

Submission to the Senate Environment, Communications, Information Technology and the Arts Committee

Inquiry into Broadcasting Services Amendment (Media Ownership) Bill 2006 & related bills

Jock Given¹

Summary

These bills propose changes to laws about digital TV, media ownership, anti-siphoning rules and the powers of the media and communications regulator. This submission argues that these changes:

- strike an appropriate balance on new powers for ACMA;
- are too conservative on digital TV policy; but
- are too radical on media ownership.

The provisions on ACMA powers are the product of careful, if overdue, analysis of practical experience with media regulation over the last fourteen years.

The changes to digital TV policy remove some of the unhelpful constraints imposed in 1998 and 2000. Unfortunately, the Government's policy about the use of additional spectrum for new digital services, announced but not incorporated into these Bills, would introduce new forms of micro-management of uncertain technology which will continue to prevent the full exploitation of its potential.

The media ownership changes will allow further concentration in the control of major media outlets. No convincing case has been made that the public benefits from these changes will outweigh the public detriment.

The submission makes no comment on the anti-siphoning changes.

¹ Jock Given [jgiven@unimelb.edu.au] is the author of *Turning off the Television: Broadcasting's Uncertain Future* (Sydney: UNSW Press, 2003). He teaches media law at the University of Melbourne, and is completing a doctoral thesis about pioneering wireless entrepreneur Ernest Fisk. He was previously Director of the Communications Law Centre, Policy Advisor at the Australian Film Commission and Director, Broadcasting Legislation and Industry Economics, in the Department of Transport and Communications. He is a member of the Campaign for Australian Media Diversity.

ACMA Powers

The proposed amendments are supported. They offer a range of new powers and processes that should assist ACMA to respond appropriately to breaches of its legislation.

Digital TV

Background

It is now nearly six years since Australian free-to-air television broadcasters commenced digital transmissions in metropolitan markets. At the time, analogue transmissions were expected to close eight years later. A large amount of VHF and UHF spectrum would be freed up for new uses.

The book I published three years ago about this transition concluded:

As revolutions go, broadcasting's digital transformation might be a little slower and a little less socially and economically special than promised, but it's today's revolution, the media tussle of this hour. We need to make everything we can of it, while carefully preparing the ground for the next one.²

Australia has not made the most of digital television and the ground has not been prepared well for future media developments.

Digital terrestrial TV (DTT) has been taken up by Australian households more slowly than pay TV, and much more slowly than DVD, although it is has been cheaper than both. Many standard definition set-top-box models are now available for around \$200 or less,³ securing the viewer ongoing access to all DTT services transmitted in an area. The same amount would buy just over five months of Foxtel's digital basic package (excluding connection fee), or four months of basic-plus-one-entertainment-tier. Yet less households had access to DTT after five years than was the case for pay TV.⁴ Over the five years to 2004, the average price of DVD players fell from \$1005 to \$181. To this

² *Turning off the Television*, p. 281.

³ <<http://www.dba.org.au/index.asp?sectionID=18&so=3&sd=asc>> (21 Sept 2006).

⁴ Digital Broadcasting Australia estimates close to 1.2 million homes had DTT in December 2005 and that take-up was considerably higher in 2005 than in the previous year: <<http://www.dba.org.au/newsletter/IB-FebMar06-full.asp#PRODUCT1>> (21 Sept 2006). In December 2000, five years after Australis pay TV commenced, there were 1.344 million pay TV subscribers: <<http://www.afc.gov.au/gtp/wptvsubsxops.html>> (17 April 2006).

needs to be added the cost of buying or renting discs. More than three-quarters of households had a DVD player by mid-2005.⁵

The transition to DTT is not happening in Australia at a rate that supports the view that underpinned the whole digital TV policy—that terrestrial television’s future was inevitably digital, and Australia’s technology-loving population would buy into it whatever it offered. For most households, existing analogue services have proved satisfactory so far, especially when supplemented by DVDs. Those looking for and able to afford a wider multichannel experience have found it via cable or satellite. Broadband and portable video devices are increasingly providing further options for those seeking more or different video options. Australia’s transition to DTT is revealing its origins as an initiative of incumbent broadcasters, politically shaped to accommodate existing industrial interests. The technology has not proved as exciting as promised in the hands of broadcasters with as much to fear as gain from its adoption. New services and functionality are limited, and remarkably, even the most obvious application, a consolidated electronic program guide, is available in only one city.

