

Submission to the Standing Committee on the Environment, Communications, Information Technology and the Arts

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



COMMUNICATIONS LAW CENTRE

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Introduction

The Communications Law Centre (CLC) is grateful for the opportunity to comment on *Inquiry into Broadcasting Services Amendment (Media Ownership) Bill 2006 and related bills*. Because of the extremely short timeframe we have had to consider the legislation, our commentary applies predominately to the Media Ownership Bill and references to “the Bill” are to the Media Ownership Bill. We consider the Broadcasting Legislation Amendment (Digital Television) Bill 2006 in passing.

The CLC is an independent, non-profit, public interest organization specializing in media, communications and online law and policy. We believe the public interest in Australian media is served by a broad range of high quality services, competitive and diversely controlled, relevant and accountable to Australians, widely available and at affordable prices. As such, our starting point in reviewing the Bill has been: what will consumers gain?

The answer, in our view, is that consumers gain little. The Bill as it stands will not create a media environment that meets our definition of public interest. Its intent and potential effect appears to be to increase media ownership concentration rather than facilitate the entry of new players into the market. Significantly, we are yet to hear a convincing public interest case for the changes contained in the Bill. Similarly there has been no public examination of the benefit of foreign investment. In general, Australians do not appear to believe that the media is too tightly regulated. In fact, according to the Australian Social Attitudes Report, 81% of Australians believe media ownership in Australia is already too concentrated among a few rich families.¹

Alongside our criticisms of the proposed changes to cross-media ownership restrictions, there are elements of the Digital Television Bill that the CLC supports. We are pleased that public broadcasters will have restrictions lifted on their current digital channels and that the networks will be permitted to multi-channel in 2009. Technological changes that affect the provision and consumption of media warrant regulatory reform; the CLC does not support preserving the status quo indefinitely. But in a rapidly changing technological environment, there is a strong argument that reform should be staged. In his address to the National Press Club earlier this year, Graeme Samuels, chairman of the ACCC, stated:²

Change will keep on coming, blurring those traditional boundaries. What that means for the ACCC when looking at possible media mergers, is that the control of content is becoming more important than the control of the many ways it is delivered to consumers.

¹ Gibson, Wilson, Meagher, Denemar and Western, *Australian Social Attitudes: The First Report* (Sydney: UNSW Press, 2005), pp. 232-3.

² Graeme Samuel, National Press Club Address, 21 June 2006.

The CLC agrees that control of content is incredibly important and arguably the most important aspect of the regulatory debate for consumers. In tinkering with the laws that control ownership of delivery mechanisms of media content, it has always been rightly assumed that both access to and quality of content will be affected. In fact media policy has historically used control of ownership of the delivery mechanisms to attempt to ensure that Australians have access to a range of quality media content. The link between diversity of control and content has previously been discussed by the CLC³. Focusing on the potential effects of regulatory change on media content not only recognizes that *change will keep coming* but also keeps the public in the picture.

The “5/4 voices test” is a rigid and blunt framework. Imposing it on top of a rapidly changing environment does not adequately recognize the importance of content, the key issue in protecting the interests of media consuming Australians. The Bill appears to serve only to strengthen the domination of the current players rather than facilitate the entry of new players and the diversity we should rightfully expect. We recommend that the Government waits until the digital roll-out takes place before reforming ownership laws.

Cross media ownership

THE 5/4 VOICES TEST AND ALTERNATIVES

The Bill proposes that the Australian Communications and Media Authority (ACMA) use the “5/4 voices test” to ensure media diversity. That is, there must be a minimum of five media players in metropolitan areas and four in regional areas.

The explanatory memorandum to the Bill states:

The objective of the Bill is to remove impediments to greater efficiency, competitiveness and responsiveness in the media sector ...

The “5/4 voices test” will potentially at least halve the number of media owners in all metropolitan markets except Perth and Adelaide⁴. In fact, it will potentially decrease the number of media players in most metropolitan and regional areas. This may increase corporate efficiency, but it will decrease competitiveness in most markets.

