

Submission to the

Productivity Commission

Broadcast Inquiry

by

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3V and Merlin Integrated Media Submission to the Productivity Commission Broadcasting Inquiry, May 1999.

Relevant Parts of Terms of Reference

"Scope of Inquiry

4. The Commission is to advise on practical courses of action to improve competition, efficiency and the interests of consumers of broadcasting services. In doing so, the Commission should focus particular attention on balancing the social, cultural and economic dimensions of the public interest and have due regard to the phenomenon of technological convergence to the extent it may impact upon broadcasting markets.

- (a) identify the nature and magnitude of the social and economic problems that the legislation seeks to address;*
- (b) clarify the objectives of the legislation;*
- (c) identify whether and to what extent the legislation restricts competition;*
- (d) identify relevant alternatives to the legislation, including non-legislative approaches;*
- (e) analyse and, as far as reasonably practicable, quantify the benefits, costs and overall effects of the legislation and the alternatives identified in (d);*
- (f) identify the different groups likely to be affected by the legislation and alternatives;*
- (g) List the groups and individuals consulted during the review and outline their views, or reasons why consultation was inappropriate;*
- (h) determine a preferred option for regulation, if any, in light of the objectives set out in (4);*
- (i) examine what mechanisms for increasing the overall efficiency of the legislation and, where it differs, the preferred option"*

(pp. 2,3, Terms of Reference, Issues Paper, May 99, Broadcasting Inquiry, Productivity Commission)

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9.1 3V and Merlin Integrated Media

9.2 Tier Zero
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1. Executive Summary and Main Recommendations

- 1.1 It is our contention that these independent electronic media producers are a leading indicator of and powerhouse behind the development of new media production and distribution forms, as they were for computer-based communications and the film and television industries in the 70's and early 80's, and that their views are undervalued and consequently overlooked in the development of policy and legislation for broadcast and new media industries .(2.5)
- 1.2 Smaller media companies are truly innovative in ways large, mainstream companies cannot be, are flexible and can best deal with ongoing cultural and technological change, and so can provide a leading indicator for not only the broadcasting and media industries, but for sectors as diverse as the financial, IT, education, leisure, and manufacturing sectors. (2.6)
- 1.3 We recommend that these smaller media companies be recognised for their benefits to the Australian community by policy makers and that therefore support for this vital part of the media and information economy should be reflected in policy and underpinned by legislation.(2.10)
- 1.4 To deal with the ongoing and relentless dynamism of new media and technology that the government institute a regular formal review of relevant legislation and make allowance in other ways for this dynamism.(2.9.3)
- 1.5 In our opinion, legislation has entrenched existing large media companies as the effective sole owners of and gatekeepers to *economically viable* distribution platforms, whether those of broadcasting, cable or the newer internet.(3.6)
- 1.6 We can predict that the trend of vital small to medium players being forced out of independent operation of their businesses, or being forced overseas, will continue and accelerate. This "brain drain" also includes skilled individuals who are leaving for overseas positions. (3.7)
- 1.7 The need for a return on investment in new media companies will necessitate the creation of a "choice" in the provision of different levels of interconnectivity, resulting in a tiered delivery of services, many of them increasingly pay services, that will mean some information and entertainment will only be available to those with the economic means, and will become more expensive to deliver or will only deliver poor quality services to regional or low socio-economic demographic regions of suburban Australia.(3.10)
- 1.8 Anti-competitive behaviour and the operation of overseas companies outside of Australian tax laws by large media companies and organisations that effectively "pirate" Australian online consumers and the potential revenues from the new economy, taking them offshore, are the greatest threats to Australia's new media and information economy.(4.1)
- 1.9 Using the Australian book selling industry as an example, it is clear that the local Australian book selling industry is potentially heading for collapse as large heavily financed companies such as Amazon online bookstore take their market. (4.2)
- 1.10 We recommend that the Commission examine ways in which government and government legislation can reduce the anti-competitive threat posed to Australian industry through the loss of customers and revenue to overseas companies outside of the Australian taxation system.(4.5)
- 1.11 Of lesser but nonetheless significant importance is local anti-competitive behaviour by large media companies and organisations, including Telstra, the ABC, the CMC's and universities, which is compromising the viability of smaller media players vital to the success of the Australian media and information economy.(4.6)

