

Ms Roxane Le Guen
Secretary
Media Ownership Bills Inquiry
Environment, Communications, Information Technology and the Arts Committee
BY EMAIL: ecita.sen@aph.gov.au

Submission of Fairfax Media

To the Committee:

A fundamental principle of the Government's media policy is to promote diversity and new services to the Australian people.

While Fairfax strongly supported the Minister's discussion paper on digital television and media reforms, the recent decision on the two new digital channels have undercut the original policy intent.

Fairfax Media 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. Our support for the former has always been predicated on rules that will ensure the promotion of diversity from these new services.

The new digital channel ("B") can potentially deliver the benefit of added diversity to accompany the ownership reforms. That benefit, however, is contingent on new services provided by new video players.

Unfortunately, the Minister's decision of 12 September permits FTAs and Foxtel to bid for the "B" license. If not excluded from bidding for the license, the incumbent FTA and pay television operators (Foxtel's pay TV has 100 channels today) have every incentive and ability to control the license and under-invest in the content. With very low marginal cost of programming, current inventory can be utilised for mobile TV -- which would constitute more of the same, not added diversity for mobile TV users. The new services will never reach their full, robust potential.

Pay TV got started principally by new players. Competitive telephone services came from new players. It is the same with this new digital channel.

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.

We believe the mobile TV programming will be comprised of news, sport, business, music, internet, video networking, digital pictures, and short form video entertainment. To be successful, it will be a new hybrid that does not exist on FTA or pay.

The media legislation will lead to some consolidation in the industry. Many argue that there is already too much concentration in the industry and these Bills will result in still more of it. So why not provide a buffer against these trends with rules that ensure the emergence of new video players for these new digital services?

Fairfax Media urges the committee to recommend the requisite amendments to the legislation that would prevent the FTAs and Foxtel from owning or operating the so-called "B" license.

We are attaching to this submission Fairfax Media's statement on the digital channels and, for the Committee's reference, our original submission from April in response to the Minister's discussion paper on media reform.

We look forward to discussing these issues with the Committee.

Sincerely

Bruce Wolpe

Director, Corporate Affairs

Fairfax

18 April 2006**SUBMISSION OF JOHN FAIRFAX HOLDINGS
LIMITED****DISCUSSION PAPER ON MEDIA REFORM OPTIONS****SUMMARY**

Fairfax supports the broad policy outlined in the Minister's Discussion Paper on Media Reform Options (March 2006).

Industry dynamics, competitive pressures, the proliferation of digital technology, and the transforming, explosive power of the internet have completely changed the media landscape.

As the Minister states in her paper:

“These developments mean that it is now necessary to consider models which move away from controlling market structures in the way successive Governments have to date and to consider a new media regulatory framework that allows for some efficiencies of scale and scope for existing industry players while encouraging new entrants, new investment and new services to contribute to diversity in a competitive environment.”¹

Fairfax believes that the digital datacasting spectrum should be opened for all possible uses short of the stated limitation that they not be used to establish a free-to-air (FTA) television service.

In order to ensure the maximum contribution to increased diversity that these new digital channels can provide, ownership by existing FTA or pay TV providers should be excluded.

Robust development of digital broadcasting services on these channels will provide an early diversity dividend from the Government's policy. This adds to the overall benefits conferred by deregulation. With such a diversity dividend in hand from the introduction of the new digital channels, cross media ownership and foreign investment rules can be removed.

The internet and the encouragement of broadband is a critical element in Australia's overall media policy. In an age of digital convergence media policy is directly tied to

¹ Discussion Paper at 4.

telecommunications policy, and the Government's promotion of broadband access in Australia is at least as important as the regulatory issues canvassed in the Discussion Paper. Fairfax urges the Government to ensure the most aggressive policy settings to promote broadband deployment. For all the progress in broadband deployment over the past five years (see our discussion on page 8), internet speeds are slower, and internet pricing is more expensive, than many other developed countries. The latest OECD figures to December 2005 rank Australia only 17th of 30 developed countries in broadband adoption.² There is a need to adjust regulatory and infrastructure policies to remove these disparities.³

In this context, Fairfax is wary of any efforts, direct or indirect, to curb content and capacity delivered via broadband. By delivering wide access to content locally and worldwide, and with virtually no barriers to entry, the internet is the decisive driver of diversity and competition across the media landscape. Current policies do not constrain video on broadband, and they should remain unchanged.