In our view, the “5/4 voices test” will be completely ineffective as a safeguard for diversity and will allow for a greater concentration of ownership than currently exists.

³ Raiche H, *Competition, Diversity and Ownership in Broadcasting Regulation by the Australian Broadcasting Authority and the Australian competition and Consumer Commission* Communications Law Centre, 1997 pp7-18.

⁴ For more discussion, see Dwyer T, Wilding D, Wilson H, Curtis S, *Content, Consolidation and Clout: How will regional Australia be affected by media ownership changes?* Melbourne: Communications Law Centre, 2006, pp39-43.

The test is a blunt instrument that does not account for the media's unique role as a tool for democratic engagement, or the influence that it exerts over the population.

Criticisms of the CLC's view

In our submission to the *Meeting the Digital Challenge* discussion paper, we stated Australia needs a more sophisticated test to measure media diversity, one that measures the influence, impact and reach of different media organization, one that distinguishes between a music station with little local news and the local newspaper, one that considers the value that Australians place on different media mastheads. The Government has, in its explanatory memorandum to the Bill, explained why it disagrees with our view:⁵

The fundamental problem of a qualitative mechanism such as a media-specific public interest relates to its subjectivity. As a number of industry participants, and the PC itself acknowledged, there are no generally accepted methods for measuring diversity or plurality, or related parameters such as media concentration or share of voice, across different media markets. As a result, the criteria that would be used in assessing the public interest impact of a media merger would inevitably require a high degree of subjective judgement by a single individual or group of individuals (the regulator, the relevant Minister, or through the relevant legal framework, the judiciary).

We appreciate the consideration given to our suggestion, and believe the Government is right to be wary of subjectivity. However, for the Bill to achieve the critical objective of maintaining diversity of ownership of influential media⁶ it cannot remove existing regulation and impose a flawed test simply because another alternative will be difficult to construct. The importance of a reliable and diverse media to the Australian democracy and to the quality of life for Australians requires greater effort on the part of the Government to evidence the benefits to consumers and to protect the interests of the public when reconstructing the media regulatory framework.

There is no evidence that the changes proposed in the Bill will do anything to assist in improving Australians experience of media. What little research has been done on the effect of cross media ownership controls indicates that there is a severe lack of useful monitoring data.⁷

There are several problems with the Government's argument. In the first instance, it is simplistic to suggest that the "5/4 voices test" is neatly objective while a qualitative test would be wholly subjective. If, as the Government states, a "*comprehensive definition*" of

⁵ The Parliament of the Commonwealth of Australia, Broadcasting Services Amendment (Media Ownership) Bill 2006, Explanatory Memorandum, p.21 at 36.

⁶ Ibid p.13 at 47.

⁷ Collingwood P, *Commercial Radio since the Cross- Media Revolution*, Communications Law Centre (1997), p.8-9.

media diversity “remains problematic”, then from where did the Government pluck the numbers five and four? After pointing out that “In Sydney and Melbourne, due to the operation of the radio licence limits, there must be a minimum of six media groups,” the Government argues the case for five voices in metropolitan markets thus:

Establishing a minimum of six groups would in effect place the other capitals on the same footing as Sydney and Melbourne, despite the much larger size of the latter two markets. Due to the common ownership of metropolitan assets, a minimum of six may prevent mergers in Sydney and Melbourne markets without divestiture of major assets to ensure that merged entities comply with a minimum requirement of six groups in markets such as Adelaide or Perth. Establishing a lower minimum, for example of four media groups, would in the Government's view undermine diversity of ownership in the largest and most important media markets.

In our view, this idea rests on an arbitrary and entirely subjective notion of diversity. It also denies the other capitals sufficient diversity because of limits applicable only to Sydney and Melbourne markets. The policy needs to be further explained before it becomes legislation. Until the Government defines the level of “diversity” that the limit of five is protecting, the “5/4 voices test” remains just as subjective as any test that attempts to measure influence.

