

23 May 2012

ACMA file reference: ACMA2012/698

Ms Gina Cass-Gottlieb
Partner
Gilbert + Tobin
GPO Box 3810
Sydney NSW 2001

By email: [REDACTED]

Dear Ms Cass-Gottlieb

Letter received from Avaaz

I understand that you have instructions to act for Mr Lachlan Murdoch (your client).

As you may be aware from public reports, on 16 May 2012, the ACMA received a letter from an organisation known as "Avaaz" (the letter). Avaaz is concerned that your client may be in a position to exercise control of News Limited, in addition to his television and radio interests. It is suggested, therefore, that there may be an 'unacceptable 3-way control situation' as described in section 61AEA of the *Broadcasting Services Act 1992* (the Act) in several licence areas. The letter itself has been posted on the Avaaz web-site and may be viewed at:

http://www.avaaz.org/en/australia_investigate_lachlan_murdoch/. I attach a copy of the substantive text of the letter for your reference: **Attachment A**.

At present, the ACMA proposes to advise Avaaz of the outcome of its consideration of the issues Avaaz has raised in the letter. I anticipate that any response to Avaaz by the ACMA will be published by Avaaz on its website.

Matters raised by Avaaz

You will see that the letter makes a series of assertions in support of the substantive contention, including the following:

- Your client's directorship of News Corporation provides him "with powers and a platform with which to play a substantial role in the management and affairs of News Corporation and News Limited";
- Your client is involved in and influences the management of News Limited, such as the appointment of News Limited's CEO, Kim Williams, as referenced in the Mark Day article in The Australian of 6 February 2012;

- Mr Rupert Murdoch supports the further involvement of your client within News Corporation;
- Your client has an associate relationship with Mr Rupert Murdoch, as evidenced by their close cooperation in the aftermath of the *News of the World* hacking allegations (meeting in Sun Valley, and the telephone conference about the resignations of News International's Rebekah Brooks and Les Hinton and the launch of the Sunday edition of *The Sun* newspaper in the UK); and
- In terms of company interests, Avaaz asserts that the Murdoch family controls almost 40 percent of the voting rights in News Corporation. Avaaz claims that "[t]he vast majority of these shares are held by the Murdoch family trust of which Rupert Murdoch is a beneficial owner and Lachlan Murdoch is a beneficiary, with 38.4% of the voting shares in News Corp." and "there are no other substantial shareholdings of voting shares and the lack of coordination between these smaller shareholders reinforces the degree of Murdoch control over News Corporation".

The ACMA raised the speculation about the appointment of Mr Williams and the potential further involvement of your client in the management of News Corporation and/or News Limited with you in its letter to you of 8 March 2012, which you addressed in your letter of reply of 15 March 2012.

Invitation to make submissions

I ask that your client consider the issues raised in the letter and invite your client to make submissions in relation to them.

I would particularly invite your client's submission in relation to the current level of his shareholding in News Corporation and his company interests in News Corporation.

I also ask that your client advise whether the Murdoch family trust gives your client company interests, by way of voting interests, shareholding interests (that is, a beneficial entitlement to shares) or otherwise, in News Corporation exceeding 15%.

I also invite his submissions as to whether, if he holds company interests of 15% or less in News Corporation, those company interests, in the absence of other substantial shareholders in News Corporation, put him in a position to exercise control of that company.

I also ask your client to consider the reference in an article by John Burns dated 17 February 2012, in the *New York Times*, to your client's time in London in February 2012, where he joined Mr Rupert Murdoch in his visit to the *Sun* newsroom. If the article is correct in stating that he joined his father that day at the *Sun* newsroom, could he explain the purpose of him joining his father there, on that day.

Regarding the reference in an article by Sarah Ellison in *Vanity Fair*, December 2011 issue, to a meeting of Rupert, James, Elizabeth and Prudence Murdoch, with your client joining via conference call from Sydney, during which the resignations of Rebekah Brooks and Les Hinton were discussed:

- could he advise whether he was present via conference call when such a discussion took place; and
- if he joined such a discussion, could he advise in what capacity he was called to join the discussion and what was discussed in relation to the resignations of Rebekah Brooks and Les Hinton.

