

## Media Ownership Laws: The Forecast is for Change

Carolyn Lidgerwood analyses the Australian Government's recent announcements indicating a long anticipated shift in policy direction.

### Introduction

On Tuesday 14 March 2006, the Minister for Communications, Information Technology and the Arts announced proposals for changes to laws regulating media ownership and control (**media ownership laws**).

Previous attempts to change the existing cross-media rules and the foreign ownership rules (eg in 2002-2003) were made in isolation from other changes to the regulatory regime for broadcasting. However, the Minister's latest proposals are presented as part of a "bundle" of proposed changes.

Beyond the proposals for changes to media ownership laws are a wide range of proposals that are either directly or indirectly related to the digital television conversion process (**digital proposals**).

Specifically, the Government proposes to release a "Digital Action Plan" during 2006 to expedite digital conversion and to bring the analog/digital simulcast period to an end. It is also proposing to change some of the existing restrictions on how the digital spectrum may be used by the free to air television broadcasters. Other proposals are directed at "enabling" new services (both in the broadcasting services bands and beyond) and at clarifying the Government's policy about further commercial television licences. The Minister has described this as being to

*"ensure that Australia will not be left behind as the world converts to digital".<sup>1</sup>*

This article focuses on how the media ownership and control proposals can be expected to be implemented, if the Government confirms the framework that was announced in March. It focuses on "what's going", "what's staying", and "what's new" (by reference to the *Broadcasting Services Act 1992(Act)*). It also considers the possible practical effects of the proposals.

Some brief observations about the digital proposals are also made at the end of this article. At this time, these are limited to observations that may be of interest to either potential "new entrants" to the broadcasting industry, or existing broadcasters who are not free to air television broadcasters.

### Proposals, not policy

At the outset, it needs to be emphasised that what the Minister announced were only "proposals". These proposals do not (yet) represent settled Government policy and have not been incorporated into draft legislation. The Minister's announcement signalled the start of another consultation process only, albeit one that is expected to be short.

The proposals announced by the Minister are contained in the Discussion Paper on Media Reform Options titled "Meeting the Digital Challenge: Reforming Australia's Media in the Digital Age" (**Discussion Paper**). Submissions to the Discussion Paper close on 18 April 2006.

In this article, references to "proposals" are to those "preferred options" identi-

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fied in the Discussion Paper.

### Timing

It also needs to be emphasised that the Government has not yet committed to a timetable for introducing the cross media and foreign ownership reforms that are discussed below. This is because they are still proposals only (as indicated above). Also, timing may depend on what the Government decides about the digital proposals.

The Discussion Paper indicates that the cross media and foreign ownership reforms could commence when licences for new types of digital services are issued for those parts of the broadcasting services bands (BSB) that are currently set aside for datacasting (see further discussion below). The Discussion Paper states that this is expected to be in 2007.

The other alternative is to delay the proposed media ownership reforms until the end of the analog/digital simulcast period for free to air television. Exactly when that period will end is another matter addressed by the Discussion Paper. Presently, the analog/digital simulcast period is due to expire 8 years from the date that digital broadcasting commenced in each

licence area (8 years from 1 January 2001 for the five mainland state capital cities – ie 31 December 2008). The Discussion Paper indicates that the Government is considering extending this period until 2010 (or 2012 for regional markets, which commenced digital television simulcasts later than major metropolitan markets). The scope of the extensions are important matters for the public consultation process.

This demonstrates that there remains ongoing uncertainty about when the cross media and foreign ownership laws may change. Nevertheless, as it is possible that the changes could be introduced from next year, it is important to focus on the possible practical implications now.

### Media Ownership and Control

The Discussion Paper states that the Government is considering "options for implementing reforms" to the media ownership laws within the framework that is outlined below. The following discussion illustrates what will occur if the Government confirms this framework at the end of the current public consultation process.

### What's Going from the BSA

#### (a) BSA cross-media ownership and control restrictions

Most of the cross-media rules in Part 5 of the BSA will be removed.

Section 60 of the BSA currently provides that a person can not be in a position to exercise control of:

- a commercial television licence and a commercial radio licence in the same licence area;
- a commercial television licence and a newspaper that is "associated" with the licence area of that television licence (that is, a newspaper that is in English, published at least 4 days per week, has 50% or more of its circulation by way of sale, and 50% or more of its circulation is within the relevant licence area); or
- a commercial radio licence and a newspaper that is "associated" with the licence area of that television licence.

