anticompetitive conduct in another market, and the Act should be amended to make this clear.

**Recommendation 5**

**The Committee recommends that s.46 be amended to state that a corporation which has a substantial degree of power in a market shall not take advantage of that power, *in that or any other market*, for any proscribed purpose in relation to that or any other market.**

1.20 The Committee, finally, considered the impact of coordinated market power on competition. The Committee considers that corporations which do not have a substantial degree of market power on their own, may obtain that power through 'conscious parallelism' or 'coordinated interaction' with other corporations. For this reason, the Committee considers that s.46 of the Act should be clarified to indicate that a company may obtain market power by virtue of its co-ordination with another company, and that such coordinated market power may amount to a substantial degree of power in a market.

**Recommendation 6**

**The Committee recommends that s.46 be amended to clarify that a company may be considered to have obtained a substantial degree of market power by virtue of**

**its ability to act in concert (whether as a result of a formal agreement or understanding, or otherwise) with another company.**

## Unconscionable conduct

1.21 Part IVA of the Act prohibits the anti-competitive behaviour known as 'unconscionable conduct'. Section 51AC, which seeks particularly to protect small businesses from unconscionable conduct by large businesses, attracted most comment during this inquiry.

1.22 A number of submissions sought to extend s.51AC to proscribe 'unfair, harsh or unconscionable conduct'. The Committee considers that 'harsh' conduct is often a normal part of tough competitive dealing, and that the concept of 'unfair conduct' is much less legally certain than the concept of 'unconscionable conduct.' It is not clear that either of these proposed additions would enhance protection for small business under the Act, and as a result the Committee does not support their inclusion.

1.23 Subsections 51AC(9) and (10) limit the operation of s.51AC to the supply or acquisition of goods or services at a price in excess of $3,000,000. A number of organisations called for greater clarity around the $3 Million figure, suggesting it should operate on a per-invoice basis, and should be indexed. Other evidence suggested that the $3 Million threshold was fundamentally inappropriate, and should be removed.

1.24 The ACCC agreed with this view, saying that subsection 51AC(3)(a) already stated that the courts may have regard to the relative strengths of the bargaining positions of the companies, so no threshold is necessary.

1.25 The Committee noted these arguments and further noted that subsections 51AC(1) and (2) exclude publicly listed companies from the protection of the section. The Committee agrees that the removal of the thresholds will not reduce the current protection for small businesses, and will enhance protection for businesses involved in transactions over $3 Million, who are nevertheless subject to unconscionable conduct within the terms of s.51AC.

### Recommendation 7

**The Committee recommends that subsections 51AC(9) and 51AC(10) of the Act be repealed.**

1.26 Submissions and witnesses also sought to extend s.51AC to proscribe a number of specific activities, including the unilateral variation of contracts, unilateral termination of contracts, and the presentation of standard form contracts. In relation to the behaviours identified in these activities, the Committee notes that many are already captured by the terms of s.51AC, particularly subsections (3)(j) and (k).

1.27 The Committee also notes evidence that there are occasions upon which the use of standard form contracts or unilateral variations of contracts may be pro-competitive and commercially beneficial for both parties. Standard form contracts, for

instance, save both parties time and money when similar transactions are conducted regularly, and when the terms and conditions are well known and agreed by both parties. The Committee is concerned that the proscription of standard form contracts *per se*, would remove these cost saving benefits in addition to proscribing the unconscionable use of such forms.

1.28 The ACCC presented a slightly different proposal in relation to unilateral variation of contracts. The ACCC argued that, rather than proscribing such contracts, they should be added to the list of matters, contained in subsections 51AC(3) and (4), to which the courts may have regard in determining whether conduct is unconscionable. This proposal would not ban the unilateral variation of contracts outright, but would make it clear that such contracts could constitute conduct which is, in all the circumstances, unconscionable.

1.29 The Committee finds this argument compelling, since it would discourage the inappropriate use of unilateral variation of contracts, while allowing unilateral variation where such provisions are commercially necessary and pro-competitive.

**Recommendation 8**

**The Committee recommends that subsections 51AC(3) and 51AC(4) of the Act be amended to include 'whether the supplier (in s.51AC(3)) or acquirer (in s.51AC(4)) imposed or utilised contract terms allowing the unilateral variation of any contract between the supplier and business consumer, or the small business supplier and acquirer.'**

1.30 Witnesses indicated to the Committee that some government authorities, particularly at State and local levels, are not covered by s.51AC of the Act, despite being large scale purchasers of products, often from small businesses. The Committee agrees that such authorities should be subject to the Act.

**Recommendation 9**

**The Committee recommends that s.2B(1) of the Act be amended so that it is clear that Part 1VA of the Act applies to the Commonwealth Government; and that the Government consult with the states and territories with a view to amending subsection 2B(1) of the Act, so that Part IVA of the Act applies to state, territory and local governments.**

1.31 The Committee examined, in some detail, unconscionable conduct in retail tenancy arrangements. Some witnesses argued that ACCC has not pursued retail tenancy issues with sufficient vigour, despite the introduction of s.51AC which was intended to strengthen the remedies available to retail tenants who were the victims of unconscionable conduct.

1.32 The Committee observed, however, that since a number of State and Territory jurisdictions have drawn down versions of 51AC into their respective retail tenancy

regimes the full impact of s.51AC on retail tenancies may be larger than is suggested by a simple observation of the ACCC's activity.

1.33 The Committee recommends that the Commonwealth government work with its State and Territory counterparts to harmonise retail tenancy laws.

1.34 The Committee noted that there are inconsistencies and areas where the law could be strengthened, including in relation to the common practice of 'secret pricing' in retail tenancies. While the Committee does not support the compulsory disclosure of rental terms, the Committee does not support arrangements which prevent such disclosure. Such arrangements inhibit, rather than support, an informed market for retail tenancies. In particular, retail tenants who utilise the collective bargaining notification arrangements proposed in the Dawson Report and supported in this report should be able to freely share information about their rental prices and conditions. If this process fails to deliver satisfactory outcomes over time, the Government should consider the adoption of a mandatory code.

**Recommendation 10**

**The Committee recommends that the Commonwealth Government negotiate with state and territory governments, with a view to introducing measures which would prohibit retail lease provisions compelling tenants to keep their tenancy terms and conditions secret.**

## Codes of conduct

1.35 The Committee considered Part IVB of the Act, which enables voluntary or mandatory industry codes to be prescribed under the Act, so that contravention of a relevant code also contravenes the Act. The Committee further noted the ACCC's proposals to endorse codes of conduct which meet its quality criteria.

1.36 The Committee concurs with the scepticism expressed by a number of small business representatives about the extent to which voluntary codes of conduct can address entrenched problems within particular industries.

1.37 The Committee does not support the general use of voluntary codes as a substitute for sensible regulation. The Committee notes that the recommendations it has made in this report are likely to accomplish more to support successful competition than the most well-meaning ambitions of developing voluntary codes.

## Collective bargaining

1.38 The Committee generally supports the Dawson Report's recommendation for a notification process rather than an authorisation process for proposed collective bargaining arrangements. The Committee notes that these recommended collective bargaining arrangements include provision for collective boycotts, where these are judged to be in the public benefit.

1.39 Although the government accepted the recommendation of the Dawson Report in relation to collective bargaining, the Committee notes that it has yet to introduce the legislation to implement that proposal.

**Recommendation 11**

**The Committee recommends that the Government immediately bring forward legislation to introduce a collective bargaining notification scheme, including the right to boycott, and excluding the proposed $3 million threshold for notifications.**

## Creeping acquisitions

1.40 Submissions before the inquiry suggested that in the retail grocery sector and the retail liquor sector, large chains are acquiring the stores of independent competitors in a program of 'creeping' acquisitions. Witnesses expressed concern that s.50 of the Act, designed to prevent acquisitions that would have the effect of 'substantially lessening competition in a market', is inadequate in dealing with piecemeal acquisitions because no single purchase is likely, by itself, to lead to a substantial lessening of competition.

1.41 The ACCC itself expressed concern about this issue, but also noted that it has not yet determined whether creeping acquisitions in general (as opposed to specific case) do substantially lessen competition and so cause economic detriment. Further, if they do have this effect, the ACCC expressed uncertainty about whether the current section 50 provisions would be adequate to deal with that issue.

1.42 The Committee considers, as a matter of logic, that creeping acquisitions must, if continued indefinitely, at some point result in a very concentrated market. The clear consensus of evidence before the Committee supported this view, and no substantial arguments were raised to oppose it. Current merger law does not effectively address this issue. Section 50 of the Act should be strengthened to take account of the cumulative effects of acquisitions which over time may substantially lessen competition.

**Recommendation 12**

**The Committee considers that provisions should be introduced into the Act to ensure that the ACCC has powers to prevent creeping acquisitions which substantially lessen competition in a market.**

## Divestiture

1.43 Divestiture powers are powers which enable a Court to order that a dominant corporation be broken up into several smaller corporations in order to prevent the anticompetitive domination of a market by one player.

1.44 Such powers are currently available under s.81 of the Act, but cannot be applied to creeping acquisitions, nor to offences under s.46. The Committee considers that the application of s.81 should be expanded, so that divestiture becomes a remedy for other breaches of the Act, including section 46 (Misuse of market power) and any new section introduced in line with the Committee's recommendation 12 (relating to the regulation of creeping acquisitions).

1.45 As divestiture is a quite severe remedy, it is appropriate to provide "warning mechanisms" to ensure that a corporation which is expanding its business is able to comply with its obligations under the Act. A suitable warning mechanism could be based around a "trigger" market concentration.

1.46 This trigger should not operate as a *de facto* cap on market share. Rather it would require companies proposing acquisitions in concentrated industries to notify the ACCC. The Commission would then assess whether the acquisition would result in a substantial lessening of competition. The Committee notes that this already occurs in the retail grocery industry.

**Recommendation 13**

**The Committee recommends that s.81(1) of the Act be amended so that s.81 can be applied where a corporation is found to have contravened section 46, section 46A, or any new section introduced to regulate creeping acquisitions.**

## Powers of the ACCC

1.47 Before the Dawson Committee, the ACCC argued that it should be given the power to issue 'cease and desist' orders to stop anti-competitive conduct. Other organisations supported the extension of these powers before this Committee. The Committee considers that cease and desist powers are a vital tool for the ACCC if it is to prevent anti-competitive conduct from resulting in substantial damage to small business. The ACCC requires a tool which will enable it to act in 'real business time' yet which will protect the rights of companies against whom the cease and desist orders are sought.

**Recommendation 14**

**The Committee recommends that the Act be amended to provide for cease and desist orders, modelled on the orders provided for in sections 74A to 74D of the *Commerce Act 1986* (NZ), appropriately modified to conform with Australian constitutional law.**

1.48 The ACCC argued, before this Committee, for an extension of its powers under s.155 of the Act beyond the commencement of injunctive court proceedings. The Committee is reluctant to interfere in the powers possessed by the ACCC once a matter is before the courts. However the Committee considers that the ACCC should be able to apply to the courts for its s.155 powers to continue after the commencement of injunctive proceedings.

**Recommendation 15**

**The Committee recommends that s.155 of the Act should be amended to enable the ACCC to seek the permission of the court (whether as part of a warrant application or otherwise) for the continued use of its powers under s.155 after the commencement of injunctive proceedings. The use of s.155 powers should cease prior to the commencement of substantive proceedings.**

## Resources of the ACCC

1.49 The ACCC acknowledged to the Committee that it is often constrained in its ability to pursue legal proceedings in relation to s.46 and s.51AC, because of the lack of availability of funding. The Committee wishes to rectify this problem.

**Recommendation 16**

**The Committee recommends that the ACCC should be adequately funded to undertake its role as the principal litigant in s.46 and s.51AC cases.**

## Judicial arrangements

1.50 One organisation suggested to the Committee that jurisdiction for s.46 and s.51AC matters should be extended to lower courts and tribunals, in order to increase access to justice for small businesses. The Committee supports this proposal, and considers that the Federal Magistrates Court has developed expertise in resolving issues without requiring the expense of a fully contested court case. This expertise could resolve a substantial number of s.46 and s.51AC matters with cost savings for all sides. Recourse to the Federal Magistrates Court may also enable more small businesses to utilise the provisions of section 83 of the Act to seek damages where anti-competitive conduct has already been established by the courts.

