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May 17, 1999

The Chairman
Productivity Commission
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Dear Sir

This letter sets out certain views that this company wishes the Commission to consider in the context of its current Broadcasting Inquiry. Please accept my apologies for the late lodgement of this submission, however at this point I do not believe that the views submitted warrant the company's participation in the public hearings to be held by the Commission. In this circumstance, I trust that our tardiness will not cause the Commission undue inconvenience.

Before turning to the substance of our contribution to the Inquiry, I might observe that virtually from the day of the transmission of the inquiry's Terms of Reference to the Commission the object of the exercise has been widely interpreted as an attempt by the Federal Government to pursue an alternative round-about route to achieving its deregulatory agenda for existing media cross ownership and foreign ownership restrictions. That may well be the case.

It would be unfortunate, however, if the undue emphasis given to no doubt interesting and important ownership questions, mostly by media commentators and specific interest lobby groups, was allowed to divert attention from the very real issues which require urgent attention in the broadcasting sector. It has been my experience that the wider public is generally unperturbed and largely unaffected by considerations of who owns media outlets. It is rather more concerned by the service that each outlet delivers. Therefore, media ownership is only relevant in the context of its impact on the services provided, not as an absolute element in media legislation and regulation to be considered in isolation.

In making the above comments, I am attempting to place the comments that follow in context. I am sure that the Commission will ensure that all matters requiring consideration under the Terms of Reference will be given proper and equal weight in the Inquiry.

1. Introduction

The Broadcasting Services Act 1992 (the Act) and its associated legislation had both general and specific objectives. It was said by its authors and the Government of the day to free up the then broadcasting system so that it became more responsive to the needs (demands?) of the community and was able to deliver services more effectively and via a range of technologies without the inherent inhibitions that had characterised the regime which it replaced. In short, it was claimed to be deregulatory and technologically neutral.

It also introduced two new categories of service – the concept of narrowcasting was, with something of a contradiction, introduced into broadcasting legislation; and after many years of debate finally authorisation was given by an Australian administration for the provision of subscription television (and radio) services.

I do not intend in this short submission to analyse in detail whether or not the Act has achieved all that was promised as a result of its introduction. Certainly there have been some notable successes, some intentional (the more eclectic community broadcasting sector) and some not (the considerable market success of the multichannel cable television systems). There have also been significant failures, such as the planning and licensing system for standard broadcasting services, particularly new commercial radio outlets, which has proved to be even less capable of actually resulting in the arrival of new services than was the one it replaced.

It is unarguable, however, that the existing legislative structure for broadcasting is becoming more and more irrelevant. It would be easy to blame those responsible for the 1992 legislation for not being more farsighted, and I would contend that some criticism is justified for the extent to which at the time they disregarded exhortations to look seriously at their assumptions and consider alternatives. At the same time, it must be said that this irrelevance has been substantially contributed to by three developments which many would argue could not have been foreseen, at least not to the degree that all three have in fact occurred.

These three major developments in the world of broadcasting in Australia are:

1. The emergence of broadband cable systems as the primary means of delivery of subscription television (pay TV) services, and the ready acceptance of cable TV by Australian consumers.

2. The evolutionary conversion of all communications services to digital technology, in a potentially more truncated timeframe than was expected, and the opportunity this offers for a raft of new services to be delivered by both the traditional Broadcasting Act-licensed operators and others operating outside the Broadcasting Act regime.

3. The phenomenon of the Internet.

2. Broadband Cable

The 1992 Act did not even refer specifically to the possibility of broadband cable systems, lumping this internationally accepted means of delivering multichannel entertainment and information services into a minor 'catch-all' provision in the Act designed to cover "all other subscription television services". Disregarding the findings of previous inquiries in this country and elsewhere, and apparently entranced by the emerging satellite direct broadcasting (DBS) services developing in the U.S., the U.K. and Europe, the Act's authors ignored warnings that cable systems offered such significant advantages (bandwidth, interactivity, competitive pricing, programming flexibility) over DBS that they would become the delivery alternative of choice and DBS would be but a program supplier to cable or a means of service in-fill in non-cable areas.

The Act's positioning of satellite as the primary means of delivering pay TV was a major error. The two licences awarded under the Act (itself a process of Pythonesque farce) have been consigned to the waste-bin of history. The two cable TV systems - Foxtel and Optus Vision – now boast a combined subscriber base in excess of 700,000 television households, or some 11.5% of the total market, and around 30% penetration of the market where cable is physically available.

It is true that there is operating in Australia a very successful pay TV operation which delivers service via both DBS and terrestrial microwave distribution – the regional market operator

Austar. It is estimated that Austar currently has more than 300,000 subscribers located in the regional areas of the mainland eastern States. It is equally true that where Austar operates there is virtually no broadband cable system development.

