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***Broadcasting Services Amendment (Meeting the
Digital Challenge) Bill 2006 (Cth)***

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Changing the law governing media ownership

- 1. Reducing foreign ownership limits**
- 2. Foreign Investment Policy - executive jurisdiction**
- 3. Cross media changes: exemption or clearance?**
- 4. Australian Competition and Consumer Commission (ACCC) jurisdiction**
- 5. Australian Communications and Media Authority (ACMA) enforcement powers**
- 6. Cross-media disclosure**
- 7. Regional services protections**

Foreign ownership limits

Restrictions in the BSA on foreign ownership of television services to be removed, by repeal of:

- s3(1) - object of Australian control of 'more influential' broadcasting services
- s57 – limit on foreign person controlling or holding more than 20 per cent interest in a FTA television licensee
- s58 – limit of foreign directorship of FTA licensee
- S109 – limit on foreign person holding more than 20 per cent interest in a subscription TV service and foreign persons in total holding no more than 35 per cent of a subscription TV service

Restrictions on newspapers require removal of specified limits in clause 34 of the *Foreign Investment Policy* under the *Foreign Acquisitions and Takeovers Act 1975*

Foreign Investment Policy

‘Media’ remains a ‘sensitive sector’ in the *Foreign Investment Policy* under the *Foreign Acquisitions and Takeovers Act 1975*.

- Clause 31 of the *Foreign Investment Policy* is retained
 - All direct proposals by foreign interests to invest in the media sector irrespective of size are subject to prior approval under the Government’s foreign investment policy. Proposals involving portfolio share holdings of 5 per cent or more must also be submitted for examination.

Investments by foreign interests are examined on whether they are contrary to the national interest.

Cross-media limits

A transaction clearance regime, to be administered by the ACMA, may replace the cross-media limits in the BSA

- The policy cornerstone is minimum of five commercial media groups in mainland state capitals and four groups in other licence areas: no exemption certificate regime is required but this is not clear
- This minimum five/four requirement is a 'market floor' system
 - A new Division in Part 5 of the BSA would govern clearance:
 - Approval would be granted to control transactions in media groups provided the market floor is equalled or exceeded after the bidder completes its control transaction
 - The regime requires new BSA definitions: media operation, sets of media operations and media groups
 - Ongoing 'same media' limits keeps Sydney above market floor

New definitions

A media operation:

A company that holds a commercial television broadcasting licence, but excluding a company that holds that licence in respect of spectrum that is not in the broadcasting services bands (to be allocated after 1 January 2007);

A company that holds a commercial radio broadcasting licence

A company that publishes a newspaper that is recorded on the Associated Newspaper register maintained by ACMA

A company that is in a position to control of any of the above.

New definitions

A set of media operations:

- (a) a commercial television broadcasting licence and a commercial radio broadcasting licence that have the same licence area; or
- (b) a commercial television broadcasting licence and a newspaper that is associated with the licence area of the licence; or
- (c) a commercial radio broadcasting licence and a newspaper that is associated with the licence area of the licence; or
- (d) a commercial television broadcasting licence and a commercial radio broadcasting licence that have the same licence area, and a newspaper that is associated with the licence area of either or both of the licences.

New definitions

***media group* means in respect of a licence area:**

- (a) a set of media operations in that licence area that are controlled by the same person; or**
- (b) a media operation that is not part of a set of media operations in that licence area.**

Sydney: Media groups

Current media operations

1. Fairfax – *SMH*
2. News Ltd – *The Telegraph*
3. Seven Network
4. PBL Nine Network
5. Ten Network
6. Austereo – 2Day, TripleM
7. Macquarie Radio – 2CH, 2GB
8. ARN – Mix106.5, WSFM*
9. DMG – Nova969, Vega 95.3
10. Tabcorp/2KY – 2KY
11. Southern Cross – 2UE
12. Caralis & Broadcasting Ops – 2SM

Potential media sets

1. *SMH* – Seven Network – Nova/Vega
2. *Telegraph* – Nine Network – 2CH/2GB
3. Ten Network – 2Day, TripleM
4. ARN – Mix106.5, WSFM*
5. Tabcorp/Southern Cross – 2KY/2UE
6. 2SM P/L & Broadcasting Ops – 2SM

Even with the cross-media exemption regime, Sydney will have a market floor of six media groups (or five if WSFM is held to be outside the licence area, allowing ARN to hold another 'Sydney' licence.)

* WSFM is now classed by ACMA as being in 'Western Suburbs Sydney' licence area

ACCC jurisdiction – the *Trade Practices Act*

The media sector will remain subject to the *TPA* s50 which prohibits any merger or acquisition that would have the effect of substantially lessening competition in a market

- Substitutability is the test for defining markets
- Can different platforms (newspapers, radio, TV) be substitutes for one another?
- What is the effect of the Internet, that carries content from all of these platforms?
- Courts have held that newspaper and radio advertising in a regional area are not substitutable: *ACCC v Rural Press Limited* [2001] FCA
 - The ACCC may be spurred to seek from the courts a fresh view of the character of product or service substitution in a media market

The ACCC should also soon have power to provide binding advice ahead of M&A activity: *Trade Practices Legislation Amendment Bill (No. 1) 2005*

ACMA enforcement powers

A transaction approval regime for cross-media holdings would be a new role for ACMA

- The system will require additional monitoring and compliance auditing by ACMA, chiefly in the areas of control of media operations and disclosure of cross-media interests

It may coincide with a proposed expansion of ACMA's powers, including enforceable undertakings relating to broadcasting services

- the Government has moved recently to expand ACMA's powers to accept enforceable undertakings in relation to the enforcement of telecoms competition and consumer protection (*Telecommunications Legislation Amendment (Competition and Consumer Issues) Act 2005*)
- It is considering the option of giving ACMA power to accept enforceable undertakings in connection with any matter in relation to which ACMA has a function or power under the *BSA*.

Cross-media disclosure requirements

Operations that are part of a cross-media group will be obliged to disclose their relationship when they report on the activities of another entity within that group

- The *Broadcast Services Amendment (Media Ownership) Bill 2002* (Subdivision BA) provided that any media outlet belonging to a group with a cross-media exemption certificate should broadcast or print a disclosure statement whenever a cross-controlled outlet was mentioned
 - For TV, disclosure was required each time a cross-controlled entity was mentioned
 - For newspapers, a disclosure statement in the same edition to “adequately” bring the relationship to the readers attention was required
 - Radio had the option of a daily prime-time disclosure or a statement each time the cross-controlled outlet was mentioned

This regime appears to satisfy the policy requirements in the new options paper

Regional services protections

The Government has signalled it may extend licence conditions for commercial radio and television operators relating to local content, if the level of local content declines materially

Any transaction approval or exemption certificate regime for cross-media holdings in regional licence areas may have additional requirements

- The *Broadcast Services Amendment (Media Ownership) Bill 2002* provided for additional requirements for minimum service standards in:
 - Local news, weather bulletins and emergency warnings
 - Local community service announcements

The TPA was amended in 2001 to add ‘a region of Australia’ to the definition of a market in s50(6)

- This provides for the ACCC to consider the competitive impact of proposed M&A activity on substantial regional markets for services

So...

- While there is less regulation – that may lead to potential M&A activity – the media sector will remain highly regulated
- More authority will reside with the executive
 - to allocate commercial television licences
 - to be first port of call for all foreign investment in media
- The transaction approval or cross-media exemption certificate regime will add to the compliance burden for both ACMA and media operators
- The ACCC's encouragement of a 'converged' view for media markets requires persuasion of the courts

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