Foxtel/Australis deal

Was it only last year that the Australian Labor Party endorsed its communications policies, including the encouragement of diversity in control of communications and broadcasting services? And wasn't there something about maximising Australian participation in the provision of new services?

What has happened to these principles and to the promise that pay TV regulation will realise greater diversity in ownership? The proposed merger of Foxtel and Australis is a prime example of what has not happened and how diversity in pay TV ownership is neither required nor encouraged.

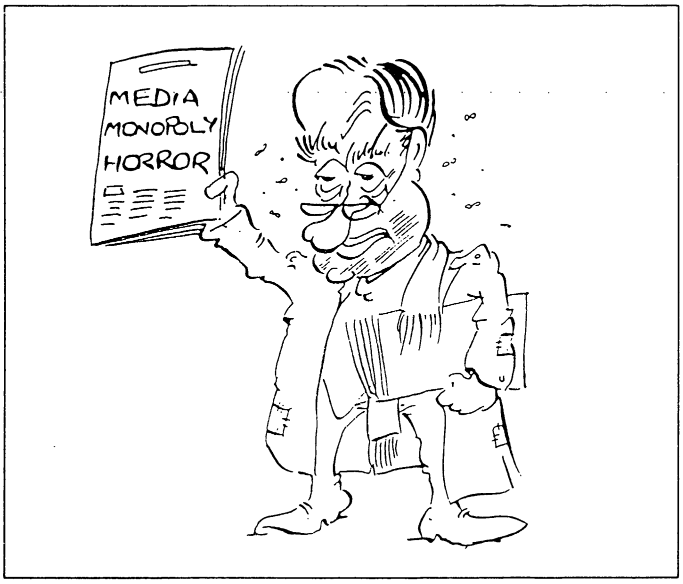
The Foxtel/Australis merger, if approved, seems likely to result in another effectively foreign-dominated media service in Australia. It will also further concentrate the already-small number of media players in both commercial free-to-air and subscription television services.

The more expansive promises about the contribution pay TV would make to the achievement of diversity in control and programming were always far-fetched. However, the pay TV regime which is emerging - just two operators with, for the moment, total control over the programming they carry - looks more like a rerun of history than a new media dawn.

BSA amendments

Facing much criticism about the cross-media provisions of the Broadcasting Services Act (the Act) and following the release of the Australian Broadcasting Authority's findings in relation to Kerry Packer's investments in John Fairfax Holdings Ltd in May this year, the Minister advised that the cross media ownership rules would be strengthened.

The proposed amendments to the Act (expected to be introduced into the Parliament shortly after *CU* went to press) provide for a 15 per cent fixed ownership limit to be applied to the control provisions, widen the definition of 'company interests', and apply this broadened definition to future foreign interests in free-to-air broadcasters.



While these proposed changes are not expected to affect the current ownership and control structures, which will be grandfathered, it is hoped that they will be tight enough to prevent future abuses of the legislation.

However, the strengthening and enforcement of the foreign interest provisions of the Act will only address Australian participation in commercial free-to-air services. They will not provide for the maximisation of Australian participation in the provision of pay television services, which are specifically excluded from the proposed amendments, on the basis that pay TV is discretionary and less influential than commercial television and, therefore, requires less regulation.

The public interest concerns raised by concentration in the pay TV arena are accentuated by the absence of rules giving alternative service and content providers access to the delivery platforms provided by Foxtel/Australis and Optus Vision.

It is this relationship between concentration and access that is the principal issue. In examining the April Foxtel/Australis pay TV programming deal, the TPC commented that the degree of control over delivery by parties associated with the Foxtel/Australis alliance could potentially be used to prevent or hinder competition. This might result in other pay TV operators being denied access to the means of delivering pay TV services which compete with those of Foxtel and Australis.

However, the TPC did not stop the programming alliance. At that time, pay TV had only just been introduced. This limited the TPC's assessment of the market and potential competitive constraints. The market has changed substantially since then. Optus Vision was launched on 20 September and Foxtel on 23 October.

The TPC now needs to assess the likely effects on competition of the latest Foxtel/Australis deal.

Relevant markets might include those for television, pay television, the carriage of television signals and the carriage of communications services. At stake are crucial issues about the quality, diversity, accountability, availability and affordability of Australian television. ❑

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