The US system

To argue its case that a potential test of media influence would fail, the Government cites the criticism leveled at the US Federal Communications Commission over its “diversity index”:⁸

For example, the “diversity index” used by the Federal Communications Commission in the US as an analytical tool in the early 2000s was strongly criticized as not giving proper weighting to the relative influence of different media – again reflecting the need for subjective judgments.

In many ways, this criticism, which came from both public interest groups and media organizations, was well placed. However, other elements of the US system deliver sensitive and objective ways of determining whether mergers should be permitted. For instance ownership of daily English-language newspapers are considered relevant to cross ownership in the same market of either commercial television or radio stations. Additionally, where the Government's system delivers a blanket threshold for all regional areas – so Cairns, with seven existing voices, will have the same threshold as Alice Springs, with three existing voices – the US system looks at the existing number

⁸ The Parliament of the Commonwealth of Australia, Broadcasting Services Amendment (Media Ownership) Bill 2006, Explanatory Memorandum, p.21 at 36.

of voices in a market and permits mergers according to the change that will take place in that specific market.

Building a new test or modifying the 5/4 voices test

This overhaul of ownership regulation is the perfect opportunity for Australia to build its own test that can accurately and precisely measure influence to ensure diversity and create a best practice model. Media influence is subjective, whatever test we apply to it. However, there are ways to measure the elements that create media influence.

Because evidence of the benefit for Australians does not yet exist, the CLC advocates maintaining existing cross-ownership laws – in the meantime we urge the government to consider strengthening the 5/4 voices test.

There are several ways this could occur, but they all require an unambiguous definition of “voice” that takes into account reach and influence. Some preliminary suggestions include:

- considering the content of radio stations and, for instance, recognizing that “talk” radio has greater influence and should not be seen as an equivalent or alternative “voice” to stations that predominantly play music;
- requiring two radio licences to be held for a point to be awarded;
- giving greater prominence to newspapers – incorporating in the rules on cross ownership of television as well as for commercial radio;
- incorporating the “two out of three” rule.

Further, in developing a test that would enable the regulator to examine the nature and effect of media mergers, a preliminary scoping of the whole market would be necessary to identify the principal sources of local news, other forms of news and local information, and local advertising. The working assumption being that, where there is a small number of genuine sources of such content, mergers between those sources would be opposed.

Our discussions⁹ with residents of four regional communities suggests the following facts are relevant to determining whether the public interest is served by mergers:

- commitments to maintain or create newsrooms with resident journalists;
- the extent to which cross promotion of merged media outlets might harm competition within the market;
- the availability of equivalent alternative sources of local advertising;

⁹ As reported in *Content Consolidation and Clout*.

- other business interests of the company and its connections with other local power elites that might affect editorial practices.

Sources of information

Source of information is very important in terms of quality of content, and not answered by turning to an alternative delivery mechanism. The Bill does not demonstrate adequate consideration of this key policy target. Not enough regulatory sanction exists to ensure that Australians will have news and information available from a variety of sources. Not enough evidence exists that the availability of alternative delivery mechanisms equates to reliable and diverse 'sources' of quality information. The regulator itself identified that continuing study is needed in this area, to be able to assess effectiveness of new strategies in achieving desired social or cultural outcomes¹⁰. The government has an obligation to ensure that these studies are undertaken before implementing regulatory reform. The CLC recommends the staging of reform until the research has been undertaken.

The importance of the local newspaper as a source of news in regional areas has been repeatedly demonstrated in research¹¹. In our view this justifies raising the level of importance that newspapers have in the cross ownership restrictions. Until evidence has been gathered by the Government that Australians have genuine access to reliable and diverse alternative sources of media, recognition of the importance of reputable newspapers that conduct investigative reporting could be done by:

- regulating cross ownership of newspapers in conjunction with commercial television as well as with commercial radio;
- extension of cross media rules to include weekly print publications;
- imposing legislative conditions on broadcasting licensees in relation to both the source and quality of content and specific statutory requirements for ACMA to monitor and enforce the content conditions;
- including a two out of three test before allowing mergers (i.e. restricting cross media ownership to either commercial TV and newspaper or commercial radio and newspaper within a licence area).