In addressing the reference to the assertions about your client's attendance at the *Sun* newsroom and his presence via telephone at a discussion of the future of Rebekah Brooks and Les Hinton, your client is also invited to make submissions in relation to the two qualifying limbs of the definition of 'associate' in section 6 of the Act, that is:

- whether your client and Mr Rupert Murdoch 'act together in any relevant dealings relating to that company, ...or newspaper'; and
- whether either '... of them is in a position to exert influence over the business dealings of other in relation to that company,... or newspaper.'

Confidentiality

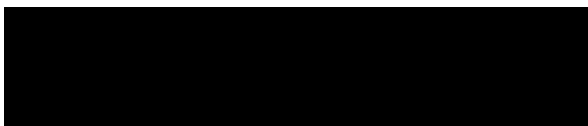
Please note that any information provided which you believe to be of a confidential nature should be clearly marked or identified as confidential.

Any confidential information received by the ACMA is accepted on the following terms:

- that there is no restriction on the use that the ACMA may make of the information consistent with its statutory functions;
- without limiting the foregoing, confidential information may be disclosed to the ACMA's external advisers and consultants on condition that each such adviser or consultant will be required not to disclose that information to any third party unless required by law;
- without limiting the foregoing, confidential information may be disclosed where required by law or for the purposes of Parliamentary processes;
- information which is 'authorised disclosure information' within the meaning of the *Australian Communications and Media Authority Act 2005* may be liable to be disclosed in line with Part 7A of that Act; and
- the ACMA reserves the right to reassess at any time whether information which is claimed to be confidential continues to be confidential or in fact has ceased to be confidential.

I would appreciate if your client could provide these submissions by close of business on **Thursday, 7 June 2012**.

Yours sincerely



Michaela Watson

Manager, Media Ownership Diversity

E-mail: 

Attachment A



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To: Chris Chapman
Chair, Australian Communications and Media Authority

From: 6,178 Avaaz Members

16 May 2012

Dear Mr Chapman,

Avaaz, a global campaign organization with over 230,000 members in Australia, submits to the Australian Communications and Media Authority ("ACMA") our concern that Lachlan Murdoch may currently be in breach of the *Broadcasting Services Act* 1992 ("the Act") and formally requests that the ACMA commence an investigation. Specifically, we ask that the ACMA render an opinion on whether Lachlan Murdoch is "in a position to exercise control" of News Limited, giving rise to an "unacceptable three way control situation" in breach of the Act.¹

Protection of media diversity is a core objective of the Act and of crucial importance in a democratic society. We set out below the reason why an investigation into Lachlan Murdoch's control over News Limited is necessary under the Act and to preserve Australia's democracy.

Avaaz

Avaaz is a global campaigning community with over 14 million members in every country around the world, including over 230,000 members in Australia.² Its mission is to close the gap between the world we have and the world most people want.

In Australia, Avaaz members have been significantly involved in the ongoing deliberations on media reform. In total, members have submitted more than 100,000 comments to the Independent Media Inquiry, Convergence Review, Communications Minister Stephen Conroy and Prime Minister Julia Gillard outlining concerns about the high level of concentration of media ownership in Australia and the lack of independent regulation for the print media. Opinion polling demonstrates that these views are widely shared by the broader Australian population.³

Media ownership in Australia

Diversity of media ownership is an important principle in any democracy, and one of the core objectives of the Act, which seeks "to encourage diversity in control of the more influential broadcasting services"⁴ including through cross-media ownership rules.

¹ *Broadcasting Services Act* 1992 (Cth).

² <http://www.avaaz.org/en/community.php>

³ Essential Media Communications (EMC) polling, 14 September 2011, commissioned by NewsStand, available online at <http://ge.tt/8duM0NF/v/0?c>

⁴ *Broadcasting Services Act* 1992 s3 (1) (c).