**Recommendation 17**

**The Committee recommends that the jurisdiction of the Federal Magistrates Court be extended to enable it to deal with Misuse of Market Power (s.46 and s.46A where cases rely upon s.83), Contravention of Industry Codes (s. 51AD) and Unconscionable Conduct (Part IVA).**

## Approaches adopted in OECD economies

1.51 In its discussion of the effectiveness of the *Trade Practices Act 1974*, the Committee has compared the provisions of the Act with those in the competition laws of a number of OECD economies. In particular, the Committee has considered approaches adopted in relation to the following issues:

- UK and US legislation regarding predatory pricing and recoupment (para 2.51);
- US legislation regarding definitions of 'unfairness' (para 3.29);

- UK legislation regarding the regulation of contracts (para 3.54ff);
- UK legislation regarding a 'trigger' of market concentration for the purpose of assessing acquisitions (para 4.76ff)
- New Zealand legislation regarding cease and desist powers (para 5.10ff)

# Appendix 1

## Submissions and Tabled Documents

**Submissions**

1. Allanbank International
2. Radio KLFM
3. Bathurst Broadcasters Pty Limited
4. International Dynamics

4A. International Dynamics (Supplementary Submission)

5. Radio 4GG Gold Coast Pty Ltd
6. Mr Peter Priest
7. Mr Tom Nilsson
8. Professor Franco Papandrea
9. Radio Outback Pty Ltd
10. friends of the abc (NSW, ACT, SA & WA)
11. Institute of Public Affairs
12. Australian Press Council
13. Ms Joan Laing
14. Interactive Television Research Institute
15. ReelTime Media Ltd
16. Austereo Group Limited
17. Independent Regional Radio
18. Screen Producers Association of Australia (SPAA)
19. Australian Broadcasting Corporation
20. Private Media Partners
21. Mr Paul Neville MP
22. Fairfax
23. News Limited
24. Prime Television Limited

25. Mr Jock Given
26. Mr Peter Andren MP
27. Telstra
28. DMG Radio
29. grant broadcasters pty limited
30. Seven Network
31. Network Ten
32. The Media Entertainment and Arts Alliance
33. Young Media Australia
34. Hutchison Telecoms
35. Broadcast Australia
36. APN News & Media
37. Austar
38. Astra
39. Foxtel
40. Macquarie Regional Network
41. Free TV Australia
42. Community Broadcasting Association of Australia
43. Commercial Radio Australia
44. North East Broadcasters Ltd
45. Premier Media Group
46. Southern Cross Broadcasting (Australia) Limited
47. Mr John Sutton
48. Friends of Fairfax
49. Northern Access TV
50. Mr Josh Chivers
51. Mr John Ley
52. Campaign for Australian Media Diversity
53. Women's International League for Peace and Freedom
54. CPSU
55. 4VL

56. AAPT
57. Ms Cleo Lynch
58. Media Access Australia
59. Australian Electrical and Electronic Manufacturers' Association (AEEMA)
60. WIN Corporation Pty Ltd
61. Friends of the ABC (Vic) Office
62. Communications Law Centre
63. SBS
64. Optus
65. Mr/Ms A T Kenos
66. Ms Suzy Pinchen
67. Mr Ian Bird
68. Mr Sigmund Jorgensen
69. Radio 4KZ
70. Mr Mark Smith and Ms Vicki Grant
71. Sony Australia Limited

## Tabled Documents

Letter to the Chair and Members of the Committee from Fairfax dated 28 September 2006 tabled by Mr James Hooke, Managing Director, NSW, 28 September 2006

Table of Foxtel's coverage of Wimbledon, June/July 2006, tabled by Ms Julie Flynn, FreeTV Australia, 28 September 2006

# Appendix 2

## Public Hearings

***Thursday, 28 September 2006***
***Parliament House, Canberra***

**Fairfax**

Mr James Hooke, Managing Director, NSW

Mr Bruce Wolpe, Director Corporate Affairs

**Institute of Public Affairs**

Mr Christopher Berg, Research Fellow

**APN News & Media Ltd**

Mr Richard Newsome, Corporate Affairs Adviser

**Media Entertainment & Arts Alliance**

Mr Christopher Warren, Federal Secretary

**Premier Media Group**

Mr Jon Marquard, Chief Operating Officer

Ms Christina Allen, Manager – Legal & Business Affairs

**Australian Competition and Consumer Commission**

Mr Graeme Samuel, Chairman

Dr Stephen King, Commissioner

Mr Brian Cassidy, Chief Executive Officer

Mr Tim Grimwade, General Manager

**Free TV Australia**

Ms Julie Flynn, Chief Executive Officer

Ms Alina Bain, Director of Legal & Broadcast Policy

**Seven Network**

Ms Bridget Godwin, Manager Regulatory & Business Affairs

**Telstra Corporation Ltd**

Ms Jane Van Beelen, Deputy Director Regulatory

Mr Danny Kotlowitz, Legal Counsel, Telstra Regulatory & Competitor Legal Group

**Hutchison Telecommunications (Australia) Limited**

Mr Brian Currie, General Manager, Regulatory Affairs

Ms Simone Brandon, Corporate Counsel

**Austereo Group Limited**

Mr Peter Harvie, Chairman

**Community Broadcasting Association of Australia**

Mr Barry Melville, General Manager

Ms Laura Kelly, Community Partnerships Coordinator

Mr Paul Mason, Manager, Content Services

**Commercial Radio Australia Ltd**

Ms Joan Warner, Chief Executive Officer

Mr Moses Kakaire, Manager Legal & Regulatory

**Screen Producers Association of Australia**

Mr Geoffrey Brown, Executive Director

**Southern Cross Broadcasting**

Mr Anthony Bell, Managing Director

**Private Media Partners**

Mr Eric Beecher, Partner

**Department of Communications, Information Technology and the Arts**

Dr Rod Badger, Deputy Secretary, Strategy and Content

Dr Simon Pelling, A/g Chief General Manager, Content and Media Division

Dr Bernard Keane, A/g General Manager, Media Industries Branch

Ms Patricia Barnes, A/g General Manager, Digital Broadcasting

Mr David Smith, Principal Lawyer (Strategy & Content)

***Friday, 29 September 2006***
***Parliament House, Canberra***

Mr Paul Neville MP (Private Capacity)

Macquarie Regional Radioworks

Mr Timothy Hughes, Executive Chairman

Mr Rhys Holleran, Chief Executive Officer

DMG Radio Australia

Mr Kingsley Hall, Finance Director

Mr Peter Ickeringill, Legal Director

Radio Outback Pty Ltd

Mr David Robertson, General Manager/Secretary/Director

Bathurst Broadcasters Pty Ltd

Mr Ron Camplin, Chairman

Independent Regional Radio

Mr Desmond Foster, Director

Mrs Alison O'Neill, President, and Director of Grant Broadcasters

Mr Kevin Blyton, Immediate Past President, Member Executive Committee and Managing Director, Capital Radio Network

Mr Stephen Everett, Past President, Member Executive Committee and Managing Director of Ace Radio Broadcasters

Mr Rowland Paterson, Chairman of Ace Radio Broadcasters and member of Independent Regional Radio

Network Ten

Mr Nicholas Falloon, Executive Chairman

Ms Kate Pounder, Regulatory Affairs Manager

Prime Television Limited

Mr Warwick Syphers, Chief Executive Officer

Mr Alan Butorac, General Manager (Broadcasting)

Australian Broadcasting Corporation

Mr Mark Scott, Managing Director

Mr Gary Dawson, Head, Strategy & Development

Ms Lynley Marshall, Director, New Media & Digital Services

Special Broadcasting Service (SBS)

Mr Bruce Meagher, Director Strategy and Communications Division

Mr Grahame O'Leary, Manager Government Relations

Foxtel

Mr Kim Williams, Chief Executive Officer

Australian Subscription Television Association (ASTRA)

The Hon. Nicholas Greiner, Chairman

Ms Debra Richards, Executive Director

Mr Jock Given (Private Capacity)

Communications Law Centre

Ms Elizabeth Beal, Director

Australian Communications and Media Authority

Mr Christopher Chapman, Chairman

Mr Giles Tanner, General Manager, Inputs to Industry Division

Mr Marcus Bezzi, General Manager, Legal

Ms Nerida O'Loughlin, General Manager, Industry Outputs

Department of Communications, Information Technology and the Arts

Dr Rod Badger, Deputy Secretary, Strategy and Content

Dr Simon Pelling, A/g Chief General Manager, Content and Media Division

Dr Bernard Keane, A/g General Manager, Media Industries Branch

Ms Patricia Barnes, A/g General Manager, Digital Broadcasting

Mr David Smith, Principal Lawyer (Strategy & Content)

# Appendix 3

## Answers to Questions on Notice

**Australian Broadcasting Corporation**

**Australian Competition and Consumer Commission**

**Australian Communications and Media Authority**

**Department of Communications, Information Technology and the Arts**

**Fairfax Limited**

**Media Entertainment and Arts Alliance**

**Network Ten**

**Private Media Partners**

**Prime**

**Seven Network**

**Screen Producers Association of Australia**

**Telstra**

# Australian Broadcasting Corporation

response to

# Senate Environment, Communications, Information Technology and the Arts Committee

## Answers to Questions on Notice

Inquiry into the Broadcasting Services Amendment (Media Ownership) Bill 2006 and related bills

October 2006

# ABC Answers to Questions on Notice: Inquiry into the Broadcasting Services Amendment (Media Ownership) Bill 2006 and related bills

On 29 September 2006, the ABC gave evidence before the Senate Environment, Communications, Information Technology and the Arts Committee hearing in relation to the Broadcasting Services Amendment (Media Ownership) Bill 2006 and other related bills. During its appearance, the Corporation took one question on notice from Senator Murray. Following the hearing, Senator Conroy provided a further four questions in writing.

Those questions and the ABC's answers to them appear below.

## Question from Senator Murray

Senator Murray asked (ECITA Hansard, p.52):

> Senator MURRAY— … Can you answer the other part of my question—do you think it is possible to expand your networking into commercial and not-for-profit providers in certain areas? Or are you prohibited from doing that?
>
> Mr Scott—I think our ability to deliver ABC content via commercial providers is certainly limited.
>
> Senator MURRAY—And not-for-profit providers?
>
> Mr Scott—I think that would still be limited for us if they are commercial providers—but we can seek more detail on that.
>
> Senator MURRAY—Sorry, by not-for-profit I mean community radio. You see, we have had submissions that community radio naturally suffers from funding limitations, staffing limitations and so on. It would seem to me that there is an opportunity for niche delivery, which would be good for them and perhaps good for you.
>
> Mr Scott—It has not been raised with me before, but, if I can take that on notice and respond to you, I would appreciate it.

ABC Response:

> The ABC licences content, including news and information content, to a range of third parties. The Corporation is not prohibited from licensing its content to other broadcasters, either in the commercial or community sectors, although, as a general rule, it does not do so. ABC Local Radio reaches 99.4% of the Australian population, ensuring that local ABC news and information radio programming can be heard by virtually the entire population on the ABC's own services.

## Questions from Senator Conroy

Senator Conroy asked:

1. As you would be aware the Minister has decided to use the currently unallocated spectrum for new digital Channels A and B.

   I understand that the ABC argued against this decision. The ABC told the Minister in response to her discussion paper that "the unallocated spectrum should first be used to address existing problems affecting digital television in Australia before consideration is given to new services."

   Could you outline these existing problems affecting digital television? How extensive are they?

   How can these problems be remedied if the available spectrum is used for new services?

ABC Response:

The ABC believes that the Government has made clear that its objective is for the unassigned channels to be used for the provision of new services. The Corporation's submission to the Committee should be understood as a response to this clearly-stated intention.

In previous submissions to the Department of Communications, Information Technology and the Arts, the ABC has argued in favour of using the unassigned channels to address existing problems affecting digital broadcasting in Australia before consideration is given to new services. The solution to each of these problems requires the allocation of spectrum and the Corporation will continue to work with the Australian Communications and Media Authority (ACMA) to find alternative means of addressing them as digital roll-out continues.

The first such class of problem is existing shortfalls in digital terrestrial television coverage arising from the introduction of digital services using UHF spectrum in areas where the corresponding analog services are carried on VHF channels. This issue will need to be resolved, possibly through the use of additional transmitters, if digital services are to provide equivalent coverage to existing analog services, as required by digital television transition arrangements set out in the *Broadcasting Services Act 1992*.

The second class of problems is created by Single Frequency Networks (SFNs), which are used to alleviate channel scarcity in regional areas with highly-congested spectrum. Digital television audiences in certain parts of those areas have suffered from "mush area" interference problems as a result of SFNs, resulting in a high level of transmission-related complaints.

Thirdly, the ABC has argued for the use of spare VHF Band III spectrum to ensure adequate spectrum is made available for Digital Audio Broadcasting digital radio services.

