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.

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?

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?

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]

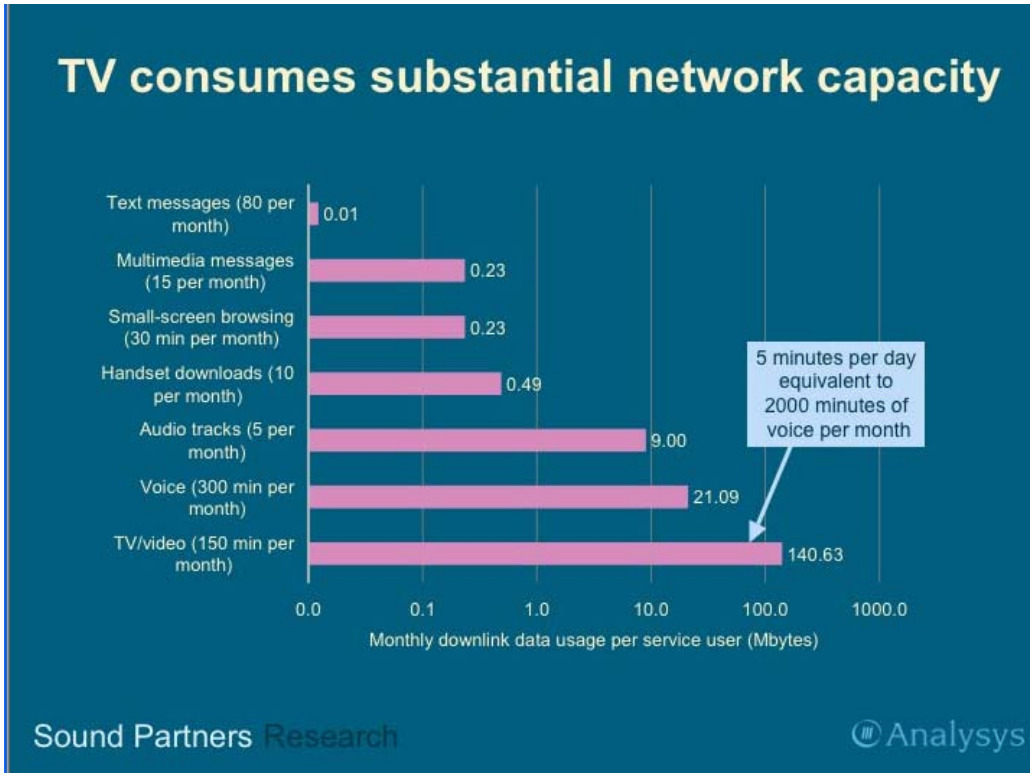
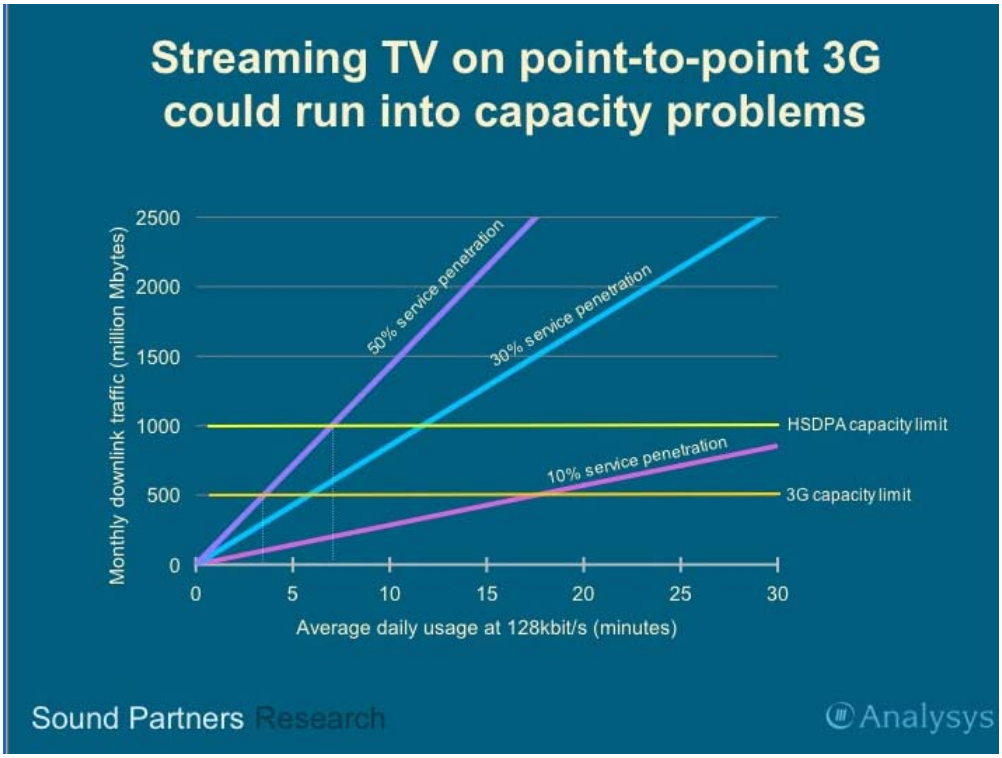


Figure 2[5]

