2004-2005-2006

The Parliament of the
Commonwealth of Australia

THE SENATE

Broadcasting Services Amendment (Media Ownership) Bill 2006

(Amendments to be moved by Senator Joyce in committee of the whole)

(1) Page 37 (after line 21), after Schedule 1, insert:

Schedule 1A—Amendments to deal with abuse of market power, creeping acquisitions and a divestiture remedy in relation to media markets

Broadcasting Services Act 1992

1 After section 61AZK

Insert:

Subdivision G—Misuse of market power in a media market

61AZL Misuse of market power in a media market

(1) A corporation that has a substantial degree of power in a media market shall not take advantage of that power in that or any other market for the purpose of:
   (a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market; or
   (b) preventing the entry of a person into that or any other market; or
   (c) deterring or preventing a person from engaging in competitive conduct in that or any other market.

(2) For the purposes of subsection (1):
   (a) the reference in paragraph (1)(a) to a competitor includes a reference to competitors generally, or to a particular class or classes of competitors; and
   (b) the reference in paragraphs (1)(b) and (c) to a person includes a reference to persons generally, or to a particular class or classes of persons.
(3) In determining for the purposes of this section whether a corporation has a substantial
degree of market power in a media market, the Court will at least take into account the
following principles:

(a) the threshold of a substantial degree of power in a market is lower than the former
threshold of substantial control previously used in section 46 of the Trade Practices
Act 1974; and

(b) the substantial market power threshold does not require a corporation to have an
absolute freedom from constraint, it is sufficient if the corporation is not
constrained to a significant extent by competitors or suppliers; and

(c) more than one corporation can have a substantial degree of power in a market; and

(d) evidence of a corporation’s behaviour in the market is relevant to a determination of
substantial market power.

(4) If:

(a) a body corporate that is related to a corporation has, or 2 or more bodies corporate
each of which is related to the one corporation together have, a substantial degree of
power in a media market; or

(b) a corporation and a body corporate that is, or a corporation and 2 or more bodies
corporate each of which is, related to that corporation, together have a substantial
degree of power in a media market;

the corporation shall be taken for the purposes of this section to have a substantial degree
of power in that market.

(5) In determining for the purpose of this section whether a corporation has a substantial
degree of power in a media market, the Court may consider the corporation’s degree of
power in a market to include any market power arising from any contracts, arrangements,
understandings or covenants, whether formal or informal, which the corporation has
entered into with other entities.

(6) In determining for the purposes of this section the degree of power that a body corporate
or bodies corporate has or have in a market, the Court shall have regard to the extent to
which the conduct of the body corporate or of any of those bodies corporate in that
market is constrained by the conduct of:

(a) competitors, or potential competitors, of the body corporate or of any of those
bodies corporate in that market; or

(b) persons to whom or from whom the body corporate or any of those bodies corporate
supplies or acquires goods or services in that market.

(7) In determining for the purposes of this section whether a corporation:

(a) has a substantial degree of power in a media market; or

(b) has taken advantage of that power for the purpose described in paragraph (1)(a), (b)
or (c);

the Court may have regard to the capacity of the corporation, relative to other
corporations in that or any other market, to sell in that or any other market a good or
service at a price below the cost to the corporation of producing or acquiring the good or
supplying the service.

(8) In this section:

(a) a reference to power is a reference to market power;

(b) a reference to a market is a reference to a market for goods or services; and
(c) a reference to power in relation to, or to conduct in, a market is a reference to power, or to conduct, in that market either as a supplier or as an acquirer of goods or services in that market.

(9) Without extending by implication the meaning of subsection (1), a corporation shall not be taken to contravene that subsection by reason only that it acquires plant or equipment.

(10) This section does not prevent a corporation from engaging in conduct that does not constitute a contravention of any of the following sections, namely, sections 45, 45B, 47 and 50, of the Trade Practices Act 1974 by reason that an authorization is in force or by reason of the operation of section 93 of the Trade Practices Act 1974.

(11) A corporation may be taken to have taken advantage of its power for a purpose referred to in subsection (1) notwithstanding that, after all the evidence has been considered, the existence of that purpose is ascertainable only by inference from the conduct of the corporation or of any other person or from other relevant circumstances.

61AZM Prohibition of acquisitions that would result in a substantial lessening of competition in a media market

(1) A corporation must not directly or indirectly:
   (a) acquire shares in the capital of a body corporate; or
   (b) acquire any assets of a person;
   if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a media market.

(2) A person must not directly or indirectly:
   (a) acquire shares in the capital of a corporation; or
   (b) acquire any assets of a corporation;
   if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a media market.

(3) Without limiting the matters that may be taken into account for the purposes of subsections (1) and (2) in determining whether the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a media market, the following matters must be taken into account:
   (a) the actual and potential level of import competition in the market;
   (b) the height of barriers to entry to the market;
   (c) the level of concentration in the market;
   (d) the degree of countervailing power in the market;
   (e) the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins;
   (f) the extent to which substitutes are available in the market or are likely to be available in the market;
   (g) the dynamic characteristics of the market, including growth, innovation and product differentiation;
   (h) the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor;
   (i) the nature and extent of vertical integration in the market.