The Interim Report recently released by the Convergence Review further recognised that “Maintaining a number of distinct voices both at a local and national level is important”⁵ and recognised media diversity as a well-established safeguard to “ensure citizens’ access to a variety of information sources, opinion, voices etc. in order to form their opinion without the undue influence of one dominant opinion forming power”.⁶ Its discussion paper on media diversity explained that:

*Australia has a long history of rules designed to protect and promote media diversity. In a democratic society, it is considered important to have diversity in programs such as news and current affairs, which influence people’s opinions. This has been one of the driving factors behind ownership and control rules in Australia.*⁷

As ACMA acknowledges, a determination of who is in “a position to exercise control” of a broadcaster or newspaper under the Act, and thus subject to its controls, can be complex.⁸ However, such a determination is at the heart of the protection of media diversity under the Act.

The unacceptable 3-way control situation

The Act provides that an “unacceptable 3-way control situation” exists where a person is in a position to control a commercial radio licence, a commercial TV licence, and a newspaper all in the same licence area.⁹ Lachlan Murdoch is recognised by ACMA to be in a position to control Network TEN (Sydney) Pty Ltd, a commercial TV group, as well as commercial radio groups DMG (UK Radio 1) Pty Ltd and Nova 96.9 Pty Ltd.¹⁰ All these groups operate in the Sydney licence area. If Lachlan Murdoch were considered to be in a position to control News Limited, it would then appear that an unacceptable three way control situation would exist since News Limited is the publisher of newspaper *The Daily Telegraph*, listed on the Associated Newspaper Register in connection with the Sydney licence area.¹¹

Lachlan Murdoch and News Limited

The Act recognises that where a newspaper is published by a company, a person will be in a position to exercise control where:

(i) the person is in a position, either alone or together with an associate of the person, to

⁵ Convergence Review, Interim Report, 2011, page 9.

⁶ Convergence Review, Media Diversity, Competition and Market Structure: Discussion Paper, 2011, page 11.

⁷ Convergence Review, Media Diversity, Competition and Market Structure: Discussion Paper, 2011, page 11.

⁸ See http://www.acma.gov.au/webwr/_assets/main/lib100048/acma_b2-b3_guidance_notes.pdf

⁹ *Broadcasting Services Act* 1992, s61AEA

¹⁰ <http://web.acma.gov.au/rcmg/mcdIndex.htm>

¹¹ http://www.acma.gov.au/webwr/_assets/main/lib100450/2010_07_29%20-%20anr.pdf

exercise control of the company; or ...

- (iv) the person, either alone or together with an associate of the person, is in a position to exercise, in any other manner, whether directly or indirectly, direction or restraint over any substantial issue affecting the management or affairs of the company; or
- (v) the company or more than 50% of its directors:
- (A) act, or are accustomed to act; ...
- in accordance with the directions, instructions or wishes of, or in concert with, the person or of the person and an associate of the person acting together.¹²

It also recognises that where a person has company interests exceeding 15 percent, there is a presumption that they are in a position to control the company.

Several factors warrant the ACMA consideration of Lachlan Murdoch as a person in a position to control News Limited.

Directorship

News Limited is a wholly owned subsidiary of News Corporation, of which Lachlan Murdoch is a non-executive director. The News Corp by-laws provide that the Board of Directors “shall establish broad corporate policies for the Corporation and its controlled entities, set the strategic direction for the Corporation and its controlled entities, oversee management” of the company and exercise a non-exclusive range of other power.¹³

As a director, Lachlan Murdoch shares these powers and duties with the other 15 directors of the company. While it does not appear likely that a non-executive directorship alone would amount to control within the meaning of the Act, this would be a question to be decided on the facts of each case. Combined with other factors, his directorship provides Lachlan Murdoch with powers and a platform with which to play a substantial role in the management and affairs of News Corporation and News Limited.