2. The ABC has argued that it should have mandated access to some of the spectrum on the proposed channel B that is likely to be used for mobile TV.

   How does the ABC envisage this access being provided?

ABC Response:

The ABC believes that sectoral diversity should be a policy objective when considering new areas of broadcasting, such as mobile television, as it has been in traditional radio and television services. This would ensure that audience expectations of being able to receive ABC services on the broadcasting platform of their choice are met.

Such diversity could be achieved via a number of mechanisms, including introducing a "must carry" provision as part of the licence conditions for mobile television services, or by requiring that a certain percentage of channels offered on mobile television platforms be provided by the national broadcasters.

3. Would there be a must carry obligation on the purchaser of the spectrum?

ABC Response:

See answer to question 2, above.

4. I understand that the ABC pays $1 million per annum to get access to the Foxtel satellite. Is your argument that access to channel B should be free of charge?

   What sort of services would you like to provide on the mobile TV platform?

ABC Response:

The ABC could provide its existing main channel and ABC2 services to a mobile TV licence holder. In addition the ABC could develop a service more suited to the mobile TV market, including news and information, short form video and program clips.

# Inquiry into Broadcasting Services Amendment (Media Ownership) Bill 2006 and related bills

**Questions taken on Notice**

**Note: The transcript of 29 September is not yet available. Therefore, ACMA has not had the benefit of the transcript in preparing its responses.**

**1. Senator Brandis—Explain ACMA's role in media mergers compared to that of the ACCC.**

**ACMA Response**

ACMA's responsibility in the area of media ownership is conferred under the provisions of the *Broadcasting Services Act 1992* (BSA) which set out the rules for ownership and control of licensees and associated newspapers. Under the *Broadcasting Services Amendment (Media Ownership) Bill 2006* [the Bill], ACMA will continue to have responsibility for protecting media diversity.

In particular, ACMA will enforce the '5/4 rule". This rule is intended to operate as a statutory minimum guarantee of diversity of ownership and control. ACMA welcomes the strengthening of its powers to enforce the ownership and control rules including the '5/4 rule. If the Bill is passed in its current form, ACMA will have power to give remedial directions under 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. 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. The Bill also establishes that undertaking a transaction that causes an unacceptable media diversity situation is subject to criminal penalties. 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. ACMA considers that this suite of powers will provide a number of powerful regulatory options for enforcing the '5/4 rule'.

It is currently one of the roles of the ACCC to monitor mergers and to take enforcement action under the *Trade Practices Act 1974* (TPA) in relation to competition issues. Under the Bill, there is no proposal for this to change. The Bill includes a provision which provides that before a transaction takes place which involves a three way merger in a regional area and the coming into existence of a registrable media group or a change of ownership, a person must obtain a written statement from the ACCC to the effect that the transactions would not constitute a contravention of section 50 of the TPA, which prohibits transactions that would lead to a substantial lessening of competition. [section 61AZK of the Bill]

ACMA and the ACCC intend to work as closely as the statutory framework allows in exercising their responsibilities in considering transactions involving changes in ownership or control in the media sector. This includes exchanging non-confidential information and any confidential information which parties to a transaction have consented to releasing to each Regulator.

**2. Senator McDonald—Could Channel B be divided up into 3 or more channels and sold separately?**

**ACMA Response**
This question was answered by Mr Tanner (ACMA) and Dr Pelling (DCITA) during the hearings. As they noted, there are technical reasons why such a division is not feasible.

**3. Senator Murray—Will ACMA be issuing guidelines for s.40 licensees on the application of standards which apply to them?**

**ACMA Response**
Commercial television broadcasting services operating outside of the broadcasting services bands are licensed under section 40 of the *Broadcasting Services Act 1992*. The *Broadcasting Legislation Amendment (Digital Television) Bill 2006* introduces amendments to provide that certain standard licence conditions and program standards for commercial television broadcasting services do not apply to section 40 licences, and that certain tailored conditions do apply.

The Explanatory Memorandum indicates that these services should be regulated to a less onerous extent as they will have less influence (particularly initially) than other commercial TV services. For example, these services may operate on a separate platform and will not be readily receivable by standard television receivers.

The main requirements for operation of section 40 licences will be contained in primary legislation, if the current Bill is passed. Once the legislation is finalised, ACMA will undertake consultation on, and development of, any additional guidelines or information that is necessary.

# Inquiry into Broadcasting Services Amendment (Media Ownership) Bill 2006 and related bills

**Questions taken on Notice**
**Questions on notice from Senator Conroy for ACMA**

**QUESTION**

1. One of the issues that this committee has not been able to spend much time on is the ACMA enforcement powers Bill. I understand that this legislation stems from a report that the ABA commissioned Professor Ramsay to write.

   Does the legislation implement all the recommendations of Professor Ramsay? If not can you indicate the areas where the Government has chosen to depart from the Ramsay Report?

   **ACMA Response**

   Nearly all of the recommendations in Professor Ramsay's report have been adopted. Following consultation with industry, the Government has not adopted the recommendation made by Professor Ramsay relating to on-air statements of investigation findings. In addition it has decided not to apply civil penalties for some 'second tier' breaches of licence conditions imposed on narrowcasters or pursuant to sections 43, 87,87A, 92J, 99(2) and 120(2) of the BSA; these are subject to the new remedial directions provisions in the Bill. The Bill implements Professor Ramsay's recommendation that provision of a narrowcasting service that is not in accordance with the relevant class licence should be subject to civil penalties by providing that the provision of unlicensed commercial, community or subscription services, including by narrowcasters, is subject to civil penalties.

   In addition, the power to accept enforceable undertakings in section 205W of the Enforcement Powers Bill has been linked to ACMA's regulatory powers in relation to broadcasting, datacasting and internet content, which is a different, more targeted, form to the approach recommended by Professor Ramsay.

2. Some broadcasters have expressed concern that the legislation allows ACMA to interfere in on air content and exercise editorial control. What do you say to these claims? Will ACMA be issuing guidelines on how it will exercise the new powers contained in the Bill?

   **ACMA Response**

   ACMA is not aware of any provisions of the Enforcement Powers Bill which could be characterised as giving ACMA power to "interfere with decisions about on-air content and editorial control". As noted above the Government has not accepted the recommendation of Professor Ramsay that on-air statements of investigation findings could be ordered.

The Enforcement Powers Bill contemplates that ACMA will formulate guidelines for use in exercising a number of its enforcement powers. The Minister for Communications, Information Technology and the Arts has also written to ACMA to formally request the development of these guidelines.

ACMA is in the process of preparing these Guidelines. In line with normal practice, ACMA will consult on the development of the guidelines to ensure that they meet industry needs. It will move to finalise guidelines quickly, once the legislation is settled.

ACMA has experience in formulating similar guidelines having published Guidelines for accepting Enforceable Undertakings under the *Telecommunications Act 1997* earlier this year.

# Inquiry into Broadcasting Services Amendment (Media Ownership) Bill 2006 and related bills

**Questions on notice from Senator Nash for ACMA**

**Question**

1. Is it correct that Channel B will be largely a capital city service and unlikely to reach out to rural and regional areas across Australia, including all of Tasmania? Is that acceptable in ACMAs view?

**ACMA response**

The licensee of Channel B will have the technical capacity to provide a national service including in rural and regional areas across mainland Australia and Tasmania. The spectrum allocated will have the same coverage as that of Channel A.

2. Notwithstanding that a media proprietor can only own 2 voices in a market, is there a cap on how many voices (radio stations) a media proprietor can own in the Australian market?

**ACMA Response**

Current provisions of the *Broadcasting Services Act 1992* place the following restrictions on control of broadcasting licenses:

- A person must not be in a position to exercise control of more than 2 commercial radio broadcasting licences in the same licence area (section 54); and
- A person must not be in a position to exercise control of commercial television broadcasting licences whose combined licence area populations exceed 75 per cent of the population of Australia (section 53).

These rules are unaffected by the Media Ownership Bill.

**Question**

3. Do you know of any Australian media outlets that are taking streamed programs, music or newsfeeds from New Zealand?

**ACMA Response**

ACMA does not monitor media outlets to determine whether and to what extent Australian media outlets are taking streamed programs, music or newsfeeds from New Zealand.

4. Does such activity contravene Australian law? If such activity doesn't contravene Australian law how do you enforce/discipline such an operator to comply with 25% Australian content?

**ACMA Response**

No. Under section 16 of the *ACMA Act 2005*, ACMA must perform its broadcasting functions in a manner consistent with Australia's obligations under the CER Trade in Services Protocol. The requirement for 25% Australian content applies to commercial radio licensees and is imposed through the Commercial Radio Code of Practice. If a licensee fails to comply with a code of practice, ACMA may impose licence conditions (or an industry standard).

# Inquiry into Broadcasting Services Amendment (Media Ownership) Bill 2006 and related bills

## Questions on notice from Senator Conroy for the ACCC

**1. Does the Commission support the maintenance of the high definition quota?**

Answer:
The ACCC stated in its June 2005 submission to the review by the Department of Communications, Information Technology and the Arts (DCITA) of HDTV quota arrangements that market forces should be allowed to determine the role HDTV will have in Australia unless it can be demonstrated that there is market failure.

**2. The Minister has indicated that the usual competition law provisions will apply to the auction of the new digital channels**

**Has the ACCC examined this issue yet?**

Answer:
The ACCC has had preliminary discussions with the Australian Communications and Media Authority (ACMA) and DCITA and with some industry players that have approached the ACCC.

**Is there any possibility that the free to air networks, Telstra or any other parties might be excluded from the auction?**

Answer:
It is possible that certain parties could be excluded from the auction by competition limits imposed under the *Radiocommunications Act 1992*. Questions about the *Radiocommunications Act 1992* should be directed to DCITA or ACMA.

**3. Have you provided any advice to the Minister on the auction?**

Answer:

No. As noted above, the ACCC has had preliminary discussions with DCITA about possible competition issues related to the allocation of the channels.

**4. Has the ACCC been consulted on the legislation for these new digital channels yet?**

Answer:

See response to Question 3.

**5. Do you think that the legislation needs to contain access provisions to allow content providers to obtain spectrum on the channel or will this just be left to the market?**

Answer:
Determining whether any additional legislative provisions are required to address competition issues that may arise is a policy decision.

The ACCC notes that the Minister's discussion paper on new services on digital spectrum states that consideration will be given to additional measures to protect competition in the context of allocation, in consultation with the ACCC.

**6. Is the ACCC concerned to ensure that mobile TV is available on reasonable terms to all phone companies? Should access terms be in the legislation?**

Answer:

See response to Question 5.

**7. I would like to ask about the ACCC position on Multichannelling**

**In its June 2003 Report on Emerging Market Structures in the Communications Sector the ACCC supported the introduction of multichannelling.**

> **"...the competitive impact of [multichannelling] would be likely to be relatively limited in the short term, given the small number of digital television receivers at present. This, however, also highlights a further potential benefit: that multichannelling may encourage the take-up of digital receivers and transition towards full digital terrestrial services" (page 82).**
>
> **"...any benefit flowing from maintaining the status quo may be lessened over time. The restriction on FTA multichannelling may actually prevent the FTA operators from responding to new sources of competition" (page 84);**
>
> **"The Commission is sceptical of the need for the extent of restrictions currently placed on multichannelling. No persuasive evidence has been presented to date to indicate that removing the prohibition of multichannelling would harm the FTA sector. The easing of the restrictions on multichannelling would provide FTA operators with the ability to offer new services to consumers and has the potential to provide a wider range of services to consumers" (page 85).**

**Does this remain the Commission's view?**

Answer:
Yes.

# Inquiry into Broadcasting Services Amendment (Media Ownership) Bill 2006 and related bills

## Questions on notice from Senator Conroy for the ACCC

**I refer to the discussion about the application of section 50 of the Trade Practices Act to 'news markets'.**

**Can the ACCC confirm that under section 50 a *market* is defined as a substantial market for goods or services?**

Answer:
Yes, for the purposes of merger analysis, section 50(6) of the *Trade Practices Act 1974* (TPA) expressly states that " 'market' means a substantial market for goods or services…" in Australia.

**Can the ACCC advise whether a news market would be a market for services for the purposes of the Act?**

Answer:
The Australian Competition and Consumer Commission (ACCC) considers markets for the supply or acquisition of content, (be it news related content or some wider definition of content) are relevant markets for the purposes of the Trade Practices Act 1974 (TPA).

***Can the ACCC confirm that it is able to authorise a merger which breaches section 50.***

Answer:
Yes, under section 88(9) of the TPA, the ACCC can authorise a merger which may otherwise breach section 50.