(4) Where:
(a) a person has entered into a contract to acquire shares in the capital of a body corporate or assets of a person;
(b) the contract is subject to a condition that the provisions of the contract relating to the acquisition will not come into force unless and until the person has been granted an authorization to acquire the shares or assets; and
(c) the person applied for the grant of such an authorization before the expiration of 14 days after the contract was entered into;
the acquisition of the shares or assets shall not be regarded for the purposes of this Act as having taken place in pursuance of the contract before:
(d) the application for the authorization is disposed of; or
(e) the contract ceases to be subject to the condition;
whichever happens first.

(5) For the purposes of subsection (4), an application for an authorization shall be taken to be disposed of:
(a) in a case to which paragraph (b) of this subsection does not apply—at the expiration of 14 days after the period in which an application may be made to the Tribunal for a review of the determination by the Commission of the application for the authorization; or
(b) if an application is made to the Tribunal for a review of the determination by the Commission of the application for the authorization—at the expiration of 14 days after the date of the making by the Tribunal of a determination on the review.

(6) In this section:

market means a substantial market for goods or services in:
(a) Australia; or
(b) a State; or
(c) a Territory; or
(d) a region of Australia.

(7) For the purposes of the application of this section in relation to a particular corporation, an acquisition by the corporation shall be deemed to have or to be likely to have the effect of substantially lessening competition in a media market if that acquisition and any one or more of the following acquisitions, namely:
(a) the other acquisitions by the corporation or a body corporate related to the corporation in that or any other market during the previous ten years; together have or are likely to have that effect.

61AZN Pecuniary penalties

(1) If the Court is satisfied that a person:
(a) has contravened any of the following provisions, section 61AZL and section 61AZM
(b) has attempted to contravene such a provision;
(c) has aided, abetted, counselled or procured a person to contravene such a provision;
(d) has induced, or attempted to induce, a person, whether by threats or promises or otherwise, to contravene such a provision;
(e) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision; or
(f) has conspired with others to contravene such a provision;
the Court may order the person to pay to the Commonwealth such pecuniary penalty, in respect of each act or omission by the person to which this section applies, as the Court determines to be appropriate having regard to all relevant matters including the nature and extent of the act or omission and of any loss or damage suffered as a result of the act or omission, the circumstances in which the act or omission took place and whether the person has previously been found by the Court in proceedings under this Part.

(2) The pecuniary penalty payable under subsection (1) by a body corporate is not to exceed: for each other act or omission to which this section applies--$10,000,000.

(C) The pecuniary penalty payable under subsection (1) by a person other than a body corporate is not to exceed $500,000 for each act or omission to which this section applies.

61AZO Injunctions

(1) Where, on the application of the Commission or any other person, the Court is satisfied that a person has engaged, or is proposing to engage, in conduct that constitutes or would constitute:
   (a) a contravention of any of the following: section 61AZL or section 61AZM;
   (b) attempting to contravene such a provision;
   (c) aiding, abetting, counselling or procuring a person to contravene such a provision;
   (d) inducing, or attempting to induce, whether by threats, promises or otherwise, a person to contravene such a provision;
   (e) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision; or
   (f) conspiring with others to contravene such a provision;
the Court may grant an injunction in such terms as the Court determines to be appropriate.

61AZP Actions for damages

(1) A person who suffers loss or damage by conduct of another person that was done in contravention of section 61AZL or section 61AZM may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention.

(2) An action under subsection (1) may be commenced at any time within 6 years after the day on which the cause of action that relates to the conduct accrued.

61AZQ Divestiture for abuses of market power and anti-competitive mergers

(1) The Court may, on the application of the Commission or any other person, if it finds, that a corporation has contravened section 61AZL or section 61AZM, by order, give directions for the purpose of securing:
   (a) the disposal or divestiture of shares or assets acquired in contravention of section 61AZM; or
   (b) the reorganisation or division of the corporation into separate and distinct entities including directions for the disposal or divestiture of all or any of the shares in or assets of the corporation to facilitate the reorganisation or division of the corporation.
61AZR Definitions

In this Subdivision:

_the Court or the Federal Court_ means the Federal Court of Australia.

_Commission_ means the Australian Competition and Consumer Commission established by section 6A of the _Trade Practices Act 1974_.

_authorization_ means an authorization under Division 1 of Part VII of the _Trade Practices Act 1974_ granted by the Commission or by the Tribunal on a review of a determination of the Commission.

_Tribunal_ means the Australian Competition Tribunal established under the _Trade Practices Act 1974_, and includes a member of that Tribunal or a Division of that Tribunal performing functions of that Tribunal.

[misuse of market power in a media market]