There are several problems:

- Broadcasters have not been held accountable for all the promises made to justify the favourable regulatory treatment and subsidies paid to support the transition. ‘Same coverage’ and a certain amount of high definition programming were demanded, monitored, and appear to have been largely delivered. More innovative forms of new service and the maintenance of locally relevant programming in regional areas (where broadcasters received \$260 million in licence fee rebates) were left to the broadcasters themselves.
- The original policy placed too many restrictions on those who got access to spectrum, and did not guarantee the presence on the digital terrestrial platform of anyone with both a genuine interest in its success, and the capacity to pursue it aggressively. A crucial element of the original policy, the allocation of two sets of frequencies in the eight largest markets to operators other than incumbent free-to-air broadcasters, to be used for new digital services, did not occur, leaving the DTT platform entirely in the hands of incumbent free-to-air TV broadcasters.
- The policy has not been modified in response to changing circumstances.
- PBL’s participation in both free-to-air and pay TV has held back the exploitation of DTT as a competitor to multichannel pay TV.

The New Media Framework announced by the Minister in July⁶ and expanded on in September,⁷ proposed some steps, but not enough, to address these problems. It started from the false premise that take-up of digital so far has been ‘primarily a market driven mechanism’. In fact, it has been heavily supported by government money and regulation, though the measures have been poorly targeted. The Digital Action Plan outlined by the

⁵ <<http://www.afc.gov.au/gtp/video.html>> (18 April 2006); Eureka Strategic Research, *Digital Media in Australian Homes* (Sydney: ACMA, November 2005).

⁶ ‘New Media Framework for Australia’, Media Release 068/06, 13 July 2006.

⁷ ‘New Digital Television Services for Australians’, Media Release 086/06, 12 September 2006.

Minister in July but absent from the Bills, contemplates more incentives, apparently based on a new perception, that analogue free-to-air broadcasters are being frog-marched by government towards their digital demise.

The starting point for re-considering policy about digital TV must be the idea that informed the original plan. At their own request, free-to-air TV broadcasters were given a wonderful opportunity to migrate their remarkable business model into the digital future. That business model—delivering audiovisual programs of wide appeal, funded by advertising or government, to large audiences—meant that in the second half of the twentieth century, society’s dominant media form was available free-of-charge at the point of reception. This had some disadvantages, but many positive features. It was appropriate that the purveyors of this product be given a chance to adapt their business to digital transmission, alongside others with an interest in offering different kinds of audiovisual experience. Broadcasters have not made the most of that opportunity, although we are now two-thirds of the way into the original timetable.

The Bill

The Bill removes some of the unhelpful constraints imposed in 1998 and 2000, but only over a period of several years.

Recommendations

Support

- Commercial TV:
 - removal of HD/SD simulcast requirements from 1 January 2007
 - ability to introduce a second SD multichannel from 1 January 2009
 - unrestricted multichannelling from the end of the simulcast period
 - removal of HD quotas from the end of the simulcast period
- ABC and SBS:
 - removal of genre restrictions on multichannelling

Oppose

Ministerial power to prevent the allocation of additional commercial TV licences

There should be no constraints on ACMA’s ability to authorise additional commercial television services. Commercial television faces an increasing range of competitors for its audiences and advertisers. Although additional networks would further fragment the revenues of existing licensees, the range of non-television competitors means it is no longer credible to argue that a fourth network, alone, is so big a threat to the economics of commercial TV that it should be opposed as a matter of public policy. Further, refusing to authorise further networks requires legal definitions of the types of services

that will be rejected. The new policy announced in September not only mirrors the problem under the 1998 and 2000 legislation of defining ‘datacasting’, but expands it by requiring *two* new definitions of non-traditional television services for Channel A and Channel B. This unduly constrains the activities of the new users of digital transmission capacity which the Bills seek to encourage, and which are so important to the attractiveness of DTT to consumers.