- 1.12 We therefore recommend that provisions of the TPA be tightened to prevent anti-competitive behaviour by large Australian media and communications companies and organisations that weakens smaller companies and impedes their ability to be genuinely competitive in the Australian and international marketplaces.(4.9)
- 1.13 We would argue that simple deregulation has negatively impacted both economically and culturally on the Australian consumer and the broadcasting and media industries, and is against the principles expressed in the objects of the BSA itself.(5.1)
- 1.14 We recommend that regulation be kept "light", be written in plain English, and be tightened in areas that ensure equity, diversity, advertising limits, regulated violence and sexual reference, and particularly for the regulation of gambling using all media. (5.3)
- 1.15 Convergence brings together the broadcasting, media and communications industries. It encourages consolidation and reduces diversity. "Reduced diversity" actually means vital smaller players, such as our company, are threatened with loss of business and eventual closure in this country. (6.1)
- 1.16 We recommend that the consolidation occurring in the media industries must be, as far as possible, reflected in a targeted consolidation of the Acts currently regulating those industries. This will mean that only the areas common to these converging industries is commonly regulated, whilst areas that are wholly or substantially different remain regulated by Acts that are currently addressing these differences. (6.3)
- 1.17 We recommend that this common or shared digital language of the broadcasting, IT, media, communications, and telecommunications sectors be the prerequisite for an industry to be called a "broadcasting" or "media" or "communications" company in the first instance, and hence would become the prerequisite for inclusion within the ambit of a revamped Digital Distribution (Broadcasting and Datacasting) Act, overseen by a suitable regulatory Authority whose aims are clearer due to the clarity of definition achieved in this strategy. (6.5)
- 1.18 We recommend that broadcasting and related legislation must take into account this strong tendency to consolidate brought on by convergence, ideally at the level of tax incentives for small business and disincentives for consolidation, or failing that, at intervention at the level of direct government support through research and development funding targeted at smaller players, and continued support for government organisations fostering innovative content production and cultural infrastructure. (6.11)
- 1.19 A policy of technologically neutral legislation could ameliorate distortions caused by inappropriate political intervention in determining policy and legislation that allows anti-competitive and inefficient industrial practices to occur among media players. (7.2)
- 1.20 We would recommend that all forms of non technologically neutral legislation be identified and changed to reflect economic and cultural outcomes, not technological outcomes. (7.5)
- 1.21 We are concerned that new media and particularly the internet are being used as the reason for a relaxation of media controls. This is because simple access to the internet is not sufficient to engage in genuine and reasonable competition with larger, stronger companies operating on the internet. (8.3)
- 1.22 To achieve a healthy media and information economy we recommend:
- 1) that legislation ensure access for new and smaller independent media companies and relevant non-profit media organisations to all domains of media distribution through the

reservation of a limited number of FTA and cable channels and/or bandwidth (see Tier Zero in Appendices); and

- 2) that legislation ensure continued support for production funding bodies that assist new and smaller independent media companies and relevant non-profit media organisations because of the significant cultural and economic benefits they afford the Australian community. (8.7)

1.23 We also recommend that the idea of a "communications commons" in all domains of the new media be enshrined in the objectives of the Act (see Tier Zero below). (8.8)

1.24 For FTA services we recommend that the national Sixth Channel be used for distributing the program material of members of the CBAA, and that commercial interests be prevented from accessing this channel. This will ensure diversity in the domain of FTA broadcasting. (8.9)

1.25 For cable we recommend that a multi-tiered system of access, similar to that operating in the US, be mandated on all cable and other media distribution systems. (8.11)

1.26 For the internet we recommend that a small percentage of bandwidth be set aside for community, cultural and educational non-profit (CCEN) use. (8.12)

2. Overview

- 2.1 This paper is presented from the viewpoint of small to medium independent media producers and distributors who either sell their material (content, production services) to a third party distributor (such as a TV or cable network, "large" internet group, or other "large" distributor using the internet, CD ROM, video or similar electronic media distribution platform) or who independently distribute their material through the internet, CD ROM, video or similar electronic media distribution platforms. They include both new and smaller independent media companies and also relevant non-profit media organisations who are mostly overseen by the Community Broadcasting Association of Australia.
- 2.2 Further, we consider that the Broadcast Services Act 1992 (BSA), is legislation whose ambit affects and therefore includes those industry sectors that produce or distribute all forms of media. Due to the wide range of influence the broadcast industries exert over our lives and culture, and the interrelated nature of media, technology and broadcasting, the BSA also has influence over the working of Acts related to media, communications, telecommunications and cultural support sectors, a fact sensibly reflected in the mix of economic, social and cultural issues outlined in the Broadcasting Inquiry Issues Paper.
- 2.3 As such, these smaller media players have a direct and vital role to play in the future of broadcasting, the new media industries and the media and information economy and hence this inquiry, their unique circumstances and contribution affording them significant economic influence on the industry and our cultural environment as a whole out of proportion to their relatively small economic size.
- 2.4 These smaller companies would fit into the SME category, are the primary employers for the sector employing an estimated 65% of the workforce of the broadcasting and new media industries, a figure increasing as the trend to outsourcing and contracting continues, and also increasing as the costs of production of electronic media continue to fall.
- 2.5 It is our contention that these independent electronic media producers are a leading indicator of and powerhouse behind the development of new media production and distribution forms, as they were for computer-based communications and for the film and television industries in the 70's and early 80's, and that their views are undervalued and consequently overlooked in the development of policy and legislation for broadcast and new media industries. This omission results in poorly framed legislation that leads to inefficient and anti-competitive practices by large media companies in areas such as the Broadcast Services Act, the Telecommunications Act and the Trade Practices Act that would not have occurred if the views and special needs of this independent sector were properly taken into account and reflected accordingly in policy and subsequent legislation.
- 2.6 Smaller media companies are truly innovative in ways large, mainstream companies cannot be, are flexible and can best deal with ongoing cultural and technological change, and so can provide a leading indicator for not only the broadcasting and media industries, but for sectors as diverse as the financial, IT, education, leisure, and manufacturing sectors.
- 2.7 Smaller media companies are, in effect, a necessary research and development "arm" of the larger companies.
- 2.8 Smaller independent media companies provide many benefits to Australia's media and information economy including:
 - a) access for smaller educational providers, contemporary arts groups and artists, multicultural and Aboriginal groups and other similar groups and individuals;

- b) a new model of efficient horizontal and scalable organisation utilising the latest in IT products and services;
- c) training and work experience in production and distribution;
- d) distribution of this independent material through the smaller window of independent media distribution channels, albeit access restricted by lack of financial and marketing strength.; and
- e) the cultural infrastructure operated by Australians to produce and distribute definably Australian information, education and entertainment content.

