

MINORITY REPORT

Australian Democrats

Broadcasting Services Amendment (Media Ownership) Bill 2006

Broadcasting Legislation Amendment (Digital Television) Bill 2006

Communications Legislation Amendment (Enforcement Powers) Bill 2006

Television Licence Fees Amendment Bill 2006

OUR DEMOCRACY IS NOT PROTECTED

Key illustrations of the point

The Minister for Communications¹ and other Government figures have tried in various ways to answer the charge that the Coalition's proposed new weak cross-media rules will result in an excessive and dangerous concentration of media power in a few hands, by pointing to the Australian Competition and Consumer Commission (ACCC) as the safeguard. Under the existing provisions of the Trade Practices Act (TPA) preserving or enhancing the democratic institution of the fourth estate is not a matter that the ACCC will concern itself with:

Senator MURRAY— ... As you would be aware, a great deal of commentary, particularly political commentary, concerns the issue of whether further media concentration, or indeed these changes, would advance the health of our Australian democracy. Just so that we have it on the record, when you consider a merger proposition in the media industry in future you will not consider the issue of whether it will contribute to the health of our Australian democracy, will you?

Mr Samuel—No, we will not.²

And for any members of the public foolish enough to think that corporate self-interest and manipulated information and opinion might be uncommon in the Australian media – here is a reality check:

Senator MURRAY— ... I want to know whether your alliance has done any research to establish to what extent media proprietors direct their editors and reporting staff to a particular line on matters which are of interest to those proprietors.

1 See for instance ABC TV's '730 Report' on the 14 March 2006.

2 Mr Graeme Samuel, Chairman, ACCC, *Committee Hansard*, 28 September 2006 p. 46.

Mr Warren—One of the interesting things that came out of the Roy Morgan Crikey! survey of journalists that we did ... was on that subject. One of the questions asked people whether they had ever been requested to report in a way that favoured the political line of their employer, and then there was a second question about whether they had ever been required to report in a way that favoured the corporate line of their employer. About 50 per cent of people said that they had been required to report in a way that favoured the corporate line of their employer, and that does not surprise me. A much smaller group—less than 20 per cent, I think—said that they had been required to report in a way that favoured the political line of their employer, and that does not surprise me either.³

Journalists are simply employees

There is a conflict between journalism and media, between a profession and a job, between a calling as a member of the fourth estate and the usual requirements of employment.

The community at large might sometimes expect too much from journalists, expecting them to behave in a manner consistent with a higher calling, the freedom of the press, and a willingness to pursue truth regardless of personal cost; and to behave in accordance with the ethics values and principles of the fourth estate. In contrast, the reality of life is that journalists have to make a living, and are required as employees to do the job required of them in an industry like any other, where business has to make a profit.

Of course not all media is a for-profit business, far from it, as the ABC, SBS and community media attest, but most journalists and editors are employees, subject to the usual pressures to make a living and to meet their family obligations. Such pressures constrain independence and freedom of action. That is why journalists' unions and codes of conduct are important safeguards. No one should be surprised either, that employees do as they are told. In any enterprise not to do as you are instructed risks your job. The following interchange was instructive, and amplifies the earlier quote I highlighted:

Senator MURRAY—It can be said that journalists are simply employees and that employees do what they are told. It has been said to me by some journalists privately that they have been told to write and run a particular line with respect to interests that matter to the proprietors, which does not surprise me. I want to know whether your alliance has done any research to establish to what extent media proprietors direct their editors and reporting staff to a particular line on matters which are of interest to those proprietors.

Mr Warren—One of the interesting things that came out of the Roy Morgan Crikey! survey of journalists that we did, that Senator Wortley talked about, was on that subject. One of the questions asked people

3 Mr Christopher Warren, Federal Secretary, Media, Entertainment and Arts Alliance, *Committee Hansard*, 28 September 2006, p. 23

whether they had ever been requested to report in a way that favoured the political line of their employer, and then there was a second question about whether they had ever been required to report in a way that favoured the corporate line of their employer. About 50 per cent of people said that they had been required to report in a way that favoured the corporate line of their employer, and that does not surprise me. A much smaller group—less than 20 per cent, I think—said that they had been required to report in a way that favoured the political line of their employer, and that does not surprise me either. But it is very concrete evidence that there is a sense in the industry that people are expected to take particularly the corporate line—and it tends to be more the corporate line than a political line, except sometimes when the two overlap. So that is pretty compelling evidence, I think, that there is a deep belief within the industry that there is an expectation that people will understand what the corporate line is and will report accordingly.⁴

So about half of the journalists said that they had been required to report in a way that favoured the corporate line of their employer, and one in five had been required to report in a way that favoured the political line of their employer. I would give odds that the pressure on editors and management to ‘toe the line’ is much higher.

You only have to have observed the generally carefully managed media response to these Bills, with a few exceptions that do not reach the mass market, to realise that the media corporates overall are determined not to give this issue much play to mass audiences by alerting Australians to the importance of what is happening and how it will affect them.

It seems very hard to find ways to combat all this. So from the vital democratic ‘fourth estate’ perspective the only way to protect a diversity of opinion, news-gathering, information and influence, is to ensure a diversity of meaningful or real voices, a diversity of media types, and a diversity of journalists and owners, and by maximising competition and restricting, even reducing, cross-media ownership.

That requires parliamentarians to reject those elements of this package that are likely to reduce competition and reduce the variety of opinion, to recognise the long-term dangers and eschew any perceived short-term self interest.

Mr Beecher—From experience, the cross-media rules are the only mechanism to guarantee diversity of journalism. We are talking about a diversity in this country that is already very fragile.⁵

4 Mr Christopher Warren, Federal Secretary, Media, Entertainment and Arts Alliance, *Committee Hansard*, 28 September 2006, pp.23-24.

5 Mr Eric Beecher, Private Media Partners, *Committee Hansard*, 28 September 2006, p. 108.

THE BILLS

Poor process

The Australian Democrats are and were very supportive of this Senate Committee inquiry into the Broadcasting Services Amendment (Media Ownership) Bill 2006 (the Media Ownership Bill) and related Bills. Although the Committee benefited from balanced judicious and considerate chairing from Senator Eggleston under constrained circumstances, nevertheless the inquiry process has been poor.

Since the Coalition won control of the Senate numbers in July 2005 the Government have moved to progressively reduce the effectiveness of previous Senate mechanisms of accountability and review. Knowing that it must at least satisfy some of its own backbenchers, the Executive does just enough to allow for some Committee review, but attitudinally, it is often quite apparent that it is just going through the motions.

This Inquiry, like many others under a now domineering Coalition, has been forced into too short a time frame.

The Inquiry has been characterised by too short a time for advertising and the writing of submissions; for Senators to read all the submissions; for the hearings themselves; for questions on notice to be answered; and for the writing of reports. The short time for submissions may be less of a problem for the mega-media groups that have been lobbying the Coalition and have ready material to hand. It may be less of a problem for witnesses with deep pockets and extensive resources, such as the business sector, so the big end of town is probably catered for. But this process effectively restricts the evidence that can be encouraged and adduced from academics, other interested parties, and members of the public.

Having been part of the Senate vote that allowed this disgraceful state of affairs, the Coalition members of the Committee came face to face with its consequences. For instance the disagreement between Senators Joyce and Brandis⁶ was a direct consequence of the ridiculous state of affairs whereby the six Coalition members present shared ten or so minutes per witness.

This is complex legislation that requires more time to assess. Secondly, the Senate deserves to be treated with more respect, not just because it represents the whole of the Australian people (unlike the Government, which is comprised of two political parties), but because when it performs its proper role it is a bulwark against excessive and self-interested Executive power.

Only two things can change this state of affairs – either for Coalition Senators (and by extension, all Senators) to promote the Parliament over Party, which seems unlikely, or for the Government to lose control of the Senate numbers at the next federal election.

6 *Committee Hansard*, 28 September 2006, p. 99.

The four bills as a package

Broadly speaking, the Media Ownership Bill will remove certain broadcasting-specific restrictions on foreign investment in Australia's media sector, and permit cross-media mergers that are currently prohibited. This is the Bill that is most contentious.

The Broadcasting Legislation Amendment (Digital Television) Bill 2006 (the Digital TV Bill) is a multi-faceted bill that seeks to advance technical and innovative aspects of the digital television and commercial television broadcasting regime.

The Communications Legislation Amendment (Enforcement Powers) Bill 2006 (the Enforcement Powers Bill) strengthens the enforcement and regulatory powers of the Australian Communication and Media Authority (ACMA).

The Television Licence Fees Amendment Bill 2006 (the Fees Bill) makes licence fee amendments consequent to the Digital TV Bill.

As the Australian Democrats have pointed out on a number of occasions, we do not oppose media industry reform. In fact we strongly support the modernisation and improvement of statute and regulation with respect to the media industry, predicated on the introduction of greater competition and meaningful diversity.

Much of the technology for media delivery in the future (and that future is not far distant) will be on telecommunications platforms. That being the case, it is essential that for telecommunications and media, we establish guaranteed, affordable services available to all but the remotest Australians and enforced through legislated customer service obligations.

For the rest, the market needs to be as free and open as possible. We need to distinguish between consumer needs and political or societal needs. Consumer needs are satisfied by a free rein being allowed for new technology and a maximum variety of product types. That is best guaranteed through few barriers to entry and through encouraging real competition.

THE MEDIA OWNERSHIP BILL AND RELATED ISSUES

Greater competition and diversity

We Democrats recognise that the technological and market changes which have occurred in the media industry over the past 10 years, (and in technology at increasing speed over the last five years), make it imperative that media law and regulation keep pace with the market and technology, and create a sensible and effective forward-looking regulatory environment for the future.

If we are to have media markets freed from oligopoly, this Government must pursue policies to increase diversity of views and voices. If we are to have a fair and open society, this Government must pursue policies to increase diversity of views and

voices. It must improve the use of and access to new technology, such as digital and broadband; it must ensure open access to media content; it must ensure that there is an adequate level of local and Australian content; and it must protect the independence and freedom of journalists and the media. Failure to protect diversity of viewpoints is a failure to protect the necessary public debate that makes our democracy function.

There is the question of whether these bills should be phased in. The Democrats believe there is a good case for arguing that the cross media laws should not be changed until full digitisation has been achieved and more spectrum is available to enable new entrants, and the range of new services provided by new technology is more mature and utilised by more consumers.