Similar restrictions apply to "cross media directorships" under section 61.

If the proposals are confirmed and implemented, sections 60 and 61 of the BSA will no longer be required, as they will be replaced with a "diversity test" to be administered by the Australian Communications and Media Authority (ACMA) – see discussion under "What's New" below. The Minister has explained that this new approach will contain "safeguards to ensure there is no undue concentration of ownership of Australia's media entities".<sup>2</sup>

It should be noted that there are also cross-media ownership limits that prevent a person who controls a commercial television licence from controlling a datacasting transmitter licence in the same licence area (see sections 54A and 56A of the BSA). It appears that these restrictions are to be retained (either in this form, or in a different form).

**(b) BSA foreign ownership and control restrictions**

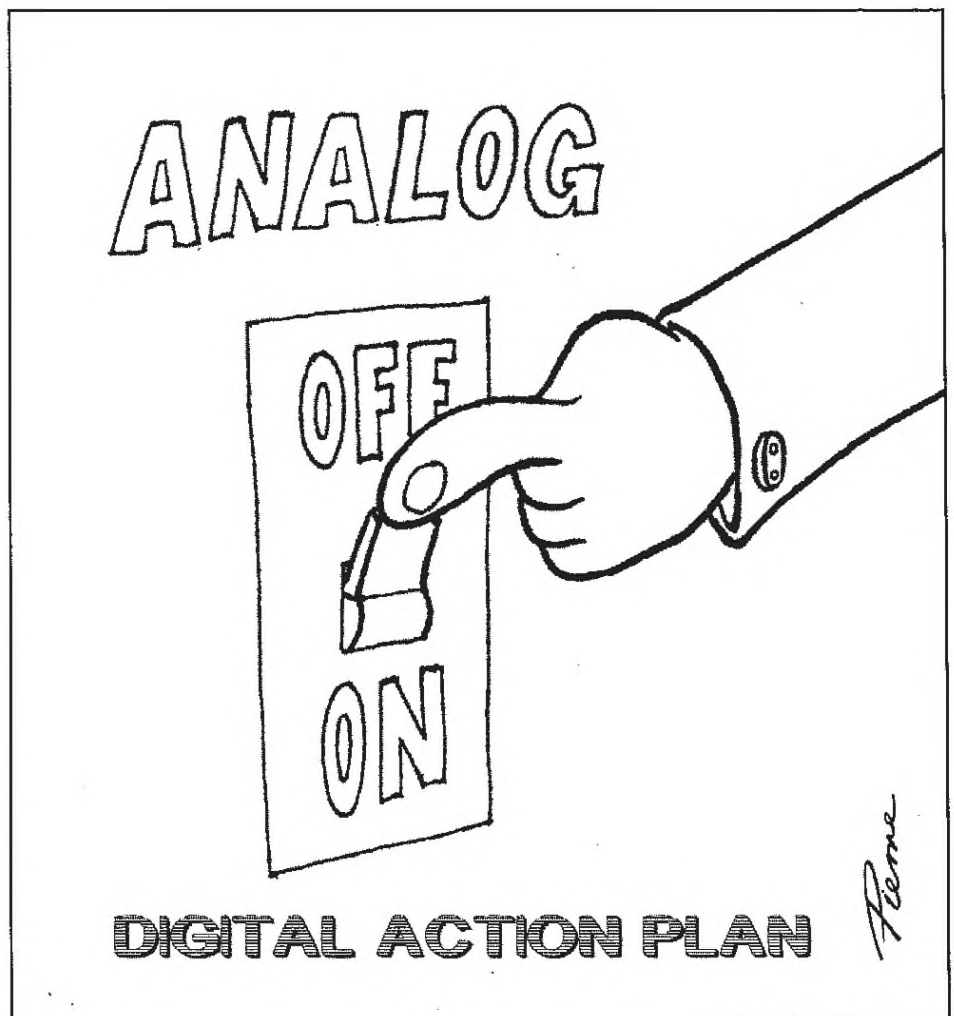
If the proposals are confirmed and implemented, the foreign ownership and control rules in Part 5 of the BSA (relating to commercial television licensees), and the foreign ownership rules in Part 7 of the BSA (relating to subscription television broadcasting licensees) will be removed.