As Fairfax is not directly involved in television production and distribution, our comments on the digital television issues are limited. In general, Fairfax supports completion of the conversion to digital television sooner rather than later and a lifting of constraints on how digital television broadcasters can use their spectrum to deliver services to Australian viewers.

² "Stuck in the Middle Lane and in Need of Speed," *The Australian Financial Review*, 13-17 April 2006, p 11.

³ See "Stuck in the Internet Slow Lane," *The Australian Financial Review*, 8-9 April 2006, pp 17-19. The World Economic Forum reported Australia slipped from 11th to 15th place in its "networked readiness index." *The Economist*, 1 April 2006, p 86

DISCUSSION OF SPECIFIC ISSUES PRESENTED IN THE DISCUSSION PAPER

1. Road Map to Digital Conversion

Fairfax supports completion of the conversion to digital television sooner rather than later, and the target timeframe of 2010-12 appears reasonable to us given the schedules in other developed countries and what that will mean regarding the availability of affordable receivers and set top boxes for consumers. This would also be consistent with the timetable for introducing digital radio services in 2009.

As the paper states, the “analogue switchover will release a large amount of spectrum in the BSB.”⁴ This is a harbinger of future new services – from broadcasting to telephony – with some revenue potential for the Government.

2. New Services on Spare Spectrum and Other Platforms

New Digital Services on Broadcasting Spectrum

Fairfax supports the paper’s stated objective of deploying the two unallocated channels in the BSB, which have been reserved for datacasting, in order “to provide significant opportunities for new innovative service options of interest and value to consumers.”⁵

Fairfax agrees that the preferred new use for these channels be for “other digital broadcasting and related services.”⁶

As the paper states, “There is a public interest in encouraging the emergence of new and different digital services on this unallocated spectrum that do not mirror existing FTA television services on the available spectrum.”⁷

Development of digital broadcasting services on these channels will provide an early diversity dividend and a motivation to move to digital reception to television viewers and consumers at the start of media deregulation and movement to universal digital broadcast reception. This diversity dividend is an essential element of a balanced and progressive public policy.

⁴ Discussion Paper at 15

⁵ Discussion Paper at 20

⁶ *ibid*

⁷ Discussion paper at 21

In order to ensure that this occurs, the new rules must avoid any repetition of the previous legislation, which so constrained what datacasting could be that it rendered a potential service that was completely nonviable commercially, and which thereby consigned this valuable spectrum to lying fallow to the present day.⁸

Fairfax suggests that the responsible agency, the Australian Communications and Media Authority (ACMA), be empowered to approve all proposed uses for this spectrum for digital services within the confine that such use does not constitute FTA television services. The Discussion Paper proposes that pay television services could be offered.⁹ Legislation should direct the ACMA to consider FTA services as only those which comprehensively duplicate the full range of FTA television services.

The burden of proof should clearly be on any person challenging the proposed use to show that the new service would comprehensively duplicate the full range of FTA services.

This approach would be the strongest signal to the market that there will be full encouragement, subject to the limitation that FTA services are not permitted, to those who seek to use this spectrum for different digital services, and avoids legislative pitfalls that have crippled the use of this spectrum to date.

In addition, these channels should be unencumbered by ownership or influence by existing FTA and pay television providers. Prospects for the development and deployment of innovative digital services on these channels will be maximised by ownership limitations which prevent existing FTA and pay television operators from owning any stake in any of the applicable licenses for this spectrum. This is consistent with the public policy intent of the existing prohibition on FTA broadcasters controlling this spectrum in order to ensure that new digital television services are not constrained by the natural inclination of incumbents to protect their existing franchises. Together with an extension of this prohibition to existing pay TV operators, the emergence of commercially viable services for the public, provided by new digital media players, will be given the best chances for success.

The Minister's paper flags several other regulatory issues – particularly with respect to license allocation issues – that are being assessed by ACMA, and all interested parties will express their views.

