

## ❖ **Australian Media Monitor: December 2008**

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### \* **Reviewing National Broadcasting in Australia**

Stephen Conroy, the Minister for Broadband, Communications and the Digital Economy, has announced a review of the national (public) broadcasters, the ABC and SBS, calling for submissions up until 12 December, 2008. Releasing a discussion paper titled 'ABC and SBS: Towards a Digital Future' to launch the review in October, the Minister explains his rationale in the Foreword to the paper: 'To move confidently into the future, the ABC and SBS must have a clear vision and direction that is supported by creative and responsible public policy and the provision of adequate funds. A clear vision for the future of our national broadcasters is perhaps more important today than ever before. New digital technologies are radically changing the fundamentals of broadcasting and media, and the ABC and SBS must face the challenges and opportunities these changes present. We need to make the right decisions now if national broadcasting is to thrive in a digital, online, global media environment. These decisions must be informed by the views of those the national broadcasters serve — the Australian people'.

Not surprisingly, the Minister invokes the twin processes of digitisation and convergence as driving the changes across 'all media platforms' to which public service broadcasting in Australia now needs to respond. A similar comprehensive review process by Ofcom in the UK — which has now embarked on phase 2 of their current review of public service broadcasting — is expected to see the Brown government to closely consider their findings as it shapes policy for the future ([http://www.ofcom.org.uk/media/news/2008/09/nr\\_20080925](http://www.ofcom.org.uk/media/news/2008/09/nr_20080925)).

Arguably one of the more problematic areas for Australia's review will be to examine the key role of the national broadcasters in 'strengthening Australian identity through the provision of programming that reflects Australia's unique character and characteristics, and promotes diversity and understanding of other cultures.' The questions arising in the context of this objective include the maintenance of cultural diversity in new media platforms, and how the national broadcasters might harness new technologies and platforms to enable Australians to remain informed at a local and national level. Earlier in the year, the ABC's Director of Television, Kim Dalton, suggested the government should be developing new policy frameworks to extend local content requirements to web-based video content ('Dalton calls for web TV controls', Canning, *The Australian*, 26 June 2008). Dalton, in his forward-thinking speech,

argued that with increasing amounts of television and video content being distributed via the web, '[i]t is time to reassess and reshape the Australian content policy framework ... There needs to be a policy response if we are not to wake in five or ten years and a whole generation is no longer able to partake in Australian culture.'

#### \* **Media Ownership**

As previously discussed in Australian Media Monitor, the enactment of amendments to media ownership laws in 2006/07 triggered a major private equity refinancing of free-to-air television, effectively taking much of the network ownership offshore into private institutional ownership. This was the dramatic, and largely unanticipated, impact of removing foreign ownership restrictions. Commentators have noted the knock-on effects of private equity, but the new management regimes are in denial. Ian Law, CEO of PBL Media, the entity now mostly owned by CVC Asia Pacific, (owner of the Nine Network, ACP magazine group and half-owner with Microsoft of Ninemsn), is quoted as saying that cuts to programming, including the flagship news and current affairs programs *Sunday* and *Nightline*, have nothing to do with the new ownership arrangements (*The Australian*, Media, 28 July 2008). These program cuts follow the axing of the highly regarded *Business Sunday* and *The Bulletin* news magazine. It's been suggested that the crippling debt facing the group and the huge repayments that lie ahead, are now driving decision-making.

Recently installed at the helm of PBL Media as independent chairman by CVC, presumably to sort out some of these problems, is British citizen Tim Parker. Parker has the tabloid anointed moniker 'prince of darkness' after he slashed thousands of jobs in the automotive industry on behalf of private equity owners in the UK (Shultz, 'Prince of Darkness descends on PBL', *The Australian*, 24 September 2008).