2.9 It is the position of our company that:

2.9.1 accessibility to and meaningful engagement with new media technologies and forms is a necessary precondition if the wider Australian community is to benefit ("to make the most out of the opportunities presented by new technologies and new ways of doing things" p 9, Issues Paper, 1999,) from efficient delivery of media and information, education and entertainment material;

2.9.2 that such efficient delivery depends, not only on the future efficient operation of the Australian broadcasting and communications regimes, but also on the recognition of and accommodation in policy and legislative frameworks to the needs of small to medium new media "players" (producers and distributors) whose experiences are vital to prospective analysis of the greenfields new media industries, and provide the most significant areas of product and service development innovation through research and development into "the opportunities presented by new technologies and ways of doing things" (p 9, Issues Paper);

2.9.3 that to deal with the ongoing and relentless dynamism of new media and technology that the government institute a regular formal review of relevant legislation and make allowance in other ways for this dynamism; and

2.9.4 that the existing broadcasting regime does not adequately deal with the needs of small to medium producers because of: the use of increasingly obsolete terms and concepts such as "broadcasting"; a failure of government and legislation to ensure open access for new players to the new technologies of delivery; and a failure of legislation to protect small business from anti-competitive activities of the large media companies.

2.10 We recommend that these smaller media companies be recognised for their benefits to the Australian community (outlined above) by policy makers and that therefore support for this vital part of the media and information economy should be reflected in policy and underpinned by legislation.

2.11 This does not mean that older, larger and more mainstream companies do not have an important part to play in innovation, but this part is primarily to realise economies of scope and scale in manufacture, marketing, distribution and other functions in exploiting the soft and hard assets developed, in the first instance, by smaller innovative companies.

2.12 For example, the three great barriers to the success of smaller media companies are:

- a) a lack of access to economically viable independent distribution platforms that are genuine alternatives to those provided by mainstream or larger media companies;
- b) the need for ongoing support for certain special kinds of services and content provided by a range of government production funding bodies; and

- c) a lack of a comprehensive and coherent set of policies and legislative instruments to ensure the ongoing access and production support.

2.13 This paper will address only those questions raised in the Inquiry Issues Paper that relate to the linkages between, on the one hand, new small to medium media producers and distributors and, on the other, the "well-being of the community as a whole, rather than just the interests of any particular industry or group" (Issues Paper, p 6.). As such, only those areas will be discussed where a change to the government's policy on small players will benefit the wider community as a whole. Where appropriate, issues additional to the questions posed by the Issues Paper will be raised and discussed.

2.14 We do this in the knowledge that our experience in over 15 government inquiries has proven that our views will be largely ignored by this inquiry in favour of those of large media companies, and that this inquiry may therefore entrench inappropriate policies and legislation. Nonetheless, we do however regard as important the opportunity afforded by this inquiry for smaller players to put forward their views and wish to contribute as a matter of record.

3. **New Developments in Broadcasting, Media and Technology in the Short to Medium Term**

- 3.1 From our experience, broadcasting, media and communications are industries which have more in common than they have differences but this has not yet been recognised in the Acts that control these areas. This has given a huge competitive advantage to large companies operating in these fields in terms of forming alliances to carry out effectively collusive behaviour disguised by operating under different Acts, and accelerating the consolidation that was already underway in Australian broadcasting and related industries. We will outline issues in this area in the **Convergence** section below.
- 3.2 Our company is in a unique position to comment on the futures of broadcasting, media and new technology as it has spent the last 15 years at the forefront of new technologies in computing, design, media production, broadcasting, cable and internet. We often work in communications and technology areas many years before the larger media companies. As mentioned we and our associates have contributed to many government inquiries in the past.
- 3.3 Being a smaller company working at the leading edge of technology and change has allowed us to predict with some accuracy which technologies are likely to gain consumer support in the future and which will not. Often these predictions are rejected by large media companies that we have worked with or have provided advice to, reflecting their inbuilt resistance to change driven by the legacies of older technologies and business systems that handicap larger media companies in determining and appropriately addressing prospective cultural and technological change.
- 3.4 Our company, like many smaller media companies, can make valid or more likely predictions because of its smaller size and resultant flexibility, and its technological skills in using leading edge technologies well ahead of the rest, something smaller companies, unlike the larger media companies, are forced to do to stay in business. New producers, like technologically literate consumers, are the "early adopters" of new technologies, not large communications and broadcasting companies.
- 3.5 The fact that smaller companies are in the best position to achieve a high level of accuracy in analysing and predicting new developments in broadcasting and technology is often poorly realised in policies which determine the economic circumstances that these smaller companies operate in. As such the significant benefits and opportunities that smaller companies could and should afford Australian industries and the community is wasted, and the efficient operation of media companies both large and small is impeded.
- 3.6 In our opinion, legislation has entrenched existing large media companies as the effective sole owners of and gatekeepers to *economically viable* distribution platforms, whether those of broadcasting, cable or the newer internet. For example, the granting of sole control over digital datacasting to existing broadcast players for the most valuable first years of operation, and the takeover of all major Australian internet portals (the most popular web sites) by existing large players - Publishing and Broadcasting Limited, Microsoft, Fairfax, the ABC, and the News Ltd's Australian - before the mainstream web audience has even arrived, and before government can properly determine legislation. This further entrenches the position of large scale and inefficient media companies and walls out or seriously impedes new players, innovation, and the potential competitive advantage that correct prediction of social and technological change affords Australia and its new media and information economy.
- 3.7 We can predict that the trend of vital small to medium players being forced out of independent operation of their businesses, or being forced overseas, will continue and accelerate. This "brain drain" also includes skilled individuals who are leaving for overseas positions. Our company is at the present time seriously considering one of these unpalatable steps in the face of the anti-competitive effects on small companies of poor legislation, and of the many

anti-competitive practices of large companies that are prejudicial to the profitable operation of smaller concerns.