The Government has no evidence to support their assertion that these reforms will not lead to a concentration of the media market. They exaggerate the beneficial market impact that the internet and 'new media' has and will have on credible information supply in contrast to traditional media.

In November 2005, a Roy Morgan poll found that 48 per cent of Australians get their main source of information from television, 22 per cent from newspapers, 19 per cent from radio and only 8 per cent from the internet. The internet market share data from ACNielsen shows that Australian content on the internet is now more concentrated than in the 'old' media of newspapers, magazines, radio and TV. Clearly an informed professional independent 'traditional' diverse media is still necessary:

Mr Samuel—We think the internet is simply a distribution channel. It has not shown any significant signs at this point in time of providing a greater diversity of credible information and news and commentary. There is talk all the time, as we have discussed on previous occasions, of the establishment of web logs and the like, but in terms of credible news and information—I say this without having done what I said we would always do, which is conduct a detailed analysis—based on all the reports that one reads, you could probably conclude that at this point of time, at the early stages of the development of the internet, the primary sources of news, information and the like still are your mainstream sources: the ABC, News.com and Fairfax. They tend to be the primary sources of credible, timely news and information and discussion.⁷

The Government has tried to focus on how this package affects *consumers*, but more important is how it affects our *democracy*. Likewise the submissions before the Senate Committee from media owners overwhelmingly concentrated on *their* economic needs, not Australia's need for an energetic independent and diverse fourth estate. One witness' body language was something to behold in his barely suppressed rage that Senators were more concerned with fourth estate issues than media business issues.

The lesson is that media owners and investors' self-interest must be tempered by the national and public interest.

7 Mr Graeme Samuel, Chairman, ACCC, Committee Hansard, 28 September 2006, p. 38.

The freedom of the press to report whatever and however they need has long been recognised as absolutely vital to democracy, and this freedom is most effective and relevant when there are a variety of diverse views of substance. Modern concentrated media power is such that if that power is not to be abused, it needs to be dispersed and multiplied, and not concentrated further.

Evidence to the Inquiry was that Australia already has one of the most concentrated media sectors in the democratic world:

Mr Beecher—...Currently in Australia most journalism of significance is in the hands of five families plus the Fairfax organisation. Let us be specific about that: in the regional areas, it is the O'Reilly family and the John B Fairfax family, and in the metropolitan areas it is the Murdoch, Packer and Stokes families and the Fairfax organisation, which used to be family owned and is now institutionally owned. So you have six unelected groups—five of them families—and they are the gatekeepers of news and opinion in this country.

....

The consolidation of the media industry in this country has been going on for years. In the 1980s there were 13 daily newspapers in the five capital cities and they had nine different owners. Today there are seven daily newspapers—almost half—and they have four owners. All the major regional city newspapers—Cairns, Townsville and all of those big places—are owned by four companies: News, Fairfax, APN and Rural Press. The last of the majors, in Albury, fell a few months ago. Most of the internet news and commentary sites—apart from Crikey, really—are owned by the same people. So they own the lot. It is the most concentrated media ownership in the Western world. We all know that, we talk about it, and yet we are sitting here talking about concentrating it even further.⁸

My clear impression of many media owners is that they fear too many competitors – witness their opposition to a fourth free-to-air TV channel – and many in the community fear too few media owners. Both from the perspective of consumers and our democracy the central issue is that we need more competition, less concentration and more diversity in all media markets.

Media diversity and independence are critical to the public debate that makes our democracy function well. Any concentration of the market in a few manipulative hands will reduce diversity in views and voices. It may also reduce quality and Australian content. If those were the outcomes then that would not be good for consumers or our democracy.

8 Mr Eric Beecher, one of the owners of Crikey.com.au; former editor of the *Sydney Morning Herald*; former editor-in-chief of the *Herald Weekly Times*, so he has worked as the most senior editor for both the Fairfax and News Ltd media organisations. *Committee Hansard*, 28 September 2006, p. 108.

Therefore the starting point for revising these proposals has to be the regulators – the ACCC, whose role is to decide on mergers and acquisitions; ACMA, whose role is to apply and enforce standards; and the Foreign Investment Review Board (FIRB) whose role is to determine foreign ownership levels.

A parable – measuring media power

From the Ezine Crikey.com.au⁹ Item 12. Measuring media power

Christian Kerr writes:

...

In dealing with media, they are dealing with powers much greater than they are.

How do we know? Back in 2004, John McMillan and Pablo Zoido of the Stanford Graduate School of Business published an ingenious study of the checks and balances that underpin democracy. The abstract says it all:

Which of the democratic checks and balances – opposition parties, the judiciary, a free press – is the most critical? Peru has the full set of democratic institutions. In the 1990s, the secret-police chief Vladimiro Montesinos systematically undermined them all with bribes. We quantify the checks using the bribe prices. Montesinos paid television-channel owners about 100 times what he paid judges and politicians. One single television channel's bribe was four times larger than the total of the opposition politicians' bribes. By revealed preference, the strongest check on the government's power was the news media.

Montesinos kept meticulous records. He required recipients of his bribes to sign receipts. He routinely videotaped himself doling out funds and explaining exactly what he expected of those whom he paid.

McMillan and Zoida used the records to compile what they described as price list for bribery – a yardstick that could be used to measure the strength of the democratic countervailing forces that Montesinos was undermining.

They discovered a clear hierarchy of power. A politician, for example, was worth slightly more than a judge. But the most powerful force of all was an owner of a television station. They commanded bribes about a hundred times higher than a politician's.

"Each channel takes \$2 million monthly, but it is the only way," Montesinos told one of his henchmen. "That is why we have won, because we have sacrificed in this way."

Why did television matter so much? Montesinos explained on tape: "What do I care about *El Comercio*? They have an 80,000 print run. 80,000 newspapers is sh-t. What worries me is Channel Four...It reaches two million people."

In the end, a small independent television station, one that Montesinos had never bribed, aired the tape that brought the regime down.

The Senate committee is due to report back on 6 October. They should look at McMillan and Zoida as part of their deliberations. If they're not going to take public interest into account, they should consider their own self interest – and if they want to give more powers to forces already up to 100 times stronger than they are.

Free to Air television (FTAs)

If television channels are the most powerful of all (as the parable above suggests) – or even if we just accept that television is a very powerful media market – should Australia be looking to increase competition in this market?

Senator MURRAY—In one word, do you support having a fourth free-to-air channel introduced on television?

Mr Falloon—We do not.¹⁰

The Productivity Commission (PC) supports the ban on entry of new television stations being lifted.¹¹ Other witnesses at the hearing were also of a different view to Mr Falloon and supported a fourth free-to-air channel:

Mr Warren— ... The second thing that could be done—and which we believe should be done—is that the free-to-air networks, who have been given this spectrum for nothing, should have a legislative mandate requiring them to broadcast different programming—not just time shifted programming—with all the normal quota restrictions and requirements that are on a free-to-air network on one of their digital bands. We also support a fourth commercial TV licence.¹²

Senator IAN MACDONALD—As I understand your proposal, instead of having a B channel you would have a fourth free-to-air network.

Mr Brown—Yes. There would be a fourth free-to-air network, which would be simultaneous analog and digital to, say, 2010 and then there would be a switch to digital two years before the incumbents—in other words, it would switch in 2010 and 9,7 and 10 would cross over in 2012.¹³

10 Mr Nicholas Falloon, Executive Chairman, Network Ten, *Committee Hansard*, 29 September 2006, p. 35.

11 Productivity Commission: Broadcast Inquiry Report No. 11, 3 March 2000.

12 Mr Christopher Warren, Federal Secretary, Media, Entertainment and arts Alliance, *Committee Hansard*, 28 September 2006, p. 21

13 Mr Geoffrey Brown, Executive Director, Screen Producers Association of Australia, *Committee Hansard*, 28 September 2006, p. 90.

Senator MURRAY—Mr Williams, it has been put to us by witnesses that a fourth free-to-air channel should be issued. Do you support that or not, or do you not have a view on it?

Mr Williams—I have a personal view. My company does not have a formal view.

Ms Richards—ASTA supports it.¹⁴

Rather shamelessly, the Government have made it quite clear that it will not agree to a fourth FTA channel, or allow the independent regulator ACMA to make that judgement on its merits.

It is hardly a matter of viability. As Mr Beecher said:

Mr Beecher— ... Are the media companies ailing? Do we have an industry that has economic malfunction? Here are some facts. In the past year, profits in the media industry were higher than ever before. This is a booming industry. It is an industry that makes profit margins—that is, the percentage of profits to revenue—that are higher than almost all other industries in Australia. There is only one other industry in Australia with higher profit margins.

The average profit margin of public companies in this country is around 15 to 17 per cent—that is, \$15 to \$17 in every \$100 of revenue is profit. The media industry average is 24 per cent. It is the second highest only after resources, and the reason resources is higher is that the capital requirement is stratospheric and therefore the risk-reward ratio is higher.¹⁵

If then a fourth FTA is out of the question under this Government, the only other option to introduce more competition in television is in community TV. Community and suburban/regional press and community broadcasting are able to supplement commercial radio and the big newspapers in an impressive manner. Community TV needs a 'leg-up' to do the same.

Promoting Community Television

The main committee report strongly supports the community television sector and the Australian Democrats fully endorse the committee's recommendation in this regard.

The community television sector is a growing and alternative voice to Australia's mainstream media. It provides much needed diversity and local content in a market that will increasingly tend towards greater concentration and reduced competition as a result of the government's changes to media ownership. Community broadcasting is fundamentally different from the commercial and national broadcasting sectors. It is media produced by communities, for communities. It promotes the principles of

14 Mr Kim Williams CEO Foxtel and Ms Debra Richards Australian Subscription Television and Radio Association, *Committee Hansard*, 29 September 2006, p. 45.

15 Mr Eric Beecher. *Committee Hansard*, 28 September 2006, p. 108.

access and participation, volunteerism, diversity, independence and localism. The sector caters to a diverse range of communities of interest, from core ethnic, indigenous, and gay and lesbian communities, to youth, religious, senior citizens, arts, fine music, Australian music and other special interest cohorts.

In March 2006, there were 7 licensed community television services. These are Channel 31 Adelaide, Briz 31 Brisbane, Linc TV Lismore, Channel 31 Melbourne, Bushvision Mount Gambier, TVS (Television Sydney) and Access 31 Perth. Community television in Australia has more than 260 member groups, 3200 volunteers and 50 paid staff; provides training in all areas of television production to more than 500 Australians every year; has a combined annual turnover of more than \$5 million and a cumulative monthly audience reach of more than 3 million.