Given the capital investment required for the new channels, and the long payback time under the best of circumstances, Fairfax urges that the licenses be issued for an initial 10-year period and with renewals in 5-year increments, without limitation.

⁸ The datacasting restrictions include provisions that, among other things, prevent information programming from having “a significant emphasis on dramatic impact or entertainment”; that limit extracts of television programming to not more than 10 minutes in length; that limit news bulletins to 10 minutes in length; that prohibit news bulletins from having presenters; that limit news bulletins to consisting of a single item of news, including a single item of sporting news; that restrict any financial or business news to a single topic, and that restrict the provision of sport, drama, reality TV, documentary, comedy and children's programming. There are no content restrictions for any broadcast of content that is simply text or still visual images. *See in general* Schedule 6, Datacasting Services, of the Broadcasting Services Act of 1992 (Cth).

⁹ Discussion Paper at 21

Current rules provide 10 years initially and one 5-year renewal. This is too short and will, together with the non-FTA content restrictions, work to inhibit investment in these channels.

New Digital Services on Other Platforms

As noted in the Minister's paper, it is current Government policy that "services that provide television and radio programs over the internet ... are not, in terms of broadcasting laws, considered to be broadcasting services" because of a determination by the former Minister, Senator the Hon Richard Alston that "a 'broadcasting service' does not include a service that makes available television programs or radio programs using the internet, unless it delivers such programs using the BSB of the spectrum."¹⁰

This is an important policy precedent which should not be overturned or undermined. Video and audio content is a significant part of the broadband future. To the extent it provides diversity and competitive tension to incumbent broadcasters and pay television operators, so much the better. Fairfax is a leading internet content provider, and intends to continue substantial growth in content – in all its forms – over the internet.

The Minister's paper argues that, "It is important that unnecessary and burdensome constraints which may stifle growth of new services on new platforms" – such as the internet – "for both new and existing broadcasters are not applied."¹¹ Fairfax agrees.

3. Media Ownership and Control

The Discussion Paper states that the existing cross media laws –

"Increasingly risk inhibiting the growth of new services, limiting media companies from obtaining economies of scale and scope, constraining them in addressing the challenges posed by emerging media forms and foreclosing future developments in the marketplace.

"As a result investment and innovation in Australian media is limited, which thereby risks undermining the BSA's objective in section 3(b) 'to provide a regulatory environment that will facilitate the development of a broadcasting industry ... that is efficient, competitive and responsive to audience needs.' These effects are potentially detrimental for both industry and consumers."¹²

Fairfax strongly supports the media ownership reforms proposed by the Government as being in the public interest.

¹⁰ Discussion Paper at 24, footnote 4.

¹¹ Discussion Paper at 25.

¹² Discussion Paper at 38

Deregulation of the media ownership rules is essential to the fulfilment of the public policy goals that must underpin any regulatory approach for media policy, and the maintenance of a media industry marked by quality as well as diversity.

The media's role in our society is to provide the accurate, timely, high quality, and compelling flow of information and ideas. This is vital to the functioning of our democracy, our society and our market economy. Without an informed public, democracy is compromised. Without full and open access by the markets to business news, markets cannot operate properly and abuses can occur.

These responsibilities are often expressed in terms of the provision of a diversity of views. However, sheer numbers of providers of marginal or indifferent quality will not fulfil the role media should play.

Media deregulation therefore must serve the interest of real diversity, including the enhancement in the quality of media services and content.

What is required is the assurance of an adequate number of competitive participants with the resources and commitment to produce and deliver a diverse range of high quality content.

Media policy therefore needs to balance the number of players with sustainable quality of media services over time.

Current regulation, particularly the limits on cross ownership and foreign ownership, bias policy towards a greater number of local players but ignores the real threat to quality. Since industry participants are restricted from growing by using their franchises and skills in related media areas—e.g. print into TV and/or radio—they can only grow today by either:

- (a) Reducing costs, and limiting choice to consumers. This is an issue confronted perennially by every major media company, print and electronic.
- (b) Diversifying into non-media businesses.
- (c) Subject to the Trade Practices Act constraints, buying more of the same type of media assets, perhaps in a different market (such as expanding in print in other geographic areas). However, both the opportunities and the synergies that may be obtained through this growth strategy are limited.