In summary, the CLC is of the view that, as it stands, the Bill will allow the largest existing players to consolidate to an extent that could seriously erode the capacity of any new entrants to compete when analogue services are switched off and the moratorium on new commercial licences expires. The consolidation will mean media ownership concentration by large organizations; group-wise efficiencies will mean

¹⁰ Goldsmith B, Thomas J, O'Regan T, Cunningham S, *The Future for Local Content? Options for Emerging Technologies* (2001), Australian Broadcasting Authority.

¹¹ Collingwood P, *Commercial Radio since the Cross-Media Revolution* (1997), Communications Law Centre, p.21.

aggregation of content and loss of employment for journalists; and Australians will end up with less local content and less media diversity.

THE EFFECT ON REGIONAL AUSTRALIA

As an overriding principle in regard to regional and rural broadcast areas, I don't believe residents of such areas should have to tolerate a second-rate engagement with the Fourth Estate.

People in country areas should not be the playthings of networks. They, like all other Australians, should have media that reflects the particular character and culture, community life and expectations of their own communities.

Email from Paul Neville MP to ABC TV's *Media Watch*¹²

The CLC appreciates the consideration the Government has given to *Content, Consolidation and Clout*, the in-depth study by the CLC on the effect of potential media reform on regional Australia. The report is based on research conducted in mid-2005, anticipating the DCITA's proposed legislative changes. It was extensively revised to match the actual proposals after DCITA's discussion paper, *Meeting the Digital Challenge*, was released. The CLC examined four regional locations – Wollongong, Townsville, Launceston and Toowoomba.

The report found that regional Australians are extremely concerned about their local media:¹³

If there is an indisputable finding from our research, it is that local print media are seen as democratic institutions of paramount importance in sustaining local public spheres. Citizens now feel that their newspapers are letting them down. Corporate pressures are prominent among the reasons for this. If their ownership becomes even more driven by corporate values, as is to be expected from any deregulation, this will further erode these public spheres.

Our research also found that regional Australians regarded their media as a local public sphere, and “consistently pointed to the lack of competition as a reason for poor quality.”¹⁴ Regional Australians are particularly fearful of any reduction in the sources of local content. Their voices should not be ignored.

¹² Available at <<http://www.abc.net.au/mediawatch/transcripts/ep33neville.pdf>>

¹³ Dwyer T, Wilding D, Wilson H, Curtis S. *Content, Consolidation and Clout: How will regional Australia be affected by media ownership changes?* Melbourne: Communications Law Centre, 2006, p.xxi.

¹⁴ Ibid, p xxii.

The “5/4 voices test” would allow significant consolidation in all four of the locations studied. In Toowoomba, the number of separate players could be reduced from eight to four; in Wollongong and Townsville, the number of separate players could be reduced from six to four; while in Launceston the reduction could be from five to four.

Further, the “5/4 voices test” will not recognise the difference between media outlets. As the authors of *Content, Consolidation and Clout* demonstrate, some potential mergers would have little impact on local media. But others would profoundly disrupt the news culture of particular communities. As we stated in our submission on the *Meeting the Digital Challenge* discussion paper, we need to determine *the mergers that matter*. Some specific examples of mergers that would damage the public sphere are:

- in Wollongong, the *Illawarra Mercury* and WIN Television;
- in Toowoomba, *The Chronicle* and WIN or 4GR;
- in Launceston, *The Examiner* and 7LA or WIN or Southern Cross;
- in Townsville, the *Bulletin* and 4TO.