On numerous occasions the Government has expressed its support for community TV and in particular its role in providing local content. For example the (then) Minister for Communications, Information Technology and the Arts, Senator the Hon Richard Alston noted:

CTV plays a valuable role in meeting local needs for information, education and entertainment, providing an outlet for innovative and niche programming, and opening opportunities for enthusiastic volunteers to train in television production, programming and management.¹⁶

According to the Community Broadcasting Association of Australia survey of the four metropolitan CTV stations on air for the duration of 2005 revealed that every week these stations broadcast:

- 164 hours of locally produced programming;
- 61 hours of news and current affairs programming;
- 37.5 hours of religious programming;
- 33 hours of Ethnic programming;
- 30.5 hours of youth programming;
- 27.5 hours of arts programming;
- 21 hours of programming for new, emerging and refugee communities;
- 19 hours of educational programming;
- 17 hours of sports programming;
- 7 hours of programming for people with a disability; and
- 6.5 hours of Indigenous programming.¹⁷

16 Press release, Senator, the Hon Richard Alston, 15 November, 2002.

17 http://www.cbaa.org.au/media/CTV_Submission_Part1.pdf

However, primarily due to the relatively high cost of producing audiovisual content, the community TV sector is not able to provide the same level of local content, news and information as community radio and community-based newspapers.

To complement the committee's community television recommendation I believe that the government should strongly support community television to drive a greater level of local content and diversity on community TV broadcasters. As the cost of producing local TV content and a lack of access to funding are the primary restraints on greater local content in community TV, I suggest that the government consider the following policy options.

Firstly, Government grants to support local content on community TV: The Australian Democrats believe there is scope for some modest level of government financial support for the production of local TV content on community TV. Because of their limited financial capacity due to their non-profit and community based nature, the government should put in place a government grants scheme directed at supporting and promoting local TV content on community TV. By providing a modest level of funding to community TV providers the government would ensure that local communities have the ability to enhance the local content and diversity that is an inherent attribute of community TV.

Second, an industry levy to support local content on community TV: Another policy option that the government should consider is a low level media industry levy aimed at supporting local content on community TV. The levy could be targeted at those commercial media organisations that merge as a result of the changes to the cross media rules as these organisations would benefit most from the government's decision to allow greater concentration of ownership. As the commercial media conglomerates would dwarf the size of the community TV providers the levy would necessarily be very small, perhaps a fraction of a percentage point.

Third, broadening sponsorship arrangements on community TV: The Democrats believe that one way to increase the available funding to community TV providers is to allow greater flexibility in its sponsorship arrangements. The current arrangements allow community television licences to broadcast 7 minutes of sponsorship announcements in any hour of broadcasting.¹⁸ Although it would not be desirable to see a large increase in the amount of time dedicated to sponsorship, allowing community TV providers some degree of flexibility in how that amount of sponsorship is allocated throughout its daily and weekly programs may attract a greater number of sponsors.

It is also worth noting that community television may be losing their current sponsors as a result of the uncertainty created by the government's indecision on community televisions access to digital spectrum. Asked whether the lack of a presence on digital

18 *Broadcasting Services Act 1992*, Schedule 2, subclause 9(2).

TV affected their current sponsorships, Mr Melville, General Manager, Community Broadcasting Association of Australia responded:

...from my discussions with station managers of community television stations I believe it to be true to say that the effect is starting to be felt. I think some of the more savvy businesses that are seeking to differentiate themselves in the [sponsorship market] are starting to ask questions about where they will be in six months to a year in terms of continuing exposure to audiences and whether they will have a place in digital. I do not know that it has actually stopped anyone coming forward and placing their sponsorship message on community television, but I know the question is beginning to be asked.¹⁹

In this regard the Community Broadcasting Association of Australia indicated in its submission:

While the community television (CTV) sector is not currently broadcasting on digital, the Government has long been committed to providing the CTV sector with access to a digital channel free-of-charge.

The Minister's discussion paper, released in March, says that the Government's Digital Action Plan will reveal how this access will be provided.²⁰

The CBAA also reminded the committee of the generous support the government currently provides to the commercial TV industry regarding the conversion to digital TV:

Because the sector cannot afford to meet the costs of both analogue and digital transmission, the CBAA has asked Government to fund the costs of digital transmission during the simulcast period. The Government currently provides \$75 million per year to fund the national and commercial broadcasters' digital conversion costs.²¹

The ACCC and improving media competition

The very first requirement in any matter of industry regulation is to ensure competition is protected. On the surface the assurances that further concentration in the Australian media industry cannot occur if the ACCC opposes mergers or acquisitions should be reassuring. They are not.

It is not credible for the Minister to assert that the ACCC and the Minister will control any proposed media mergers adequately, because there are insufficient safeguards. The 'Dawson' bill (the Trade Practices Legislation Amendment Bill (No. 1) 2005) will actually reduce safeguards because it allows for forum shopping and the

19 Mr Melville, General Manager, Community Broadcasting Association of Australia, *Committee Hansard*, 28 September 2006, p. 83.

20 Community Broadcasting Association of Australia, *Submission 42*, p. 2.

21 Community Broadcasting Association of Australia, *Submission 42*, p. 2.

application of different principles between the ACCC and the Australian Competition Tribunal.

Without very significant strengthening of the Trade Practices Act (TPA), including section 46, and including divestiture provisions, plus the addition of a media-specific public interest test, any media market deregulation through this legislation seems bound to result in reductions in real competition, and a greater concentration of media power.

I have outlined elsewhere at length the weakness of the *Trade Practices Act 1974* (TPA) with respect to mergers and acquisitions, such as in these remarks three years ago:

... a dynamic, modern market economy means that the efficiency and competitiveness of the market should be facilitated and that mergers, acquisitions and takeovers should be made easier. The flip side of easing the market for mergers, takeovers and acquisitions is a need to ensure that the overmighty and abusive are properly constrained. I have said before that big business roars approval at the dynamism of the American market but fiercely condemns a major contributor to that dynamism—that is, the effects of antitrust or divestiture laws. We need those regulatory tools in Australia. Balanced divestiture laws are the corollary of balanced merger laws. We do not have effective divestiture laws. It is a strange and illogical policy that can prevent mergers to maintain effective competition but cannot require divestiture also to maintain effective competition.²²

The non-Government members of the March 2004 Senate Economics References Committee *Report into the effectiveness of the Trade Practices Act 1974 in protecting small business* accepted the proposition that divestiture powers were essential:

Divestiture

Divestiture powers are powers which enable a Court to order that a dominant corporation be broken up into several smaller corporations in order to prevent the anticompetitive domination of a market by one player.

Such powers are currently available under s.81 of the Act, but cannot be applied to creeping acquisitions, nor to offences under s.46. The Committee considers that the application of s.81 should be expanded, so that divestiture becomes a remedy for other breaches of the Act, including section 46 (Misuse of market power) and any new section introduced in line with the Committee's recommendation 12 (relating to the regulation of creeping acquisitions).

As divestiture is a quite severe remedy, it is appropriate to provide "warning mechanisms" to ensure that a corporation which is expanding its business is able to comply with its obligations under the Act. A suitable warning mechanism could be based around a "trigger" market concentration.

22 *Senate Hansard*, 13 August 2003, Senator Murray on adjournment.

This trigger should not operate as a *de facto* cap on market share. Rather it would require companies proposing acquisitions in concentrated industries to notify the ACCC. The Commission would then assess whether the acquisition would result in a substantial lessening of competition. The Committee notes that this already occurs in the retail grocery industry.

Recommendation 13

The Committee recommends that s.81(1) of the Act be amended so that s.81 can be applied where a corporation is found to have contravened section 46, section 46A, or any new section introduced to regulate creeping acquisitions.²³

Even the Government, which has hardly covered itself in glory in strengthening competition laws, has accepted the TPA needs strengthening, although it has done nothing to translate its in-principle acceptance into legislation. The Government accepted the Senate Economics References Committee recommendations 5, 8, 9, 16 and 17; and 3, 6 and 11 in part; all made well over two years ago.

The point is the Government seems divorced from reality. It does not even recognise that it is simply bad policy to introduce much looser media concentration rules without simultaneously introducing legislation to bolster general competition law. And of course, strengthening the TPA will benefit competition in all other sectors too.

As I've emphasised earlier, the great concern with the Media Ownership Bill is the fear it will harm our democracy through excessive concentration, a loss of diversity, and increased abuse of media power. These are matters which concern society. These are values matters and political matters, requiring public interest judgements. It is worth repeating the quote at the start of this Minority Report:

Senator MURRAY— ... As you would be aware, a great deal of commentary, particularly political commentary, concerns the issue of whether further media concentration, or indeed these changes, would advance the health of our Australian democracy. Just so that we have it on the record, when you consider a merger proposition in the media industry in future you will not consider the issue of whether it will contribute to the health of our Australian democracy, will you?

Mr Samuel—No, we will not.²⁴

All is not lost, provided the Government comes to its senses. The ACCC and TPA as presently configured are simply not equipped to deal with these matters at present, but in his evidence Mr Samuel made it clear that the ACCC would be able to deal with public interest issues if there were a law change:

23 Senate Economics References Committee, *Report into the effectiveness of the Trade Practices Act 1974 in protecting small business*. The Executive Summary is attached to the end of this Report.

24 Mr Graeme Samuel, Chairman, ACCC, *Committee Hansard*, 28 September 2006, p.46.

Senator MURRAY— ... the only way in which you could be obliged to take the public interest—which would include what I would classify as social considerations, such as the health of our democracy—into account would be for a provision to be specifically inserted into legislation, wouldn't it?

Mr Cassidy—I take it that you are saying, 'Leave aside authorisation,' which is a public interest matter?

Senator MURRAY—That is right.

Mr Cassidy—In considering media mergers generally, the only way in which we could, or could be required to, take into account the public interest would be if that was specified in legislation.

Senator MURRAY—My judgement of the media area is that the political class have always recognised that the ACCC is inadequate in determining these broader issues. That is why they have introduced rules which are specific to the media area and which are governed, effectively, from a political perspective. The restrictions on cross-media and foreign ownership and so on are quite different to those which apply in other industries. If you want to lessen that industry specific control, in my view you have to increase the capacity for the ACCC as a competition regulator to take matters like that into consideration. My question is this: do you think that if a public interest test was required of you in issues concerning media you would be able to develop and devise, with your usual ability ... guidelines and methodologies which are appropriate to that task?