After declining a request from CVC Asia Pacific for the Packer family controlled Consolidated Media Holdings (CMH) to inject \$75 million of equity into PBL Media to service the high debt, CMH's stake in PBL is expected to fall to 10% or less (Shoebridge, *Australian Financial Review*, 28 October 2008). An immediate consequence was the standing down of James Packer and executive chairman John Alexander as directors of PBL Media. In 'CVC seeks bankers' backing for PBL', it's reported that CVC Asia Pacific 'is understood to be planning to invest another \$300 million in PBL media, which will cut Consolidated Media's holding from 25 per cent to 10 per cent or less'. These refinancing manoeuvres are being read by some analysts as the fruition of the Packer family's long-awaited withdrawal from traditional media assets.

A cross-media development that's worth watching is the situation with West Australian Newspapers (WAN). Anticipating the changes to cross-media rules, the Seven Network had initially bought up 14.9% of WAN, and this then edged to approximately 22% — well over the statutory controlling position of 15% allowed under Australian broadcasting laws. But it's now lawful to have broadcast/newspaper combinations like this under the new ('2 out of 3') laws. This means that in the Perth market, the highest rating, most watched free-to-air TV network, has indirect control of the highest circulation daily newspaper and the second most popular online news site associated with that paper (TheWest.com.au). News Corporation's 'PerthNow' is the frontrunner in this online news market, and Fairfax Media have now launched WAtoday.com. Fairfax Media say their move is about creating a national news and advertising footprint, and it echoes the arrival of their quickly successful online paper the 'Brisbane Times' (see next AMM item). Following Kerry Stokes' failure to secure board representation, some analysts are predicting that his Seven Media Group will use the 'creep provisions' of the Corporations Law to increase Seven's stake in WAN in small increments (possibly up to almost

30%) by June 2009. This is a significant cross-media development, and has attracted the scrutiny of the competition regulator, the ACCC, who announced a review of the implications of the share transactions on 26 August 2008 (acc.gov.au). There have already been various consequences of the Stokes-led bid for WAN control. One report notes a succession of journalists handing in their notice at *The West Australian* as 'the biggest sudden exodus of senior journalists in the paper's 175-year history' (*The Australian, Media*, 14 August 2008).

#### \* **Fairfax Media Restructuring**

Few have explicitly linked the \$9 billion merger of the Fairfax and Rural Press in the wake of changes to the cross-media rules, to the unprecedented layoff of over 550 journalists and other production staff. Yet despite rather muted commentary, it seems likely that the post merger rationalisations are symptomatic of a seachange at the *The Sydney Morning Herald* and *The Age* mastheads of Fairfax Media, and signpost wider processes of digitisation. The Fairfax CEO David Kirk in a speech to the Sydney Institute, described his plans to transform Fairfax Media. *The Australian* (Shultz, 15 October, 2008) reports the three-part strategy as: 'defending and growing its newspapers and magazines, growing its digital businesses and building an integrated digital media company'. The report refers to critics such as former Fairfax editors Eric Beecher and Michael Gawenda, as seeing a very different media company emerging to Kirk, where they argue, quality, well-resourced investigative journalism is the likely first casualty. For opposing advocacy sites, and a map of the Fairfax digital empire see: <http://www.fairgofairfax.org.au/>, <http://fairfaxjustthefacts.com.au/justthefacts/> and <http://www.fairfax.com.au/map.ac>

#### \* **Right to Know Campaign**

The latest in the 'Right to Know Campaign' saga is that whistle blower laws promised by the Rudd Government while in election mode, are struggling to emerge from the Canberra bureaucracy. It's reported ('Promised Laws under Cloud', in *Media, The Australian*, 4 September 2008) that the Attorney-General's Department and the Australian Commission for Law Enforcement Integrity, are 'trying to limit the scope of the laws to establish a complaint-handling system inside the bureaucracy'. Apparently both support a mechanism which allows public servants to complain and be protected from victimisation, but in a very limited, and arguably self-defeating approach, the proposal would not protect those who go outside the approved regime procedures, should it be implemented. It's noted that under the proposal, public servants who leak to the media, would still be guilty of criminal offences even if it were in the public interest. And journalists could still find themselves in contempt of court for refusing to name confidential sources unless they blow the whistle via the proposed mechanism. The House of Representatives Legal and Constitutional Affairs Committee is currently inquiring into a preferred model for legislation to protect public interest disclosures (whistle blowing) within the Australian Government public sector. The inquiry is considering: the categories of people making disclosures; types of disclosures and the conditions under which they're made; the scope of statutory protections; and the procedures for protected disclosures that may be implemented. See <http://www.aph.gov.au/house/committee/laca/whistleblowing/tor.htm>

