NETWORK TEN SUPPLEMENTARY SUBMISSION TO THE JOINT SELECT COMMITTEE ON BROADCASTING LEGISLATION
9 APRIL 2013

Term of reference (A): the abolition of the 75 per cent rule, particularly in relation to regional and local news;

Network Ten addressed the reach rule issue in detail in its 18 March submission to the Committee and our position has not changed.

Network Ten remains opposed to the removal of the reach rule without a full consideration of the relevance and effectiveness of existing media ownership rules and diversity protections, including regional content obligations.

Following the withdrawal of the remaining media reform bills in March, there is now time to properly consider all the implications of removing the reach rule, as should have been done in the first place.

Network Ten does not understand the urgency surrounding this particular issue when the Convergence Review identified numerous areas where existing law is inadequate in responding to a converged media market?

It is certainly not the case that the reach rule must be abolished urgently and immediately because technology has already overtaken it. After investing almost $2 billion in digital terrestrial transmission facilities, free-to-air broadcasters are not likely to rush to stream channels nationally online and thus 'overtake' the reach rule any time soon. There are numerous technological, commercial, and content rights issues that must be resolved before commercial FTAs can even consider full live streaming of whole channels online.

Therefore the only conceivable reason to rush through a standalone legislative change to abolish the reach rule in June this year would be to facilitate the reported Nine/Southern Cross merger. Ten does not consider that is a valid basis for rushing critical policy reform.

Network Ten's position has been consistent: any change should only be made after a careful and diligent consideration of all existing diversity protection measures. Pulling one major policy lever by rushing one particular reform through Parliament without looking at the bigger picture is not good media policy and can bring about damaging unintended consequences.

Some of the issues that should be fully examined before the reach rule is abolished include those identified by the Convergence Review Committee:

- Whether the 'two out of three' rule should be abolished;
- Whether the 'two to a market' radio licence rule and the 'one to a market' television licence rule should be abolished; and
- Whether the current 'voices' test should be expanded to cover emerging media services and new major players.

Network Ten Pty Ltd ABN 91 052 515 250
1 Saunders St, Pyrmont NSW Australia 2009
GPO BOX 10, Sydney NSW Australia 2001
t. 61 2 9650 1010 f. 61 2 9650 1111 tty. 61 2 9650 1213
onehd.com.au ten.com.au eleven.com.au

Other issues that should be considered before the reach rule is abolished in isolation include:

- The relevance of the existing licence area framework as currently outlined in the *Broadcasting Services Act* (BSA); and
- Whether there is any need to change the existing local content obligations if and when the reach rule is removed.

Without a proper consideration of all of these issues in context, abolition of the reach rule will lead to a reduction in regional diversity and local content, particularly in regional markets.

Nine's draft undertaking

Committee members are right to be skeptical that a merged entity would invest $15 million to open newsrooms around regional Australia and hire 200 new regional reporters. These statements defy logic and commercial reality.

As outlined in Ten's previous submission, the point of mergers is to create efficiencies by ripping out costs. Cost savings from the reported Nine/Southern Cross merger have been estimated at between $50 million to $75 million.

We also understand why Committee members may be attracted to the idea of an enforceable commitment to increase regional news services in the event of a merger.

However, the reality is that without detailed and specific legislative amendment there is no guarantee that these commitments will be met or that a merged entity will do any more than meet the current regional content obligations.

Specifically, the Committee should not take into account Nine's draft undertaking to the Australian Communications and Media Authority (as outlined in Nine's submission to the Committee of 18 March 2013) because that undertaking is unenforceable under current law.

Nine's draft undertaking is made pursuant to section 205W of the *BSA*. However, under s205W, the ACMA may only accept a written undertaking that a person will take specified action in order to ensure compliance with *existing provisions* of the *Broadcasting Services Act* or a *BSA* code.

In other words, unless there is a breach or potential breach of existing regulation that makes an undertaking relevant: (a) there is no power to accept an undertaking; and (b) it can't be a proper use of the resources of the agency.

The ACMA has publicly advised that without knowing the detail of Nine's proposed enforceable undertakings or the legislative changes which may accompany any change to the 75% reach rule, the ACMA cannot say whether it could, or would, accept any such undertaking.