Mr Samuel—Tests such as that would probably be no different to the sort of test the guidelines provide for us already in section 50. For example, we are required to take account of regional considerations as part of our determinations in dealing with merger matters. These are all factors that we take into account in many senses.²⁵

The Australian Democrats position on these Bills is informed by the PC's broadcasting report of March 2000.²⁶ That report looked into a range of conflicting policy issues including convergence, media markets, protecting diversity and cultural identity. All these issues are of great concern to the Democrats and to many Australians.

The Government did not respond to the complexities of the PC's report, and certainly the Commission's recommendations are not reflected in the Discussion Papers issued by the Minister for Communications, or the legislation which the Government has presented to the Senate.

A key recommendation from the PC was that the cross-media ownership rules should not be repealed or changed until the following had been achieved:

25 Mr Graeme Samuel, Chairman, ACCC, *Committee Hansard*, 28 September 2006, p.46.

26 Productivity Commission: Broadcast Inquiry Report No. 11, 3 March 2000.

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- the removal of regulatory barriers to entry, including making spectrum available for new broadcasters;
 - the repeal of restrictions on foreign investment, ownership and control; and
 - amending the Trade Practices Act to provide for a media-specific public interest test to apply to mergers and acquisitions.²⁷

The Democrats would add to the PC's list, the amendments to the TPA including the introduction of effective divestiture powers; clarification of the meaning of a 'substantial degree of power in a market' and 'take advantage' in section 46 to overcome existing deficiencies; introduction of a 'financial power' consideration; and strengthening the ACCC's powers to prevent creeping acquisitions.

Those recommendations, if implemented would give the TPA real teeth and afford enforceable protection from anti-competitive abuses of market power. If those recommendations were implemented there would be the opportunity to loosen up the present media rules quite considerably and allow greater competition.

Instead, under the proposed changes to the *Broadcasting Services Act 1992*, big media business will get the chance to accelerate the oligopolisation of the media market. The Democrats believe that some of the amendments in the Digital Television Bill are long overdue and have considerable merit, but the amendments proposed to the Media Ownership Bill cannot be agreed to until the Government implements the PC's recommendation regarding a public interest test, and strengthens the TPA as outlined above.

Many witnesses agree that a media-specific public interest test should be added to the TPA. The PC made a number of key points in this regard.

The PC said the TPA is unable to deal effectively with cross-media mergers and mergers between 'old' and 'new' media which could affect concentration and diversity in the 'market for ideas'. They said a media-specific public interest test should be added to the Act.²⁸

The PC said that cross-media rules prevent mergers among 'old' media companies, and will impose increasingly severe constraints on them. They thought the rules' effectiveness will decline as convergence proceeds. Therefore they believed cross-media rules should be removed once a more competitive media environment is established, that is, when:

- the media-specific public interest test is in place;
- foreign investment is permitted under normal guidelines;

27 Productivity Commission: Broadcast Inquiry Report No. 11, 3 March 2000, p. 33.

28 Productivity Commission: Broadcast Inquiry Report No. 11, 3 March 2000, p. 3.

- the ban on entry of new television stations is removed; and
- a significant amount of spectrum is available for new entry.²⁹

It is useful to quote the Report in full:

[Productivity Commission] Overview

Australia could try to extend the cross-media rules to other media, but such an approach would become increasingly difficult to implement in a convergent world. The Australian community will be better served by policies that encourage contestability and entry. Given that ownership structures are changing rapidly, the Commission recommends that a media specific public interest test be inserted into the Trade Practices Act immediately (recommendation 10.3).³⁰

...

Once the new media-specific public interest test is in place and new entry has established a more competitive atmosphere for Australian media, the cross-media rules should be repealed.³¹

...

RECOMMENDATION 10.3

The Trade Practices Act 1974 should be amended immediately to include a media-specific public interest test which would apply to all proposed media mergers. The test would be administered by the Australian Competition and Consumer Commission, and require that the commission seek ABA input on social, cultural and political dimensions of the public interest.

RECOMMENDATION 10.4

After the following conditions have been met:

- removal of regulatory barriers to entry in broadcasting (s. 28 and the s. 23 non-technical criteria), together with the availability of spectrum for new broadcasters;
- repeal of BSA restrictions on foreign investment, ownership and control; and
- amendment to the *Trade Practices Act 1974* to provide for a media-specific public interest test to apply to mergers and acquisitions; the cross-media rules should be removed.³²

There is also the question of what will constitute a market in the new media landscape. ACCC Chairman Graeme Samuel has already suggested in a number of speeches that the definition of 'market' may have to be reviewed in some aspects of the media industry. Rather than dividing the industry into radio, television, newspapers and internet, he says it may have to be looked at in terms of sports markets, classified

29 Productivity Commission: Broadcast Inquiry Report No. 11, 3 March 2000, p. 3.

30 Productivity Commission: Broadcast Inquiry Report No. 11, 3 March 2000, p. 24.

31 Productivity Commission: Broadcast Inquiry Report No. 11, 3 March 2000, p. 25.

32 Productivity Commission: Broadcast Inquiry Report No. 11, 3 March 2000, pp.38-39.

advertising markets, and so on, so that it revolves around a question of content rather than a question of delivery platform.

These issues remain unaddressed by this legislation and many of the provisions of the Bills are something of a knee-jerk reaction to certain examples of media failure in regional areas brought to the attention of the Liberal Party by their Coalition partners, the Nationals. In particular, this is true of the Local Content Plans, which require licensees to demonstrate how they are meeting local content licence conditions and includes provision for emergency warning broadcasts and other matters. Some regional witnesses warned against an ineffective bureaucratic approach here. Media commentator, Mr Jock Given acknowledged that while aimed at laudable goals, the regional radio localism requirements:

...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.³³

WARNER, Ms Joan - A lot of our broadcasters—and you will hear from a number of them tomorrow, I believe—are quite concerned about going back to the bad old days where a bureaucrat comes in and demands a book of 10 pages and then decides with the stroke of a pen whether it is acceptable or not. ... So we are just harking back to the pre-BSA days when everything was a beauty pageant and it was a lot of time and a lot of effort on every broadcaster to provide that so the bureaucrat would tick it off.³⁴

The FIRB and foreign ownership restrictions

In the media ownership bill, the Government proposes the removal of media-specific foreign ownership and control restrictions in the *Broadcasting Services Act 1992* (BSA), and the discontinuation of newspaper-specific foreign ownership limits under Australia’s *Foreign Investment Policy*. The media would be retained as a ‘sensitive sector’ under the *Foreign Investment Policy*.

In principle the Australian Democrats could agree with the lifting of foreign ownership restrictions to enable more competition in the market, subject to some important caveats. We do agree that it is retained as a ‘sensitive sector’ under the Foreign Investment Policy.

There are many issues to consider here. Firstly, if other countries close out their media or parts of their media to competition from Australia, why should Australia allow

33 Mr Jock Given Media Law lecturer University of Melbourne. *Submission 25*, p. 9.

34 Mrs Joan Warner, CEO, Commercial Radio Australia Ltd, *Committee Hansard* 28 September 2006, p. 94.

those countries to buy Australian media outlets? If non citizens in one country are prohibited from owning or operating TV stations or are subject to ownership caps or other barriers to entry, as they are reported to do, why should non-resident foreigners from those countries be allowed to run Australian TV stations or other media?.

The logic here is that only those countries that open their markets to us should get the reciprocal privileges here.

The next question is one that cannot be avoided. Nationalism is an issue in Australia. Australians do not seem to concern themselves much with foreign media ownership that already exists, from relatively similar countries like Canada, the USA and Great Britain. Based on what I read see and hear, I expect they may be less comfortable with some types of ownership from other countries.

Australia cannot discriminate by race or country. If foreign ownership is to be allowed it has to be open to all. This is well understood by some witnesses:

Senator MURRAY— ... The question I want to ask you concerns foreign ownership. It is your position, isn't it, that foreign ownership of media in Australia should not be restricted other than through the normal processes of the Foreign Investment Review Board?

Mr Falloon—Correct.

Senator MURRAY—And your position is, isn't it, that with respect to those issues that you might describe as nationalism they should be catered for by local content rules and rules about the coverage of news and information with respect to Australia? Is that correct?

Mr Falloon—Again, correct.

Senator MURRAY—And in principle, of course, opening the market to foreign owners means that it does not matter whether it is an owner from France, the United States, Great Britain, Canada, China, India or, indeed, Iran?

Mr Falloon—Again, correct.³⁵

Of course even the new rules will prevent one owner owning all TV media for instance but it would not prevent one owner owning a key or dominant TV station and 70% of the major newspapers:

Senator JOYCE—With regard to your broader critique on globalisation and your belief that everything should be put up for sale and that anybody should be able to buy it, could I run this past you: if everything is up for sale and anybody can buy it, and al-Jazeera buys the lot—everything that is in Australia—would you be happy with that outcome?

Mr Berg—No, not necessarily, but I do not think that could ever possibly happen.

35 Mr Nicholas Falloon, Executive Chairman, Network Ten, *Committee Hansard*, 29 September 2006, p. 35.

Senator JOYCE—Under your proposal, yes, it could.

Mr Berg—No, only if we fix a point in time. If al-Jazeera buys up absolutely everything, I am sure that there would be individuals who would like to break that al-Jazeera monopoly by setting up some other.³⁶

Perhaps. I would only be comforted if there were changes to the TPA strengthening it and including divestiture provisions (see my comments on the TPA and the ACCC above).

ACMA and standards

ACMA powers

The Communications Legislation Amendment (Enforcement Powers) Bill 2006 is the bill that strengthens ACMA's powers.

The TPA is the legislation which regulates competition and consumer needs as enforced by the ACCC, and oversees mergers and acquisitions. However, ACMA as the media industry-specific regulator which must have the necessary powers to promote genuine real and meaningful diversity of economic, political, social and other media voices. If these two regulators are properly resourced, have interconnecting provisions where necessary and are given the appropriate powers then there is a chance that the media landscape of the future will adequately provide the information, social, political and entertainment needs of future generations.