The problem for the existing legislative and regulatory regime in not recognizing the likely dominance of cable systems where they are available in the major metropolitan markets is that this leads to a disregard in the legislative structure of one of the major influences in the development of converged broadcasting and telecommunications services, leading to a new service package in which the boundaries between these two traditionally separate services are not just blurred but non-existent. The increasingly difficult question of what is broadcasting and what is telecommunications brings a myriad of uncertainties for the operation of almost all aspects of existing regulatory arrangements.

This trend to convergence is destined to become the norm. After a lengthy period of problematical development, various DSL technologies, which enable digitised broadband services to be delivered to consumers via the existing copper wire telephony system, appear now to be on the verge of operational implementation. Further, the Australian Communications Authority (ACA) has recently and successfully auctioned 1.150 GHz of spectrum in each and every Australian market, to be employed in the operation of LMDS systems, making it possible to deliver simultaneously to interested consumers a wide range of telecommunications, broadcasting and interactive on-line services. From its published comments, it is clear that the ACA does not intend to stop there and is already planning the allocation by auction of other sections of the radio frequency spectrum suitable for the dissemination of similar packages of integrated services, and for the acquisition of which there seems to be ample commercial interest.

Our conclusion is that it is no longer possible to devise legislative and regulatory regimes that address the fields of broadcasting and telecommunications as being conveniently separate. This difficulty for policy development and implementation is of course materially added to by the complication of the wide acceptance of the Internet, delivered by broadband cable, as a means of accessing services traditionally seen as broadcasting.

3. The Arrival of the Digital Era

Whatever the basis of the prior claim that the 1992 Broadcasting Act was “technologically neutral” (and many would say that this was no more than political puffery), it certainly has been rendered irrelevant by the reality and promise of digital communications services. There is simply no possibility of the Act successfully extending itself to cover the Digital Era. For example, even the definition of a ‘broadcasting service’ contained in the Act may be of limited utility in an environment in which all services will increasingly be individualised and delivered ‘point-to-point’ to specific viewers via requests based on ‘on demand’ selection menus.

There is already emerging a vigorous debate as to what will constitute ‘broadcasting’ under these changed circumstances. Both existing licensed broadcasters and other commercial interests are planning the development and operation of “Enhanced TV” and “Datacast” services, many of which will share sufficient of the characteristics of existing television broadcasting so as to be indistinguishable from the existing product, but will not satisfy the definition of ‘broadcasting’ as contained in the Act nor in some cases will they be operated by existing licensed broadcasters. Others will be quite different to what we now recognize as ‘broadcasting’ but will be an imbedded element of the ‘broadcasting’ service and will be unable to be received except within the ‘broadcasting’ signal.

It is also probable that the currently proposed restrictions on the delivery of multichannel program services by existing licensed broadcasters will break down in the face of public demand for additional services, and the likely earlier approval for the ABC and the SBS to enter the

multichannel domain. The outcome will be increased homogeneity between broadcast and subscription services now considered to be separate, a development likely to be emphasised by the (regrettable) increased carriage of advertising on subscription channels.

Additionally, the feature of digital technology which allows the compression into an existing communications space a volume of information not previously thought possible will make it increasingly attractive to use narrowband services (e.g., the telephone, both fixed and mobile) to provide services which are in all senses the same as broadcasting. This will have fundamental repercussions for all elements of regulation – licensing, content, ownership and control.

4. The Internet

It is difficult to imagine a more fundamental change to our traditional way of looking a broadcasting than the impact of the Internet. The intrinsic incompatibility of the *raison d'etre* of the Internet, and its in-built anarchy, with the concept of relatively detailed and intrusive broadcasting regulation as currently practised, is becoming more and more obvious as the popularity of the Internet grows and it becomes a true means of mass communication. The frustration of those that see regulation as the answer to what they consider to be unacceptable content is understandable. It is inevitable, however, that their efforts are doomed to failure.

In this context it is of interest that the Federal Government has regularly looked to the Australian Broadcasting Authority (ABA) to assist it in dealing with the administrative and regulatory inconvenience that the Internet represents. It was the ABA that was given the task of conducting inquiries into how to manage the arrival of the Internet into the communications sector, and its subsequent expanding usage and consumer acceptance. It is to the ABA that the Government has turned to administer its (possibly unconstitutional) attempts to enforce proposed and somewhat arbitrary content standards. This will be at best a forlorn attempt to impose control on what is designed to be uncontrollable, and at worst will artificially constrain Australia's attempts to forge a position for itself in the future world of on-line culture, economy and society.

It is not clear to me as to what constitutional power the Federal Government would refer to authorise its decision to legislate for the regulation of the Internet via the Broadcasting Services Amendment (Online Services) Bill 1999. Possibly, it may rest on its powers relating to the classification of imported material, however the placement of the regulations within the Broadcasting Services Act may suggest that it is depending on its general powers relating to the regulation of communications. It is difficult to see how that could extend to material packaged as a communications service in other national jurisdictions.