***What criteria would the ACCC apply to determining whether a media merger which in its view breaches section 50 should be authorised?***

Answer:
The criteria used by the ACCC in considering whether to authorise a merger arise in the context of a 'public benefit' test under the TPA. Section 90(9) of the TPA states that the ACCC shall not make a determination granting authorisation in respect of a proposed merger unless "it is satisfied in all the circumstances that the proposed acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to take place."

Under section 90 (9A) of the TPA, when assessing merger authorisations, the ACCC must have regard, without limitation, to the following public benefits:

- a significant increase in the real value of exports; and
- a significant substitution of domestic products for imported goods.

The ACCC must also take into account all other relevant matters that relate to the international competitiveness of any Australian industry.

The TPA does not define the terms 'public benefit' or 'public detriment'. However, the Australian Competition Tribunal (the Tribunal) has stated that both terms should be given the widest possible meaning. As regards public benefit, the Tribunal has defined it to be

> "anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements…the achievement of the economic goals of efficiency and progress." [*Re 7-Eleven (1994)* ATPR 41-357 at 42, 677.]

The Tribunal has defined public detriment to be:

> "…any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency…" [*Re 7-Eleven (1994)* ATPR 41-357 at 42, 683.]

There are no specific legislative restrictions on the criteria the ACCC can consider when assessing public benefits or detriments. In line with the Tribunal, the ACCC has in the past adopted a wide range of criteria when considering public benefits or detriments.

# Inquiry into Broadcasting Services Amendment (Media Ownership) Bill 2006 and related bills

## Questions on notice from Senator Lundy to the ACCC

**1. For ACCC in relation to Hutchison:**

**Hutchison contend that a new monopoly will be created by License B because the winning bidder will have sole rights for Mobile TV until at least in the short to medium term.**

**1. What is the ACCC's response to their call for an access regime to ensure competitive access to this spectrum to prevent this monopoly distorting the development of 3G services on the mobile spectrum?**

Answer:
The ACCC notes that the Minister's discussion paper on new services on digital spectrum states that consideration will be given to additional measures to protect competition in the context of allocation, in consultation with the ACCC.

**2. What is the ACCC's view on the impact on 3G service providers if a) vertically and horizontally integrated incumbent telco's and pay tv's purchase the spectrum b) that they bundle mobile TV with existing services.**

Answer:
See response to Question 1(1).

**2. In the ACCC's opinion does the offering of the A license provide any credible opportunity for an increase in diversity, particularly in the context of the history of failure of datacasting?**

Answer:
Policy questions about media diversity should be directed to the Department of Communications, Information Technology and the Arts (DCITA).

**3. In the ACCC's opinion, given the Minister has changed her mind and will now allow incumbents to bid for the B license, is there any credible likelihood that the B licence will increase diversity?**

Answer:
Policy questions about media diversity should be directed to Department of Communications, Information Technology and the Arts (DCITA).

# Inquiry into Broadcasting Services Amendment (Media Ownership) Bill 2006 and related bills

## Questions on Notice from Senator Dana Wortley

## Australian Competition and Consumer Commission

**1. Question*: How would you respond to the statement by Network 7 in their submission that:***

> **"We are concerned with the role of the competition regulator in assessing the mergers and the fact they will not undertake a public interest test in their determination."**

Answer:
The Australian Competition and Consumer Commission (the ACCC) administers section 50 of the *Trade Practices Act 1974* (TPA), which prohibits acquisitions of shares or assets which would be likely to substantially lessen competition in a market, including regional markets. The ACCC would only consider public benefits and public detriments arising from a proposed merger if the merger parties applied for authorisation under section 88 of the TPA. Whether or not a separate media mergers public interest test should be introduced is a policy matter, and therefore not an issue on which the ACCC wishes to comment.

**Senate Environment, Communications, Information Technology and the Arts Legislation Committee**

ANSWERS TO QUESTIONS ON NOTICE

**Department of Communications, Information Technology and the Arts**

Inquiry into Broadcasting Services Amendment (Media Ownership) Bill 2006 & related bills
29 September 2006

**Question: 1**

**Topic: ACCC clearance**

**Senator Conroy asked:**

A three-way merger in a regional area which has 5 media groups is not possible because fewer than 4 groups would remain. Therefore the regional protection provided by the requirement for an ACCC competition review for three-way mergers [new section 61AZJ] does not apply to regional centres with 5 media groups. What is the rationale behind this? What is your view on extending this protection to two-way mergers in regional areas with 5 media groups?

**Answer:**

The requirement for Australian Competition and Consumer Commission (ACCC) clearance of mergers between commercial radio, commercial television and Associated Newspapers in regional licence areas is intended to ensure that the mergers of most concern and most likely to raise competition issues are assessed in relation to their impact on competition, prior to consideration by the Australian Communications and Media Authority.

The extension of a requirement for ACCC clearance to other mergers is a matter of Government policy.

**Senate Environment, Communications, Information Technology and the Arts Legislation Committee**

ANSWERS TO QUESTIONS ON NOTICE

**Department of Communications, Information Technology and the Arts**

Inquiry into Broadcasting Services Amendment (Media Ownership) Bill 2006 & related bills
29 September 2006

**Question: 2**

**Topic: Local content**

**Senator Conroy asked:**

Why do the local content protections of regional television licence conditions only apply to certain regional areas not across all regional areas? [new section 43A]

**Answer:**

The decision to impose local content licence conditions is a matter of Government policy.

**Senate Environment, Communications, Information Technology and the Arts Legislation Committee**

ANSWERS TO QUESTIONS ON NOTICE

**Department of Communications, Information Technology and the Arts**

Inquiry into Broadcasting Services Amendment (Media Ownership) Bill 2006 & related bills
29 September 2006

## Senator Lundy asked questions in relation to the effect of Australia-US Free Trade Agreement on local content settings for services on Channels A and B

Under the Australia-US Free Trade Agreement (AUSFTA), Australia has preserved its existing local content requirements, and has reserved the right to maintain and introduce new local content requirements, subject to a number of conditions, in a range of areas

*Proposals relating to new digital services on Channel A and Channel B*

The Government has not indicated an intention to impose any specific local content requirements on services delivered over the Channel A and Channel B licences.

The extent to which the provisions of the AUSFTA would apply to services delivered over proposed channels A and B will therefore depend on the type of broadcasting or other digital service being delivered on those channels. (For more detail on the provisions of the AUSFTA as they relate to audio-visual services see the Attachment.)

The Government has indicated that it does not intend to allow the provision of commercial broadcasting services on Channel A or Channel B, except as a retransmission of existing services to other than in-home receivers.

Content services on Channel A seem likely to be restricted to datacasting and narrowcasting services. For Channel B, as well as datacasting or narrowcasting, a potential model for the use of this channel could be a mobile TV offering, integrated with 3G mobile phone services and internet services and made available on a subscription basis.

This means that existing local content requirements applying to subscription television broadcasting services could apply to any service on Channel B if that service is regarded as a subscription television service.

In relation to a datacasting or narrowcasting service on Channel A or Channel B, these services types are not currently subject to local content requirements. New local content requirements, however, could be applied to these Channels to the extent they are covered by Australia's Annex II reservations to the AUSFTA.

*Measures relating to commercial television broadcasting services contained in the Bills*

In relation to the Broadcasting Legislation Amendment (Digital Television) Bill 2006, the provisions of the Bill relating to local content requirements relate to:

- Amendments which provide that during the simulcast period, standards made by ACMA under subsection 122(1) of the *Broadcasting Services Act* 1992 (Australian content and children's television standards) do not apply to a commercial television broadcasting service unless the service is the core service (new subsections 122(7) and (8)). These provisions ensure that the Australian content and children's television quotas cannot be satisfied by programming provided on multi-channels. By excluding multi-channels, the standards will be required to be satisfied by programming provided on the simulcast or main channel, thereby ensuring the free availability of this content to the widest possible audiences during the simulcast period. This will also provide time for multi-channels to be developed and become established before they are subject to the full suite of regulatory obligations.

- Amendments that provide that if a new commercial television broadcasting licence is allocated under section 36 (BSB services) or subsection 40(1) (non-BSB services), the Australian content and children's television program standards do not apply to the licensee during the first five years of operation. This is designed to ensure that new services are able to emerge and establish operations in the market before the full suite of regulatory obligations is imposed on the licensee.

The Department consulted the Department of Foreign Affairs and Trade in developing the provisions of the Bill and it understands these provisions to be consistent with the AUSFTA.

# ATTACHMENT

**Overview**

Australia has preserved for itself the right to maintain existing local content requirements by listing, in Annex I, those measures that are carved-out from the operation of AUSFTA. In Annex II of AUSFTA, Australia has listed those sectors where it may maintain or introduce new local content requirements, subject to a number of conditions.

Those measures listed in Annex I of AUSFTA are also subject to a 'ratchet mechanism'. This means that Australia would be automatically bound by any liberalisation of these measures. Therefore, liberalization of transmission quotas currently applied to free-to-air commercial television broadcasting services would automatically become a binding commitment under AUSFTA. Measures listed in Annex II of the AUSFTA are not subject to the 'ratchet mechanism'.

**Extract for the Department of Foreign Affairs and Trade website - The Australia-United States Free Trade Agreement: the outcome on local content requirements in the audiovisual sector**

(http://www.dfat.gov.au/trade/negotiations/us_fta/backgrounder/audiovisual.html)

- The outcome on audiovisual takes the form of three reservations to the AUSFTA's Chapters on Cross-Border Trade in Services (CBTS) and Investment. These reservations, included in two Annexes to the Agreement, allow Australia to maintain or adopt measures that are inconsistent with certain obligations of the CBTS and Investment Chapters (i.e. "non-conforming measures").
    - Under the AUSFTA, Annex I can be used to reserve the right to maintain existing non-conforming measures that are specifically identified in that Annex.
    - Annex II can be used to identify certain sectors, sub-sectors or activities where a Party reserves the right to maintain existing non-conforming measures, to make these measures more restrictive, or to introduce new non-conforming measures.
- The three reservations addressing the use of local content requirements in the audiovisual sector:
    - An Annex I reservation allowing Australia to maintain the existing 55% local content transmission quota on programming, and the 80% transmission quota on advertising, on free-to-air commercial TV on analogue and digital (other than multichannelling) platforms. Subquotas may also be applied within the 55% programming quota.
    - A general Annex II reservation allowing Australia to both maintain existing and introduce new measures in relation to:
        - Multichannelled free-to-air commercial TV.[1]
        - Subscription TV.
        - Free-to-air commercial radio broadcasting.
        - Interactive audio and/or video services.
        - Broadcasting planning, licensing and spectrum management.

        - Taxation concessions for investment in Australian film and television production.
    - An Annex II reservation allowing Australia to both maintain the existing co-production arrangements with other countries and to introduce new ones.
- The general Annex II reservation preserves Australia's right to take the following interventions:
    - Multichannelled free-to-air commercial TV:
        - A 55% transmission quota on programming may be imposed on no more than 2 channels, or 20% of the total number of channels (whichever is greater), made available by an individual broadcaster. The quota cannot be imposed on more than three channels of any individual broadcaster. Subquotas may be applied within the 55% quota in a manner consistent with existing standards.
        - An 80% transmission quota on advertising may be imposed on no more than three channels made available by an individual broadcaster.
    - Subscription TV:
        - Expenditure requirements of up to 10% of program expenditure may be imposed on services providers making available services in the following formats: the arts, children's, documentary, drama, and educational.
        - The expenditure requirement on drama channels may be increased up to 20% upon a finding by the Australian Government that the 10% requirement is insufficient to meet its stated goal for such expenditure. This finding will be made through a transparent process including consultations with affected parties. The increase will be non-discriminatory and no more burdensome than necessary.
    - Free-to-air commercial radio: transmission quotas of up to 25% can be imposed on individual stations.
    - Interactive audio and/or video services:
        - Measures can be imposed to ensure that Australian content on such services is not unreasonably denied to Australian consumers, upon a finding by the Australian Government that Australian content is not readily available to consumers through such services.
        - Any measures adopted will be implemented through a transparent process, be based on objective criteria, be the minimum necessary, be no more trade restrictive than necessary, and be applied only to enterprises carrying on a business in Australia.
    - Market access restrictions can be imposed on planning, licensing and spectrum management.
    - Taxation concessions for investment in Australian film and television production will remain unaffected.

**Senate Environment, Communications, Information Technology and the Arts Legislation Committee**

ANSWERS TO QUESTIONS ON NOTICE

**Department of Communications, Information Technology and the Arts**

Inquiry into Broadcasting Services Amendment (Media Ownership) Bill 2006 & related bills
29 September 2006

**Question: 1**

**Topic: Research on media concentration**

**Senator Wortley asked:**

Has the Department carried out research, in possession of modelling, have information or aware of research, that presents scenarios where the changes to the cross media laws could result in fewer voices in any market place or where they would result in greater media ownership concentration and not increased diversity.