Management involvement

Lachlan Murdoch has served in a variety of executive positions with both News Corporation and News Limited. During the early 1990s, Lachlan Murdoch was publisher of the *Australian* and between 1995 and 1996 was Deputy CEO of News Limited, before taking up roles in the USA with News Corporation.

Recent claims reported in the *Australian* newspaper suggest that Murdoch's involvement and influence at the company does not end with his executive appointments. Long-time News Limited employee Mark Day reported in his February, 6 2012 column that "It is said Lachlan

¹² *Broadcasting Services Act* 1992 Schedule 1, s3.

¹³ <http://www.sec.gov/Archives/edgar/data/1308161/000119312511099601/dex31.htm>

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was the architect of [new News Limited CEO Kim] Williams's appointment."¹⁴

If accurate, this would suggest that Lachlan Murdoch is in a position to "exercise, in any other manner, whether directly or indirectly, direction or restraint over any substantial issue affecting the management or affairs of the company," and thus be a person in a position to control News Limited within the meaning of the Act.¹⁵

The situation bears a striking resemblance to an investigation by the Australian Broadcasting Authority in 1995. In that case, the ABA gave notice under section 177 of the Act requiring John Fairfax Holdings Ltd to disclose any documents relating to any attempt to influence any substantial issue affecting the management or affairs of Fairfax by Kerry Packer.¹⁶ The action was based in part on the publication of a report in the *Australian Financial Review* containing an allegation by the Managing Director and Chief Executive of Fairfax that the managing director of Kerry Packer's company, CPH, had sought to have him removed from his positions at Fairfax.

On the facts, the ABA found that the attempt had been unsuccessful and that it could not infer control based upon a failed attempt to influence the operations of a company. However, the allegations leading to the ABA's decision to exercise its investigative powers suggest precedent warranting an investigation into claims raised by Mark Day regarding Lachlan Murdoch's role in Williams's appointment as CEO of News Limited.

Position as an associate

Lachlan Murdoch's strong associations with his father Rupert Murdoch, Chairman and CEO of News Corporation and Chairman of News Limited, suggests that the two may be in a position to exercise control together as 'associates' within the meaning of the Act. Rupert Murdoch is already recognised by the ACMA as a person in a position to control News Limited.

The Act states that an associate includes a "spouse or a parent, child, brother or sister", unless "ACMA is satisfied that they do not act together in any relevant dealings relating to that company, licence or newspaper, and neither of them is in a position to exert influence over the business dealings of the other".¹⁷

Evidence suggests that Rupert Murdoch and Lachlan Murdoch do in fact act together and cooperate in dealings with News Corporation and News Limited. In his *Australian* article, columnist Mark Day reported that: "It is today widely understood that Rupert Murdoch would like his son to return to the business. When Williams was appointed chief executive, Rupert took the

¹⁴ Mark Day, 'Lachlan in the wings as Williams subscribes to overhaul at News', *The Australian*, 6 February 2012, available online at <http://www.theaustralian.com.au/business/opinion/lachlan-in-the-wings-as-williams-subscribes-to-overhaul-at-news/story-e6frg9tf-1226263177233>

¹⁵ *Broadcasting Services Act* 1992, Schedule One, Part Two (3) (c) (iv)

¹⁶ Available at http://www.acma.gov.au/webwr/aba/newspubs/radio_tv/investigations/documents/ownership_control/pacfax.pdf

¹⁷ *Broadcasting Services Act* 1992, s6.

chairmanship of News Limited, leading to speculation he was about to take a greater interest in Australian affairs. I do not believe this is so. He is merely keeping the seat warm for Lachlan.”¹⁸

Following the revelation by the *Guardian* newspaper in the UK that the Murdoch family’s *News of the World* had hacked the phone of murdered schoolgirl Milly Dowler, Lachlan and Rupert Murdoch cooperated closely in company matters. According to Sarah Ellison in *Vanity Fair* magazine, “Rupert and Lachlan huddled together in Sun Valley for most of the week following the Milly Dowler revelations. They avoided the press and almost everyone else.” Also according to the article, following Rupert Murdoch’s trip to London, “the adult children—James, Elisabeth, and Prudence, with Lachlan on conference call from Sydney—gathered with their father. They discussed Rebekah Brooks and Les Hinton, the current and former News International C.E.O.’s, and whether either should resign”.¹⁹