All these strategies threaten the ability of participants to deliver quality via investing in people, and embarking on new, and often riskier, media initiatives in Australia.

The status quo places the quality of our media at great risk.

We are today in the main well served by high quality media. However, the threat to quality by perpetuating the current regulatory regime is real. The early signs are that

such threats are indeed materialising and once they do, the results cannot be easily reversed. Under the current industry structure, certain television news bulletins in regional and rural Australia will likely never be restored. It took Fairfax several years following its emergence from receivership to begin to have the resources to reinvest in its printing facilities and infrastructure so as to position our papers to deliver better services to readers and advertisers.

Without new future investment – which can only be spurred by the prospects for real growth in the scale and scope of the business – there are limits to the ability of media companies, inside and outside the major metropolitan markets, to grow and to contribute further to high quality media services. Maintaining and building on the quality media businesses already in place by gaining scale is the most attractive option for strategic growth, because it will allow us to leverage the content we produce over multiple platforms. This is the best guarantee of the sustainability of media companies capable of providing quality media services and programming.¹³

The ubiquity and vitality of the internet has rendered the conventional diversity debate obsolete.

In Australia's modern society, the internet has transformed personal and commercial life. The internet provides access to maximum diversity, with barriers to entry virtually zero. Everyone with internet access has access to everything that is available on the net worldwide. Anyone can be a national publisher with global reach.

In 2005, 13.9 million Australians, or 68.2% of the population, have access to the internet – up from 6.6 million users, or 33.8% only 5 years ago.¹⁴ Today, 15 million Australians – or 75% of the population – live within ADSL areas, and nearly 2.8 million Australians have broadband. Over 2 million have ADSL.¹⁵ Broadband grew by 98% last year.¹⁶

In this world, where a dominant proportion of the population has access to all the media that is available in this country or around the world, the cross media rules are

¹³ There is a major player today who has the full benefits of scale and synergies because the cross media rules do not apply: the ABC. In each capital city, the ABC owns and operates a television station and five radio networks, and there are lesser, but similar, cross media operations in regional and rural markets. The viewers and listeners of the ABC benefit enormously from the attributes of scale afforded the public broadcaster, in which its journalists and producers can generate and make available a rich array of content across all its broadcast networks. No one would argue that the diversity in ABC content and the robust content the public receives is diminished by the concentration of ownership that the ABC has over both television and radio outlets in the same market. Were the ABC, consistent with the cross media rules that apply to the rest of the industry, forced to divest its television or radio operations to other public broadcasters, the quality and diversity of ABC programming would, we believe, plummet. It is these same benefits of cross media scale enjoyed by the ABC today – and the diversity in news and information that they promote – that Fairfax seeks in advocating reform of the media ownership laws. The same arguments can also be applied to SBS and its radio and television networks.

¹⁴ source: Nielsen Net Ratings; see <http://www.internetworldstats.com/sp/au.htm> 67.2% of the population (slightly under the percentage with internet access) is over the age of 15.

¹⁵ ACCC media release, "Broadband Connecting Near Three Million," 4 April 2006.

¹⁶ *The Sydney Morning Herald*, 28 March 2006, p 28

irrelevant as the world in which they were invented – when all media was produced by a handful of newspaper and broadcasting companies. That world no longer exists.

For those who argue that any further concentration in media ownership among the established media players is hostile to the public interest because it diminishes diversity, the fact is that the established media players are no longer the gatekeepers of information to the public.

It is this easy ability for access to the great diversity in sources of news and information and entertainment that defines the competitive marketplace for news and information.

This is a highly dynamic and competitive media market. Because of the internet and the structural changes it has wrought in our industry, the media market is now driven by consumer choice, not media company dominance. To constrain Australia's media companies in such an environment is archaic and nonsensical.

A continuation of the status quo condemns media markets outside Sydney and Melbourne to no expansion in diversity.