**Answer:**

Changes to the number of independent media groups in each radio licence area following changes to the media ownership regulatory framework will depend on decisions made by media companies within and outside those licence areas, and determinations made by the Australian Competition and Consumer Commission in relation to whether transactions result in a substantial lessening of competition. The Broadcasting Services Amendment (Media Ownership) Bill 2006 establishes that a transaction cannot reduce the number of separate media groups below a minimum level of 5 in mainland State capitals and 4 in other licence areas.

The number of media groups currently in each licence area are listed on p.34 of the Explanatory Memorandum to the Broadcasting Services Amendment (Media Ownership) Bill 2006. These do not include other sources of media diversity in radio licence areas, such as national and community broadcasting services, non-Associated and national newspapers, subscription television and online services.

**Senate Environment, Communications, Information Technology and the Arts Legislation Committee**

ANSWERS TO QUESTIONS ON NOTICE

**Department of Communications, Information Technology and the Arts**

Inquiry into Broadcasting Services Amendment (Media Ownership) Bill 2006 & related bills
29 September 2006

**Question: 2**

**Topic: Determination of separate media groups**

**Senator Wortley asked:**

A number of submissions have suggested that music radio should not be considered a voice for the purpose of the 5/4 rule.

What is your response to this?

**Answer:**

The Broadcasting Services Amendment (Media Ownership) Bill 2006 determines separate media groups based on commercial radio and commercial television licences and Associated Newspapers. This is the same approach as the current cross-media rules in the *Broadcasting Services Act 1992,* which restrict common ownership of these media platforms in a licence area. The format of a commercial radio or television service is not relevant for the purposes of either the current cross-media rules or the Bill.

# Inquiry into Broadcasting Services Amendment (Media Ownership) Bill 2006 and related bills

## Question on notice from Senator Joyce to Fairfax

The FTA audience is diminishing your internet site is increasing but you are prepared to sacrifice the whole package over the B license. For the benefit of the nation is that a parochial position and what about your position on regional diversity in your current internal policy media policy for areas such as Queensland.

Fairfax Response from Bruce Wolpe:

Senator Joyce, sincere thanks for your question.

An op ed was published today (29/9/06) in The Age on this very issue, and it follows immediately below. I believe it is fully responsive to your question.

With respect to regional diversity, Fairfax is in substantial agreement with submission of your colleague, Paul Neville, and Fairfax would support an amendment that provides for a "2 out of 3" rule in small, regional markets. Fairfax does not have any significant publishing operations in Queensland.

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## Get media reform right - or end it

By Bruce C. Wolpe
THE AGE
September 29, 2006

A fundamental principle of the Government's media policy is to promote diversity and new services to the Australian people.

We strongly endorse this public policy objective.

Fairfax has consistently viewed the legislation as a package, with the ownership reforms balanced by the delivery of new digital broadcasting services that herald additional diversity and competition.

Indeed, Communications Minister Helen Coonan said it eloquently in outlining the new digital television services in July:

"By allowing new entrants into the Australian media industry, the Government will encourage increased diversity and new sources of information and entertainment."

Fairfax's support for the media ownership reforms has always been predicated on rules that will ensure the promotion of diversity from these new services.

Two new digital channels have been authorised. One is for fixed narrowcasting services to homes (the so-called "A" license), and the new digital "B" license can provide between 15-30 channels of video programming to mobile devices, including phones. It is this second digital license that has the strongest potential to deliver the benefit of added diversity to accompany the ownership reforms.

That benefit, however, is contingent on the emergence of new services provided by new video players.

Unfortunately, the Minister's subsequent decision of 12 September permits the Free To Air television networks, who have an oligopoly and are protected from significant broadcasting competition, and Foxtel, which has 100 channels of programming and is effectively a pay TV monopoly, to bid for the "B" license.

If not excluded from bidding for the license, the incumbent FTA and pay television operators have every incentive and ability to control the license and under-invest in the content.

And if the new license comes to be owned by the incumbent video providers, that does not constitute diversity.

If this occurs, these new services will never reach their full, robust potential.

To create the opportunity for new digital services and allow them to be turned over to the incumbents is the antithesis of diversity - and what we believe the Government wants to achieve.

Diversity and competition have been common threads running through the debate on this legislation.

Many argue that there is already too much concentration in the industry and these Bills will result in still more of it.

If enactment of these Bills will lead to some further industry consolidation – and we believe there will be some – then why not provide a buffer against these trends with rules that ensure the emergence of new video players for these new digital services?

Fairfax urges the Senate committee now reviewing the legislation to recommend the requisite amendments that would prevent the FTAs and Foxtel from owning or operating the so-called "B" license. Indeed, such a prohibition for the FTAs already exists with the

“A” license, so it would hardly set a precedent in terms of how the new licenses are regulated.

At the same time, there is no need for the FTAs or Foxtel to be barred from providing content to these channels - but they should not own, control or operate the license because of the risk it will be skewed to protect their other, dominant platforms.

There is much more at stake that the media industry's structure - because of what media does. Competition and diversity in media is essential to the robust functioning of a democracy. If the legislation is not corrected, the Government's policies, by promoting further media concentration in the new digital world, will harm, our democracy at the very moment when we should be exploiting the full potential of the digital media age.

Clearly, the success of the government’s policy depends on getting these rules right at the outset. Rather than simply hope for a good outcome from the most significant media reforms in 20 years, Parliament must legislate to ensure a good outcome.

If the legislation is not changed, it should be defeated. Better no reform and the status quo, than a bad reform that will effectively defeat the Government's own objectives of its own media policies - to the detriment of those whom public policy must serve the most: viewers, users, consumers, households.

Bruce C. Wolpe is Director, Corporate Affairs for Fairfax Media, publisher of *The Age* and *Sydney Morning Herald*.

# Inquiry into Broadcasting Services Amendment (Media Ownership) Bill 2006 and related bills

## Question on Notice from Senator Lundy for the MEAA

What do you think prompted the Minister to change her position on 12 September regarding the "B" license, and allow the "B" license to be bid for by the FTA's and Foxtel?

**Response**

It is difficult to conclude other than that it affords a further degree of protection for the incumbent commercial broadcasters from competition.

Certainly, it does not allow for enhanced competition. Whilst the proposal does not preclude others than the incumbent broadcasters from bidding for the licence, they are the best placed to do so successfully. They have the financial capacity, are existing media players and have libraries of content that could be reutilised on the B license service.

At the very time that the maximum amount of spectrum possible should be made available to new entrants to assist in the takeup of digital services and to foster a competitive industry in lines with the principles of competition policy, the Alliance can only assume that the Minister listened to arguments from the incumbents that greater competition would adversely affect their profitability. The Alliance considers that it is the Minister's responsibility to set the framework in which a viable commercial broadcast industry can operate rather than a profitable one. Certainly, the Government should not be in the business of picking or favouring those they presume to be likely winners.

# Inquiry into Broadcasting Services Amendment (Media Ownership) Bill 2006 and related bills

## Questions on Notice from Senator Dana Wortley

Date: Friday, 29 September

## Network Ten

1. Question*: You spoke about the proposed changes leading to growth.*
*Will this growth extend to Network Tens Newsrooms? Will it lead to an increase in the number of journalists employed in the newsrooms on week days and on weekends, locally produced current affairs programs, and news presenters residing in the State where the news bulletin goes to air?*

**Answer:**

Strong, successful media companies are the best way to ensure investment in News and jobs and create meaningful diversity. The media ownership rules need to change so that companies like Network Ten (TEN) can better access capital and create scale, enabling us to invest in new services and local content such as News programs.

It is more than likely that media ownership reforms will provide opportunities for journalists as companies are more likely to have the financial capacity and inclination to put additional News resources into new mediums such as online and mobile formats.

Without change to the media laws, the impact of fragmentation will undoubtedly extend to the News market where competition for dispersed news audiences in both print and broadcast journalism will put pressure on standards and diversity of views.

# Inquiry into Broadcasting Services Amendment (Media Ownership) Bill 2006 and related bills

## Response from Prime Television Australian to question on notice

In hearings of the ECITA Committee on 29 September 2006, Senator Conroy sought the view of Prime Television regarding the likely position of the Australian Competition and Consumer Commission on any possible proposed acquisition of radio assets by Prime.

Prime would expect the ACCC to play a key role in determining the competition outcomes likely to flow from any proposed merger or acquisition.

In reaching any such determination, Prime would expect the ACCC to take into account all of the factors relevant to each particular case, having regard for the circumstances of the specific market or markets in question.

It is Prime's understanding that the ACCC is not constrained by section 50 of the Trade Practices Act to consider the proposed merger or acquisition alone, but rather it is empowered also to look at all the arrangements that might flow out of any proposed merger or acquisition. The ACCC therefore has a role of continuing oversight.

Alan Butorac
General Manager (Broadcasting)
Prime Television Australia

**Inquiry into Broadcasting Services Amendment (Media Ownership) Bill 2006 and related bills**

## Questions on Notice from Senator Dana Wortley

Date: Thursday, 28 September

## Private Media Partners

1. Question: *Would you explain further, how media mergers are likely to result in fewer journalists in a media organisation and how this impacts on the quality of journalism?*

There are relatively few prime assets in the Australia media industry, and very few opportunities to acquire them. The abolition of the cross-media rules will almost certainly result in intense competitive bidding for those finite assets, and the resulting mergers/acquisitions will be made at high prices. In order to justify those prices, media companies will cut costs – including the cost of journalists and journalism. The quality of journalism is directly related to the resources for that journalism, and reduced spending will impact on the calibre of journalism in Australia. Moreover, fewer media owners will result in few employment opportunities for journalists, and therefore tamer journalism.

2. Question: *Could you explain how public debate will be curtailed, making Australia a less democratic country?*

> "By consolidating political and societal power in the hands of a tiny number of individuals, this legislation will curtail public debate and make Australia a less democratic country."

The media is the institution primarily responsible for the flow of public debate in Australia. Very few subjects become major community issues if they are ignored or downplayed by the media; conversely, issues that are promulgated or highlighted by the media are much more likely to become public issues. If the ownership of more of the "media of influence" is concentrated in few hands – which is the likely outcome of the proposed legislation – the flow of public debate will be controlled by fewer owners. This will result in even tighter control of the news/opinion agenda by even fewer media owners, which has the obvious potential to make Australia a less democratic country.

3. Question: *Could you elaborate on this statement?*

> "In the process, the role of the fourth estate as the scrutineer of government will be weakened, perhaps irrevocably."

The role of the "fourth estate" in a democracy is to act as an observer, commentator and source of disclosure that scrutinises the other "estates". If most of the media that controls the journalism responsible for this important role is controlled by just one or two owners in a market – a likely outcome of these bills – the quality of scrutiny will be severely diminished. Instead of scrutiny of a diverse range of issues by a diverse range of media owners, the issues under scrutiny will be restricted to issues favoured by a tiny number of owners. The result will be a weakened fourth estate.

**Senate ECITA Committee - Inquiry into Media Ownership and Related Bills 2006**

**Seven Network Response to Questions on Notice from Senator Eggleston**

***Channel 7 is opposed to local content rules applying to new FTA multichannels.***

***My concern with this approach is that the multichannel programs would be likely to consist of cheap second run US material (as is the case in New Zealand where there are no local content rules) and would have an adverse affect on local production of content and thereby could not be said to be in the public interest.***

***Could Channel 7 outline their plans for the type of content which might be shown in their multichannel program?***

Seven does not oppose local content rules applying to new FTA multichannels. However, we believe these should be carefully introduced at a time that the new channels are able to sustain them.

Seven is a strong supporter of local content and Australia's biggest producer of Australian drama. We consistently meet and exceed our Australian and local content requirements.

Our position is that content and financial obligations on these new channels should be minimal in the establishment phases when business models are emerging. Free-to-air multichannel television is completely untested in the Australian market. It will have only one source of revenue – advertising – in an environment where there is increasing fragmentation and competition. New multichannels will be unable to sustain heavy regulatory burdens until such time as the services have established themselves.

A similar approach was taken with the introduction of pay TV in the 1990's. Pay TV was not subjected to the same Australian content, drama or children's television requirements applicable to their commercial television counterparts. It is only relatively recently that pay TV has been subject to any level of mandatory Australian content rules.