The references in the Government’s earlier Discussion Paper to ‘conventional commercial television’ and ‘traditional television services’ ignore the large changes to program formats and schedules throughout the history of television (eg. the growth of live sport; the decline of live entertainment; the growth of infotainment and reality TV and the decline of the miniseries and movies over the last 15-20 years). This terminology encourages a perception of free-to-air television as a heritage media form to be preserved, not an adaptive one whose constant evolution could be stimulated by the possibilities of digital transmission.

It is completely inappropriate to give the Minister specific powers to prevent the allocation by ACMA of new television licences inside and outside the broadcasting services bands. This fundamental change to Australia’s media regulatory processes is justified only by reference to the Government’s 2004 election commitment. The platform said ‘The issuing of commercial television licences has historically been a matter for the government of the day.’⁸ Why a practice put in place shortly after World War 2 should be equally appropriate for the 21st century is not explained. Lessons have been learned about communications regulatory processes since the 1950s. Separating telecommunications regulatory functions and spectrum allocation from both industry participants and central government are among the most important. This reflects the now widely accepted principle of independence in authorising the use of public resources. This is fundamental to the Rule of Law and due process, which underpin investment confidence in a modern economy. Australia has been an active and principled supporter of these ideas in international trade forums. The Bills would disrupt the careful balance of planning and licensing responsibilities without adequate justification. By creating yet another distinction in the way spectrum is allocated for different purposes, it would contradict the convergence of radiocommunications and broadcasting regulation that justified the merger of the broadcasting, radiocommunications and telecommunications regulators.

Australian content and children’s programs

The review of the regulation of multichannels, including the regulation of Australian content and children’s programs, should occur as part of the introduction of these services and not be delayed until closer to digital switchover. These elements are just as important as other ‘usual viewer protections’, as is recognised in the requirement under the Broadcasting Services Act for there to be mandatory standards about them. The Government considered this matter nearly three years ago, when finalising the Australia-United States Free Trade Agreement. Detailed parameters for regulating Australian content on multichannel free-to-air services are included in the text of that agreement.

⁸ *21st Century Broadcasting*, The Howard Government Election 2004 Policy, p. 12.

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

What is not in the Bill

A central part of the reforms announced by the Minister is not addressed in the Bills—the new digital services to be introduced in major markets using two already available sets of frequencies, although the Minister indicated legislation to give effect to this aspect of the policy will be introduced shortly.⁹ The following comments about the Minister’s proposals for these services are included in this submission because they are relevant to the approach taken to what is in the digital TV and media ownership bills.

The Minister’s plan for new digital services would replace some of the existing restrictions applying to those getting access to spectrum for new digital services with new forms of micro-management. These will continue to prevent the full exploration of the potential of uncertain technology. A particular problem is the further inconsistencies the plan would introduce for several aspects of the administration of broadcasting services bands spectrum:

- the types of services permitted on different frequencies (commercial television on existing frequencies; datacasting and narrowcasting on Channel A; ‘a wider range of services’, including mobile TV, on Channel B);
- the reception environment to which they can be directed (in-home for existing frequencies and Channel A; mobile for Channel B); and
- the terms and conditions attaching to the licences, including the ACMA and ministerial powers, and the basis on which fees will be charged.

The different terms and conditions for Channel A and Channel B defy the trend towards convergence which the government elsewhere regards as a defining feature of the emerging media and communications landscape. The designation of Channel A and Channel B services and conditions is reminiscent of the Licences A, B and C employed for early satellite pay TV, a political attempt to decree the shape of the emerging industry which bore little relationship to the structure of the services actually introduced.