Unfortunately this legislation does not give ACMA sufficient appropriate powers to achieve this and the TPA remains inadequate to deal with the competition and consumer issues which are raised by this legislation.

ACMA needs to have its role boosted, so that it can interlink with the ACCC more effectively, in mergers that it considers likely to be anti-competitive. The exchange below elucidates this point:

Senator BRANDIS—It has to be the ACCC, doesn't it?

Ms Beal—Not necessarily. In my view there is also a way to give stronger direction to ACMA in these reforms. I suggest that both regulators are given clear statutory guidance in relation to ensuring that their different roles—they have different roles, of course—are clear.

Senator BRANDIS—Let me just make sure that we have this straight. At the moment, ACMA has no power to prevent an anti-competitive merger within any of the forms of media organisation over which it has jurisdiction and it is not proposed to give ACMA such powers in these bills, is it?

Ms Beal—No.

36 Mr Christopher Berg, Research Fellow, Institute of Public Affairs and Editor IPA Review, *Committee Hansard*, 28 September 2006, p. 12.

Senator BRANDIS—So your understanding is that the only way in which that could be done is under the existing law with the ACCC seeking an injunction under section 80 of the Trade Practices Act for an apprehended breach of section 50 of the Trade Practices Act. Is that right?

Ms Beal—I had not thought about it quite so technically. I had been striving to demonstrate ways that content could be brought into the picture when considering the point of mergers because it is so important to the public interest. If the quality and type of content that Australians have access to are going to be affected by a merger, that ought to be something that the ACCC can take into account and protect against. We have had preliminary consultations with the ACCC in exploring this issue which suggest that content would not be a key focus in the minds of the ACCC when carrying out their role of enforcing the Trade Practices Act in relation to competitive conduct.³⁷

Local Content

With respect to local Australian content the Australian Democrats support the submission put forward by the Screen Producers Association of Australia (SPAA) regarding assistance to produce local content. There is no point in regulating for a certain level of Australian content on television and radio, when the financial conditions surrounding the production of that local content are too difficult to make it a sensible business proposition.

Everyone accepts that cheap imported American product which has proven its ability to attract viewers in other marketplaces, is much more likely to be purchased by profit-conscious FTA broadcasters than perhaps more costly Australian locally written and produced content. Therefore if there is to be more and better local content for FTA television stations or digital channels to show on the different delivery platforms then conditions conducive to the production of such content should be implemented as soon as possible. As Bill Gates is said to have once pointed out, ‘content is king’ and although he was talking about the internet, he also acknowledged that it was true of broadcasting.

If Australians are to continue to hear Australian voices, across a range of media platforms, then the recommendations of the SPAA regarding changes to the taxation system need to be given consideration by the government:

Senator MURRAY— ...The question is: if you open up foreign ownership in the way we have just discussed, do you think that we need additional protection supplied to ensure that there is sufficient local content, localism and Australian character and that that area is protected more than it has been? I ask you to recognise in your response that there has been something, I think, of a community reaction to what is regarded as an

37 Ms Elizabeth Beal, Director, Communications Law Centre, *Committee Hansard*, 29 September 2006, pp. 66-67.

excessive Americanisation of our entertainment and information. I do not know what weight to put on it, but I get that feeling.

Mr Falloon—I think if you look at the free television industry first, on local content, you see that there are rules in place: the transmission plus the drama quota. We think they are essential; they have been an important part of the whole mix. The issue where there has been some debate in the past years, which unfortunately now is a matter of fact, is that in the new industries that are clearly growing, namely the internet and pay television, the local content requirements under those rules as part of the free trade agreement have been fixed at 20 per cent maximum. The rule on pay TV is only at 10 per cent currently, but it cannot go above 20 per cent. So, as I was saying to you before, it is important in these rules that we keep it vibrant. It is not just because of the debate you hear from some people about having completely free and open competition in every market. In the television industry in this country, regulation has played a part for 50 years to get a position where we are the envy of most countries for the amount of local content that is on free television for viewers for free. We have got a fantastic system; we should be very proud of that system.

As new technology is coming down the pipe, you will never get in the new media more than 20 per cent under legislation that has now passed. That is why I keep saying that we need to be mindful of what part local content plays in this package of rules. As we move through the transition, whether we continue to have localism and local content as part of our mix will continue to be an important part of consideration for legislators such as you. Going forward, free television is the only area that is going to be able to deliver that, by definition.³⁸

Telstra and telecommunications

The ACCC needs stronger regulatory powers, not just specific to media but to cover telecommunications, because the ACCC needs the power to regulate both the content and the pipes that deliver it, to achieve that. The media proposals package fails to acknowledge the pivotal role of the telecommunications industry in the provision of media content and access in the future, and that is a big hole that should have been addressed.

The big hole in the media proposals package is that there is no mention of Telstra and how its future privatisation feeds into this debate. You cannot debate media regulation, access and content in a vacuum that excludes telecommunications. You must also debate telecommunications infrastructure and access along with it.

Competition has improved in the telecommunications markets over the years, especially in mobile phones, but Telstra, with its ownership of the copper network and Hybrid Fibre Coax (HFC) cable (used for pay TV and broadband delivery), is still the

38 Mr Nicholas Falloon, Executive Chairman, network Ten, *Committee Hansard*, 29 September 2006, p. 35.

dominant player in most other telecommunications markets. Telstra also has a significant share in Foxtel, giving Telstra a potentially dominant position in the new media market.

In the 21st century one of the most important delivery systems of media content is the internet, which is why telecommunications and media are absolutely intertwined. It provides access to the most diverse range of media content, but much of rural and regional Australia will miss out on this access because of the lack of telecommunications infrastructure to deliver high speed broadband access. Recently Telecommunications expert Paul Budde told Meet the Press that it is likely Telstra will only roll out fibre to metropolitan areas, leaving rural areas in the lurch.

When the sale of Telstra was negotiated, the media side of Telstra was neglected. It is a pity nobody reminded the National Party negotiators that telecommunications is the way to deliver media diversity in the 21st century.

The Democrats have argued time and time again that Telstra should at a minimum be forced to divest Foxtel and its HFC cable. This stance supports the ACCC's view. This would open up more competition in the market. The ACCC has argued that Telstra, in protecting the revenue of both the copper wire and the HFC network, will only invest in services that would cannibalise the revenue of the other network.

Ideally the Democrats say that for fair and transparent competition and parity for rural Australians the Government must separate the wholesale access network from the retail business and retain ownership of the infrastructure. Ownership of the HFC cable could be retained in this case, or divested to raise revenue for fibre roll-out.

THE DIGITAL TV BILL AND RELATED ISSUES

The motive behind the Broadcasting Legislation Act (Digital Television) Bill 2006 (Digital TV Bill) is to set up conditions which are, hopefully, conducive to the take up of digital television, and to open up media markets to some competition brought about by new technologies. These are laudable aims and the Australian Democrats agree with the majority report on some of the matters arising from this Bill which came before the Committee. However, although the Digital TV Bill contains some aspects with which the Australian Democrats agree, it also contains aspects which do not promote diversity of voices, or provide conditions in which an effective fourth estate can flourish as part of the democratic process.

The Australian Democrats wish to raise three issues that it believes are of great concern in relation to the Digital TV Bill, namely:

- the transfer of decision-making power from the ACMA to the Minister in relation to the grant of new commercial television licences;
- the Minister's power of veto over the grant of licences in the non-broadcasting services band; and

-
- the need for adequate funding for the national broadcasters to enable them to provide high quality multi-channel services now that genre restrictions have been lifted.

Transfer of decision making power from ACMA to the Minister

The Australian Democrats strongly oppose this change. The decision to grant a commercial television broadcasting licence should be made by an independent regulatory body, it should not be something that the Minister can be lobbied on by the big media owners.

The Government has not articulated any good policy reason for a fourth commercial TV licence to be excluded from the discussion, except another station would impact negatively on the revenue streams of the FTA commercial networks in the market.

The submission by the Media, Entertainment and Arts Alliance (MEAA) captured the folly of the Government's proposals:

The Alliance does not support the Government removing the capacity for the regulator to determine licence allocation. It is a central part of ACMA's role as an independent regulator and it should retain this decision-making capacity.

In announcing that it will assume the decision-making capacity to allocate a fourth licence, the Government has announced that it will not do so.

Again, the Alliance is at a loss to understand why the Government is so averse to opening up the broadcasting industry to competition.

The oft claimed arguments in defence of the Government's position rely on the assumption that to do so would threaten the viability of the incumbents because it would fracture the advertising pie, a pie that is already under threat from new media.

These arguments fly in the face of reality.

According to research undertaken by Free TV Australia – the association that represents the free to air commercial television broadcasters – 'seven out of ten media planners and buyers believe that there are even more opportunities to engage with viewers on Free TV than there were five years ago' and '80% also agree that having ads on free to air television strengthens the performance of [their] campaign in other media.'³⁹

The Government is again seen to be pandering to vested interests, and not dealing sufficiently with policy issues. The common perception is that while free and open competition is the claimed mantra of this government, in reality that only applies until it impacts on selected media mates.

39 MEAA, *Submission 32*, p. 6.

The Australian Democrats do not believe there is a discretionary role for the Minister in competition matters. Evidence of the undesirability of this practice was recently borne out by the Treasurer's behaviour in relation to access to rail networks in the North West of Western Australia.⁴⁰

ACMA is the regulator of media matters in Australia and it should be up to that body, which presumably is (or if not, should be) made up of appropriately skilled impartial and independent people, to investigate these types of matters and to come to an objective conclusion which is based on the application of evidence.

The Minister's power of veto

The Digital TV Bill provides a power to the Minister to veto an application made to ACMA for a new commercial television broadcasting licence outside the BSB (under section 40 of the BSA) on the basis that the allocation of the licence would be likely to be contrary to the public interest.

Again this is a decision that should not be able to be vetoed by the Minister. Under existing provisions of the TPA this has shown to be a power that can be misused and work against new players entering a market when they are up against powerful and financially endowed incumbents (again, I refer to Fortescue Metals efforts to become a third player in the Pilbara iron ore industry). There is no reason why ACMA can not make these sorts of decisions itself, taking into account 'the public interest'.

Neither the BSA, or the Digital Television Bill, set out exactly what factors will be taken into account when the Minister considers whether the grant of a licence under section 40 is 'likely to be contrary to the public interest'.

