NETWORK TEN

NETWORK TEN SUBMISSION TO THE ENVIRONMENT AND COMMUNICATIONS LEGISLATION COMMITTEE INQUIRY INTO THE MEDIA REFORM BILLS 2013

18 March 2013

Introduction

Network Ten is extremely concerned about the timeframe and processes imposed on the Parliament, industry stakeholders, and the public to digest, analyse and comment on legislation which will shape the future of our businesses and Australia's media landscape.

In 2006 Senator Conroy described the process to implement the last major media reform package as "debauched" and said "We should not be surprised when such an approach produces poor policy."1

The table below provides a comparison of the timeframes for consideration of the 2006 media reform package with the timeframe imposed by the Government in relation to this package.

	2006	2013
No. of Bills	4	6
No. of days Bills in Parliament	34	7
No. of working days for Committee - inquiry & report	17	2

As is obvious from the above, this current process is far more compressed with far less opportunity for scrutiny and debate than the 2006 process.

Broadcasting Legislation Amendment (Convergence Review and Other Measures) Bill 2013 (CR Bill)

Australian Content

Network Ten supports the changes to the Australian content rules set out in the CR Bill which are critical to the free-to-air sector.

Despite the serious structural and cyclical challenges currently facing the free-to-air television sector, Australian content is flourishing on commercial free-to-air TV, reflecting its quality and popularity with audiences.

Network Ten's investment in local drama will grow in 2013, as we broadcast our largest and most diverse drama slate ever with Logie-nominated dramas like *Puberty Blues, Offspring* and *Neighbours* returning and new dramas like *Mr and Mrs Murder, Reef Doctors, Secrets and Lies – The Track,* and *Wonderland*. In 2013 Ten will broadcast close to 190 hours of first-run Australian drama.

Commercial FTA broadcasters remain the major underwriters of Australian content with record levels of investment over the past few years - $1.35 billion invested in Australian programming in 2011/12 - an increase of $267.6 million over the past two years. No other sector comes close to this level of commitment.

1 Hansard, Parliamentary Debates, Senator Conroy's speech, Second Reading, Senate, 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, Wednesday, 11 October 2006, Page 17

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Network Ten has invested its entire licence fee rebate received to date back into content, most of it Australian content.

The amendments in the CR Bill form a package designed to strengthen and update the current content obligations for a digital-only environment.

The existing 55% (6am to midnight) transmission quota on the main channel and the existing Australian drama, children's and documentaries sub-quotas remain unchanged.

At the same time a new Australian content hours quota on the digital channels will be introduced.

Until now there have not been any Australian content quotas on the digital channels so claims that Australian content producers are worse off under the new rules are just wrong.

Under the amendments in the CR Bill, one hour of first-run Australian drama on a digital channel will count for two *hours* toward the *hours* quota only. This has been designed to act as an incentive for broadcasters to bring more first-run Australian dramas to the digital channels.

It is important to note that this 'two for one' rule does not apply to the drama points sub-quota. An Australian drama premiered on a digital channel will attract exactly the same number of drama points as it would if premiered on the main channel.

The amendments will also provide flexibility for broadcasters to program Australian drama, documentaries and children's content on the digital channels.

In 2011 Network Ten moved iconic Australian drama, *Neighbours*, to digital channel Eleven Ten is the only commercial free-to-air broadcaster to have invested in first release adult drama for a digital channel.

However, under the current legislation *Neighbours* does not count for drama points because it is on a digital channel. The proposed amendments will address this loophole. *Neighbours* embodies the reason we have drama quotas: it reflects Australian culture and lifestyle; it has been a training ground for numerous talented people on and off-screen for more than 25 years; it employs around 200 people over the full year; it has a younger audience; and it showcases Australian production skills globally.

Network Ten supports these amendments which will bring the commercial broadcasters into line with the ABC and SBS who are not restricted in how they program Australian content.

Self-serving calls by the independent production industry for arbitrary increases of up to 50% in the drama quotas are not backed up by any evidence of underproduction or any policy problem in current levels of Australian drama programming. In fact there is more Australian drama on free to air television now than there has ever been.

In particular, imposing expensive additional drama quota on free-to-air broadcasters currently facing serious financial challenges is unjustifiable and counter-productive.

Rather than targeting those who currently do vastly more than any other sector, calls for more Australian content should be directed to those who currently make no contribution to local content and in fact barely pay any tax in this country.

Network Ten does seek an amendment to s121G(5) to the CR Bill to reflect the specified intention of the Explanatory Memorandum and the ACS. The detail on this and suggested amendments are outlined at Annexure A to this document.

Television Licence Fees Amendment Bill 2013

Network Ten supports the *Television Licence Fees Amendment Bill 2013*.