This continuing desire to micro-manage spectrum allocations is a poor precedent for the looming liberation of far more frequencies when analogue television is shut down. The timidity of the preferred options about what to do with already vacant spectrum suggests a lack of conviction in the whole rationale for the analogue-digital conversion.

⁹ ‘Government Media Reforms to be introduced to Parliament’, Media Release 088/06, 13 September 2006.

The two sets of frequencies already available should be allocated as soon as practicable in 2007 for new digital services. The government should not attempt to prescribe the forms of service that can or cannot be offered.

The main priorities, however, should be to ensure, first, that entities with a substantial interest in existing television services, including multichannel services, should be excluded from bidding for these frequencies. This would include Foxtel, Austar and Optus, and their major shareholders, notably Telstra, PBL and News. Otherwise there is a real risk that the same players who dominate the now profitable pay TV platforms will also dominate a restructured DTT platform. UK experience shows the advantages for digital TV take-up of having real competition between the cable, satellite and terrestrial platforms. The exclusion of powerful existing players would be consistent with the approach taken to the allocation of frequencies for digital mobile telephony in the late 1990s.¹⁰ Though excluded from bidding directly for the spectrum, these entities would be able to supply channels and other applications to the successful applicant.

Second, once these incumbents have been excluded from bidding, it is reasonable to allow a new entrant to acquire both sets of new frequencies in an area. This would provide one digital-only player with the capacity and incentive to drive significant developments on the DTT platform. The Digital Action Plan proposed by the Minister, developed in conjunction with the ACCC, could consider what, if any, access incumbents who are excluded from bidding for the first two sets of frequencies should have to vacated analogue spectrum once it becomes available.

Third, one of the two new sets of frequencies should be made available subject to the sub-allocation of a portion of the data rate for any community television channel in the area. This would overcome one of the peculiar and unfortunate by-products of the existing digital TV policy, that viewers acquiring digital receivers lose access to the existing analogue-only community channels. The treatment of this long-standing commitment, made as part of the Government's 2000 decisions, contrasts starkly with the the 2004 election commitment to empower the Minister to prevent the allocation of additional commercial TV licences.

Fourth, the two reserved frequencies should be allocated on the same basis and subject to the same terms and conditions as each other. These terms include:

- the duration of the licences, preferably the same as spectrum licences under the Radiocommunications Act;
- the basis on which fees are set, preferably a mix of up-front payment and on-going licence fees that reflect annual earnings from the use of the spectrum;¹¹
- powers for the regulator to set conditions, including roll-out obligations.

¹⁰ See 'Competition and Market Development', in Alasdair Grant (ed) *Australian Telecommunications Regulation: The Communications Law Centre Guide* (Sydney: UNSW Press, 2004), pp. 226-8.

¹¹ See *Turning off the Television*, pp. 245-51.

This will ensure the decisions about Channel A as well as Channel B frequencies are revisited at a point in the future that allows for security of investment over a reasonable period, and prevents the creation of a new population of virtually perpetual spectrum incumbents. It also provides a consistent precedent for the licensing of vacated analogue spectrum

Media ownership

The Broadcasting Services Amendment (Media Ownership) Bill 2006 is opposed.

The Bill would allow further concentration in the control of major media outlets. No convincing case has been made that the public benefits from these changes would outweigh the public detriment. As explained in the attached article,¹² the existing merger laws under the Trade Practices Act are unlikely to prevent a disturbing level of consolidation of major media enterprises in Australia should the Bill pass.

The Bill's 62 pages largely comprise measures designed to ameliorate, or give the appearance of ameliorating, the negative consequences of consolidation:

- the five/four media groups test;
- the requirement for prior approval of regional media consolidations by the ACCC;
- the requirements for disclosure of cross-media relationships;
- the requirements for:
 - minimum levels of material of local significance, including local news, transmitted by regional aggregated commercial television broadcasting licensees; and
 - minimum service standards for local news and information and maintaining at least the existing level of local presence for regional commercial radio licensees, and local content plans.