Lachlan Murdoch’s active role in the high-level management of News Corporation with his father was also demonstrated by his February 2012 trip to London with his father. Faced with the growing scandal in the UK, Rupert and Lachlan visited London and the *Sun* newsroom to reassure staff of their support for the paper, and launch the new Sunday edition of the paper. Commenting on Lachlan Murdoch’s presence with his father, John Burns wrote in the *New York Times* that “plans to bring Rupert Murdoch’s eldest son, Lachlan, who is 40, back into the operation have stepped up”.²⁰

An investigation by ACMA into these accounts should seek to ascertain the veracity of these reports and their bearing on the association between Rupert and Lachlan Murdoch in the management and affairs of News Corporation and News Limited.

Company interests

The influence of Lachlan and Rupert Murdoch over the affairs of News Corp is further established through their association and combined interest in the Company within the Murdoch family trust. News Corp employs a dual-share structure widely recognised as designed to retain Murdoch family control over the company, a scheme that has attracted significant criticism from corporate governance experts. The result of this system is that while the Murdoch family owns an equity stake of approximately 12 percent in the company, their disproportionate ownership of the voting shares means they control almost 40 percent of the voting rights. The vast majority of these shares are held by the Murdoch family trust, of which Rupert Murdoch is a beneficial owner and Lachlan Murdoch is a beneficiary, with 38.4% of the voting shares in News Corp.

¹⁸ Mark Day, ‘Lachlan in the wings as Williams subscribes to overhaul at News’, *The Australian*, 6 February 2012, available online at <http://www.theaustralian.com.au/business/opinion/lachlan-in-the-wings-as-williams-subscribes-to-overhaul-at-news/story-e6frg9tf-1226263177233>

¹⁹ Sarah Ellison, ‘The Rules of Succession’, *Vanity Fair*, December 2011, available online at <http://www.vanityfair.com/society/features/2011/12/murdoch-kids-201112>

²⁰ John F. Burns, ‘Murdoch visits downcast tabloid, with other son in tow’, *New York Times*, 17 February 2012, available online at <http://www.nytimes.com/2012/02/18/world/europe/rupert-murdoch-offers-reassurances-to-sun-newsroom.html?pagewanted=all>



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The Act states that a person with company interests exceeding 15 percent is regarded as being in a position to control the company. Company interests are defined in the Act as including voting interests, and that where a person has two or more interests, their interest is defined as the interest that is of the greatest percentage.²¹

The Act also holds that a person may also be in a position to exercise control even when they hold less than a 15 percent interest in a company. The example provided is where a person holds a 10 percent interest in a situation where no other person holds more than 2 percent. After the Murdoch family voting interests of 38.4%, the next most substantial holding of voting shares is that of Saudi Prince Al-Waleed bin Talal with 7%. There are no other substantial shareholdings of voting shares, and the lack of coordination between these smaller shareholders reinforces the degree of Murdoch control over News Corporation.

History of non-compliance

A history of non-compliance with the Act by Lachlan Murdoch strengthens the case for the ACMA to investigate this case. In 2011, the ACMA found Lachlan Murdoch had been in breach of the Act's restrictions on limits on control and directorships of broadcasting licences in the Brisbane RA1/Nambour RA1 combined licence area between 7 October 2010 and 9 November 2010.²²

ACMA investigation needed

Given the issues outlined above, Avaaz formally requests that the ACMA initiate an investigation toward issuing an opinion on whether Lachlan Murdoch is in a position to control News Limited, either alone or in association with Rupert Murdoch.

²¹ [Broadcasting Services Act 1992, s6 and Schedule 1.](#)

²² Available at http://www.acma.gov.au/webwr/_assets/main/lib312030/mr4-2011_statement_of_findings-lachlan_murdoch.doc

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