While the debate about the regulation of the Internet is an interesting review of the Federal Government's powers, the real issue is that the solution is but another graft of an inappropriate growth on to the body of the existing Act, to join that already somewhat clumsily attached to cover the development of digital television services and the regulations to apply to that latter body of services operated by licensed broadcasters and certain (but not all) others.

5. Conclusion

To the probable frequent irritation of those that would regulate the communications sector, generally it is a difficult entity to take hold of let alone control. No Australian Government, nor for that matter any overseas administration has satisfactorily come to grips with the many underlying tensions that infest the sector. For that, many consumers are no doubt grateful.

There are aspects of the sector, however, which deserve better consideration by Governments and regulators. One primary aim should be to attempt to as great a degree as possible to be as consistent and equitable as possible in the way in which different participants in the overall sector are treated. That is not currently the case.

To a considerable degree this is the result of the historical separation of the various pieces of Federal legislation which apply to communications, and the resulting separate administrative and regulatory bodies which are responsible for the different acts. Telecommunications, radiocommunications and broadcasting are decreasingly separate or different fields of endeavour, and increasingly deliver to end-users several virtually similar services. For example, why is it that a commercial operator could tomorrow freely deliver to consumers digital television services employing the LMDS part of the radio frequency spectrum, while existing licensed broadcasters could not do so except under a rather restrictive set of broadcasting regulations. The whole of the answer is not just that the former paid for the spectrum, while the latter did not. At least in part, it is because the regime of the Radiocommunications Act is not necessarily consistent with that of the Broadcasting Services Act.

Prior to the introduction and passage of the Broadcasting Services Act 1999 a review was conducted into the operation of the then Australian Broadcasting Tribunal. A number of interested parties took this opportunity to bring to the attention of the Federal authorities the good sense in looking at communications not as a number of different strands but as one body of services likely to be subject to increasing convergence in service type, delivery technologies and systems and corporate (private and public) ownership and operation. A number recommended that this should be reflected in one coherent Communications Act and one integrated administrative body. This viewpoint was not accepted.

The good sense of this proposition is now obvious. Therefore, as one basic conclusion, I would encourage the Commission to consider fully the option of bringing together the strands of communications administration and regulation in this way. The material submitted by those taking this position previously should still be available within the Federal sector and would bear another and more considerate analysis within the current Inquiry.

At the same time there is another aspect of communications operation which requires attention. One of the great tensions of the sector is that between the increasing possibly undesirable centralisation of control over its systems and services and the need for integrated ownership if the full benefits of converged services are to be enjoyed by the consumer. There is no doubt in my view that the major presence of a Packer or a Murdoch in the on-line service world could potentially result in a body of quality services that would not otherwise be created. These corporate forces have the resources and existing software to generate outcomes, at levels of pricing, which others would find difficult if not impossible to achieve.

One means of dealing with this tension is to ensure that all systems of communications are subject to the most rigorous and effective access rules. The problem of who controls the communications conduit is significantly reduced if all those that interested in utilising the conduit for the distribution of material have a fair and reasonable opportunity to do so. Currently, it is being argued that reasonable access for content suppliers is not part of the responsibility of operating broadband cable systems in Australia. It would seem that both Foxtel (comprising Telstra, the Packer group and the Murdoch News Corporation) and Optus (primarily Cable & Wireless, but other important sector players such as the Seven Network) are holding to this position of denial of access. While this is the subject of a current ACCC investigation, it is also a matter requiring the closest Commission scrutiny in the context of the Broadcasting Inquiry.

The issue of access will be one of the defining debates of the next few years, not just here but in all countries where the communications sector is undergoing fundamental restructure. In the

U.S., as the telecommunications giant AT&T absorbs the very biggest of the previously independent cable television companies, strenuous concerns are being expressed as to what this corporate convergence will mean for those Internet service providers wishing to access consumers via the "big pipe" of broadband cable but which are not part of the AT&T stable. Similar questions will arise in this country.

An effective guarantee of access is a valuable balancing mechanism to increasing control over the means of distribution. It is necessary no matter what might be the outcome of other considerations raised in the course of the Commission's Inquiry.

6. Summary of Recommendations

1. That the Commission review the operation of the Broadcasting legislation and find the separation of telecommunications, radiocommunications and broadcasting to be inappropriate, and to be increasingly so in the era of convergence of communications systems and services occasioned by the development of broadband services, digital technologies and the growth of popular usage of the Internet; and therefore recommend to the Federal Government that this convergence be reflected in both Federal legislation and in the bodies established to administer that legislation.

2. That irrespective of the outcome of this first recommendation, the Commission find that the issue of access is central to the proper operation of a modern communications sector and that all steps, up to and including legislation, be taken to ensure that all prospective providers of content on all communications systems have a fair and reasonable opportunity to access those systems.

In closing, I thank the Commission for the opportunity to submit these views and again offer my apologies for the delay in lodging this submission.

Yours faithfully

R.J. Rowe
Director