In regional areas, the inability of the “5/4 voices test” inability to take media influence and reach into account, when determining appropriate mergers, could have grave consequences for local markets. These consequences are difficult to predict. For that reason, the CLC urges the Government to conduct its own research into the impact of the legislative changes on regional markets. Further investigation into regional markets could include such aspects as the application of competition law to media mergers.

Case study: Canberra

Canberra (along with Hobart and Darwin) has regional status for the purposes of the Bill. Unsurprisingly, the Canberra Times were interested in exploring what this regional status meant for the residents of Canberra. Hypothetically, Canberra Times merging with Southern Cross TV (Channel Ten) would potentially be one point under item 5; Capital Radio merging with Austereo would potentially be one point; and Prime TV (Channel 7) and WIN (Channel 9) would potentially count for a point each. The Bill does not recognize that by having the local paper potentially share content (due to ownership by the commercial television broadcaster), the quality and diversity of news coverage is potentially diminished in the region. The Bill does not recognize the importance of an independent source of news in a print format.

Regional radio and Media Watch

HOW TO DISSOLVE A COMMUNITY IN 3 EASY STEPS:

Take away local voices. Take away local content and replace it with Sydney Centric rubbish ... this is all over Australia now, every small town/regional city suffers from this plague ... No local content ... because there is no-one AT your local radio station, just a satellite uplink with a voice interstate.

Email from Brad Shannon, former commercial radio manager in Katanning in Western Australia, to ABC TV's *Media Watch*¹⁵

On Monday 25 September 2006, ABC TV's *Media Watch* examined several different regional markets. It found that some regional markets are already ill-served by their "local" media. Macquarie Regional Radioworks listeners in regional areas in Western Australian and Tasmania were listening to news generated in the Gold Coast in Queensland. The bulletins do not provide local content for those areas.

In his email to *Media Watch*, Paul Neville MP suggested a formula to ensure adequate local content on regional radio stations.

I think 12.5 minutes of local news PER DAY, as an absolute minimum, is adequate for regional radio stations. But it is to be hoped that stations would do more.

The cost of a part time journalist for, say, 27.5 hours per week - from 5.30am to 11am daily for example - would allow 5 x 2.5 minute daily bulletins, or 6 x 2 minute daily bulletins (exclusive of weather reports). This should not impose too onerous a burden on any licensee, except perhaps for the very smallest in the 2 and 3 voice markets which could be granted Ministerial exemption from this requirement.

While the details of Mr Neville's formula could clearly be negotiated, we agree with the premise that specific definitions of local content should be included in the legislation rather than left up to the regulators. When announcing the reforms the Hon. Helen Coonan stated that "... ACMA will oversee the diversity and local content safeguards. The upshot of these safeguards is that there would be limited scope for mergers in regional markets and they would need to be assessed on a case by case basis".¹⁶ However, recognition of the need for this case-by-case assessment does not appear in the Bill. The Bill needs to include definitions of local and diversity.

The case for change

In our view, the case for changing the cross media ownership restrictions is unconvincing, while the risks are high. Those risks are not confined to a decrease in media diversity, but also, as the Media, Entertainment and Arts Alliance has pointed out, a potential loss of jobs in the media industry.¹⁷ The loss of jobs in the media

¹⁵ Available at <<http://www.abc.net.au/mediawatch/transcripts/s1748438.htm>>.

¹⁶ Senator the Hon. Helen Coonan, Minister for Communications, Information Technology and the Arts, *Media: Unpacking the Package*, 4 August 2006, Sydney, p.8.

¹⁷ *The media muzzled: Australia's 2006 press freedom report*, Media, Entertainment and Arts Alliance, p.19.

industry was demonstrated to have occurred when de-regulation occurred in commercial radio.¹⁸

THE ROLE OF THE ACCC

As part of our membership of the Campaign for Media Diversity, the CLC has consulted with senior members of the ACCC. We are satisfied that the ACCC cannot adequately protect media diversity under the *Trade Practices Act*. The Government must include a media-specific public interest test to guide the ACCC in making decisions about potential mergers.