Section 57 of the BSA currently provides that:

- a foreign person cannot be in a position to exercise control of a commercial television broadcasting licence (whether this is because they hold more than 15% of the company interests in the licensee, or because they are in control for some other reason); and
- foreign persons must not have company interests in a commercial television broadcasting licence that exceed 20%.

There are also limitations on foreign directorships of commercial television broadcasting licensees under section 58, as no more than 20% of directors can be foreign persons.

In addition, section 109 of the BSA currently imposes foreign ownership (but not control) restrictions on subscription television broadcasting licences. Under section 109:



- a foreign person must not have company interests of more than 20% in a subscription television broadcasting licence; and
- combined foreign interests in a subscription television broadcasting licence must not exceed 35%.

All of these BSA foreign ownership and control restrictions will be removed if the Government's proposals are implemented, meaning that foreign investment in commercial television businesses and subscription television businesses will be able to be made in a manner that is consistent with foreign investment in commercial radio. No foreign ownership restrictions apply to commercial radio under the BSA.

Specifically, there will no longer be a need for foreign investors to attempt to structure their investments in commercial television licensees to ensure that they are not in a position to exercise control (contrast the previous experience of CanWest, as illustrated by the three Australian Broadcasting Authority investigations from 1995 to 1998).<sup>3</sup>

It also means that the peculiar foreign ownership provisions that apply to subscription television licences will also be removed. In the absence of a corresponding restriction on foreign control, it has long been difficult to see the purpose of these restrictions.

Regulation of foreign ownership will then be limited to the scheme under the *Foreign Acquisitions and Takeovers Act 1975*. The Discussion Paper indicates that the media sector will remain a "sensitive sector" for the purposes of the *Foreign Investment Policy*<sup>4</sup> meaning that foreign investments in the media sector will continue to be subject to approval by the Treasurer. However, the newspaper-specific provisions will be removed from that policy.

**What's Staying in the BSA**

Under the Discussion Paper, there are no proposals to remove or amend the existing ownership limits in the BSA, comprising:

- the "two to a market" rule that applies to commercial radio

licences (under sections 54 and 56 of the BSA);

- the “one to a market” rule that applies to commercial television licences (under sections 53 and 55 of the BSA).

Also, the “75% audience reach limit” that applies to commercial television licences under sections 53 and 55 of the BSA will be retained. This means that the development of (truly) national television networks with common ownership and control will continue to be prohibited.

The proposal to retain these limits on ownership means that there continues to be a role for the tests of control contained in Schedule 1 of the BSA. In addition, the existing control tests will also be relevant to assessing whether particular businesses form part of the same “commercial media group” (as explained below).

#### **What’s New to the BSA**

The most important new proposal for changing the cross media rules in the BSA relates to the proposed introduction of a “diversity test” (also called a “minimum number of media groups” test).

Cross media ownership acquisitions will be permitted if and only if there remain a “minimum number of commercial media groups” in the relevant licence area after the transaction is completed.

The Discussion Paper indicates that a “commercial media group” can be comprised of one or more of a commercial television licensee, a commercial radio licensee or associated newspaper, where these entities have “common control” (under the BSA control tests).

In other words, the proposed definition of “commercial media groups” will be limited to those categories that are presently regulated under the cross media rules. Ownership of open narrowcasting licences or community licences will not be considered in this context.

The minimum numbers of commercial media groups that are being proposed are:

- Five (5) commercial media groups in “mainland state capital” licence

areas – ie Adelaide, Brisbane, Melbourne, Perth and Sydney; and

- Four (4) commercial media groups in “regional” licence areas (which are assumed to include Hobart, Darwin and Canberra).

Since the Minister’s announcement, there has been much media commentary about what this may mean, but little in the way of practical illustration. Three examples are set out below to assist in a consideration of this issue.

#### **(c) Example 1 – Small regional market**

In the Wangaratta (Victoria) radio licence area,<sup>5</sup> North East Broadcasters Pty Limited (an independent commercial radio operator) owns two commercial radio licences, which provide the 3NE 1566 AM service, and the Edge 102.1 FM service.

The Wangaratta radio licence area is contained within the aggregated Victorian commercial television licence area (Regional Victoria TV1), so people in Wangaratta also receive the commercial television services provided by WIN, Prime and Southern Cross.