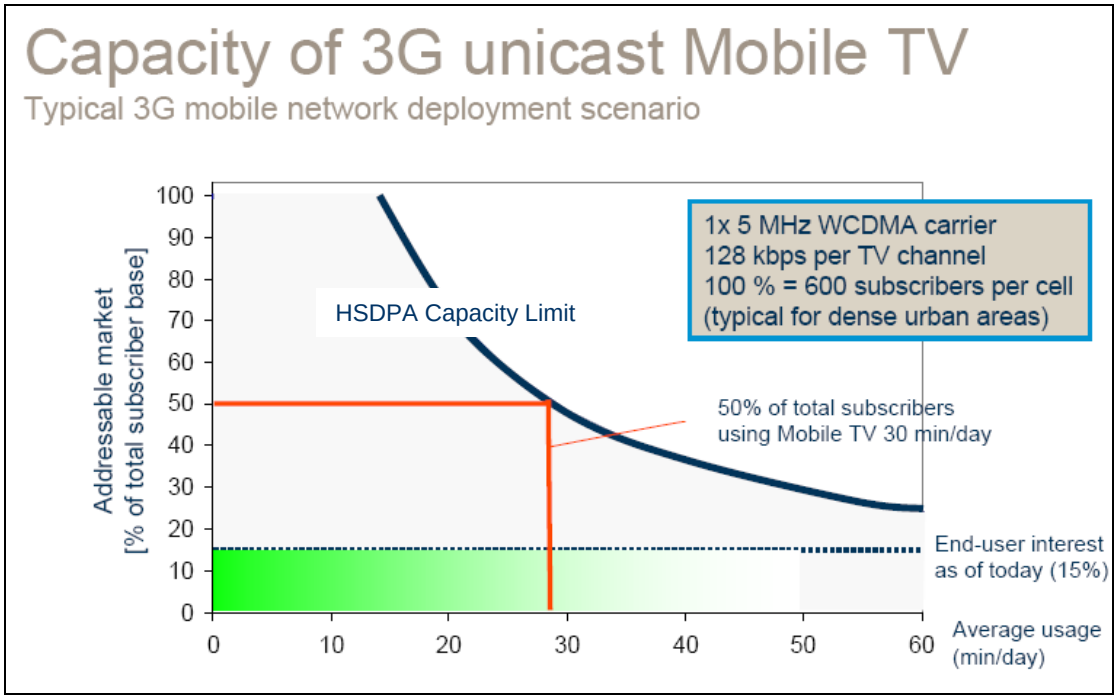


[4] See presentation at http://www.ipwireless.com/solutions/mobile_tv.html

[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

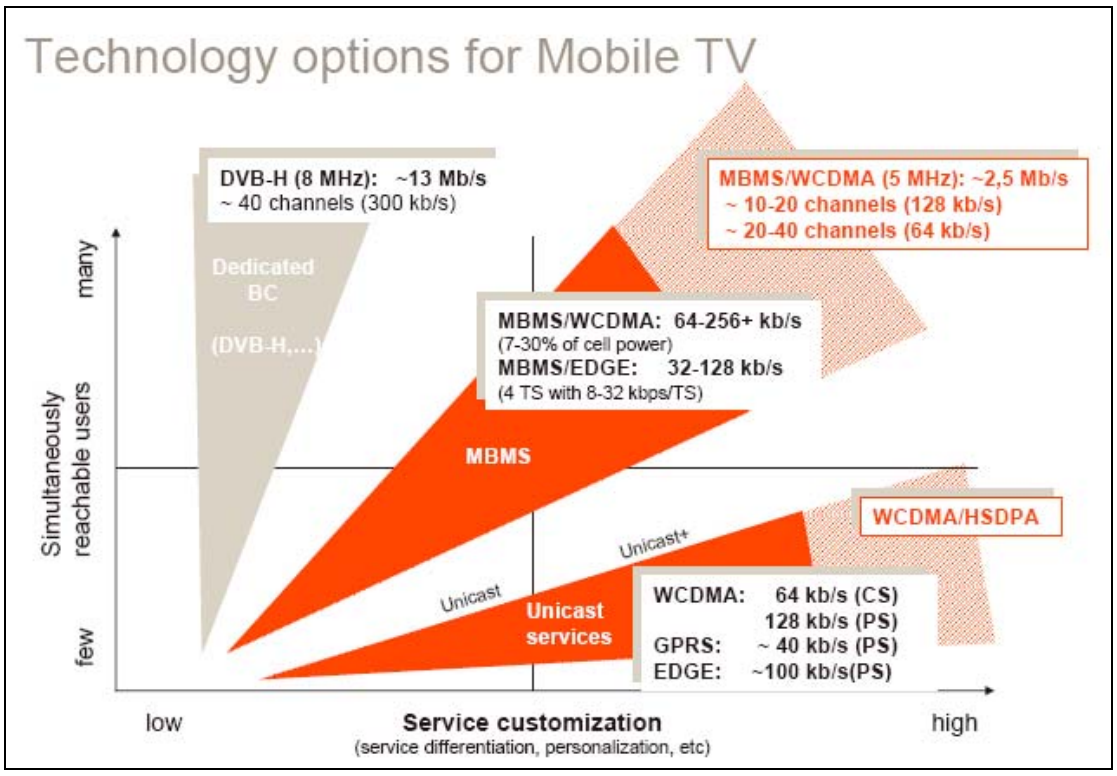
9 Digital Video Broadcast - Handheld ("DVB-H") is an open standard to transmit video to handheld devices based on the DVB-T standard used for transmission of digital terrestrial television. DVB-H trials are underway or completed in Europe, the United States, Australia, India and Africa. Commercial launches 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?

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.