#### \* **Australian Communications and Media Authority**

#### \* **Renewed Consumer Dialogue?**

There have been some changes to communications industry consultative groups. Four new members have joined ACMA's Consumer Consultative Forum (CCF). They are Professor Julian

Thomas (Swinburne University of Technology), Alex Varley (Chief Executive of Media Access Australia), Sarina Jan (advising on Remote and Indigenous communications), and Holly Raiche, (Executive Director of the Internet Society of Australia). (*ACMASphere*, Issue 33, August 2008). Another interactive consumer development was the announcement by the Federal government of a new peak telecommunications consumer body the *Australian Communications Consumer Action Network* (ACCAN). This group is separate from the CCF, but there is some overlapping of membership. The group will promote consumer issues in the development of telecommunications policy and industry change more generally. It has nine members who represent various community sectors and interests (*ACMASphere*, Issue 34, September 2008).

#### \* **Substituting Mobile for Fixed Line Services**

New research commissioned by ACMA indicates that the trend for people to replace fixed-line services with mobile ones, is growing in Australia (*Fixed-mobile Convergence and Fixed-mobile Substitution in Australia*). Yet the trend in some overseas markets for convergence of fixed-line and mobile devices and networks is only predicted to be low in Australia in the short term. Eventually, however, these trends will have significant impact on current regulatory arrangements and concepts, as they have with the growth in VOIP services (*ACMASphere*, Issue 34, September 2008).

#### \* **Social Networking Advisory**

A new social networking fact sheet outlining key risks of using online social networking sites have been released by ACMA. Social Networking – Staying Safe Online recommends that users observe a few common sense precautions:

- Being aware of potential risks
- Thinking carefully before giving out personal or financial information
- Reading the terms and conditions before signing up to any social networking sites
- Checking privacy settings and understanding who can access their information
- Knowing where to go for help if anything does go wrong.

The information was prepared by ACMA in conjunction with the Federal Privacy Commissioner. (*ACMASphere*, Issue 34, September 2008).

#### \* **Draft Children's TV Standards**

ACMA recently released draft Children's Television Standards 2008 for public and industry comment. The period for comments initially closed on 17 October 2008, but in response to requests from some stakeholders, ACMA extended the period for public and industry submissions on the draft to Friday 31 October 2008. New CTS are expected to be finalised in January 2009. The draft standards contain a number of specific proposals, including:

- 'C' (children's) and 'P' (preschool) television quotas to be maintained
- greater flexibility in how quotas could be delivered
- current advertising restrictions to be maintained, and strengthened in some areas
- no general restrictions to be imposed on food and beverage advertising
- improved effectiveness and transparency in the operation of children's programming obligations.

Importantly, the regulator is recommending a status quo position on the yearly quotas of 260 hours of 'C' and 130 hours of 'P' programming. ACMA have been on the receiving end of some criticism in relation to the decision not to include restrictions on food and beverage advertising to children. The suggestion has been that ACMA are losing an opportunity to restrict junk food advertising to children. ACMA's defense was that their commissioned independent review of children's advertising and obesity did not establish a 'sufficient consensus on the impact on

obesity levels of banning food and beverage advertising'. The Chairman of the agency, Chris Chapman, is quoted as saying that ACMA would review this position should evidence of an 'identifiably stronger association between advertising and obesity, and the benefits of food and beverage advertising restrictions becomes available, and if a food identification standard is successfully introduced in Australia' (*ACMA Sphere*, Issue 34 2008).