The *Wangaratta Chronicle* is the local newspaper, but it is only published three days per week,<sup>6</sup> so would not be an “associated newspaper” for the purposes of the existing cross media rules, or for the purposes of forming a “commercial media group”.

On this basis, in Wangaratta there are presently only four (4) “commercial media groups”. This means that no cross media acquisitions would be permitted (under the BSA) in that market.

#### **(d) Example 2 – Larger regional market**

In the Cairns (Queensland) radio licence area,<sup>7</sup> there are four (4) commercial radio licences. Two of these are provided by Macquarie Regional Radioworks (HOT FM 103.5 and SEA FM 99.5), one is provided by Prime Radio (Cairns) Pty Limited (4CA FM), and the fourth is provided by Elmie Investments Pty Limited (4EL/Easymix).

The Cairns radio licence area is contained within the aggregated regional Queensland television licence area (Regional Queensland TV1), so receives

commercial television services from Southern Cross, Seven Queensland and WIN. Note that this is not a Prime Television market, which explains why Prime was able to acquire the 4CA commercial radio licence.

The *Cairns Post* is the local newspaper, published 6 days per week by News Limited. The other local newspapers (the *Cairns Sun* and the *Northern News*) are free newspapers, so would not be considered to be “associated newspapers”.

On this basis, in Cairns there are seven (7) “commercial media groups”. This could reduce to four (4) under the proposals, subject to compliance with the relevant ownership restrictions (ie the “one to a market” television rule and the “two to a market” radio rule), and to Australian Competition and Consumer Commission (“ACCC”) approval (discussed below at section 2.4).

#### **(e) Example 3 – Major metropolitan market**

In the Sydney radio licence area, there are seven (7) commercial radio operators providing commercial radio services in the broadcasting services bands. These are:

- Macquarie Radio Network (2GB, 2CH);
- Austereo (2DAY, MMM);
- APN News and Media (WSFM, MIX 106.5);
- DMG (NOVA, VEGA);
- Southern Cross Broadcasting (2UE);
- Sky Channel (2KY);
- Broadcast Operations (2SM).

The Sydney radio licence area boundaries<sup>8</sup> are within the Sydney television licence area (Sydney TV1).<sup>9</sup> This means that people living in the Sydney radio licence area are also served by the Seven, Nine and Ten commercial television services.

In addition, *The Daily Telegraph* (published by News Limited) and *The Sydney Morning Herald* (published by John Fairfax Holdings) are newspapers associated with the Sydney licence area.

On this basis, in Sydney there are twelve (12) “commercial media groups”. In

theory, this could reduce to five (5) "commercial media groups" under the proposals. Again, this would be subject to compliance with the relevant ownership restrictions (ie the "one to a market" television rule and the "two to a market" radio rule), and to ACCC approval.

Notably, it is not proposed that there be an express prohibition on a commercial media group controlling "three out of three" of the regulated media outlets in a market (ie commercial television, commercial radio and an associated newspaper). This was an issue that was incorporated into previous draft legislation relating to media ownership reform (but this was not enacted, as noted).

Also, the Discussion Paper proposes that the existing local content requirements applying to commercial television licensees in aggregated regional television markets (except Tasmania) are to be retained, and will be extended to Tasmania. These requirements are presently imposed as a condition of licence. The Discussion Paper indicates that the ACMA and the Government will monitor the provision of local content in other regional television licence areas and also on digital radio, and will "consider extending licence conditions relating to levels of local content to those markets if local content levels decline materially". However, that this could impact upon the viability of regional broadcasters is also noted as a balancing factor. Whether these kinds of proposals will be sufficient to satisfy the "minor parties" remains to be seen.

### **Regulatory approvals**

In addition to regulatory approvals for foreign investment in the media sector that are required under the Foreign Acquisitions and Takeovers Act 1975, each of the ACMA and the ACCC will have ongoing roles when media mergers and acquisitions are being contemplated.

### **(f) ACMA**

The Discussion Paper indicates that the ACMA would need to monitor cross media consolidations to ensure that the "diversity test" was complied with

(and that acquisitions did not result in there being less than four (4) commercial media groups in regional areas, and five (5) commercial media groups in mainland capital cities). This would be in addition to the ACMA's existing obligations to monitor compliance with the ownership and reach limits in the BSA.