The ACMA also confirmed that currently the *BSA* does not allow the ACMA to accept such an undertaking, other than with a view to securing compliance with existing obligations (See Appendix A).

As the ACMA expressed in its *Guidelines relating to the ACMA's enforcement powers under the Broadcasting Services Act* 1992, the terms of an enforceable undertaking offered should establish a relationship between the specified action and the contravention of the BSA or BSA code.

Nine is well versed in the process of enforceable undertakings given the five enforceable undertakings it has had to provide to the ACMA since January 2009 (Ten has not had to provide any in that time). However, while each of these Nine undertakings outlined the relevant rules that were breached, the draft undertaking on the reach rule does not cite a contravention and that is because a relevant *BSA* provision or code does not exist.

Even if the undertaking could be accepted, enforceable undertakings may be withdrawn or varied at any time with the consent of the ACMA. Furthermore, each licensee must provide a separate undertaking so it would be open to Nine to argue in future to the ACMA that some of its regional markets can't sustain the agreed commitments and should be rolled back, even before the 3 year period expires.

During the Committee hearings on 18 March, Nine expressed the view that each licensee should negotiate its own undertakings to the ACMA to suit its business model. Under this system there is no guarantee the same level of commitment will be provided in each market as licensees seek to negotiate the best possible terms with the ACMA.

Section 61AS of the BSA allows undertakings to be given in order to prevent an "unacceptable media diversity situation" coming into existence in certain circumstances. Section 43A of the BSA requires the imposition of a licence condition in relation to a minimum level of "content of local significance" for those who are "regional aggregated commercial television broadcasting licensees". Neither of these provisions would enable the ACMA to accept the draft Nine undertaking.

To be clear, Ten is certainly not calling for heavier regulation. We are simply making the point that unless promises around new investments in regional content are legislated and detailed in their terms, undertakings given prior to any merger are unenforceable and therefore meaningless.

The only way to guarantee regional diversity and local content is to get the policy framework right *before* the reach rule is removed. Once the reach rule is gone, it will be too late.

Term of reference (B) whether the Australian Communications and Media Authority (ACMA) should be required to examine program supply agreements for news and current affairs when determining whether a person is in control of a commercial television broadcasting service

Network Ten opposes any legislated requirement that the ACMA examine program supply agreements for news and current affairs when determining whether a person is in control of a commercial television broadcasting service. In the absence of any demonstrated policy failure we are staunchly opposed to more regulation of this already highly regulated sector.

The impetus for an inquiry into this matter appears to be Network Ten's decision to outsource production of *Meet the Press* and *The Bolt Report*.

As is well known, Network Ten has outsourced the production of these two programs to News Limited.

However, Ten retains overall editorial control and general oversight of the production of the program in accordance with our obligations as the commercial broadcasting licensee. Furthermore, each program must comply with the *Commercial Television Industry Code of Practice* (the Code). This includes specific obligations regarding news and current affairs programs, including the requirement to broadcast factual material accurately and represent viewpoints fairly.

Ten's well-respected senior political correspondents, Paul Bongiorno and Hugh Riminton, continue to appear regularly on *Meet The Press* and it is hosted by Katharyn Robinson who was formerly employed by Network Ten. The program's producers have come from Sky News and Ten. *The Bolt Report* continues to be filmed at Ten's Melbourne studio.

The decision to outsource the production of these two programs was made following a strategic and operational review of all of Network Ten's news and current affairs programming in 2012. This review was conducted with the aim of achieving cost savings and efficiencies in light of the serious cyclical and structural challenges confronting Ten and all FTA broadcasters.

Outsourcing production and news content supply arrangements are common across the media industry and increasingly so given the current pressures facing media companies.

Network Ten has program supply agreements with a number of independent production companies across a range of program genres, including *The Project*, which is produced by Roving Enterprises. Ten sources news content from a variety of news content suppliers including Reuters, ITN, S-NTV, CBS, CNN, APTN and the Bureau of Meteorology. Network Ten also has agreements in place to supply video content including Ten News video stories to both Fairfax and News Limited for use in their online properties. The use of third party production resources is commonplace in the industry and Ten utilises content and resources from a variety of suppliers and producers.