A requirement for 10% expenditure on Australian content by the Pay TV sector was included in the Broadcasting Services Act when the current Act was introduced in 1992. However, the requirement was not enforceable until the legislation was reviewed in1999.

Seven would support a similar approach in relation to free-to-air multichannels, that is a 10% expenditure quota of the kind introduced in relation to pay TV drama channels from the outset, with review of these provisions at an appropriate time. Given that it could be expected that these channels will provide a range of content, we would support broadcasters being able to meet their commitments through provision of any form of Australian content rather than being restricted to drama. This would permit broadcasters

to meet their quota in innovative ways and using a range of material, including news, current affairs, interviews with persons of local interest as well as drama, comedy and documentary programming.

As noted by Kim Williams in his evidence to the committee this has not precluded pay TV from making additional investment in Australian programming now that the Foxtel platform is well established and profitable. One could expect a similar pattern with multichannels. While their levels of new local content in early years might not meet current levels on the main channels, this is more than balanced by the significant benefits DTT multichannelling could provide to the local production industry over time.

Free to air multichannelling could deliver benefits to the Australian production industry in the following ways:

- through maintaining primary services able to sustain current levels of Australian and local content regulation;

- through creating secondary markets for the sale of existing Australian product;

- creating an environment free from the rigorous ratings performance parameters that dictate primary channel scheduling which would permit greater experimentation and innovation;

- if the DTT platform is successfully developed and not shackled with unsustainable levels of regulation from the start, there will be a strong demand for increasing levels new local content over time.

Seven believes that multichannelling is essential to the survival of free-to-air broadcasters in a fragmenting market. As noted by the ACCC in its Report on Emerging Market Structures in 2003, “the restriction on FTA multichannelling may actually prevent the FTA operators from responding to new sources of competition”.

If free-to-air broadcasters are to continue supporting the Australian production industry to the current extent (we are responsible for almost 80% of all Australian film and television production) we need a way to ensure our ability to compete and to finance our current levels of production. Multichannelling is a clear strategy to achieve this.

Multichannels will provide a valuable secondary market for Australian product that does not currently exist except in a limited form with sales to pay TV. This would be expected to generate new revenue streams for producers and others involved in the local production industry. With revenue from overseas sales of product ever declining, this new revenue source would be extremely important to the industry.

If a successful platform emerges, greater amounts of new Australian programming could be expected. Once established and profitable, the sustainability of regulatory requirements such as Australian content quotas could be considered. In this regard, Seven notes that the Australian Government has recently reserved the right to impose content requirements on DTT multichannels in the US Free Trade Agreement.

The imposition of local content requirements from the outset is likely to create financial and operational obligations that would not be sustainable in a start-up business. A heavy regulatory burden would ensure the failure of the DTT multichannel model and all that it may be capable of delivering to viewers and the production industry over time.

Further, multichannelling offers the opportunity to trial new programming in an environment where it is not necessary to deliver the same levels of ratings as on the primary service. This permits greater risk taking and new and innovative programming choices. This factor has been clearly recognized on the Freeview platform in the UK where Ofcom has also noted the role of multichannel services in encouraging innovation and experimentation in local production:

> *"To support innovation, public service broadcasters (as FTA broadcasters are known in the UK) are now also able to use digital channels to complement their analog output. ITV2 and E4 have given viewers access to large-scale event TV. The BBC argues that BBC Three provides alternative comedies such as Little Britain or Nighty Night with a testing ground, so that the most successful can transfer to BBC Two." (Ofcom Review of Public Service Broadcasting, Phase 1 consultation paper, April 2004)*

Seven's plans for multichannelling

Clearly, our programming plans for new multichannels are highly sensitive and of significant interest to our competitors. Consequently we are not in a position to outline our programming strategy in detail at this time.

However, Seven is committed to significant levels of local content on our multichannel services from the outset. We have a proven commitment to local content above and beyond the regulatory requirements on our main channel, particularly in drama and news. Seven's intention is to use our expertise in this area to operate successful new services and to provide localised content in both metropolitan markets and regional areas.

Multichannel services could be expected to be complementary and not competitive to our existing primary services. Internationally, DTT services tend to include:

- news services
- new comedy and drama
- sport
- some time shift of primary channel programs (eg local news could be shown later in regional markets to enable people to view them at a more suitable time)
- children's programming
- documentary programming
- long form programming not easily accommodated on a primary channel
- archive programming eg classic Australian drama
- new overseas drama such as excess international content

**Senate ECITA Committee - Inquiry into Media Ownership and Related Bills 2006**

**Seven Network Response to Questions on Notice from Senator Joyce**

***In your negotiations with the ACCC how much has it cost and do you feel that a small regional operator would be able to effect a reasonable challenge to decisions via this process?***

Seven has had numerous negotiations with the ACCC over the past decade or more. Many of these related to our access disputes with Telstra and Foxtel in relation to our pay television channel C7. These disputes cost Seven many millions of dollars, including numerous court actions to enforce the relevant access regime contained in Part XIC of the *Trade Practices Act* when we were unable to obtain the ACCC's support in relation to these issues. Seven won all of the court actions relevant to this issue (including in the High Court) in relation to access, although the ACCC had indicated that it did not consider there to be any issues under the relevant legislation when the matters were raised with them initially.

Unfortunately, Seven's access action was in effect superseded when the ACCC consented to the Foxtel/Optus Content Sharing Agreement. Some of the ACCC's decisions to grant exemptions from the *Trade Practices Act* requirements in return for special undertakings were appealed by Seven to the Competition Tribunal. The Tribunal found that many of the undertakings accepted by the ACCC as a basis for allowing the effective monopolisation of the pay TV industry by Foxtel were inadequate to safeguard competition in the sector. It also found that some of the assessments on which the ACCC relied to make its decision (for example that the deal was necessary to ensure that Foxtel digitised its service) were not correct. In that instance, the Tribunal found that Foxtel would have digitised its pay TV service in any event.

In contrast to the ACCC's decision that the undertakings proffered by Foxtel gave effective access, the Tribunal expressed a wide range of concerns about the undertakings and the limitations imposed by the undertakings. The Tribunal referred to the "substantial limitations on the commercial prospects of any access seekers to the Telstra/Foxtel digital network, to the point where it is doubtful whether they provide for meaningful and effective access".

These proceedings were extremely complex and costly to Seven. It is unlikely that a small operator in a regional area would have the resources to challenge decisions of this nature by the ACCC. Further, even if such a challenge is e successful, in many instances the effect of the initial ACCC decision cannot be reversed, as was the case with the approval of the Foxtel/Optus Content Sharing Agreement and its flow on effects of creating a monopoly in pay television.

Seven also raised its concerns about the acquisition of the AFL and NRL rights in 2000 by a consortium of our direct competitors including News, PBL, Telstra, and about the

operation of the Content Sharing Agreement between Foxtel and Optus. Initially we raised our concerns about the anti-competitive nature of these deals with the ACCC. However, the ACCC indicated that it did not wish to become involved in the dispute. As a result, Seven has spent well over $80 million on pursuing its claims in the Federal Court. Clearly, an action of this magnitude is only an option for those with sufficient resources to take the necessary financial risk. As well as the substantial costs involved, it has taken many years from the time of the conduct in question to bring this case to trial, and it is now expected that a decision will be forthcoming in the first half of 2007. It is also possible there will be appeals. Again, the time Federal Court proceedings can take will be a further disincentive for regional operators.

***How would you feel if one of your other competitor FTAs were to purchase the Channel B licence?***

Seven is committed to pursuing opportunities to provide mobile and out of home services and strongly supports the proposal to allow free-to-air broadcasters to bid for the Channel B spectrum. While any bidder would of course prefer a guaranteed outcome in its favour in any allocation process, we accept that in a market driven auction there is a risk that that our competitors may succeed if we do not. This is a risk that would of course inform our bidding strategy but we accept it is a necessary element of being given the opportunity to bid for the spectrum ourselves.

***You said that you wanted to be treated the same as Pay so if Pay is disallowed from Channel B as well as FTA would that suffice?***

No we do not believe that this would suffice. Seven is extremely interested in providing new and innovative services in the mobile television and out of home sector and believes it should be given an opportunity to move into these services, which are new and different to existing broadcasting services.

Our concerns about equal treatment of free-to-air and pay television operators go to both Channel A and Channel B. We are very concerned that the issue of who may bid for Licence A has not been the subject of much discussion during the Senate Inquiry. Currently on Channel A, a person in a position to control a pay television licence is able to bid but a person in a position to control a free-to-air licence is not. This would mean that corporations already dominant in the media sector such as News and Telstra could bid for this spectrum. Given the undeniable influence pay TV now has in the media sector and that fact that Foxtel already has a monopoly in multichannel television services, they should not be able to also control spectrum earmarked for in-home services.

This concern applies equally in relation to channel B. Persons in a position to control a free-to-air broadcaster would not be able to control the channel if it were used for in-home services, but a person in a position to control a pay TV licence would.

Persons in a position to control the Pay TV licensee Foxtel are News, Telstra and PBL. Under the current proposal, all of these players could bid for Channel A and B and could provide in-home services on both channels. As the only providers of multichannel television services for the foreseeable future, clearly it is not in the public interest to extend this monopoly position.

**Senate ECITA Committee - Inquiry into Media Ownership and Related Bills 2006**

**Seven Network Response to Questions on Notice from Senator Murray**

***"Perhaps you may want to go away and think about whether foreign ownership rules should be reciprocal. In other words, for those markets that are open, we will be open to them; if those markets are closed, we are closed to them….I am particularly interested in the Americans."***

The Seven Network strongly supports the removal of foreign investment restrictions on commercial television and subscription broadcasting licences.

In Seven's view, 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 businesses.

Access to capital can be a difficult issue for enterprises operating in a small market like Australia. Some smaller and independent players would benefit if they were able to access additional financial support from foreign investors. Given the difficulties of attracting suitable international partners in a small market, these sources of capital should be available from as wide a pool as possible. The pro-competitive effects this would have in the Australian media sector we believe outweigh any concerns that may arise from greater levels of foreign investment. Although we understand that US rules generally limit foreign ownership to 25%, for these reasons we do not support taking a reciprocal position on this issue.

The Productivity Commission recommended the removal of foreign investment restrictions in its Broadcasting Inquiry Report for similar reasons.

> "Media convergence in all of its manifestations is imposing considerable pressures on existing media players to take strategic positions in the marketplace and to shore up their competitiveness through better use of economies of scale and scope…Restrictions on foreign investment and control restrict the options open to Australian media businesses.
>
> …Removing the foreign investment constraints opens up the capital market for television, and improves access to technology and managerial know how…[T]he maintenance of a restriction on foreign investment is at odds with policies that encourage international competition in other sectors of the economy."[1]

[1] Productivity Commission's Broadcasting Inquiry Report, March 2000, page 334

The Productivity Commission also recognised the place that increased foreign ownership could play in ensuring healthy debate on a range of issues through increased diversity of ownership and because foreign media owners are less likely to intervene in local political issues or to have commercial interests that may be affected by stories concerning the activities of other Australian companies or individuals.

> "…[A] less restrictive foreign investment and control regime would encourage greater diversity in control and thus greater diversity in information and opinion. It is an important mechanism for guarding against excessive concentration in the media."[2]

Seven has a strong commitment to local content and also believes that significant levels of Australian programming are now expected by Australian viewers. To the extent that market failure may not deliver these, strong local content rules are capable of ensuring Australian media operations do not just become outposts of international operations.

Current requirements for Australian transmission quotas and specific requirements in relation to drama, children's programming and local news on free-to-air television deliver clear and measurable outcomes. To meet the requirements of being an "Australian program" under the current Australian content standard, a program must be produced under the creative control of Australians, have Australian producers, directors, writers and actors and be produced and post produced in Australia. Detailed requirements such as these in our view are capable of adequately protecting the Australian media sector from any of the concerns commonly expressed about increased levels of foreign ownership.

It is also noted that Network Ten has had high levels of foreign ownership under a grandfathered arrangement for many years but has successfully met its Australian content requirements and indeed increased its commitment to Australian drama and news in recent years.

When combined with strong local content rules, Seven believes that the FAT Act provisions, FIRB oversight and Treasurer discretions will act to protect the Australian public interest in relation to foreign investment in other industry sectors

[2] ibid

# Inquiry into Broadcasting Services Amendment (Media Ownership) Bill 2006 and related bills

## Question on Notice from Senator Murray

## Screen Producers Association of Australia

Could additional content regulation on Community Broadcast services assist in alleviating SPAA'S concerns for avenues for local content opportunities for Independent Television Producers?