A new role for the ACCC in media regulation is a clear consequence of the Government's proposals. If the ACCC is unable to adequately test the effects of a proposed merger on a local market for news – as distinct from information or data – then there must be genuine consideration of the kind of test the Productivity Commission described, a media-specific public interest test. This test must be capable of recognizing the difference between a story on forests written by a Launceston journalist and story on forests filed by Reuters.

THE ROLE OF ACMA

ACMA's role is different to that of the ACCC. Historically, ACMA has been required to ensure diversity of content and provide for general and specific audience needs and news and information programs which reflect a broad range of ideas, opinions and viewpoints. It is appropriate that the Bill give strong clear statutory guidance to ACMA on ensuring that those aims are achieved.

Regulating in the public interest

The opportunity presented by the review of media policy should not be squandered. If cross media rules are to be abandoned and foreign ownership restrictions are to be lifted, safeguards are needed to ensure the quality of our media. These safeguards must take account of the public interest as well as corporate interests.

No evidence exists that the Bill is necessary to enable the entry of new players to the media market. On the other hand, some evidence does exist that regulation enhances

¹⁸ Collingwood P, *Commercial Radio since the Cross-Media Revolution* (1997), Communications Law Centre, p.29.

diversity and quality and still enables the entry of new players¹⁹ and further reliable research is clearly needed as to the effects of media regulation. Ensuring Australians have diverse and high quality media content (accessible from a variety of delivery mechanisms) requires greater effort from policy-makers. It is a question for now, not for later, and it is not answered by further deregulation alone. Counting the owners of some media platforms cannot be the only tool to protect diversity; the regulator must also be aware which companies are dominating which spheres of influence.

In our research project, *Content, Consolidation and Clout*, we compared our media landscape with other jurisdictions, including Canada. Although the importance which the Canadians place on foreign ownership does not have equal application in Australia, we have observed that there is nevertheless a clear agenda on the part of the Canadian Government to regulate in the public interest. There is a *rationale* for the Canadian legislation that has its origins in the cultural interests of the community. That this policy benefits certain Canadian companies is a by-product of media policy, rather than its driver. We believe our Government should adopt this emphasis on the public interest.

The CLC believes that media independence, local content and diversity will be the ultimate losers if the Media Ownership Bill is passed.

Recommendations

The Communications Law Centre recommends that the Government:

1. extends the time for the community to consider the Broadcasting Services Amendment (Media Ownership) Bill 2006, before asking Parliament to vote on it;
2. conducts extensive research into the effect which relaxing media ownership regulation will have in all Australian markets, and regional areas in particular;
3. waits until the digital roll-out takes place before amending media ownership legislation;
4. in terms of a “test”:
 - a. considers replacing the “5/4 voices test” with a more sophisticated test able to objectively measure media influence and reach; or

¹⁹ *Out of the Picture: Minority and Female TV Station Ownership in the United States – Current Status, Comparative Analysis & the Effects of FCC Policy and Media Consolidation*, September 2006, Free Press, USA.

- b. strengthens the “5/4 voices test” by defining “voice” in a way that unambiguously takes media influence and reach into account; it is only when a particular voice achieves broad community recognition that it can realistically be regarded as a voice of influence;²⁰
- 5. expands the role of the national broadcasters, to maintain and strengthen public voices at the national level;²¹ and
- 6. develops a media-specific public interest test to guide the ACCC in making decisions about potential mergers, and that this test be in the legislation.

²⁰ Raiche H, *Competition, Diversity and Ownership in Broadcasting Regulation by the Australian Broadcasting Authority and the Australian Competition and Consumer Commission* (1997), Communications Law Centre p.44.

²¹ Goldsmith B, Thomas J, O'Regan T, Cunningham S, *The Future for Local Content? Options for Emerging Technologies* (2001), Australian Broadcasting Authority pp.65-66.