There are a couple of differences between the media-specific test that the PC put forward and the proposal in the Digital TV Bill, namely that the power of veto would be exercised by the Minister, and not by the ACCC and it is being applied in relation to the grant of a broadcast licence, not in consideration of a media merger.

The Australian Democrats understand that this particular issue received little attention in submissions and at hearings. However, the Democrats believe that this is a reflection on the volume of other issues that needed to be considered in the legislative package, and not an indication that the informed public simply agrees with this measure. For example when the Government announced this proposal in its Meeting the Digital Challenge discussion paper, released earlier this year, the MEAA responded:

The [MEAA] is strongly opposed to the plan for the Government to assume the regulatory and licensing functions of ACMA. ACMA is the statutory authority established at arm's length from Government to make such decisions. The Alliance does not consider that a case has been made to

40 See Barry Fitzgerald, 'Treasurer derails Pilbara track-sharing plan', *The Age*, 24 May 2006, p. 3. Also see Senator Murray, Senate Hansard 15 June 2006 p. 186.

remove the licensing capacity from the communications and media regulator.⁴¹

Mr Jock Given, in his submission on the discussion paper, also opposed the transfer of this power from the ACMA to the Minister. Mr Given's reasons for opposing the proposal were outlined in his opposition to the transfer of decision-making power in respect of commercial television broadcast licences, namely:

Why a practice put in place shortly after World War 2 should be equally appropriate for '21st Century Broadcasting' is not explained. When this policy was put in place, licences were awarded after a qualitative review of the merits of competing bids. Once granted, they were subject to a serious process of periodic review whereby there was a real possibility that they would not be renewed if performance was inadequate. This all changed in 1992. Commercial television licences are now awarded by price-based allocation, a highly inappropriate process for direct government involvement. The much more limited grounds on which renewal can be refused, or revocation undertaken, mean licences are now much more secure commodities than those handed out in the 1950s. They are very close to perpetual franchises. Lessons have been learned about communications regulatory processes since the 1950s. The separation from both industry participants and central government of telecommunications regulatory functions and spectrum allocation have been among the most important changes. They reflect 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 Discussion Paper's proposal would disrupt the careful balance of planning and licensing responsibilities without adequate justification, and contradict the 'convergence' of radiocommunications and broadcasting regulation that ACMA is supposed to be a response to, by creating yet another distinction in the way spectrum is allocated for different purposes. Regulation for the 21st century would be replaced with a discredited 1950s process.⁴²

The Australian Democrats note that Mr Given did not make any comment in his submission to the committee on the proposal to grant the Minister a power of veto over the grant of commercial television broadcasting licences outside the BSB. Nonetheless, the Democrats believe that Mr Given's argument set out above is worthy of consideration in the current debate.

Adequate funding for national broadcasters

Removing the genre restrictions on multi-channelling by national broadcasters will permit them to provide a broader range of digital services. The Australian Democrats

41 MEAA submission to the Meeting the Digital Challenge discussion paper, p. 9.

42 Mr Jock Given's submission to the Meeting the Digital Challenge discussion paper.

support the lifting of genre restrictions on content for ABC and SBS so they can provide a broader range of digital services. The ABC has shown itself to be a great innovator in the area of radio broadcasting with podcasting, and they have also produced some popular VODcasts in the recent past.

This lifting of genre restrictions will enable the national broadcasters to broaden their ability to create new and innovative programming. However the Australian Democrats have reservations about this because of course there has been no increase in real funding for the ABC or SBS over the last decade so that raises the question of how will these new services be financed? The Government continues to expect the national broadcasters to produce quality news and current affairs on a diminishing budget. Many argue that there are few options available for the ABC now, except to introduce advertising in the same way that SBS has done, to meet the increasing costs of content production.

Even though it was not covered in this Committee's majority report, the Australian Democrats would like to record their opposition to the introduction of advertising to make up the Government shortfall in funding to the national broadcasters. The obvious reason for this is that it impacts on the independence of the broadcasters, and the media environment is already affected enough by commercial interests.

High Definition Television

The proposed amendments to the HDTV obligations would require the 1040 hours per year HDTV quota to continue during the simulcast period, but will be removed once the simulcast period ends. Essentially this would allow the market to decide the preferred use of the digital spectrum beyond the simulcast period.

Although there was no clear consensus amongst submitters on this issue, the Democrats are persuaded by the argument made by those that support the early removal of the quota. For example SBS favoured an early transition:

Mr Meagher—We certainly think that, come either the switch-off time or perhaps the time when multichannelling is provided, it would be appropriate to do away with the high-definition quota. We do believe that, over time, there will be increased high definition and that people will come to value high definition. If you look at the UK, it is quite interesting. They started with a model driven by multichannelling, and now that has been quite well established there are substantial amounts of high definition, and that is often the point of differentiation for channels and providers. But we agree with you that, over time at least, removing the quota obligation would be a sensible move.⁴³

The Democrats believe that the mandated HDTV quota should be removed sooner than the end of the simulcast period in order to free up broadcasting spectrum for the other digital services.

43 Mr Bruce Meagher, SBS, *Committee Hansard*, 29 September 2006, p. 55.

The Democrats also have a concern that, as the Government has previously failed to meet its simulcast deadline on a number of occasions and its lack of ingenuity to drive digital take-up, that the simulcast date may be further delayed. As a result, this would further extend the duration of the HDTV quota, which would be undesirable.

Anti-siphoning

The anti-siphoning scheme ensures that certain events are available to the whole viewing public by preventing pay TV licensees from acquiring exclusive rights to listed events. The Minister may gazette a list of events, or events of a kind, which the Minister believes should be available free to the general public.

The current anti-siphoning list comprises domestic and international sporting events in twelve categories including cricket, tennis, golf, motor sports and the football codes. Pay TV licensees are prevented from acquiring a right to televise a listed event until a right has first been acquired by the ABC, the SBS or commercial free-to-air broadcasters reaching more than 50 per cent of the Australian population.⁴⁴

The Government's preferred option of dealing with this issue is to apply a 'use it or lose it' approach, where, in the event that FTA broadcasters fail to provide adequate coverage of a listed event, the event would be considered for removal from the list.⁴⁵

Amongst the criteria the Government is considering for determining 'adequate coverage' of events on the anti-siphoning list is whether the event or events that make up the item were shown live, or near live (commencing within one hour of the start of the event).

As highlighted in the Hearings the Democrats are concerned for communities outside the eastern seaboard states, as these areas often receive delayed broadcasts of major sporting events (as well as news and weather). The Democrats stress that 'live means live' and that the anti-siphoning regime should take greater account of the interests of those in non-east coast states. This issue should be considered during the review of the anti-siphoning scheme, scheduled to occur prior to 31 December 2009.

Mr Williams—I think perhaps we have not made our position sufficiently clear. The issue is: if you have legislative commercial preferment, which is what we are talking about, we are saying there needs to be a rule around it. And the rule is: you must play it within one hour of the thing starting. Sports broadcasting is about live sport. It is not about starting the transmission of the Rugby League grand final on Sunday in Perth over three hours after the lap of honour around the ground will have been run. That is preposterous. There need to be proper rules. We are saying: if it is delayed by an hour, yes, it comes off the list. And, hopefully, the industry, which

44 DCITA website, Broadcasting and online regulation > Television > Anti-siphoning and anti-hoarding, available at http://www.dcita.gov.au/broad/television/anti-siphoning_and_anti-hoarding, accessed 3 October 2006.

45 Meeting the Digital Challenge discussion paper, p. 32.

seem to hunt in a pack when it suits but then become guerrilla agents when it does not suit, will actually do something about it. Live means live. National means national. We are one nation. This is one parliament for the nation.⁴⁶

...

Senator MURRAY—Mr Williams, as a general observation as a Western Australian, my experience has been that eastern staters do not pay enough attention to the real effects of time zones in this country. You saw me nod vigorously when you said ‘live means live’. It is a strong issue in Western Australia. It is not just with respect to sport; we want real-time news, we want real-time weather—⁴⁷

THE LICENCE FEES BILL

As part of the general package of media bills being considered, the Television Licence Fees Amendment Bill 2006 amends the definition of ‘gross earnings’ (of the licensee, upon which fees payable are calculated) to take into account the fact that broadcasters will now be able to earn revenue from providing multiple services (ie. the new digital services and the existing services). Effectively, the Bill ensures that all revenue generated by the licensee will be taken into account in determining the relevant licence fee.

At the Senate hearing concern was raised about the detrimental burden that would be placed on these new services if they were forced to pay licence fees from the very beginning (with the licence fees currently being about nine per cent of gross revenues). Ms Julie Flynn, Chief Executive Officer of Free TV Australia, stated:

In relation to the Television Licence Fees Amendment Bill, we are opposed, as you have just heard from Channel 7, to bundling multichannels with the main channel for the purpose of calculating licence fees. These are new services operating in an uncertain environment and should be exempt in the first instance, as new services have been in the past. We all agree that when fees are applied they should be levied separately from the main channel.⁴⁸

I believe that Ms Flynn has a point. Some sort of ‘break’ is needed for those that choose to provide these new services. As Ms Flynn notes, these are new services operating in an uncertain market, and ‘small’ should also be added. It is not uncommon for infant industries to be allowed a transitional period before the fees kick in. Also, if other services, when first starting, have been given exemptions (as Ms Flynn notes), it is only fair and equitable that similar exemptions be granted.

46 *Committee Hansard*, 29 September 2006, p. 41.

47 *Committee Hansard*, 29 September 2006, p. 44.

48 *Committee Hansard*, 28 September 2006, p. 56.

What is needed is some sort of transitional period, in which the success (or failure!) of the new services can be assessed, and the licence fee situation review accordingly. I would like to lend my support to the idea, as put forward by Ms Bridget Godwin (Manager, Regulatory and Business and Affairs, Seven Network) at the Senate Hearing, that a moratorium be placed on licence fees, until such time as it is appropriate to review the situation.

The possibility of separating out the main channel and the new digital service should also be considered, so that a sliding scale (as contained in the Television Licence Fees Act) could be used, with the new services paying in accordance with their revenues, and not the revenues of the channel as a whole.

CONCLUSION

Given the ridiculously short time for this Inquiry, and the length and complexity of the four bills that comprise this media proposals package, it is inevitable that this Democrats' Minority has not covered all the material issues that arise from consideration of this legislation. We have just run out of time.

The Majority Report covers a number of issues more fully. We will support those Coalition Senators' initiatives that will have the effect of improving diversity, adding more real competition and enhancing regulatory process and oversight, as outlined in the Majority Report.