## SPAA response:

We do not think so because:

1. Community television has no funding base to support professional production - these services by their nature and licence conditions, are narrowcast, cannot carry advertising and must reflect local community interests. Ironically its because of these limitations that the bulk of their programming is low-cost, local content. They are useful at developing emerging talent e.g Rove.

2. Community Television doesn't have audience reach - by definition, it only services a local audience and then has less transmission power than the networks i.e. cannot be picked up by all the potential audience.

3. The aim of community Television is access for the general population and specific interest groups. It's charter is fundamentally different from the big five broadcasters. Also, as I understand it, programming cannot be networked.

It may present opportunities for new entrants looking for exposure but there is no capital base or money, hence there's no measurable contribution to the sustainability and vigour of the independent professional production industry.

**Inquiry into Broadcasting Services Amendment (Media Ownership) Bill 2006 and related bills**

**Questions on Notice from Senator Dana Wortley**

**Screen Producers Association of Australia**

1. Question: *You support a fourth terrestrial channel. Are you aware this can't happen if the government auctions off Channel A and Channel B ? Does this affect your view on whether those channels should be auctioned?*

   **SPAA Response:** Yes, the use of this digital spectrum for Channels and B is a complete waste of valuable public property. The spectrum would be better applied to a fourth terrestrial FTA commercial network. This represents the best opportunity for new players to enter the market, stimulate competition, ensure diversity and increase the amount of Australian content in adult drama, children's programming and documentary, for Australian audiences. It also will provide an accessible alternative service to a truly national audience. A fourth network need not and should not emulate what already exists with the three commercial networks. If a new network were allowed to transmit both digital and analogue until say, two years before analogue switch off, it would be the best opportunity we have to encourage digital take-up i.e. viewers would be compelled to switch to digital to continue to receive the fourth network service.

2. Question: *Your submission expresses concern about the impact of softening the anti-siphoning regime on your industry. Can you explain the link? Would you prefer to see the rules remain as they are?*

   **SPAA Response:** Our point is that an increasing emphasis on obtaining, and locking up, sporting rights will have an adverse effect on FTA budgets, particularly in local content. There are already signs that the TEN and SEVEN deal for AFL rights is placing pressure on SEVEN's local drama budget. SPAA's concern is that this could escalate under the "use it or lose it" rule. The key to understanding this is that PAY TV has an Australian spend obligation for adults and children's drama (based on total drama expenditure), regardless of what is spent on sport whereas the commercial FTAs local drama content obligations are based on a points formula. Hence they can drive down costs for this programming to offset increased costs for sporting rights.


# TELSTRA CORPORATION LIMITED

## Submission to Senate Environment, Communications, Information Technology and the Arts Committee

Inquiry into Broadcasting Services Amendment (Media Ownership) Bill 2006 & Related Bills

**Response to "Questions on Notice"**

3 October 2006

# Questions on Notice

**1. Senator CONROY**

**How many transmitters are required to rollout a national mobile TV service?**

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Mobile TV services utilising the 700 MHz broadcast license Channel B will require a cellular 3G back channel for purposes of authentication, billing, EPG (Electronic Programme Guide) and interactive services. Thus it may be important from a customer satisfaction point of view that footprints of Mobile TV and 3G cellular should overlap and the network operator would need to take such a requirement in to account. The design of the Mobile TV network should therefore take into consideration the depth and breadth of 3G coverage.

A mobile TV network whose coverage could overlay Telstra's planned 3G footprint would require significant investment. Such a network will use a mix of main transmitters (~200kW) on existing broadcast towers in conjunction with auxiliary transmitters with lesser power (~30kW–600W) and low power repeaters (~120W) which will use existing cellular infrastructure as much as possible. The density of these transmitters in a given area will depend on required in-building coverage requirements. However, as mentioned earlier, due to the symbiotic relationship between mobile TV and 3G services the required in-building coverage of mobile TV may need to match the excellent 3G850 in-building coverage. Another factor which will determine the number of transmitters is the total number of TV channels needed. Channel B will be able to accommodate 15 – 45 TV channels but to achieve the upper range will require a larger number of transmitters.

Subject to the various considerations described above the total number of transmitters which will be required to provide a national mobile TV footprint is expected to lie in the range of 1000 to 1500.

## 2. Senator NASH

**When capacity is reached on 3G network, does it affect the network as a whole, or does it affect in areas of high demand?**

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Telstra is still committed to rolling out the first high-speed packet download access ("**HSDPA**") 3G network by 2007. Telstra's new 3G network will deliver mobile broadband speeds 3-5 times faster than the current 3G 2100 network. It will average 550kbps-1.1Mbps at launch with planned increases in data speed in 2007/8, allowing users to access higher quality voice, internet, video and television services at faster speeds.

Telstra's 3G network is capable of delivering mobile TV services. However, as reflected in our submission to the Minister's discussion paper, mobile TV are nascent services that have the potential to drive demand for *more* digital content and services such as video, real time sports, movie downloads, news clips, soap operas etc. Mobile TV is poised to be the next growth service, and take-up of the service will very much depend on roll-out of higher speed wireless networks, increased availability of mobile content, decreasing prices of mobile TV enabled handsets, and augmenting consumer preferences. Due to the relative infancy of this market, the 3G delivery mechanism will provide sufficient capacity for the foreseeable future. Telstra expects that 3G-enabled TV will suffice to meet market demand for at least the next 2 to 3 years.

However, if 3G enables the proliferation of mobile TV services, an overlay access network to address mass-market may be needed in high-use areas. This is because 3G cellular networks are not optimised to deliver large amounts of broadcast video (e.g. streaming video) especially in situations of mass user demand. 3G networks are divided into cells, and users in a given cell share the available bandwidth. 3G also relies on "unicast" streaming, where signals are transmitted between a single sender and a single receiver. Therefore, if 200 people in the same cell want to watch the same video clip, the network has to transmit a copy of that video clip over the network to each user. This is an efficient solution for applications such as text, chat or downloading internet content, wallpapers or ring tones, but inefficient for the purposes of mass-market mobile TV in light of the following factors:

- Streaming video consumes 10 times the bandwidth over a network that voice traffic consumes[1] - see Figure 1.
- One key differentiator about mobile TV is the ability to offer the end user a host of broadcast video and TV services distinct from current mobile offerings.
- Mobile TV is predicted to reach 210 million subscribers worldwide by 2010.[2]
- Telstra's 3G 850 network has access to 10 MHz spectrum in the metro areas and 15 MHz elsewhere.

In the UK, Analysys[3] estimates that if 50% of the user population takes up mobile TV services and uses it for 3.5 minutes a day, you will hit capacity limits of the existing UK 3G network. The capacity is somewhat improved with HSDPA, increasing it to approximately 7 minutes a day– see Figure 2. This analysis does not take into consideration other services of the network, just TV.

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1 Analysys, "Making a Success of Mobile TV and Video: 3G MBMS versus DVB-H, DMB and MediaFLO" September 2005

2 Informa Telecoms & Media, "Mobile TV: Broadcast and Mobile Multimedia", 2nd edition Strategic Report, July 2006

3 See: http://www.ipwireless.com/solutions/mobile_tv.html. Analysis is based on the assumption of a 10,000 site network, 10 megahertz and 10 million subscribers on network – similar to a UK 3G network.

**Figure 1**[4]

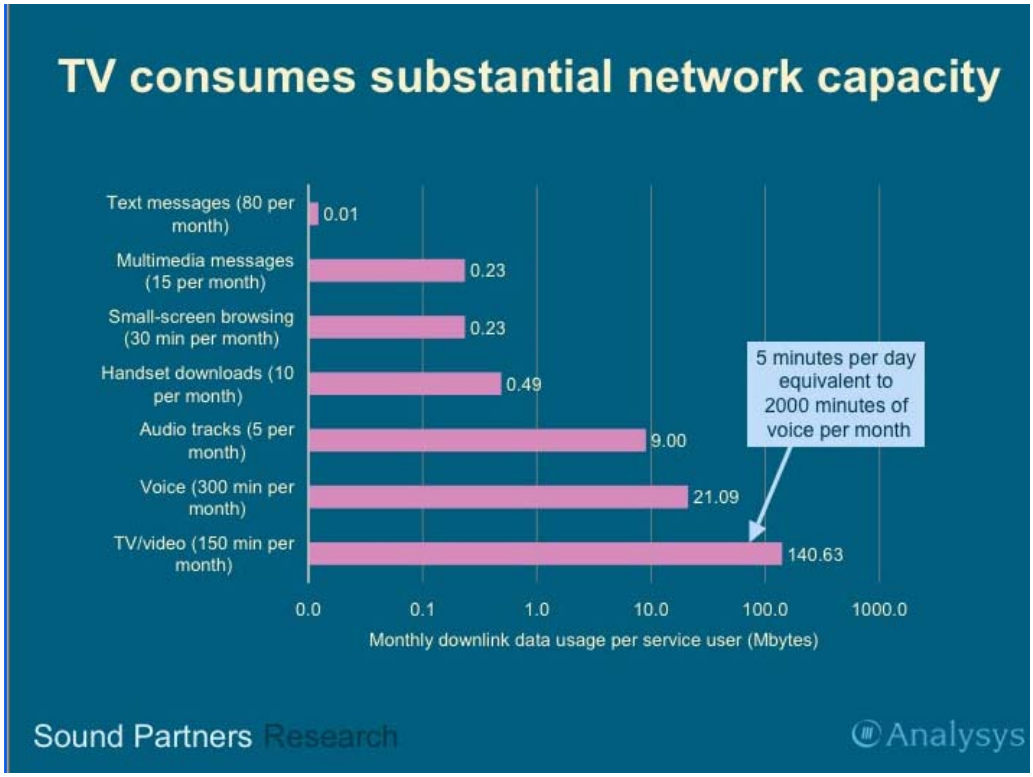
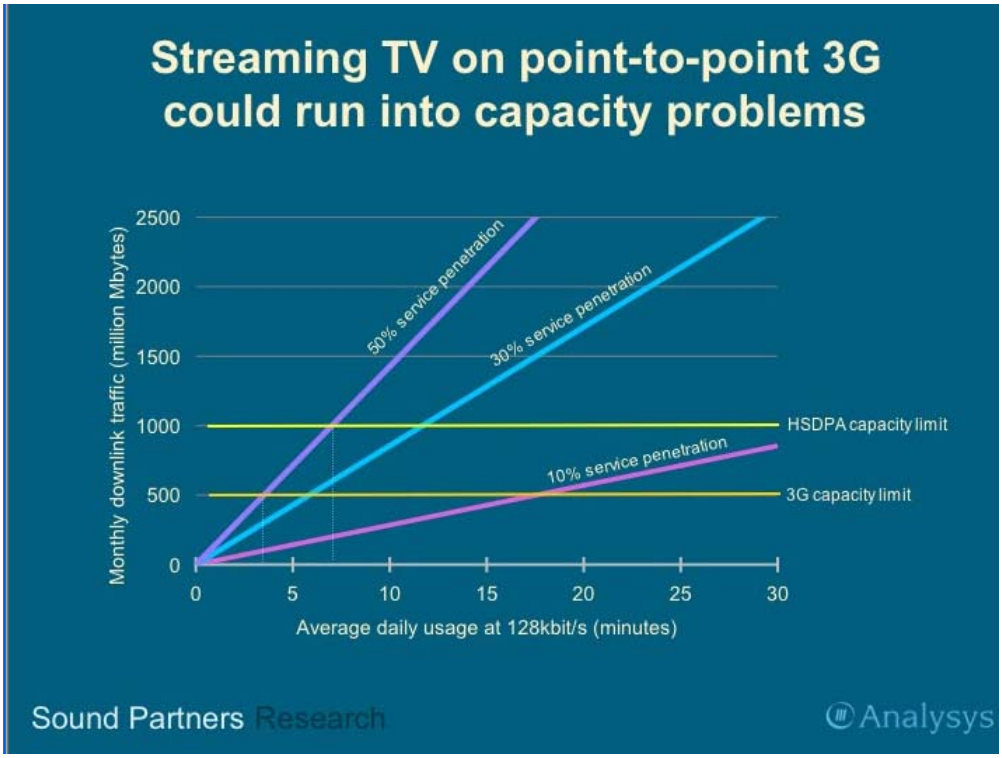



