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

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

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Summary

This brief supplementary submission provides comments on two issues raised in the Committee's public hearing on Friday 29 September:

- ACCC powers and a 'media-specific public interest test', especially the degree of specificity that would be appropriate in such a test.
- Restrictions on the parties to whom Channels A and B can be allocated.

ACCC powers and a 'media-specific public interest test'

- The current structure of media ownership regulation in Australia provides a good mix of clear rules (the cross-media rules), laid down in legislation by the Parliament and administered by ACMA, and more flexible powers over anti-competitive mergers and trade practices, administered by the ACCC.
    - The strength of the cross-media rules, for policy-makers and industry, is that their impact is predictable. Their weakness is that, without amendment, they do not apply to emerging bottlenecks in the media and communications business. These include content, non-BSB spectrum, conditional access and subscriber management systems, electronic

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program guides etc. Control of these bottlenecks is already critical to the level of competition and diversity in the media landscape. Some new rules and powers in these areas were added to the Broadcasting Services Act (BSA) with the original digital TV amendments.

  - The strength of the Trade Practices Act (TPA) rules and ACCC powers is their ability to address these emerging bottlenecks. Their first weakness is their unpredictability. Relying on the flexible TPA/ACCC powers over anti-competitive mergers and trade practices, as a major filter for the raft of media mergers likely to flow from the removal of cross-media laws, represents a sweeping delegation of Parliamentary authority whose practical outcome is highly uncertain. Their second weakness is their likely softness when applied to broad markets for 'ideas' or 'opinion' or 'viewpoints'. They are unlikely to be sufficient to prevent certain mergers which are plainly contrary to the public interest.

- In my view, any new set of media rules needs to retain ***both*** these elements—the certainty of cross-media-like rules, so the Parliament sets clear parameters for any reshaping of the media industry, and the flexibility of TPA-style rules and powers, to deal with new competitive bottlenecks in a timely way.

- My earlier submission argued that the current impact of the cross-media rules in restricting the activities of incumbent media organisations is exaggerated. I think the cross-media rules are now driving diversity and innovation, not constraining them. Franco Papandrea's submission similarly argues 'There is no credible evidence that the current rules impose significant economic costs'. While not supporting change to these rules, I would argue strongly that if there are changes, any new rules must at least have as their primary element a similarly predictable impact on the most widely-used media outlets. [eg. '2 out of 3' or '2 out of 4']. ***Any new test must be simple, though not simplistic.***

  - The 5/4 media groups test is simplistic, returning media ownership regulation to the discredited 'headcount' approach of the 'two station rule' that preceded the cross-media rules, and resulted in major structural imbalance in the local media scene. A proprietor controlling TV stations in Mt Isa and Mildura was as constrained as one controlling stations in Sydney and Melbourne. That is exactly the situation that is likely to re-emerge overnight, as a very small number of cross-media conglomerates are created before the 5/4 limit cuts in.

- The softness of existing TPA/ACCC rules and powers when applied to broad markets for 'ideas' or 'opinion' or 'viewpoints' needs to be addressed by the introduction of a tougher test for anti-competitive mergers and trade practices in media, communications and cultural industries—a 'media-specific public interest test', of the kind discussed by the Productivity Commission in its 2000 report on broadcasting [see pages 358-66]. Details could include:

- A new object could be introduced into the TPA, with a corresponding object introduced into the BSA: *to encourage diversity in control of sources of information, entertainment, ideas and expression.*
- All media acquisitions and mergers involving the three media currently regulated under cross-media rules, or other media, communications and cultural enterprises specified in guidelines to be determined by the ACCC and ACMA, or where the total assets are more than a certain amount, would have to be notified in advance to the ACCC and ACMA.
- Where the ACCC and ACMA conclude that any notified acquisition or merger is likely to lead to a substantial lessening of diversity in control of sources of information, entertainment, ideas and expression in an 'area', it could only be approved if the ACCC, following a public inquiry, report and recommendation by ACMA, concluded that the public benefits of the transaction outweighed its costs. Public benefits would be assessed by the two regulators in accordance with the objects of their Acts.
- 'Areas', like the geographical dimension of 'markets' under the TPA, could be local, sub-regional, regional, sub-national, national etc.

Restrictions on the parties to whom Channels A and B can be allocated

Instead of the proposed restrictions on control of Channels A and B, the Committee may wish to consider prohibiting joint control of the transmission and content licences for these frequencies. This would need to extend to preventing joint control by a party or its associates (eg. shareholders).

Separation of licences granting access to spectrum from licences granting permission to offer content services was recommended by the Productivity Commission in its 2000 report on broadcasting [see p. 193]. It was implemented by the government in the legislation covering datacasting. These datacasting provisions need to be amended to adopt the new policy on Channels A and B.

Fairfax and others have expressed concerns about the allocation of carriage/transmission and content licences for Channel B to incumbent free-to-air networks. Hutchison has expressed concerns about the allocation of licences to telecommunications carriers and carriage service providers as well as free-to-air and multichannel pay TV providers. These parties are worried that allocating the single set of frequencies to be made available for mobile TV to an incumbent telco, broadcaster or pay TV operator would give a unique opportunity to that incumbent to integrate and cross-promote existing and new services in potentially anti-competitive ways.

But their recommended response to the problem is to impose possibly capricious restrictions on who can bid for the new frequencies. This approach may serve immediate

commercial interests, but is less useful as a precedent for long-term planning of the allocation of still more spectrum, as it becomes available with digital switchover.

It would be better to try to put in place a more durable regulatory approach which will still be relevant to the competitive challenges likely to arise when allocating further spectrum in the future.

In practical terms, prohibiting joint control of the transmission and content licences would mean an existing supplier of content, such as:

- Foxtel and its shareholders, Telstra, News and PBL/9;
- the other free-to-air networks, 7 and 10 and the ABC and SBS;

could not acquire the transmission licences for either Channel A or B if they also wanted to be able to supply content to them.

Separating the licences granting access to spectrum from licences granting permission to offer particular content services, and preventing joint control of them by a party and/or its associates, is consistent with the ACCC's long-expressed view that Telstra should be forced to divest its shareholding in Foxtel. It would apply the same logic to the emerging market for digital terrestrial services.

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