However, this should be a more straightforward for the ACMA than what was proposed previously, as the ACMA will not need to assess whether requirements relating to "editorial separation" are being met.<sup>10</sup>

If the proposals are implemented and cross media mergers follow, on-air "disclosure requirements" will apply when one part of a commercial media group reports on the activities of another entity within that group. While not clear from the Discussion Paper, it is assumed that this will be limited to news and current affairs programs. It is possible that it could also apply to cross-promotions. This will be another area to be administered by the ACMA.

### **(g) ACCC**

Importantly, the merger provisions in the *Trade Practices Act 1974* will continue to apply, and the ACCC will need to assess the competitive impacts of proposed media industry mergers and acquisitions.

The Discussion Paper indicates that the ACCC will be

*"asked to articulate its proposed approach to media mergers, particularly in relation to those factors that will affect its definition of media markets" once the Government's media reform framework has been settled.*

Since 2004, the Chairman of the ACCC, Graeme Samuel, has made a number of public statements about the ACCC's possible approach if there are changes of the existing cross media rules in the BSA, including an acknowledgement that "convergence is now starting to blur traditional lines of market definition".<sup>11</sup> However, press commentary about the current proposals has observed that the media industry appears unsure about how the ACCC will approach media mergers and acquisitions.<sup>12</sup>

The Chairman of the ACCC has been reported as saying that he will answer media groups' calls for more clarity through a speech or discussion paper if cross media ownership restrictions were removed in 2007. He has stressed that this will constitute "guidance, not guidelines", and cautioned that the ACCC will not be "pre-defining" markets.<sup>13</sup> Mr Samuel has also indicated that "the best guidance is often obtained through confidential discussions with the Commission by parties proposing a merger".<sup>14</sup>

## **Digital Broadcasting Reforms**

As outlined at the beginning of this article, the proposals in the Discussion Paper also include a wider range of proposals relating to digital broadcasting and the Government's response to issues that arise under the BSA in 2007.

The media release issued by the Minister on 14 March 2006 contains a comprehensive list of the key proposals that are being made in that area (and this is repeated in the Discussion Paper). These include proposals relating to multichannelling, the use of HDTV, the duration of the analog/digital simulcast period, and small changes to the anti-siphoning regime. It is not proposed to repeat those proposals here.

However, from the perspective of organisations that do not currently hold a commercial television broadcasting licence, but are interested in becoming a provider of digital audio visual services, the most important points to note are:

- There is unlikely to be a new "fourth commercial television network" in the BSB any time soon. While the BSA moratorium on the issue of fourth commercial television licences will end on 31 December 2006 (under section 28 of the BSA), the Government proposes to amend the BSA so that the power to issue such licences resides with the Government (presumably with the Minister), rather than with the ACMA;
- It may be possible to acquire a non-BSB licence to provide a com-

mercial television service in the future. Non-BSB licences have previously been issued by the ACMA's predecessor (the ABA) for commercial radio services (under section 40 of the BSA), but the section 28 BSA moratorium has prevented this from occurring for commercial television services (ie in those markets which are already served by three commercial television services). This means that persons who presently provide audio-visual content that is likely to be categorised as a "broadcasting service" for the purposes of the BSA have needed to ensure that they only make such services available on a subscription basis, or that such services fall within the narrowcasting criteria in the BSA. Once the powers to allocate new commercial television licences are transferred to the Government (ie away from the ACMA, as noted above) and the section 28 moratorium ends, the Discussion Paper indicates that the Government may consider the issue of non-BSB commercial television licences. However, this would be subject to the application of a "public interest test" (yet to be defined with precision);

- When the digital BSB spectrum was planned (for digital television conversion), in most licence areas two 7MHz channels of spectrum were set aside for digital "datacasting". Datacasting transmitter licences were originally proposed to be auctioned by the Australian Communications Authority (as it then was), but these auctions never eventuated (due to a lack of industry interest as a result of the restrictive content rules that apply to datacasting services under Schedule 6 of the BSA). The Government is now considering whether these channels should be allocated for other new types of services. Specifically, the Government is no longer confining consideration of this issue to "datacasting" as defined in Schedule 6 of the BSA. However, as indicated by the Discussion Paper, the Government is still drawing the line at this spectrum being used for ser-

vices that look like traditional television services, and so the "datacasting spectrum" won't be able to be used to provide anything like a fourth commercial network. Services being proposed include the kinds of mobile content services presently being trialled as DVB-H services (eg short video services, news headlines, and other "made for mobile" content), narrowcasting services and subscription services. The Government is also proposing that existing free to air television broadcasters will not be able to acquire this spectrum.