- 3.8 Unless the government appropriately and wisely intervenes to ensure access to economically viable distribution platforms for smaller media players we can see the inevitable formation of an oligopoly of new media players, many of them wholly or partially owned by existing Australian players, or by existing overseas players working or soon to work in the Australian market. Such an outcome will seriously compromise the future benefits for the Australian consumer of media products and services that this Inquiry seeks to ensure.
- 3.9 Another important trend, against the hype of "information wants to be free", is that the internet is beginning to exhibit features of cable delivery, not the least because existing cable companies are now offering internet services and content, but also because large new media companies are about to rapidly move to a cost-recovery basis in the provision of content and services as the huge price to earnings ratios of internet, computing and communications companies returns from the 300's to more realistic values.
- 3.10 Shareholders of new media companies will eventually require a return on investment and this will necessitate the creation of a "choice" in the provision of different levels of interconnectivity, resulting in a tiered delivery of services, many of them increasingly pay services, that will mean some information and entertainment will only be available to those with the economic means, and will become more expensive to deliver or will only deliver poor quality services to regional or low socio-economic demographic regions of suburban Australia.
- 3.11 This makes our proposals for the establishment of a "communications common" outlined below an important regulatory instrument to ensure the maintenance of a minimal level of services available to all Australians, regardless of the technology that produces and delivers these services.

4. Economic and Social Dimensions, the Objectives of Legislation

- 4.1 Anti-competitive behaviour and the operation of overseas companies outside of Australian tax laws by large media companies and organisations that effectively "pirate" Australian online consumers and the potential revenues from the new economy, taking them offshore, are the greatest threats to Australia's new media and information economy.
- 4.2 Using the Australian book selling industry (for which our company builds online ecommerce sites) as an example, it is clear that the local Australian book selling industry is potentially heading for collapse. This collapse is underway in the US at the present time, initially with the closure of many smaller stores, as large heavily financed companies such as Amazon online bookstore take their market. In Australia, companies such as Amazon "cherry pick" the best of the Australian online market and take trade away from local Australian businesses while escaping our taxation system entirely. With a potential GST on the way this becomes a significant problem which must be overcome by addressing this issue through legislation.
- 4.3 The same offshore "pirating" occurs for CDs, newspapers and magazines and other related goods and services offered globally online, and the same basically applies to all companies offering goods or services that can be offered online from another country.
- 4.4 The offshore pirating of Australian consumers online by large US companies operating free of Australian legislation and taxation regime is particularly damaging to the prospects of small to medium media players. This "pirating" causes damage to Australian industry and its international competitiveness by:

- a) discouraging proprietors away from upgrading their IT systems. For example the main bookstore database used in Australia, Bookscan, is an obsolete MS DOS system made in the early 80's that would best be in a museum, not operating as a fundamental part of Australia's IT industry;
- b) discouraging proprietors from investing the significant amounts required to set up and operate a full ecommerce site;
- c) widening the competitive gap between smaller and large media companies in favour of those with the financial strength to compete with large overseas companies; and
- d) the loss of the valuable online "brand" establishment to large overseas companies who, using the reticence of the Australian industry to go online, can be first to market in the race for the new consumer.

- 4.5 We recommend that the Commission examine ways in which government policy and government legislation can reduce the anti-competitive threat posed to Australian industry through the loss of customers and revenue to overseas companies outside of the Australian taxation system.
- 4.6 Of lesser but nonetheless significant importance is local anti-competitive behaviour by large media companies and organisations, including Telstra, the ABC, the CMC's and universities, which is compromising the viability of smaller media players vital to the success of the Australian media and information economy.
- 4.7 Larger companies, able to skirt the provisions of the TPA because of an outmoded and nominal separation of industry sectors and non-specific legislation, are unconscionably and non-competitively using their market and financial strength to dominate the broadcasting, media and communications industries. This is weakening and rendering unprofitable many smaller players who often were previously industry leaders, not simply because of their size, but because of their innovation in production. This weakening causes many companies to fail, as many have already done, for the wrong reasons.
- 4.8 For example, the use of loss leader strategies by:
- 4.8.1 Telstra which is able to offer media services such as hosting, interconnect and related services at prices far below that of smaller companies. Our company has lost several contracts to Telstra who offered some clients free hosting and sponsorship as part of the deal;
 - 4.8.2 Spike, Australia's largest web company, then in collusion with the ISP Microplex, used a loss leader strategy to dominate the cultural sector. Our company was in negotiation with both the Art Gallery of NSW and the Museum of Contemporary Art in Sydney, two of Australia's most significant website clients, to provide culturally-oriented websites when Spike offered to do the site for free and took the contract; and
 - 4.8.3 universities and the CMC's are the next most anti-competitive institutions, using government funding they receive to undercut proper market pricing mechanisms for the supply of goods and services. They have been forced into a cost-recovery situation for each department and consequently departments of computing, design and communications, using university equipment, premises and cheap student (work experience) labour, can offer prices below the true market price for goods and services.
- 4.9 We therefore recommend that provisions of the TPA be tightened to prevent anti-competitive behaviour by large Australian media and communications companies and organisations that weakens smaller companies and impedes their ability to be genuinely competitive in the Australian and international marketplaces.

