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

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

by

AAPT Ltd
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1. Introduction

This submission is made by AAPT Ltd to the Senate Environment, Communications, Information Technology and the Arts Committee inquiry into the Broadcasting Services Amendment (Media Ownership) Bill 2006 and related Bills.

AAPT is making a very brief submission based upon our recent experience of legislative amendments. We wish to draw attention to aspects of the process of regulation as evidenced in these Bills and raise our concerns over these processes.

The matters we wish to address are;

1. The process of legislative review
2. The role of the ACMA
3. The role of the ACCC

2. The process of legislative review

The bills are admittedly not addressing a new area of public policy. They are the culmination of a number of years of discussion on the future of digital terrestrial television, the use of broadcast spectrum and the continued application of specific media ownership laws. In March this year Minister Coonan issued a discussion paper *Meeting the digital challenge: reforming Australia 's media in the digital age* canvassing many of the matters and received 173 submissions.[1]

The Minister announced the introduction of the legislation on 13 September.[2] In her release the Minister stated "I welcome the opportunity for all issues relating to these important reforms to be considered by the Senate Committee and I encourage all interested stakeholders to make submissions as appropriate." However, if we consider the timetable for that review by the Senate committee we note the legislation was introduced on 13 September with submissions requested by the committee by 25 September. That is, 12 days to consider the detail of 163 pages of legislation, and prepare considered responses. The committee itself has been allowed two days to read those submissions prior to two days of hearing evidence. At the conclusion of that the committee has six days to generate a report.

Now such legislative haste could be understood were this a matter that was not contentious or about which there was a significant degree of urgency. Neither seems to apply in these circumstances. It seems instead to be an approach taken to legislation merely because the Government can. In this regard it is reminiscent of the Telstra privatisation bills considered by the Committee.

In his submission to the Government's regulation taskforce Senator Ronaldson proposed increased quorum requirements for debate of legislation "so that Parliament cannot pass

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[1] Discussion paper and ssubmissions available at http://www.dcita.gov.au/broad/media_reform_options
[2] Media release available at http://www.minister.dcita.gov.au/media/media_releases/government_media_reforms_to_be_introduced_to_parliament

legislation by auto-pilot".[3] While that may be a beneficial change, it appears that the current legislative process designed to ensure bills don't get passed on "auto-pilot" is the Senate Committee process.

AAPT acknowledges that the matters of substance have already been widely debated and that the Minister did consult widely. However, the benefits of that consultation are not available to the Committee or the Parliament. The Minister's discussion paper received a great deal of interest as noted above, but the Minister has not divulged how she considered the raft of submissions and what basis was used to decide in favour of one argument over another.

Consequently, the Committee is feasibly being asked to perform the same task as the Minister's department, without the real benefit of any detail of that consideration and on a significantly shortened timescale.

Members of the Committee should consider the question of whether meeting the timetable proposed by the Government is at all appropriate, and whether their first action might not be to request an extension of time from the Senate. Failing the granting of an extension of time the Committee should recommend that the Bills not be passed.

3. The role of the ACMA

The References Committee reported in March 2005 on its inquiry into the provisions of the Australian Communications and Media Authority Bill 2004 and related bills and matters. The report was titled *A lost opportunity?*[4] The title drew upon the fact that the creation of the ACMA had not addressed any of the underlying legislation and so a converged regulator was being constructed without creating converged regulation.

The Committee's first recommendation was amendment of the Bill to require the ACMA to conduct a review of operation within eighteen months and provide the consequences of that review to the Minister within two months.

This was a recommendation supported in principle in the Government members' dissenting report, though amendment of the Bill was not supported.

AAPT's submission at the time was that it is not appropriate to ask the regulator to review policy, but that the review should be conducted by the Department.

It is disappointing to note that since that time we have had a package of Bills relating to Telstra's ownership and now a package of Bills relating to Media and Broadcasting regulation, but that the review agreed upon by all Committee members has not been conducted by either the Department nor the ACMA.

In relation to the specifics of the current bills, the Broadcasting Legislation Amendment (Digital Television) Bill has the effect of transferring the power to allocate new commercial

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[3] *Fighting Australia's Over-Regulation* available at http://www.regulationtaskforce.gov.au/submissions/sub001.pdf

[4] See the report at http://www.aph.gov.au/senate/committee/ecita_ctte/acma/report/index.htm

broadcasting licences from the regulator to the Minister.[5] This decision reflects in part a lack of clarity around the role of "independent regulators".

The Uhrig review of statutory authorities concluded that only genuine trading entities should operate through appointed Boards and that all others should, to all relevant consideration, operate like a Department of State. This is reasonable in areas where the authorities' role is primarily administrative; however, there are a number of authorities whose responsibility is described to be a regulator. Such authorities, like the ACMA and the ACCC, have the power to issue quite a variety of subordinate legislative instruments.

The theory of the creation of agencies with the title of "regulator" separate from Departments is that they are supposed to be operating on the basis of instruction from the Parliament in the exercise of their delegated powers, which is distinct from the Department which is there to advise the Minister and act under the Minister's instruction.

If this distinction is eroded, administrative efficiency would be created by re-amalgamating the authorities with the Departments.

One way the distinction can be eroded is the continual transfer of responsibility from the authority to the Minister. There appears to be no considered reason for the transfer of this power in this case, other than the desire to hold decision making in control of Executive government.

4. The role of the ACCC

The policy imperative around the proposed changes to the media ownership laws is a perception that diversity remains a desirable outcome and that new media forms promote diversity and that changes to ownership restrictions will create greater efficiencies for old media forms to compete with the new.

The preservation of diversity rests on the voices test to be administered by the ACMA and the existing merger laws to be administered by the ACCC. The ACCC has published a guide outlining how it will interpret the merger rules.[6] However, it is important to recognise that in general the ACCC's powers in relation to mergers really only relate to the ability to launch prosecutions or to accept undertakings in cases where the parties recognise that a successful prosecution may be launched in the absence of undertakings.

The legislative package includes a new Subdivision F in Division 5A that requires an ACCC clearance prior to certain transactions in regional areas. The ACCC clearance is a statement that the ACCC is of the opinion that the transaction would not constitute a contravention of section 50 of the Trade Practices Act.

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[5] See also the Minister's Media Release http://www.minister.dcita.gov.au/media/media_releases/government_media_reforms_to_be_introduced_to_parliament

[6] ACCC Guide available at http://www.accc.gov.au/content/index.phtml/itemId/758218/

However, it is doubtful that the ACCC would be truly a deliberative body in this area. Were the ACCC to refuse to grant such an opinion the matter would presumably be considered by the Federal Court. The Federal Court would interpret section 50 in accordance with the existing precedents. Those precedents give increasingly little grounds to believe that the guidelines issued by the ACCC would be determinative in the matter.

AAPT would caution the Committee against relying at all on suggestions that might be made about how the ACCC guidelines would result in certain mergers being prevented in regional areas. The notional requirement does nothing to strengthen the ACCC's interpretation over that of the Courts. Were the Government confidant in the Court's interpretation the requirement would not have been added to the Bill.

5. Conclusion

AAPT recommends the Committee defer consideration of the Bill. In addition AAPT suggests the Committee not finalise the consideration of the Bill until the Government commences a full inquiry of the communications legislation as recommended by the Committee in March 2005.