Naturally, my Minority concentrates on negatives or on shortcomings, but I have also attempted to suggest a number of improvements in policy that would positively contribute to greater diversity and competition, such as greater assistance for community TV.

I emphasise that the Democrats welcome a number of features of this package of legislation, including advancing technology and new media, and strengthening ACMA.

As stated at the outset of this Minority Report, our main problem is with the Media Ownership Bill. Without substantial and concurrent legislation to strengthen the ACCC in particular, ACMA and the FIRB; and to tighten the 'voices formula' to require a safety net of real meaningful voices in each significant media market, the Media Ownership Bill must be opposed outright.

Senator Andrew Murray
Senator for Western Australia

Appendix A

March 2004: Senate Economics References Committee Report into the effectiveness of the *Trade Practices Act 1974* ('the Act') in protecting small business

EXECUTIVE SUMMARY

AND LIST OF RECOMMENDATIONS

1.1 The Senate Economics References Committee's inquiry into the effectiveness of the *Trade Practices Act 1974* ('the Act') in protecting small business is the latest in a long series of government and parliamentary inquiries into the operation of this Act.

1.2 The most recent of these, the *Review of the Competition Provisions of the Trade Practices Act* ('the Dawson Report'), canvassed a number of areas relevant to this inquiry, particularly regarding the 'misuse of market power' provisions in Section 46 of the Act. After the Dawson Committee had completed its consultations with interested parties, however, several decisions were handed down from the Full Federal Court and the High Court which have raised questions about the application and operation of Section 46 of the Act. The decision of the High Court in *Boral Besser Masonry Ltd v ACCC* (the *Boral* case), in particular, raised these issues and forms a significant backdrop to this Committee's inquiry.

1.3 An issue which has been raised during many of these inquiries is the question of whether the Act should seek to protect *competition* or *competitors*. The Committee considers that the Act can best protect competition by maintaining a range of competitors, who should rise and fall in accordance with the results of competitive rather than anticompetitive conduct. This means that the Act should protect businesses (large or small) against anticompetitive conduct, and it should not be amended to protect competitors against competitive conduct. This inquiry considered how well the Act achieves this goal.

Misuse of market power

1.4 Section 46 of the Act prohibits corporations with a substantial degree of market power from taking advantage of that power for the purpose of eliminating or substantially damaging a competitor, preventing the entry of a competitor into the market or deterring or preventing a competitor from engaging in competitive conduct.

1.5 A number of submissions and witnesses argued in evidence that the High Court's decision in the *Boral* case has raised the threshold for determining that a corporation possesses a substantial degree of market power. They argued that the High Court's finding that Boral did not possess a substantial degree of market power means, effectively, that a corporation would have to be near dominant in the market to satisfy that element of section 46.

1.6 Accordingly, many including the ACCC argued that section 46 requires amendment to ensure that the lower threshold intended by Parliament is given effect in the legislation. The ACCC in fact informed the Committee that, as a consequence of the decision in *Boral*, it had discontinued four cases that had reached the ‘second threshold’ stage of its investigations in relation to section 46.

1.7 The Committee considers that the amendments suggested by the ACCC are consistent with the intention of Parliament in 1986, and that their inclusion in the Act would clarify the intentions of Parliament.

Recommendation 1

The Committee recommends that the Act be amended to state that the threshold of ‘a substantial degree of power in a market’ is lower than the former threshold of substantial control; and to include a declaratory provision outlining matters to be considered by the courts for the purposes of determining whether a company has a substantial degree of power in a market. Those matters should be based upon the suggestions outlined by the ACCC in paragraph 2.16 of this report.

1.8 The Committee received some evidence arguing that amendments are also required to section 46 in order to clarify what a court may have regard to in determining whether a corporation has ‘taken advantage’ of its market power.

1.9 Witnesses argued that the need for clarification arises from the Federal Court’s decision in *Safeway*, which found that the business rationale for the conduct was relevant to considering whether the corporation had taken advantage of its market power. The ACCC was concerned that this reasoning left open the possibility of a defence on the grounds of ‘rational business conduct’ to corporations which had unfairly taken advantage of their market power.

1.10 The Committee considers that the Act should be amended to remove current uncertainty with regard to the meaning of ‘take advantage.’ The Committee considers that its proposed amendment would make clear and explicit the link between proscribed conduct and the possession of substantial market power, and would deal with the issue of ‘rational business conduct.’

Recommendation 2

The Committee recommends that the Act be amended to include a declaratory provision outlining the elements of ‘take advantage’ for the purposes of s.46(1). This provision should be based upon the suggestions outlined in paragraph 2.28 of this report.

1.11 A number of submissions and witnesses expressed concern about predatory pricing activities which, they argued, are not adequately captured by section 46. The Committee notes that predatory pricing has proven difficult to define or establish.

Low, or below cost, prices may be evidence of predatory pricing but they may also occur as a consequence of normal, competitive behaviour.

1.12 The Committee considers that the Act would be strengthened by making predatory pricing a clearer target of section 46.

1.13 One factor which may indicate that the relevant pricing is predatory is where the price-cutting company plans to recoup its losses by increasing prices once its opponents have been driven from the market. However, there was dispute in the evidence before the Committee over whether recoupment is a *necessary* feature of predatory pricing.

1.14 The Committee considers that, while evidence of a corporation's intention to recoup losses may well contribute to the proof of an allegation of predatory pricing, there is nothing in s.46 which makes recoupment an element necessary to prove predatory pricing. The Committee considers that the Act could be improved by stating that recoupment is a factor which the courts *may* examine when considering allegations of predatory pricing.

Recommendation 3

The Committee recommends that the Act be amended to provide that, without limiting the generality of s.46, in determining whether a corporation has breached s.46, the courts may have regard to:

- **the capacity of the corporation to sell a good or service below its variable cost.**

The Committee recommends that the Act be amended to state that:

- **where the form of proscribed behaviour alleged under s.46(1) is predatory pricing, it is not necessary to demonstrate an capacity to subsequently recoup the losses experienced as a result of that predatory pricing strategy**

1.15 The Committee received some evidence suggesting amendments designed specifically to deal with the use of financial power to support predatory pricing. The proposed amendments set out to capture predatory pricing conduct of firms with financial power but not market power, that might otherwise fall outside the scope of section 46.

1.16 The importance of such amendments was highlighted by the outcome of the *Rural Press* case, handed down in December 2003. In that case, Rural Press pursued a clearly anticompetitive business strategy, but was not found to be in breach of the Act, partly because it relied on its "economic and financial power" and not its market power. An attempt by the trial judge to link economic, financial and market power was overturned on appeal.

1.17 The ACCC supported the use of the concept of financial power in regulating conduct contrary to s.46, but considered that rather than introducing a financial power threshold in s.46, financial power should be listed as one of the factors contributing to a determination of substantial power in a market.

Recommendation 4

The Committee recommends that s.46 of the Act be amended to state that, in determining whether or not a corporation has a substantial degree of power in a market for the purpose of s.46(1), the court may have regard to whether the corporation has substantial financial power.

‘Financial power’ should be defined in terms of access to financial, technical and business resources.

1.18 Evidence raised the issue of whether amendments are required to ensure that s.46 applies where a corporation uses market power in one market to engage in proscribed conduct in a second market. This issue was determined by the High Court late in the Committee’s deliberations, when in the *Rural Press* judgment the Court clearly stated that misuse of market power in a second market is not a breach of the Act.

1.19 The Committee considers that this should not be the case. The possession of market power in one market should not become the base for anticompetitive conduct in another market, and the Act should be amended to make this clear.

Recommendation 5

The Committee recommends that s.46 be amended to state that a corporation which has a substantial degree of power in a market shall not take advantage of that power, *in that or any other market*, for any proscribed purpose in relation to that or any other market.

1.20 The Committee, finally, considered the impact of coordinated market power on competition. The Committee considers that corporations which do not have a substantial degree of market power on their own, may obtain that power through ‘conscious parallelism’ or ‘coordinated interaction’ with other corporations. For this reason, the Committee considers that s.46 of the Act should be clarified to indicate that a company may obtain market power by virtue of its co-ordination with another company, and that such coordinated market power may amount to a substantial degree of power in a market.

Recommendation 6

The Committee recommends that s.46 be amended to clarify that a company may be considered to have obtained a substantial degree of market power by virtue of

its ability to act in concert (whether as a result of a formal agreement or understanding, or otherwise) with another company.

Unconscionable conduct

1.21 Part IVA of the Act prohibits the anti-competitive behaviour known as ‘unconscionable conduct’. Section 51AC, which seeks particularly to protect small businesses from unconscionable conduct by large businesses, attracted most comment during this inquiry.

1.22 A number of submissions sought to extend s.51AC to proscribe ‘unfair, harsh or unconscionable conduct’. The Committee considers that ‘harsh’ conduct is often a normal part of tough competitive dealing, and that the concept of ‘unfair conduct’ is much less legally certain than the concept of ‘unconscionable conduct.’ It is not clear that either of these proposed additions would enhance protection for small business under the Act, and as a result the Committee does not support their inclusion.

1.23 Subsections 51AC(9) and (10) limit the operation of s.51AC to the supply or acquisition of goods or services at a price in excess of \$3,000,000. A number of organisations called for greater clarity around the \$3 Million figure, suggesting it should operate on a per-invoice basis, and should be indexed. Other evidence suggested that the \$3 Million threshold was fundamentally inappropriate, and should be removed.

1.24 The ACCC agreed with this view, saying that subsection 51AC(3)(a) already stated that the courts may have regard to the relative strengths of the bargaining positions of the companies, so no threshold is necessary.

1.25 The Committee noted these arguments and further noted that subsections 51AC(1) and (2) exclude publicly listed companies from the protection of the section. The Committee agrees that the removal of the thresholds will not reduce the current protection for small businesses, and will enhance protection for businesses involved in transactions over \$3 Million, who are nevertheless subject to unconscionable conduct within the terms of s.51AC.

Recommendation 7

The Committee recommends that subsections 51AC(9) and 51AC(10) of the Act be repealed.

1.26 Submissions and witnesses also sought to extend s.51AC to proscribe a number of specific activities, including the unilateral variation of contracts, unilateral termination of contracts, and the presentation of standard form contracts. In relation to the behaviours identified in these activities, the Committee notes that many are already captured by the terms of s.51AC, particularly subsections (3)(j) and (k).