Under the industry structure that emerges from deregulation – and specifically from the elimination of the cross media rules – a greater degree of media diversity can be extended to all the other States beyond New South Wales and Victoria. For example, Fairfax's metropolitan broadsheet newspapers are virtually irrelevant in every State except NSW and Victoria. Were Fairfax permitted to merge with other media companies with a presence in other States, as well as NSW and Victoria, Fairfax's ability to be a provider of quality media services in those States – adding to the diversity of media services – becomes much more commercially viable. Without deregulation, capital cities that exist with just one major newspaper will not see any significant new entrants into their markets.

The foreign ownership rules must also be reformed.

As proposed in the discussion paper, foreign investment in the media sector should be regulated in exactly the same way as all other foreign investment in Australia: under the Treasurer pursuant to the Foreign Acquisitions and Takeover Act.

Were Parliament to enact a Bill addressing only the foreign ownership rules, there would be one, and only one, clear message to Australian media companies and to the market: "If you want to grow, your best option is to sell yourself to a foreign media conglomerate. You do not have any future as an Australian media company."

Fairfax rejects that message. It is our aspiration to grow as a leading Australian media company. We do not believe that such an approach of providing a direct incentive to take offshore this country's media assets, and the profits they generate, is the appropriate public policy choice.

The ACCC will provide vigorous oversight and guard against anti-competitive developments in the market.

The Discussion Paper states:

“The Government’s preferred option is that the media sector should remain subject to the TPA in its current form and, in particular, to the requirements of Section 50 which prohibits any merger or acquisition that would have the effect of a substantial lessening of competition in a market.”¹⁷

Fairfax supports this option.

The ACCC has made clear that adoption and implementation of media ownership reforms will not constitute deregulation into a laissez-faire vacuum.

In a series of speeches, the Chairman of the Commission has repeatedly stated that the agency will be vigorous in its analysis, review and exercise of its statutory responsibility to protect consumers and guard against anti-competitive mergers and commercial activity. In a speech given to the Australian Communications and Media Authority annual conference last November, Mr Graeme Samuel said:

“Regardless of any changes made to the media ownership laws, Section 50 of the Trade Practices Act – which prevents mergers or changes in ownership between two or more entities which result in a substantial lessening of competition – should continue to prevent undue concentration or accumulation of market power in the media which would result in higher prices or lower quality service for consumers ...

“... In our market analysis we might increasingly be focused on markets such as classified advertising, maybe even markets as small as classified advertising for jobs, for motor vehicles, for real estate and display advertising ...

“... It is our job to ensure that existing players will not be allowed to use their market power to close down new forms of competition, and that, as far as possible, it is left to consumers to decide what form this revolution takes and what services and content they wish to access.”¹⁸

Critics of these reforms have made crude numerical calculations that there will be an inevitable reduction in the number of media players in urban and rural markets to the minima of 5 commercial players in metro markets and 4 in rural markets. Such a view takes no account of the ACCC’s review of any specific merger that is proposed, and how that merger, pursuant to analysis under the Trade Practices Act, would affect advertising markets or the acquisition of premium content, in the affected markets.¹⁹

¹⁷ Discussion Paper at 43.

¹⁸ Graeme Samuel, Chairman, ACCC, speech to Australian Communications and Media Authority’s First Annual Conference, 10 November 2005

¹⁹ In an interview with the AFR, “Mr Samuel indicated that mergers may be ‘a lot more difficult’ when they impinge on content across several markets, with the ACCC ‘keeping in mind’ creeping transactions that aggregate ownership.” *The Australian Financial Review*, 3 October 2005, p 3.

4. Timing

The robust development of digital broadcasting services on the new digital channels will provide an immediate diversity dividend, and this adds to the overall benefits conferred by deregulation. With this in hand, the media ownership reforms should then come into effect at the same time as these new services are authorised. This should be achieved by 2007. Other changes driven by the Digital Action Plan will further add to the gains achieved by deregulation today.