The *five/four media groups test* would return media ownership regulation in Australia to the simplistic station-count model that applied to commercial television until 1987, when the 'two station rule' was replaced with a limit on the total population reached by commonly-controlled stations. The same 'structural imbalance' would inevitably evolve, with huge groups controlling TV, radio and newspapers counting towards the five/four voices test the same as groups controlling a single radio station in the same geographic market.

The *requirement for prior approval of regional media consolidations by the ACCC* would, in practice, amount to no more than the process of informal clearance that would

¹² Jock Given, 'Media laws: should we rely on the regulators?', *Creative Economy*, 11 September 2006: http://www.creative.org.au/webboard/results.chtml?filename_num=100607 (21 September 2006)

be sought by any party to a merger which might result in a substantial lessening of competition in any metropolitan or non-metropolitan area.

The requirements for disclosure of cross-media relationships are worthwhile, but should be part of a broader obligation on the part of all licensees to disclose relevant information to audiences where it may be relevant to any perceived conflict of interest. In this context, it is notable that, when reviewing its code of practice after the Cash for Comment inquiry, the commercial radio industry amended Code of Practice 2 – News and Current Affairs Programs, as follows:

2.2 In the preparation and presentation of current affairs programs, a licensee must ensure that:

...

(d) viewpoints expressed to the licensee for broadcast are not misrepresented, and material is not presented in a misleading manner by giving wrong or improper emphasis, or by editing out of context, ~~or by withholding relevant available facts.~~

While the regulator imposed new standards in an attempt to ensure audiences were properly informed of commercial arrangements which might be perceived to affect the accuracy and fairness of viewpoints expressed on air, the broader obligation, previously self-imposed by the industry itself, was watered down.

The requirements for local television content on regional stations in the major east coast markets are already provided for in ACMA standards, although the Bill would extend coverage of these requirements to Tasmania.

The requirements for local commercial radio content on regional stations, and the maintenance of local presence, while aimed at laudable goals, involve a troubling level of detailed intervention in the day-to-day operations of commercial broadcasters, including their physical facilities. They are framed negatively, to ‘maintain’ rather than ‘enhance’ or ‘encourage’ localism, and are activated not as part of a general policy applicable in all situations, but only where a trigger event occurs that might give rise to special fears about cutbacks in local content or presence. They clearly demonstrate the Government’s expectations that the practical impact of the Bill will be to reduce local activities and content.

The administrative procedures under which ACMA would administer the five/four media groups test are based on the existing rules allowing temporary breaches of ownership rules, set out in sections 67-69 of the Broadcasting Services Act. These provisions allow media proprietors to hold assets in excess of the ownership limits for up to three years, and do not specifically direct the regulator to have regard to the desirability of ensuring any unacceptable media diversity situation is remedied.

Recommendations

The Bill should be rejected.

If Senators wish to consider amendments to further ameliorate the consolidation likely if the Bill passes, it might wish to consider:

- modifying the five/four media groups test so that radio licences only count as ‘media operations’ [clause 61AA Definitions, or clause 61AC Points] if they operate a talk format. This would mean that an entity controlling only music stations would not count towards the number of media groups in the area;
- a ‘two-out-of-four test’, whereby pay TV was added to the three existing cross-media regulated media forms. This would prevent News Limited and PBL acquiring additional media forms outside those which they are deemed to control under existing laws. News, with substantial interests in newspapers and pay TV, would be unable to move into free-to-air TV. PBL, with substantial interests in free-to-air TV and pay TV, would be unable to move into newspapers. It would not, however, prevent the creation of newspaper/TV combinations in regional areas;
- adding a ‘media specific public interest test’ to the Trade Practices Act, along the lines recommended by the Productivity Commission in its 2000 inquiry into broadcasting legislation.¹³

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¹³ Productivity Commission, *Broadcasting*, report no 11, (Canberra: Productivity Commission, 2000), pp. 358-67.