**Figure 2**[5]

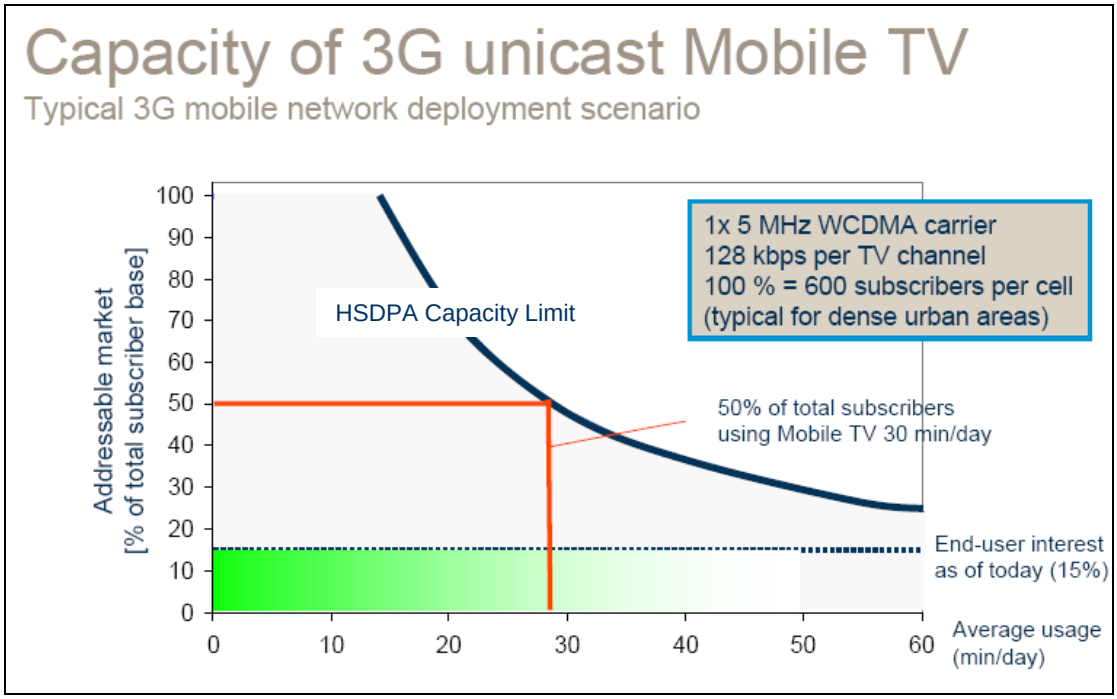



[4] See presentation at http://www.ipwireless.com/solutions/mobile_tv.html

[5] See presentation at http://www.ipwireless.com/solutions/mobile_tv.html

Ericsson predicts that HSDPA provides 30 minutes of TV usage for 50% of the addressable market[6] - see Figure 3.

**Figure 3**[7]




Clearly, mobile TV via 3G does not pose any capacity issues in the short to medium term as the number of mobile TV unicast stream users is relatively low. However, as the popularity of mobile TV grows (and the forecasts predict that it will), 3G unicast streaming will start to witness capacity issues when a multiplicity of users simultaneously try to stream TV. The lack of capacity to meet broadcast video demands becomes even more acute for big media events, such as a breaking news story or a championship sporting event. This has already occurred in South Korea where SK Telecom decided to build a separate satellite network based on Digital Media Broadcasting (DVB) standard after its mobile network became congested within nine months of the launch of video streaming.[8] Network congestion will occur in the more populated areas where traffic density is highest.

As discussed both in Telstra's submission and during the Senate hearings, there are a range of technology options available to address this situation – see Figure 4. One approach is to build and use terrestrial digital broadcast networks and their extensions. Already, we are observing competing broadcast mobile TV delivery technologies such as DVB-H[9] (suitable for the current unallocated 700MHz spectrum), T-DMB[10] (Korea), ISDB-T[11] (Japan) and MediaFLO[12]

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6 http://www.medienwoche.de/WebObjects/Medienboard.woa/wa/CMSMediaDownload/3323

7 See presentation by Ulf Wahlberg, Vice President Ericsson Research, Sweden at IEEE 63rd Vehicular Technology Conference, 7 - 10 May 2006. Available at: http://www.ieeevtc.org/vtc2006spring/Walhberg_Monday_plenary-rev-c.pdf

8 http://www.slashphone.com/74/1914.html

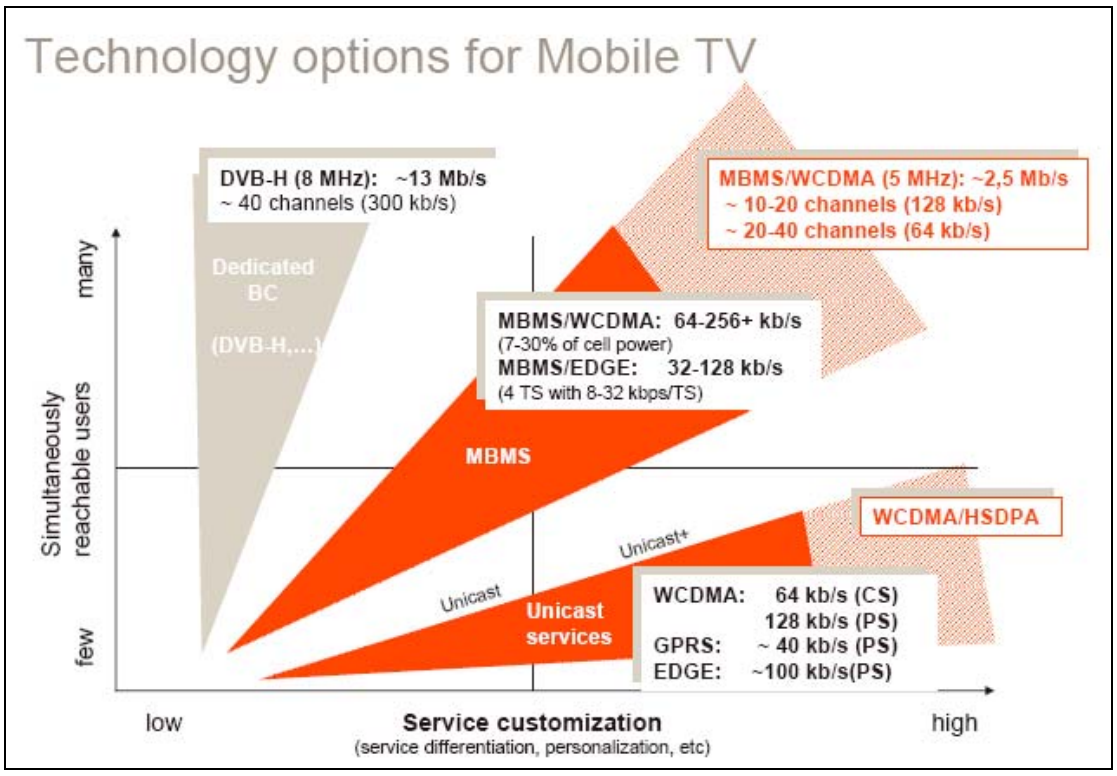
9 Digital Video Broadcast - Handheld ("DVB-H") is an open standard to transmit video to handheld devices based on the DVB-T standard used for transmission of digital terrestrial television. DVB-H trials are underway or completed in Europe, the United States, Australia, India and Africa. Commercial launches are planned for 2006.

10 Digital Multimedia Broadcast ("DMB") is in use in Korea and is being trialed in Europe. Korea awarded six DMB mobile TV licenses in 2005 with services beginning in May 2005. DMB can operate via satellite (S-DMB) or terrestrial (T-DMB) transmission. T-DMB uses MPEG-4 Part 10 to encode and compress the video transmission.

(USA). Solutions based on broadcast systems are a highly *efficient* method of distribution, because they are not sensitive to the number of people receiving the content within the service area. Digital broadcast networks are optimised to deliver the same content to many users at the same time. However, these systems are not adapted to supporting a very high number of channels or interactivity (e.g. video on demand, etc.). New broadcast networks are also expected to complement existing unicast networks and enable new business models for both live and on-demand video content.

There are also two other radio technology families for delivering broadcast content to mobile terminals. First there are in-band cellular broadcast techniques such as the MBMS (Multimedia Broadcast and Multicast Service) which builds on existing 3G networks. MBMS offers a solution to the unicast stream capacity issue as it uses broadcast or multicast as a delivery mechanism. This means that multiple users will be streamed with the same content on a single delivery channel. There is an enhancement to MBMS known as TDtv, which uses existing UMTS TDD spectrum for delivering broadcast TV. The second radio technology family is the hybrid satellite/terrestrial systems, such as S-DMB from SKT in Korea, MobaHO! from MBCO in Japan (both projects using the same MBSAT satellite), and DVB-H adapted for S-band.

**Figure 4**[13]




There are obviously pros and cons to each of these technology options. Many 3G carriers, including Telstra are continuously searching for ways to make their existing networks more efficient for carrying video, and planning for the delivery of higher quality, high capacity services moving forward.

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11 Integrated Services Digital Broadcasting ("ISDB-T") is the digital television and digital audio broadcasting (DAB) format that Japan has created to allow radio and television stations there to convert to digital. It operates on unused TV channels.

12 MediaFLO is Qualcomm's proprietary multicast technology for delivery of mobile content. Cellular operators who choose to partner with MediaFLO can use the network as a complement to their CDMA/EV-DO or UMTS/HSDPA networks to offer broadcast services.

13 Ericsson Mobile TV – Overview, 12 September 2005.

Telstra hopes that Channel B is made available on reasonable terms and conditions so that this spectrum can be utilised for efficient spectrum forward planning. If not, other technologies will be utilised to manage demand.

**3. Senator MURRAY**

**Can you propose a 'light touch' regulatory framework for Channel B?**

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**Introduction**

Telstra has expressed the view that 'light touch regulation' would be preferable to Part XIC of the Trade Practices Act, in providing access to carriage services using the Channel B spectrum (to the extent that Part XIC may be applicable or that such access may be justified on competition grounds).

The following is an example of a 'light touch' approach that could be used. Telstra provides this example to illustrate that 'light touch' options are available, but Telstra does not necessarily endorse this example as its preferred regulatory approach or suggest that this is the only 'light touch' option available.

**Example of 'light touch' approach: secondary auction of the right to use a reasonable proportion of the available mobile TV channels (assuming DVB-H technology adoption by the licensee)**

- ACMA specifies a licence condition in the Channel B licence that requires the successful bidder to resell the right to use a reasonable proportion of the channel capacity that the Channel B licence enables to third parties, by means of a secondary auction to be held as soon as reasonably possible after the Channel B licence is issued.

- This means that the successful bidder in the primary auction will retain for its exclusive use a significant or predominant portion of the capacity of the Channel B licence. That exclusive use may involve onsale of some or all of the channel capacity or its own use of the channel capacity, as the winning bidder determines.

**Further details**

- Section 109 of the Radiocommunications Act provides that licence conditions for datacasting transmitter licences include "*such other conditions as are specified in the licence*".

- Any resale arrangement would occur pursuant to a sub-licensing arrangement (as currently occurs in the context of authorisations granted by licensees under the existing provisions of the Radiocommunications Act).

- Any secondary auction could be conducted by an independent third party selected by the licensee, subject to the consent of ACMA.

- Any grant of access could be in relation to one or more channels using the overall Channel B spectrum and could be for a meaningful period of time.

- The design of any auction, for example whether lots would consist of single or multiple channels or both, would need to be considered for possible inclusion in the licence condition.

- A reasonable reserve price could be set for the auction, to enable the licensee to either recover its investment in the spectrum or to put the capacity to other use if the reserve price is not reached.

- Telstra has previously developed detailed auction terms and conditions for the allocation of digital channels in the context of its undertaking given to the ACCC for the Foxtel-Telstra-Optus regulatory clearance in 2002. The ACMA also has various model auction terms and conditions that it has developed in the context of its own various auctions of radiofrequency spectrum.

- The Channel B licence will also be subject to a "use-it-or-lose-it" condition that the licensee must commence a service within 18 months of the licence allocation. If the secondary auction approach above were adopted, the licensee may be exposed to the risk that the successful bidders for digital channels in the secondary auction would not use that spectrum within the "use it or lose it" timeframe. In order to supply services it may be necessary for the licensee to enter into commercial arrangements to access the broadcasting towers of third party operators. Even though a statutory access regime exists under Schedule 4 of the Broadcasting Services Act, it is possible that access delays (including arbitration under Sch 4) could place the Channel B licensee in breach of its "use-it-or-lose-it" obligation. Therefore, if the secondary auction approach was adopted then the "use it or lose it" licence condition would need to include an exemption for the following circumstances:

    - ❖ where a party has used reasonable endeavours to roll out a service, but has been delayed in doing so by the actions or omissions of third parties (including in failing to provide access to broadcasting towers); or

    - ❖ where the secondary auction condition identified above has been adopted and the successful bidder has caused the licensee not to comply with the "use it or lose it" mechanism.