### What's Next?

After the consultation period ends, formal policies are expected to be announced. If the proposals outlined above are adopted, there will be a range of amendments required to be made to the BSA.

Also, and as noted at the outset, the Government has indicated that it will release a "Digital Action Plan" during 2006 that is focussed on getting Australian television audiences converted to digital.

In the meantime, the ACMA has indicated that it will shortly issue a further discussion paper considering options for how the two "datacasting channels" should be allocated (from a technical and licence allocation perspective). For instance, the ACMA paper is expected to discuss whether the channels should be sold separately and whether they should be allocated on a licence area by licence area basis. It is expected that there will be much demand for these channels, and the ACMA's recommendations on this issue are awaited with interest.

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<sup>1</sup> Senator the Hon Helen Coonan, Minister for Communications, Information Technology and the Arts: Address to CEDA: "Meeting the Digital Challenge: Reforming Australia's Media in the Digital Age", 14 March 2006.

<sup>2</sup> Speech to CEDA, 14 March 2006, *ibid*.

<sup>3</sup> Copies of the ABA's reports of investigation into CanWest's investment in the Ten Network are available at: <http://www.acma.gov.au/ACMAINTER.65640>:

STANDARD:1978925624:pc=PC\_91719

<sup>4</sup> See summary at [http://www.firb.gov.au/content/downloads/General\\_Policy\\_Summary.pdf](http://www.firb.gov.au/content/downloads/General_Policy_Summary.pdf).

<sup>5</sup> [http://www.aba.gov.au/licplan/planning/licareas/defmaps/documents/maps/la\\_437.pdf](http://www.aba.gov.au/licplan/planning/licareas/defmaps/documents/maps/la_437.pdf); <http://www.edgefm.com.au/area.html>

<sup>6</sup> [http://www.vcpa.com.au/Vic/wangaratta\\_chronicle.html](http://www.vcpa.com.au/Vic/wangaratta_chronicle.html). As noted above, a newspaper needs, among other things, to be published at least 4 days per week in order to be considered an "associated newspaper".

<sup>7</sup> [http://www.aba.gov.au/licplan/planning/licareas/defmaps/documents/maps/la\\_507.pdf](http://www.aba.gov.au/licplan/planning/licareas/defmaps/documents/maps/la_507.pdf)

<sup>8</sup> [http://www.aba.gov.au/licplan/planning/licareas/defmaps/documents/maps/la\\_542.pdf](http://www.aba.gov.au/licplan/planning/licareas/defmaps/documents/maps/la_542.pdf)

<sup>9</sup> [http://www.aba.gov.au/licplan/planning/licareas/defmaps/documents/maps/la\\_305.pdf](http://www.aba.gov.au/licplan/planning/licareas/defmaps/documents/maps/la_305.pdf)

<sup>10</sup> See summary of previous proposals in the article by the author: "Towards Princes of Print Being Queens of Screen and Regents of Radio", 28 March 2002, at <http://www.gtlaw.com.au/gt/site/articleIDs/27522749DD579C45CA256DEF00007B8A?open&ui=dom&template=domGT>

<sup>11</sup> ABC AM program, 24 October 2004. For previous analysis of the approach that the ACCC may take, see the article by Liza Carver & Kate Horrocks, "Competing Visions", in *Lawyers Weekly*, 18 February 2005 at <http://www.lawyersweekly.com.au/articles/40/0C02CB40.asp?Type=55&Category=909>

<sup>12</sup> For example, see comments in "Coonan's Hard Line on Media", *The Australian Financial Review*, 15 March 2006 at page 14.

<sup>13</sup> "Samuel wary of ownership limits", *The Australian*, 16 March 2005, at [http://www.theaustralian.news.com.au/common/story\\_page/0,5744,18480430%255E7582,00.html](http://www.theaustralian.news.com.au/common/story_page/0,5744,18480430%255E7582,00.html)

<sup>14</sup> "ACCC to advise media groups on reforms", *The Sydney Morning Herald*, 16 March 2005, at <http://www.smh.com.au/news/National/ACCC-to-advise-media-groups-on-reforms/2006/03/16/1142098556455.html>