Nine and Fairfax Media have recently partnered to launch a broadcast version of the Australian Financial Review, to be produced and broadcast by Nine using The Australian Financial Review's commentators and resources. The business program, *Financial Review Sunday*, will be extensively cross-promoted across Fairfax and Nine platforms. And the ABC and Fairfax have conducted a number of joint investigations for programs like *Four Corners* and *7.30*.

Such practices do not raise any issues of control or media diversity.

It is also important to note that *Meet the Press* and *The Bolt Report* represent one and a half hours of programming within a large and diverse slate of news and current affairs programming on Network Ten.

Network Ten produces and broadcast five separate hour long local news programs every weekday for each of its markets (Brisbane, Sydney, Melbourne, Adelaide and Perth). We also produce and broadcast a forty-five minute national late night news program weeknights (the only network to do so) and a national one hour weekend news program. Ten broadcasts *The Project* in primetime five nights a week with a late night encore screening.

The suggestion, therefore, that the outsourcing of *Meet the Press* and *The Bolt Report* has led to a change in control or reduced Ten's diversity of news offerings is ridiculous.

It is important to note that in fact the ACMA already has the ability to look at these sorts of arrangements when determining control issues.

As the ACMA itself has pointed out, the *Broadcasting Services Act 1992 (Cth)* (the Act) already contains "a wide-ranging definition of control."[1] Schedule 1 of the Act provides detailed criteria to assess when a person is in a position to exercise control of a broadcasting licence or a company. Part 1 of Schedule 1 states, "This Schedule recognises that the concept of control of a licence, a newspaper or a company can be a complex one. The holding of company interests is not the only

1 See http://www.acma.gov.au/WEB/STANDARD/pc=PC_91749

way to be in a position to exercise control."

The control criteria listed in Part 2 of Schedule 1 includes whether:

> *a person, either alone or together with an associate of the person, is in a position to exercise (whether directly or indirectly) control of the selection or provision of a significant proportion of the programs broadcast by the licensee; or*
>
> *the person, either alone or together with an associate of the person, is in a position to exercise (whether directly or indirectly) control of a significant proportion of the operations of the licensee in providing broadcasting services under the licence;*[2]

Hence there are detailed criteria already in place for the ACMA to assess when a person is in a position to exercise control, including in relation to programming. There is no need to include separate and specific reference to news and current affairs programs. Nor is there any demonstrated problem which requires any additional regulation.

Term of Reference (C): On-air reporting of ACMA findings regarding broadcasting regulation breaches.

There is no evidence of any policy failure to suggest that the ACMA requires an additional enforcement power in the form of requiring on-air reporting of its breach findings. Furthermore, it is not clear what benefit will be achieved by forcing broadcasters to read ACMA statements of findings on-air.

The ACMA already has a range of powers at its disposal to ensure compliance with the BSA and the other regulation and the current compliance framework has delivered a responsive commercial FTA sector and a very low repeat offence rate.

In 2006 the ACMA was granted additional enforcement powers as a result of the *Communications Legislation Amendment (Enforcement Powers) Act 2006* and *Broadcasting Services Amendment (Media Ownership) Act 2006*.

These additional powers included the introduction of civil penalties for a range of breaches where only criminal sanctions were currently available, giving the ACMA greater flexibility to address non-compliance. It also allowed the ACMA to accept enforceable undertakings from industry, including undertakings to provide on-air and/or online reports of breach findings.