- 4.10 We would also argue that many of the economic and cultural issues are in fact closely related and dependent upon one another, but their close relationship has been disguised and distorted by existing players opposed to a genuinely more open and flexible regulatory regime. Such a regime would bring a genuine competitive environment to Australia's media and information industries.
- 4.11 As is reflected in the Objectives of the BSA and the Issues Paper for this Inquiry, the intent is to take into account the need to balance "the social, cultural and economic dimensions of the public interest" to achieve the best result of this Inquiry for Australians. In order that this balance be maintained we recommend that the Inquiry recognise the close relations between the public interest and the economic and cultural regulation of the industry as a whole.

5. Deregulation

5.1 We would argue that simple deregulation has negatively impacted both economically and culturally on the Australian consumer and the broadcasting and media industries, and is against the principles expressed in the objects of the BSA itself.

5.2 For example, due to the negative impact of deregulation:

5.2.1 the Australian consumer now has less local television and diversity of programming through the disastrous policy of aggregation in radio and television. We predict that there will be a sale of one or more Australian networks to an American company which will see much more American radio and television programming in regional and urban markets;

5.2.2 the Australian consumer has more violence and sexually titillating programming and advertising on Australian television thanks to the failed idea of industry self-regulation. We predict that this will soon be the same for the internet, led by the largest media companies operating there. For example, one of ninemsn's most popular services is a sex site, albeit masquerading under the auspices of "health"; and

5.2.3 the Australian consumer must unwillingly endure significant increased amounts of advertising and advertorial "lifestyle" programming, with Channel Nine and other networks consistently breaking self-regulated "limits" to on-air advertising. This has led to Australians being the first in the world to have to endure ads on pay TV, and we can further predict, that without proper regulation, advertising will become ubiquitous, across all media and platforms, filling an inappropriately large amount of media space and consumers' time.

5.3 We recommend that regulation be kept "light", be written in plain English, and be tightened in areas that ensure equity, diversity, advertising limits, regulated violence and sexual reference.

5.4 We also recommend that particular emphasis should be placed on the strict regulation of gambling - or gaming as the popular euphemism puts it - in all domains of media with special emphasis on the simultaneous access of gambling and ecommerce services. Such simultaneous access will mean that gamblers can connect their credit card to the casino through an ecommerce supplier.

5.5 It should be noted that it is likely that the trend of large media companies buying into and operating on-air, online and remote gambling services will increase, requiring special skills and resources on the part of government to regulate such an industry that has potentially disastrous economic consequences for Australian consumers - not just for "problem gamblers" - but also for lower-income households with children who are already experiencing economic stress as the gap between the wealthy and poor increases.

5.6 It should also be noted that the Broadcasting industry currently circumvents the weak regulation of the BSA in regards of gambling on free to air (FTA) services through the operation of programs on Channel Nine and Seven that use loopholes in the law to allow contestants to effectively gamble for large sums of money over the air. This contravenes the BSA's Objectives (h) and (j), and also flouts the spirit of this section of the BSA.

5.7 We recommend that the Objectives of the Act be updated to include new media forms and be strengthened in regards of providing Australians with a comprehensive and free media service delivering information, education and entertainment throughout Australia, to complement those provided by pay TV services. Such an objective protects the regional Australian community as USOs are degraded, and as pay TV services seek to supplant the FTA market.

6. Convergence

- 6.1 Convergence brings together the broadcasting, media and communications industries. It encourages consolidation and reduces diversity. "Reduced diversity" actually means vital smaller players, such as our company, are threatened with loss of business and eventual closure in this country.
- 6.2 Convergence, in bringing together the broadcasting, media and communications industries, encourages consolidation and reduced diversity precisely because of the many different Acts that govern and regulate these previously largely separate industries. The formulation of Acts, primarily the BSA, the TCA and the TPA, has been manipulated by the large broadcasting and media companies through the "capture" of the regulatory bodies in the full knowledge that such manipulation provides effective legislative sanction for anti-competitive practices, too subtle to be caught by the Acts. For example, the television industry here and in the US supported the idea of a split between "narrowcasting" and "broadcasting", thereby quarantining any competition to narrowcast services, and maintaining the oligopoly in television broadcasting.
- 6.3 Therefore, we recommend that the consolidation occurring in the media industries must be, as far as possible, reflected in a targeted consolidation of the Acts currently regulating those industries. This will mean that only the areas common to these converging industries is commonly regulated, whilst areas that are wholly or substantially different remain regulated by Acts that currently address these different domains.
- 6.4 It is our opinion that the area common to all these industries, and not yet recognised in policy or legislation, is the common media content "language" of the digital domain. We also appreciate that what we are about to propose is a major shift in the strategy for fostering and maintaining Australia's media and information economy and its benefits for the Australian community.
- 6.5 We recommend that this common or shared digital language of the broadcasting, IT, media, communications, and telecommunications sectors be the prerequisite for an industry to be called a "broadcasting" or "media" or "communications" company in the first instance, and hence would become the prerequisite for inclusion within the ambit of a revamped Digital Distribution (Broadcasting and Datacasting) Act, overseen by a suitable regulatory Authority whose aims are clearer due to the clarity of definition achieved in this strategy.
- 6.6 A consequence of this action would be the potential for a complementary Digital Production (Broadcasting and Datacasting) Act that regulates content industries. This would also afford the opportunity of consolidation of existing government support for the ABC, SBS, the AFC, the FFC, the AFTRS, and others.
- 6.7 While we predict that changes such as we have proposed will very likely be forced on our economy and culture eventually we feel that it would be timely to make a move such as this now to maintain a leading position on the world stage. We are also aware that the political realities of change have before now meant a laborious incrementalism in policy development and a slow pace of real change. This legislative inertia plagues our broadcasting and communications policy development. Such legacies in the fast moving world of the media and information economy also represent a significant competitive disadvantage for Australia.
- 6.8 For our smaller media players' sector, convergence simply means more competition from larger players in areas that are traditionally ours. For example, large advertising companies had no direct involvement with the internet until convergence allowed them to repurpose or reuse already existing systems of client networks and contracts to move onto and take over the majority of work in new media production work on the internet.