Respectfully submitted on behalf of John Fairfax Holdings Limited:

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FAIRFAX MEDIA CALLS FOR DEFEAT OF THE GOVERNMENT'S MEDIA LEGISLATION

SYDNEY, 13 September, 2006: David Kirk, Chief Executive of Fairfax Media [John Fairfax Holding Limited, ASX: FXJ] today issued the following statement on the Government's proposed media industry legislation:

"The Government's media policy package as it currently stands has become so flawed that it should be defeated by the Senate.

"A fundamental principle of the Government's media policy was to promote diversity and new services to the Australian people. This is an objective we have always supported. We have told the government consistently that our views on the reform package were dependent on the way it promoted diversity.

"The decision to permit Free To Air Television and Foxtel to have the ability to control the new mobile TV license can only increase media concentration, and will compromise the delivery of new digital services.

"Cross media legislation that is already vulnerable to the charge that these reforms will reduce competition should not permit the incumbent video media players to control the only new competitive services that will be made available.

"The fixed digital channel is still so encumbered with content restrictions that we believe there is no commercially viable business model.

"The Government's announcement yesterday therefore destroys all hope of any diversity from these licenses.

"Competition and diversity in media is essential to the robust functioning of a democracy. 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.

"The Australian people deserve better than legislation that rewards entrenched old media interests, that limits competition, and undercuts the delivery of new digital media services.

"This is not about Fairfax having a specifically-advantaged position from the reforms. It is about an even-handed treatment of all media companies so as to promote diversity for the Australian people.

"Our view is that the best alternative to what has been finally produced by the Government is that all restrictions should be removed."

-- ENDS --

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Fairfax Media Briefing Note on Digital Media Services

Fairfax's support for the media deregulation package was premised, as we stated in our submission in April, on the twin pillars of new digital services as well as media ownership reforms. Robust new digital services are essential to counter the potential for consolidation in metro and regional markets and provide a diversity dividend from deregulation.

There were two key issues to be resolved: content and eligibility for the licenses to be awarded.

With regard to the content, the old datacasting regime failed. As Fairfax warned when it was enacted, it was fatally flawed from conception. It exists nowhere else in the world and should be retired as a policy option.

Over the last several weeks, we have done extensive technology reviews and business modeling on the two new digital channels. The best commercially viable use of that spectrum, we believe, is for digital video content to mobile phones and similar devices.

One channel could support up to 30 channels of content, including news, sports, information, music, film and video entertainment, video networking, and other similar services.

Successful trials on DVB-H technology for video to mobile phones are well underway in Europe, and the services are being provided by new video entrants.

These mobile TV and phone services would be genuinely new offerings for consumers and different in scope and scale from current mobile phone applications. A regulatory regime for content premised on protecting FTA or pay TV content is inappropriate and would defeat the viability of these new services.

With regard to who is eligible for these licenses, it is imperative, in our judgment – if in fact packages of attractive, compelling new digital services are to be offered to consumers – that this be done through robust new providers who have no conflict of interest in seeing that these new services succeed. FTA and pay TV incumbents can provide content but must not have the right to operate the license and decide what services are provided.

As a matter of public policy, all the FTAs and all the pay TV licensees should not be eligible for these new digital licenses.

The FTAs are currently barred by existing law from bidding on this spectrum. This should be continued. An FTA should not control a second block of broadcasting spectrum in its market on top of the analogue and digital spectrum they already control as well as multichannelling capacity. This is a bad precedent for television policy and will result in undue concentration.

With regard to Foxtel and its shareholders, Foxtel already controls 100 channels of video. Why should they control 30 more?

If the incumbents acquire these new digital licenses, these new services will be hedged and compromised by the incumbents to protect their program offerings on FTA and pay television, and the new services will never reach their competitive potential.

The program content of the incumbents may well be commissioned by mobile phone TV licensees for the new mobile TV and phone services – but the incumbents should not own, have a stake in or control the licenses.

We believe there will be ample bidders from infrastructure providers, content providers (including potentially Fairfax), other mobile phone companies, and potentially foreign investors, in these new licenses for new digital services.

The most sound public policy, therefore, is that the existing digital broadcasting and cable providers should not control the new spectrum.

Rules providing robust content and strict limitations on eligible bidders for spectrum licensing are essential if the Government's policies are to fulfill their stated objectives of delivering new digital services to consumers.