1.27 The Committee also notes evidence that there are occasions upon which the use of standard form contracts or unilateral variations of contracts may be pro-competitive and commercially beneficial for both parties. Standard form contracts, for

instance, save both parties time and money when similar transactions are conducted regularly, and when the terms and conditions are well known and agreed by both parties. The Committee is concerned that the proscription of standard form contracts *per se*, would remove these cost saving benefits in addition to proscribing the unconscionable use of such forms.

1.28 The ACCC presented a slightly different proposal in relation to unilateral variation of contracts. The ACCC argued that, rather than proscribing such contracts, they should be added to the list of matters, contained in subsections 51AC(3) and (4), to which the courts may have regard in determining whether conduct is unconscionable. This proposal would not ban the unilateral variation of contracts outright, but would make it clear that such contracts could constitute conduct which is, in all the circumstances, unconscionable.

1.29 The Committee finds this argument compelling, since it would discourage the inappropriate use of unilateral variation of contracts, while allowing unilateral variation where such provisions are commercially necessary and pro-competitive.

Recommendation 8

The Committee recommends that subsections 51AC(3) and 51AC(4) of the Act be amended to include ‘whether the supplier (in s.51AC(3)) or acquirer (in s.51AC(4)) imposed or utilised contract terms allowing the unilateral variation of any contract between the supplier and business consumer, or the small business supplier and acquirer.’

1.30 Witnesses indicated to the Committee that some government authorities, particularly at State and local levels, are not covered by s.51AC of the Act, despite being large scale purchasers of products, often from small businesses. The Committee agrees that such authorities should be subject to the Act.

Recommendation 9

The Committee recommends that s.2B(1) of the Act be amended so that it is clear that Part 1VA of the Act applies to the Commonwealth Government; and that the Government consult with the states and territories with a view to amending subsection 2B(1) of the Act, so that Part IVA of the Act applies to state, territory and local governments.

1.31 The Committee examined, in some detail, unconscionable conduct in retail tenancy arrangements. Some witnesses argued that ACCC has not pursued retail tenancy issues with sufficient vigour, despite the introduction of s.51AC which was intended to strengthen the remedies available to retail tenants who were the victims of unconscionable conduct.

1.32 The Committee observed, however, that since a number of State and Territory jurisdictions have drawn down versions of 51AC into their respective retail tenancy

regimes the full impact of s.51AC on retail tenancies may be larger than is suggested by a simple observation of the ACCC's activity.

1.33 The Committee recommends that the Commonwealth government work with its State and Territory counterparts to harmonise retail tenancy laws.

1.34 The Committee noted that there are inconsistencies and areas where the law could be strengthened, including in relation to the common practice of 'secret pricing' in retail tenancies. While the Committee does not support the compulsory disclosure of rental terms, the Committee does not support arrangements which prevent such disclosure. Such arrangements inhibit, rather than support, an informed market for retail tenancies. In particular, retail tenants who utilise the collective bargaining notification arrangements proposed in the Dawson Report and supported in this report should be able to freely share information about their rental prices and conditions. If this process fails to deliver satisfactory outcomes over time, the Government should consider the adoption of a mandatory code.

Recommendation 10

The Committee recommends that the Commonwealth Government negotiate with state and territory governments, with a view to introducing measures which would prohibit retail lease provisions compelling tenants to keep their tenancy terms and conditions secret.

Codes of conduct

1.35 The Committee considered Part IVB of the Act, which enables voluntary or mandatory industry codes to be prescribed under the Act, so that contravention of a relevant code also contravenes the Act. The Committee further noted the ACCC's proposals to endorse codes of conduct which meet its quality criteria.

1.36 The Committee concurs with the scepticism expressed by a number of small business representatives about the extent to which voluntary codes of conduct can address entrenched problems within particular industries.

1.37 The Committee does not support the general use of voluntary codes as a substitute for sensible regulation. The Committee notes that the recommendations it has made in this report are likely to accomplish more to support successful competition than the most well-meaning ambitions of developing voluntary codes.

Collective bargaining

1.38 The Committee generally supports the Dawson Report's recommendation for a notification process rather than an authorisation process for proposed collective bargaining arrangements. The Committee notes that these recommended collective bargaining arrangements include provision for collective boycotts, where these are judged to be in the public benefit.

1.39 Although the government accepted the recommendation of the Dawson Report in relation to collective bargaining, the Committee notes that it has yet to introduce the legislation to implement that proposal.

Recommendation 11

The Committee recommends that the Government immediately bring forward legislation to introduce a collective bargaining notification scheme, including the right to boycott, and excluding the proposed \$3 million threshold for notifications.

Creeping acquisitions

1.40 Submissions before the inquiry suggested that in the retail grocery sector and the retail liquor sector, large chains are acquiring the stores of independent competitors in a program of ‘creeping’ acquisitions. Witnesses expressed concern that s.50 of the Act, designed to prevent acquisitions that would have the effect of ‘substantially lessening competition in a market’, is inadequate in dealing with piecemeal acquisitions because no single purchase is likely, by itself, to lead to a substantial lessening of competition.

1.41 The ACCC itself expressed concern about this issue, but also noted that it has not yet determined whether creeping acquisitions in general (as opposed to specific case) do substantially lessen competition and so cause economic detriment. Further, if they do have this effect, the ACCC expressed uncertainty about whether the current section 50 provisions would be adequate to deal with that issue.

1.42 The Committee considers, as a matter of logic, that creeping acquisitions must, if continued indefinitely, at some point result in a very concentrated market. The clear consensus of evidence before the Committee supported this view, and no substantial arguments were raised to oppose it. Current merger law does not effectively address this issue. Section 50 of the Act should be strengthened to take account of the cumulative effects of acquisitions which over time may substantially lessen competition.

Recommendation 12

The Committee considers that provisions should be introduced into the Act to ensure that the ACCC has powers to prevent creeping acquisitions which substantially lessen competition in a market.

Divestiture

1.43 Divestiture powers are powers which enable a Court to order that a dominant corporation be broken up into several smaller corporations in order to prevent the anticompetitive domination of a market by one player.

1.44 Such powers are currently available under s.81 of the Act, but cannot be applied to creeping acquisitions, nor to offences under s.46. The Committee considers that the application of s.81 should be expanded, so that divestiture becomes a remedy for other breaches of the Act, including section 46 (Misuse of market power) and any new section introduced in line with the Committee's recommendation 12 (relating to the regulation of creeping acquisitions).

1.45 As divestiture is a quite severe remedy, it is appropriate to provide "warning mechanisms" to ensure that a corporation which is expanding its business is able to comply with its obligations under the Act. A suitable warning mechanism could be based around a "trigger" market concentration.

1.46 This trigger should not operate as a *de facto* cap on market share. Rather it would require companies proposing acquisitions in concentrated industries to notify the ACCC. The Commission would then assess whether the acquisition would result in a substantial lessening of competition. The Committee notes that this already occurs in the retail grocery industry.

Recommendation 13

The Committee recommends that s.81(1) of the Act be amended so that s.81 can be applied where a corporation is found to have contravened section 46, section 46A, or any new section introduced to regulate creeping acquisitions.

Powers of the ACCC

1.47 Before the Dawson Committee, the ACCC argued that it should be given the power to issue 'cease and desist' orders to stop anti-competitive conduct. Other organisations supported the extension of these powers before this Committee. The Committee considers that cease and desist powers are a vital tool for the ACCC if it is to prevent anti-competitive conduct from resulting in substantial damage to small business. The ACCC requires a tool which will enable it to act in 'real business time' yet which will protect the rights of companies against whom the cease and desist orders are sought.

Recommendation 14

The Committee recommends that the Act be amended to provide for cease and desist orders, modelled on the orders provided for in sections 74A to 74D of the *Commerce Act 1986* (NZ), appropriately modified to conform with Australian constitutional law.

1.48 The ACCC argued, before this Committee, for an extension of its powers under s.155 of the Act beyond the commencement of injunctive court proceedings. The Committee is reluctant to interfere in the powers possessed by the ACCC once a matter is before the courts. However the Committee considers that the ACCC should be able to apply to the courts for its s.155 powers to continue after the commencement of injunctive proceedings.

Recommendation 15

The Committee recommends that s.155 of the Act should be amended to enable the ACCC to seek the permission of the court (whether as part of a warrant application or otherwise) for the continued use of its powers under s.155 after the commencement of injunctive proceedings. The use of s.155 powers should cease prior to the commencement of substantive proceedings.

Resources of the ACCC

1.49 The ACCC acknowledged to the Committee that it is often constrained in its ability to pursue legal proceedings in relation to s.46 and s.51AC, because of the lack of availability of funding. The Committee wishes to rectify this problem.

Recommendation 16

The Committee recommends that the ACCC should be adequately funded to undertake its role as the principal litigant in s.46 and s.51AC cases.

Judicial arrangements

1.50 One organisation suggested to the Committee that jurisdiction for s.46 and s.51AC matters should be extended to lower courts and tribunals, in order to increase access to justice for small businesses. The Committee supports this proposal, and considers that the Federal Magistrates Court has developed expertise in resolving issues without requiring the expense of a fully contested court case. This expertise could resolve a substantial number of s.46 and s.51AC matters with cost savings for all sides. Recourse to the Federal Magistrates Court may also enable more small businesses to utilise the provisions of section 83 of the Act to seek damages where anti-competitive conduct has already been established by the courts.

Recommendation 17

The Committee recommends that the jurisdiction of the Federal Magistrates Court be extended to enable it to deal with Misuse of Market Power (s.46 and s.46A where cases rely upon s.83), Contravention of Industry Codes (s. 51AD) and Unconscionable Conduct (Part IVA).

Approaches adopted in OECD economies

1.51 In its discussion of the effectiveness of the *Trade Practices Act 1974*, the Committee has compared the provisions of the Act with those in the competition laws of a number of OECD economies. In particular, the Committee has considered approaches adopted in relation to the following issues:

- UK and US legislation regarding predatory pricing and recoupment (para 2.51);
- US legislation regarding definitions of ‘unfairness’ (para 3.29);

- UK legislation regarding the regulation of contracts (para 3.54ff);
- UK legislation regarding a ‘trigger’ of market concentration for the purpose of assessing acquisitions (para 4.76ff)
- New Zealand legislation regarding cease and desist powers (para 5.10ff)