- 6.9 Currently over 75% of the revenue from publishing on the internet in Australia is taken by just five or six large players. We can predict that within two years, over 95% of internet production and publishing revenue will be made by just two or three large players forming an effective oligopoly. We can also predict that there is a significant likelihood that these two or three companies will be existing large players currently regulated by the BSA.
- 6.10 We anticipate both the further consolidation of large media, advertising, telecommunications, publishing and broadcasting companies, together with an influx of large overseas media companies that will accelerate this consolidation. This will greatly diminish the likelihood of profitable operation for smaller companies with the consequent lessening of innovation, diversity and potential for a leading edge development base for local media and information industries.
- 6.11 We recommend that broadcasting and related legislation must take into account this strong tendency to consolidate brought on by convergence, ideally at the level of tax incentives for small business and disincentives for consolidation, or failing that, at intervention at the level of direct government support through research and development funding targeted at smaller players, and continued support for government organisations such as the Australian Film Commission, the Australian Council, Cinemedia, NSW Film and Television Office and other similar organisations fostering innovative content production and cultural infrastructure.
- 6.12 Better co-ordination between government entities that regulate media and communications, and those that support the production of content for these industries, would also improve the situation provided the social and cultural dimensions of such regulation and support are balanced with that of the economic dimension, as suggested in the Issues Paper.
- 6.13 However, although we propose some level of consolidation in the Acts, the government regulatory and "content" bodies, we would not recommend that consolidation be taken to a point where the very different circumstances of companies that work in different industries, even those sharing the core digital systems, and the very different needs of different States and regional areas, be forgotten. In fact, we recommend that particular and increased attention be given to the unique needs of:
- a) different geographical areas and socio-economic circumstances of the audience;
 - b) different economic strengths of organisations; and
 - c) the different aims and objectives of for-profit and non-profit media organisations, including libraries.

7. Technology "Neutral" Legislation

- 7.1 Government legislation should ideally be technologically "transparent" or "neutral", something that has never been properly achieved, as demonstrated by the failed mandating of microwave and satellite delivery of pay TV, through to the current technologically "opaque" legislation mandating digital television. Technologically transparent legislation would create legislation that could better deal with: entrenched media interests and the resultant regulatory "capture"; the unforeseeable future social and economic circumstances resulting from the *ongoing* technological dynamism of the communications and broadcasting industries; and the changes in cultural and social practice and patterns that affect and are affected by these changes.
- 7.2 A policy of technologically neutral legislation could ameliorate distortions caused by inappropriate political intervention in policy development and legislation that allows anti-competitive and inefficient industrial practices to occur among media players.
- 7.3 Similarly, a policy of technologically neutral legislation would ensure that policy development affords the maximum opportunities and benefits to the Australian community and industries.

- 7.4 A policy of technologically neutral legislation is identical in intent to the policies expressed through Australian competition legislation, and is also fundamental to the proper operation of the Productivity Commission itself.
- 7.5 We would recommend that all forms of non technologically neutral legislation be identified and changed to reflect economic and cultural outcomes, not technological outcomes. This would have the affect of making the debate over the introduction of digital television and datacasting services largely redundant.

8. New Media and Its Benefits

- 8.1 For our company "new media" can be defined as "information, education and entertainment media digitally generated, manipulated, stored, transmitted or distributed to the public".
- 8.2 This means that "new" media is not a subset of the "old" media, but rather, new media has absorbed the old media almost entirely, with the only exception being the paper-based and analogue video or film distribution of media. The remaining not-yet-fully-digital media of paper, film and video are undergoing rapid digitalisation, potentially leaving only some paper-based distribution, and some users of older media, in the non-digital domain in 5 years time. As such we have suggested changes to the relevant Acts to cover this new conceptualisation of media and the changed circumstances of the broadcasting, media and communications industries.
- 8.3 We are concerned that new media and particularly the internet are being used as the reason for a relaxation of media controls. While we would agree that ownership - provided content regulation remains - is not an issue, in our opinion controls over the maximum "reach" or audience for one related company, that is cross-media regulation, must be strengthened. This is because simple access to the internet is not sufficient to engage in genuine and reasonable competition with larger, stronger companies operating on the internet.
- 8.4 This is because the internet is analogous to the television industry model only in terms of the competitive advantage that large companies have over smaller ones as regards marketing, equipment and finance raising. As such, the internet cannot be truly considered a new media model in this case as these older "laws" of the broadcasting and media market also hold for the new market of the internet justifying government intervention and regulation to achieve genuine competition between large and small companies.
- 8.5 Therefore, just as new independent broadcast players are excluded from access to cable delivery platforms because of the artificially-raised cost of access or a falsely induced "scarcity" of channels, so are new independent media players denied equitable access to an economically viable distribution platform on the internet, hampered by lack of financial backing and marketing strength.
- 8.6 A healthy media and information economy requires many players, large and small, competing in a fair and reasonable manner to best deliver the benefits such an economy can offer and we feel that only appropriate regulation can protect this diversity against market failure.
- 8.7 To achieve a healthy media and information economy we recommend:
- 8.7.1 that legislation ensure access for new and smaller independent media companies and relevant non-profit media organisations to all domains of media distribution through the reservation of a limited number of FTA and cable channels and/or bandwidth (see Tier Zero in Appendices); and
 - 8.7.2 that legislation ensure continued support for production funding bodies that assist new and smaller independent media companies and relevant non-profit media organisations because of the significant cultural and economic benefits they afford the Australian community.
- 8.8 We also recommend that the idea of a "communications commons" in all domains of the new media be enshrined in the objectives of the Act (see Tier Zero below). This is the best and most efficient way to ensure access and equity in all domains of media. Such a strategy would provide media domains and accessible distribution systems complementary to those provided by large-scale commercial enterprises, and would further benefit those larger companies with an output of skilled producers, innovative programming, and a media and technology literate audience comfortable with new technologies, thereby growing the potential market for media