Commercial television broadcasters currently pay 9% of gross revenue as a licence fee. Since 2010 that fee has been reduced by 50% to reflect the permanent structural changes currently facing the industry.

Making the rebate permanent will provide much needed certainty and will allow Ten to continue to invest in quality Australian content, including Australian drama, children's programming and documentaries. More to the point, reducing the levels of licence fees paid by domestic commercial FTA broadcasters brings Australia closer to international standards. Even with the 50% rebate, however, Australian free-to-air broadcasters pay almost seven times more than the closest comparable market (Singapore).

Broadcasting Legislation (News Media Diversity) Bill 2013 and Public Interest Media Advocate Bill 2013 (PIMA Bill)

Network Ten strongly opposes both of these bills which create a highly uncertain and subjective regime applied by a single person unilaterally appointed by the Minister for Communications and with very limited rights of appeal.

Principles aside, the Bills are fundamentally flawed, contain numerous significant drafting and operational problems and cannot realistically be implemented in their current form. They should not be passed.

Of immediate primary concern however, is the fact that the public interest test will not even apply to any transactions that occur within the first six months of the passage of the legislation.

This is particularly concerning if the 75% audience reach rule is removed through this media reform package.

The *Broadcasting Services Act* (*BSA*) currently prevents one person from controlling commercial television broadcasting licences that, in total, reach more than 75% of the population.

Removing the reach rule would allow metropolitan broadcasters to merge with regional affiliates to cover 100% of the population.

Senator Conroy has stated repeatedly in the last week that anyone opposed to further concentration of media in this country should support this media reform package.

But the only guaranteed outcome from removing the audience reach rule – in isolation from other changes – will be less diversity.

At the moment, any mergers that occur within six months will not have to pass the public interest test. They would not have to apply for prior approval from the Public Interest Media Advocate.

They would not have to prove either no lessening of diversity or a strong public interest. They would not have to make court enforceable undertakings to address public interest concerns (such as additional regional news commitments).

This would include deals permitted because the reach rule has been abolished.

Even though the PIMA has the power to undo any deal done during the interim period, that is a very different proposition to having to prove no lessening of diversity or prove a public interest benefit before the deal can be done in the first place.

The reality is that it would be almost impossible and highly unlikely that the PIMA would undo a $4 billion dollar deal months after the deal has gone through. The egg could not be unscrambled.

We do not think the 75% audience reach rule should be removed as part of this package as we have stated elsewhere today.

However, at the very least it should not be removed until the PIMA framework, if it passes, is established and fully operational.

Network Ten has identified a number of further problems with the operation of the provisions in these bills which are set out in Annexure B.

If you require any further information on the matters covered in this submission please do not hesitate to contact Annabelle Herd, Head of Broadcast Policy on 0408 293 458 or email aherd@networkten.com.au.

ANNEXURE A

The CR Bill includes provisions that would elevate obligations to broadcast Australian content from a legislative instrument made by the Australian Communications & Media Authority into primary legislation. In particular, the legislation intends to replicate concepts used in the *Broadcasting Services (Australian Content) Standard 2005* (the ACS).

Network Ten seeks an amendment to s121G(5) to the CR Bill to reflect the specified intention of the Explanatory Memorandum and the ACS in relation to this concept. The provision states that for sports coverage commencing before midnight and finishing the next day, the portion between midnight and 2am can count towards the 55% transmission quota.

However, s121G(5) does not limit the provision to Australian programs that are sports broadcasts as the ACS currently does.

The CR Bill Explanatory Memorandum explains that:

> Where an *Australian program* consisting of coverage of a sporting event begins before midnight on a particular day (the first day) and ends the next day, that part of the program transmitted between midnight and 2 a.m. the next day would be deemed to be transmitted during the *targeted viewing hours* on the first day (proposed subsection 121G(5) refers). The reference to *targeted viewing hours* and the treatment of televised sporting events in subsections 121G(4) and (5) use similar concepts to the ACS. [Page 13]

ACS Part 5 Section 9(3) provides that:

> *If an Australian program that is first release sports coverage begins before midnight on a day (the first day) and ends on the next day, the part of the program broadcast between midnight on the first day and 2 am on the next day is taken to have been broadcast between 6 am and midnight on the first day*. [emphasis added]

So the express intention is that s121G(5) applies to Australian programs only. We recommend the provision be amended thus:

121G Australian content—transmission quota

….

(5) For the purposes of this section, if:

(a) an Australian ~~television~~ program consists of coverage of a sporting event; and

(b) the program:

*(i) begins before midnight on a particular day (the **first day**); and*

(ii) ends on the next day;

the part of the program transmitted between midnight on the first day and 2 am on the next day is taken to have been transmitted during targeted viewing hours on the first day.