#### \* **Darwin TV Breaches**

On 10 October 2008 ACMA issued a notice directing various CVC Group companies to take action to remedy breaches of the media control rules in relation to two television services in Darwin. An ACMA Media Release reported that through their interests in PBL Media Holdings Pty Ltd (PBL Media), eleven CVC companies were in a position to exercise control of both an analog commercial television licence (NTD Darwin) and a new (section 38B) digital commercial television licence (DTD Darwin) in Darwin (ACMA Media Release 121/2008). 'ACMA was satisfied that these CVC companies are in breach of subsection 53(2) of the Broadcasting Services Act 1992 (the BSA), which says a person must not be in a position to exercise control of more than one commercial television broadcasting licence in the same licence area. ACMA has directed the companies to take action within one year so that they are no longer in breach of subsection 53(2)'.

#### \* **IceTV Copyright Case**

High Court judge, William Gummow, has indicated that he would use a special leave application by technology company IceTV to conduct a 'root and branch' review of the copyright infringement implications of factual database compilations. In this case, IceTV was found by the Federal Court to have been in breach of the Nine Network's copyright by using their program title and time information that had been assembled from various sources. To the uninitiated, IceTV is the producer of an Electronic Program Guide (EPG), which depending on who you talk to, is an increasingly valuable kind of navigational aid and intellectual property in its own right. Some high profile precedent cases, including Desktop Marketing Systems versus Telstra Corporation, have lead to a situation which arguably, has stifled innovation. In the Desktop Marketing case, the company was prevented from reformatting names and numbers from Telstra's White and Yellow Pages directories into searchable CD-Roms. The High Court's decision in that case meant that Australia would not go down the US path of not protecting creativity in works that select and arrange works from pre-existing facts. By contrast, Australian courts have given due weight to 'sweat of the brow' interpretations that prevent unauthorized third parties re-using their data in new ways. Perhaps the High Court is set to roll-back the scope of this kind of protection? (Flahvin, *The Australian*, 12 September 2008; *ComsLaw Update*, Issue 21 2008).

#### \* **ARIA and Bigpond at War**

It's reported that the Australian Record Industry Association (ARIA) and the Bigpond (Telstra) ISP are at war over alleged inaction by Telstra to take a big stick to music and TV/film file sharers. ARIA wants Bigpond to implement a 'notice and disconnect' regime. It seems that the parties are still consulting. It strikes me that this kind of approach can be likened to the US Net Neutrality debates where the cable giant Comcast was found by the FCC to be engaging in discriminatory behaviour by singling out individual file sharers (Media, *The Australian*, 21 August 2008).

#### \* **Australian Law Reform Commission's Privacy Reforms**

The ALRC's much-trumpeted review of Australian privacy laws had the Right-to-Know

Campaigners out in force, writing about the potential adverse outcomes for media practitioners. The 2700 page report has taken the ALRC approximately two years of research to complete. An editorial in *The Australian* (13 August 2008) expressed this view: 'Privacy Laws Shield Acts of Malfeasance: Law reform proposals give more power to the powerful'. It made the argument that journalists would 'have to think twice' when investigating maladministration or political corruption. The editorial further argues that 'If the ALRC's proposal goes ahead, it would remake media law by skewing the balance in favour of public figures with something to hide. The media would be at risk if it published private correspondence disclosing flawed public administration'. Other commentators suggested that tabloid-style current affairs programs and celebrity gossip magazines alike have a bleak future if the proposals for a statutory tort of privacy in cases of 'egregious' media invasions of privacy were to be introduced. But Mark Day (Media, *The Australian*, 14 August, 2008) thought there had been an overreaction on the media's part, noting that the recommendations were just that, and making the point that the report covered the full gamut of information, communications and personal privacy, not only the media intrusions variety. Day interprets the report as recommending a statutory tort to avoid allowing 'common law to develop at the whim of individual judges'. Quite rightly, he notes that the report takes some of the worst privacy breach scenarios (e.g. hidden cameras in women's toilets, disclosure of medical data to media outlets, personal financial data used for fraudulent purposes), and uses these to make the case for specific statutory examples.

(See <http://www.alrc.gov.au/media/2008/mr11108.html> for the ALRC's report).

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