services. This mandated space in all domains of communications would include FTA, cable, the internet and any new future media or delivery system (see Tier Zero below).

- 8.9 For FTA services, we recommend that the national Sixth Channel be used for distributing the program material of members of the CBAA, and that commercial interests be prevented from accessing this channel. This will ensure diversity in the domain of FTA broadcasting.
- 8.10 However, given the problems experienced to date by community FTA stations, we would recommend that only formally accredited members of the CBAA who conform to strict CBAA non-profit guidelines be allowed to hold licenses.
- 8.11 For cable, we recommend, as we have to the Duopoly, Telecommunications and related Inquiries, that a multi-tiered system of access, similar to that operating in the US, be mandated on all cable and other media distribution systems in the form of:
- a) a Basic Tier delivered free (see "Tier Zero" in Appendices) carrying non-profit independent community and education channels, parliamentary broadcasting, a program guide, "samples" of pay programming to attract customers to pay services, and, ideally, retransmitted FTA channels;
 - b) a Premium Tier delivering pay services and carrying program material currently available;
 - c) additional Premium Tiers carrying pay-per-view and other similar pay programs of a high-value and high-cost nature.
- 8.12 For the internet, and particularly because the changing nature of internet delivery will not deliver services to all Australians if left to "market forces", we recommend that a small percentage of bandwidth be set aside for community, cultural and educational non-profit (CCEN) use. The government's recent intervention to ensure supply of a minimum necessary bandwidth to regional Australia is similar to this strategy and is to be commended.
- 8.13 However, simply ensuring ISDN or similar connection to all Australians does not legislatively underpin the regulation of likely future cost increases that may see this service increase significantly in cost in the next few years, effectively denying access to the internet to many Australians. Telstra is notorious for such cost increases but it is likely that competing services will follow the same basic pattern, particularly for service supply in regional areas.
- 8.14 To ensure that regional Australia and socio-economically disadvantaged groups have access to the same quality of service that urban Australia enjoys regardless of the state of the economy or Australian industry, we recommend that this access be enshrined in legislation, ideally as part of a legislatively-mandated "communications common" or public lifeline in all forms of media. For further background on the idea of the communications common see Tier Zero in the Appendices.

9. Appendices

9.1 3V and Merlin Integrated Media

Our company is an electronic media producer and publisher, working in many media forms, and specialising in the digital arts and sciences. It incorporates Open Access Cable, a communications consultancy and contributor to over 15 government inquiries into Broadcasting, Communications, Telecommunications, Competition, Copyright, the Arts and related areas between 1992 and 1995. Information on Open Access Cable is provided below.

3V is a virtual network of programmers, artists, producers and writers which also incorporates Merlin Integrated Media, the web production arm of 3V. The company consulted on and built the first web sites for many large Australian companies, including Qantas, SegaOzisoft, the Australian Council of Social Service, and the Australian Council for the Arts.

3V also provides business and marketing consultancy and advice in regards of new technologies to the Australian Film Commission, the Sydney Contemporary Arts Network (SCAN), the National Association for the Visual Arts (NAVA) and the Australian book selling community.

We work with some of Australia's leading designers and programmers who have undertaken projects for CD ROM and website authoring, and electronic publishing and distribution. The company designs, builds and manages online databases and electronic publishing websites, for example www.gleebooks.com the website for Australia's leading independent book shop. Our group has many years experience in content creation (including video, and 2 and 3D animation), and website management and marketing. We also work closely with the Australian arts and book selling communities and are members of the Australian Booksellers Association and the Arts Law Centre.

The company has worked with many arts organisations, assisting them to go onto the web, using it both promotionally and as a new kind of arts space for new digital media forms. Last year 3V built the Stuff Art 98 online digital gallery www.stuff-art.com.au for the Australian Film Commission. 3V also operates the Media and Culture Domains www.media.com.au and www.culture.com.au, small media and cultural portals on the web. Our latest project is to create the Digital Arts Store to distribute digital media work over the internet to national and international markets for the Australian Film Commission.

The Author

Jeffrey Cook, the author of this submission, is a director of the company and has the role of Senior Producer and Consultant. Jeffrey is a researcher and writer on media futures and is an independent media producer.

He has served as Vice President on the Board of Metro Television (now Metro Screen) and was Station Manager of the Telstra Cable TV Trial in Centennial Park Sydney producing and programming content for a locally delivered cable channel. This involvement in alternative media distribution channels led to his work with the web and internet as a new distribution platform.