ANNEXURE B

News Media Diversity Bill – Operational Issues

- This regime appears designed to achieve the same objectives as the regime in Part 5 of the Act. It is duplicative and combined with Part 5, over regulation.

- The Eligibility Rules are essential but they have not been provided. How are the capital city numbers going to apply to regional services? How are broadcast audiences to be averaged and applied to online services? Over what period must a service sustain an audience in order for it to qualify for regulation?

- The impact of the public interest test is to make every transaction involving the merger of a significant news organisation in Australia subject to regulatory review. Even transactions that create new and independent news media voices of sufficient scale will be subject to review. This framework does not take account of the fact that different forms of media compete in different markets. In fact it ignores markets completely and looks only to whether the number of controllers is reduced. Why should the government care if the owner of a radio network in Queensland buys regional TV station based in Western Australia?

- In relation to the first stage of the public interest test, the question of whether a transaction results in fewer voices, the mechanism would appear to be straight forward subject to the familiar issues regarding what it means to be in a "position to exercise control". The test for whether or not a person is in a position to exercise control is in Schedule 1 of the BSA. These rules can be difficult to apply in some circumstances. They are also very wide and capture entities that are clearly not in any position to exercise control.

- In relation to the second stage of the public interest test, there is no guidance as to what public benefits might be counted and how they will be measured. The second part of the test is similar to the test in the Competition and Consumer Act 2010 (CCA) for approving mergers and authorising certain transactions. Under the CCA it is necessary to assess whether the public benefits of a proposed transaction outweigh the anti-competitive detriment of the transaction. Considering the similarity of this assessment to the second stage of the proposed public interest test perhaps the ACCC would be better to administer the Diversity Bill rather than creating the new public office of PIMA?

- The imposition of considerations and filing requirements that are in addition to, and in many ways similar to the requirements imposed by Part 5 of the BSA seems excessive. It also seems to show haste in that the government hasn't taken the time to consider how the new requirement fits in with the old and how, if it wished to retain the old system, the regulatory burden might be streamlined.

- Considering the very likely high level of complexity involved in applying the public interest test to large scale media transactions over many geographic and functional markets, the powers of PIMA to obtain information from any person and the power to give directions, the PIMA seems an inadequate institution and unaccountable. It would be more appropriate for decisions regarding the public interest test to be made by a tribunal that is subject rules of process, subject to guiding principles and subject to rights of appeal.

- The lack of an appeal mechanism for decisions of the PIMA renders the requirement that PIMA give reasons for approving or failing to approve a control event relatively worthless from a practical point of view.

- The requirement that PIMA give reasons applies only to approval or disapproval of transactions (78CB (8) and (9)). PIMA should be required to give reasons for all its decisions.

PIMA Bill – Operational Issues

- The description of the functions of the PIMA in the PIMA Bill does not describe the public objectives of the office of the PIMA or how the functions are to be exercised. Comparatively, in the *Auditor General Act 1997* (which establishes the Auditor General) all functions of the Auditor-General are expressly stated in the act. The *Ombudsman Act 1976* also states all the functions of the Ombudsman. If the PIMA was a public authority like the ACCC it would have stated objects.

- Missing from the PIMA Bill is any obligation on the Minister to consult on the appointment of the PIMA or seek an independent recommendation. Consultation is optional.

- The wide range of potential qualifications that the PIMA may have does not necessarily relate to the position. A person from the media industry in content production, in the law practicing in probate, in business engaged in mining, in public administration of the transport system or advising on financial economics could each have both "substantial experience and knowledge" and "significant standing" but no relevant qualifications for the position. The Act should require appointment of a person with relevant experience.

- It is not clear why the position is expressly part time. Considering the complex news media self-regulatory body registration and monitoring obligations together with the obligation to review control events, and the lack of a formal administration, the position could be full time.

- The fact that the Minister can appoint the PIMA implies that the Minister can sack the PIMA at any time. The Minister can also determine whether or not the PIMA has leave of absence. Section 17 of the PIMA Bill empowers the Minister to allocate other functions to the PIMA. These factors ensure that the PIMA is subject to the Minister and not impartial.

- The PIMA may disclose information obtained in the performance of its functions to the Minister. This is a further indication of lack of independence.

- There is not obligation on the PIMA to publish guidelines regarding the discharge of its functions and/or its interaction with the public.

- There is no obligation on the PIMA to be independent, impartial or transparent in decision making.

- There are no provisions in the PIMA Bill which provide for a review of the PIMA or the legislation.

- There is no provision for the adequate resourcing of the PIMA or for expert or administrative support except perhaps from other government agencies.