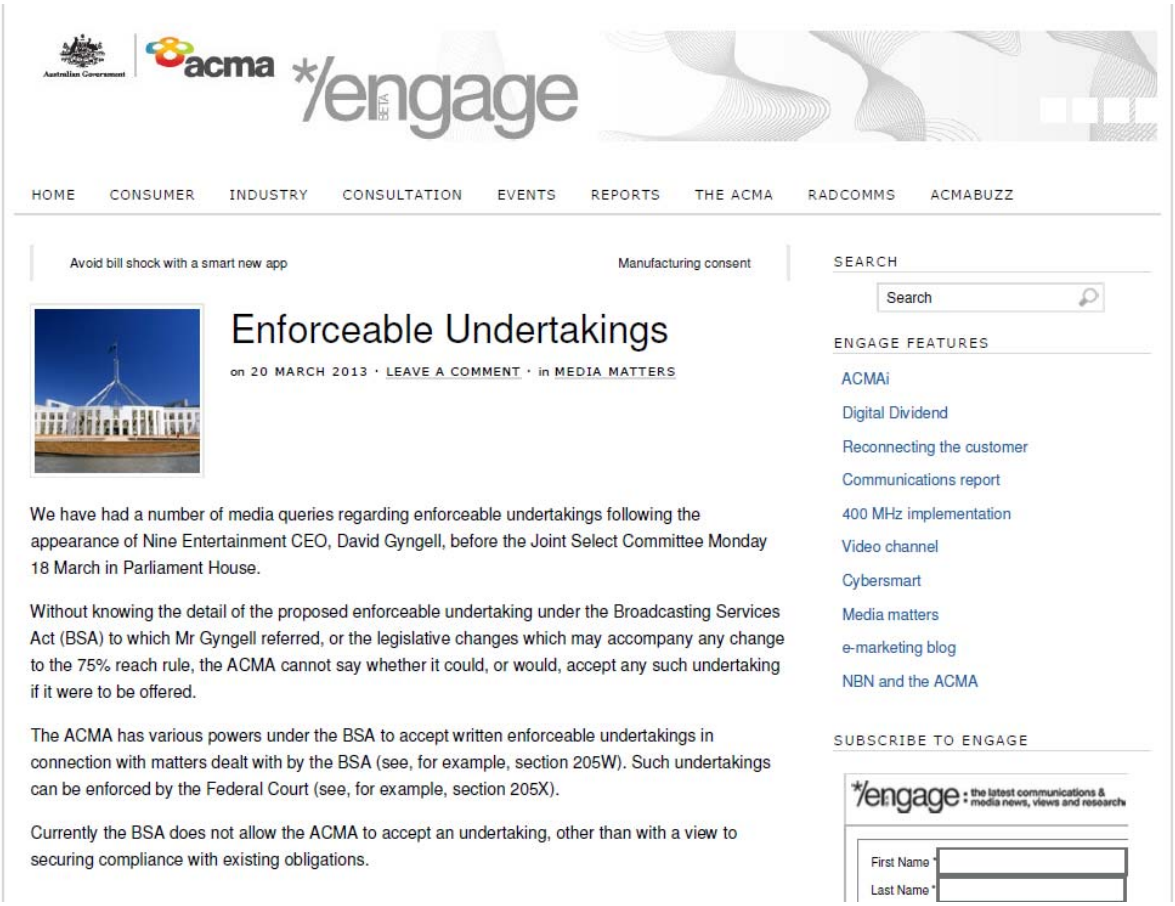
The ACMA always publishes its findings on the ACMA website and in its various publications. The ACMA will also always issue a media release. If there is a high level of interest it will even hold a press conference to announce its findings.

The publication of the ACMA's breach findings already attracts widespread media attention where warranted. When the ACMA found on 4 April that Nine's *A Current Affair* had breached the Code of Practice on privacy and other grounds, the breach was prominently reported on all main media outlets well before the ACMA had even issued its findings publicly.

For more information on any aspect of this submission please contact Annabelle Herd, Head of Broadcast Policy, on 02 9650 1395 or aherd@networkten.com.au.

2 Broadcasting Services Act 1992 (Cth) Schedule 1, Part 2, Clause 2(1)(b)(ii) and (iii)

Appendix A – Network Ten Supplementary Submission



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Enforceable Undertakings

on 20 MARCH 2013 · LEAVE A COMMENT · in MEDIA MATTERS

We have had a number of media queries regarding enforceable undertakings following the appearance of Nine Entertainment CEO, David Gyngell, before the Joint Select Committee Monday 18 March in Parliament House.

Without knowing the detail of the proposed enforceable undertaking under the Broadcasting Services Act (BSA) to which Mr Gyngell referred, or the legislative changes which may accompany any change to the 75% reach rule, the ACMA cannot say whether it could, or would, accept any such undertaking if it were to be offered.

The ACMA has various powers under the BSA to accept written enforceable undertakings in connection with matters dealt with by the BSA (see, for example, section 205W). Such undertakings can be enforced by the Federal Court (see, for example, section 205X).

Currently the BSA does not allow the ACMA to accept an undertaking, other than with a view to securing compliance with existing obligations.

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