He edited the book *Community and Independent Television* in 1993 and wrote the broadcasting and communications column *Box Seat* in the Sydney Morning Herald from 1995 to 1996. He now writes freelance articles for the Australian, geekgirl and other publications. He is the editor for the online magazine TechTonic, www.culture.com.au/techtonic.

His group has worked for several years with Australian performance artist Stelarc in collaborative telemedia projects such as *Fractal Flesh*, *Ping Body* and *ParaSite* in many locations around the world, interactively linking the artist to their audience and vice versa. Their CD ROM, *Metabody: From Cyborg to Symborg*, on the human-machine interface, was released in 1997.

He is currently undertaking postgraduate studies for a Research Masters in Art Theory at the College Of Fine Arts, UNSW, in digital media arts.

9.2 Tier Zero

Tier Zero would be a public non-government "communications commons" - the first level of a set of telecommunications service tiers carrying media and communications services between

groups and individuals on free-to-air (FTA), cable, internet and emergent electronic media services.

It would provide a technology neutral “lifeline data dialtone” in all domains of communications ensuring: that the Australian media and communications industries have increased diversity of ownership and control; a source of innovative, relevant and definably Australian independently-produced content; technologically critical and aware Australian consumers; and a healthy communications industry essential for the success of the new media and information economy.

Tier Zero would provide a managed “communications commons” for the new digitally-based communications environment. As an alliance between a wide range of community, cultural and educational non-profit (CCEN) companies, organisations and providers of services to those interests - the carriers or distributors of digital media and information - it would play a vital role in building Australia’s new media and information economy.

It would carry public services while other higher-cost government and user-pays premium commercial tiers would provide additional services. Many government information and service providers would also use this tier while others would operate in higher-cost tiers.

This lifeline data dialtone would provide, no matter where you live in Australia, a “connection” to a non-profit FTA channel, freely-delivered cable channels, and a cheaply-priced, high-quality internet service - a commons or “portal” guaranteeing a minimum set of services for all Australians. Tier Zero would carry digital data from all forms of electronic media and communications regardless of the way in which the distribution and reception of this data is carried out.

Media Domain	Tier	Cost	Service
FTA	Zero	Free	Datacasting, non-profit independent and community channels, parliamentary broadcasting, etc. A gradual conversion to digital would occur.
	Premium	Pay	Pay per view digital channels, eventually multi-casting many channels from one station and frequency. A more rapid conversion to digital would occur.
Cable	Zero	Free	Non-profit independent and community channels, parliamentary broadcasting, program guide, "samples" of pay programming to attract customers to pay services, and, ideally, retransmitted FTA services.
	Premium	Moderate	Pay services and carrying program material currently available.
	Premium “Plus”	High	Additional Premium Tiers carrying pay-per-view and other similar pay programs of a high-value nature.
Internet	Zero	Low	A minimum standard of bandwidth, hosting and ecommerce nationally.
	Premium	Moderate	Existing commercial hosting, bandwidth and other online services.

	Premuim "Plus"	High	High value, high-cost extranets, intranets, VPNs and similar closed, private networks.
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It would provide services that are complementary and supplementary to those provided by larger companies and government organisations, and would assist in the development of new markets and opportunities for both large and small companies and organisations. Because of its relevance, immediacy and connections to its many audiences it will increase community awareness and familiarity with new media and communications services.

The cost of this tier would be cross-subsidised by governmental and commercial service tiers in exchange for the economic, social and cultural benefits derived from its operation with both cash and non-cash support and sponsorship.

This vital access to the communications commons would be reflected in policy and underpinned by legislation in recognition of its many public benefits and to ensure tenure of access for new and smaller independent CCEN media and communications organisations in an uncertain and rapidly-changing environment.

However access to the use of technology is only half the picture. There can be no such service if there is little or no "content" to make the use of these technologies attractive and useful. Ongoing government support for this independently-produced content is necessary and vital. A public lifeline tier could then also promote the development of diverse and innovative ways of using CCEN services, and communications and media services generally. It would also promote the creation of new forms of audio-visual program material, software, electronic media arts and design and other "content" for these services. It would enable participants to gain skills in a wide range of creative, communications and management activities through the operation and promotion of these services and the production and distribution of audiovisual and other material.

These strategies are difficult and complex - but without them the increasing concentration of media ownership and the commercial industry's purely economic imperatives will not equitably deliver the benefits of communications and technological development and evolution to all citizens of Australia.

9.3 Open Access Cable (1992 to 1997)

Open Access Cable was a communications company that between 1992 and 1997 provided project management skills and strategic advice and consultancy to a range of non-profit and for-profit organisations and acted as an advocate in regards of access to and appropriate use of communications technologies to promote a more equitable, connected, creative and informed society. It was incorporated into Merlin Integrated Media in 1997.

Objective

OAC's main aim was to promote the efficient and equitable implementation and operation of a public communications "backbone" or lifeline data dialtone in all domains of communications: Tier Zero.

Activities

OAC was involved in setting up and operating alternative marketing and distribution channels, with particular emphasis on the social and cultural implications of the use of new technologies. OAC specialised in packaging, scheduling and presenting program and other televisual material.

OAC was the co-ordinating consultant to Telstra, developing and operating the Community and Educational Channel in collaboration with Metro Television (now Metro Screen) on the

Residential Video Trial at Centennial Park in Sydney from 1993 to 1995. This was Australia's first test of cable television prior to the startup of the Foxtel service.

It was a founding member of Merlin Integrated Media, contributing in an independent manner, and in some cases as an advocate for independent and community-based organisations, to over 15 federal government inquiries into media arts, innovation, media, broadcasting, economics and Australia's future and place in the world.