

AUSTRALIAN CROSS-MEDIA OWNERSHIP RULES AND FREEDOM OF POLITICAL COMMUNICATION

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I PREAMBLE: THE ENDURING *REALPOLITIK* OF AUSTRALIAN MEDIA POLICY

The High Court's finding of an implied freedom of political communication in the *Australian Constitution* in the 1990s led to a fairly rapid rewriting of Australian media law textbooks. These now routinely open with a chapter on freedom of speech. Previously they were more likely to lay out the 'nuts and bolts' of actual legislative instruments and the role and powers of entities such as the regulatory authority responsible for the oversight of commercial broadcasting.¹ As much broadcasting legislation was produced from within a rather brutal *realpolitik*, those accounts made for very murky and uninspiring reading.

Regrettably, the elegant clarity recently attained by media law textbooks has not been matched within media policy debate. The welcome exception to this situation has been the Australian Productivity Commission's Inquiry into, and report on, broadcasting in 1999/2000.² The commissioners took up the Australian Press Council's recommendation that the promotion of 'freedom of expression' be added to the objectives of the key legislation, the *Broadcasting Services Act 1992* (Cth) ('BSA'). This proposal still awaits serious public discussion or implementation but it does provide a useful focus for discussing the possible relevance of the implied freedom to the cross-media ownership rules ('CMR').

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1 The responsible regulatory authority changed from the Australian Broadcasting Authority ('ABA') to the Australian Communications and Media Authority ('ACMA') on 1 July 2005. 'The regulator' is used instead throughout.

2 Australian Government Productivity Commission, *Broadcasting*, Report No 11 (2000) <<http://www.pc.gov.au/inquiry/broadcast/finalreport/index.html>> at 7 November 2005.

The Productivity Commission Inquiry resulted from the Howard Government's second attempt to alter the CMR (s 60 of the BSA).³ The CMR were introduced by the Hawke Government in 1987 (within prior legislation but carried over into the BSA). They constitute restrictions on cross-ownership of newspapers and commercial free-to-air radio and television and have no direct relevance to the public broadcasters, the ABC and SBS.⁴ They are generally regarded as then Treasurer Keating's initiative. Indeed, many of Keating's public statements since political retirement in 1996 have been made in defence of these rules. Likewise, most definitions of the CMR draw on Keating's characteristically colourful prediction of their effects: that media owners would need to become a 'prince of print or queen of screen' but not both.⁵ They certainly led to a remarkable scramble of ownership changes in 1986–87. These initially resulted in the withdrawal of both the Murdoch (News Ltd) and Packer (PBL) family groups from ownership of the nascent national free-to-air television networks, TEN and Nine. Packer later regained control of the Nine Network but Murdoch's Australian interests remain largely confined to newspapers (estimated at 67.8 per cent of daily circulation) and co-ownership of the Foxtel cable subscription service (pay TV) with Packer and Telstra.

The necessary shift in this narrative to the interests of 'moguls' takes us to the heart of the *realpolitik* in Australian media policy. Unlike many comparable nations, newspaper moguls were allowed considerable cross-ownership dominance upon the introduction of radio and television.⁶ Thus moguls remain the 'absent presence' within legislative instruments within this policy field.

II IN LIEU OF FREEDOM OF POLITICAL COMMUNICATION: 'INFLUENCE' AND 'DIVERSITY'

The current objectives of the BSA are:

- (a) to promote the availability to audiences throughout Australia of a diverse range of radio and television services offering entertainment, education and information; and
- (aa) to promote the availability to audiences and users throughout Australia of a diverse range of datacasting services; and

3 For a rough chronology of the Howard Government's moves against the rules up to 2003, see xmedia.org.au, *Timeline: Media Ownership 1991–2003* (2003) <<http://www.xmedia.org.au/content/view/22/60/>> at 8 November 2005.

4 See Kim Jackson, *Media Ownership Regulation in Australia*, Commonwealth Parliamentary Library E-Brief (issued 2001; updated 2003) <http://www.aph.gov.au/library/intguide/SP/media_regulations.htm> at 8 November 2005.

5 Cited in Colleen Ryan, *A Thorn in the Moguls' Side* (2003) [50] <<http://www.xmedia.org.au/content/view/18/60/>> at 8 November 2005.

6 See Paul Jones and Michael Pusey, 'Class and Media Influence in Australia' in Don Heider (ed), *Class and News* (2004).

- (b) to provide a regulatory environment that will facilitate the development of a broadcasting industry in Australia that is efficient, competitive and responsive to audience needs; and
- (ba) to provide a regulatory environment that will facilitate the development of a datacasting industry in Australia that is efficient, competitive and responsive to audience and user needs; and
- (c) to encourage diversity in control of the more influential broadcasting services; and
- (d) to ensure that Australians have effective control of the more influential broadcasting services; and
- (e) to promote the role of broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity; and
- (f) to promote the provision of high quality and innovative programming by providers of broadcasting services; and
- (fa) to promote the provision of high quality and innovative content by providers of datacasting services; and
- (g) to encourage providers of commercial and community broadcasting services to be responsive to the need for a fair and accurate coverage of matters of public interest and for an appropriate coverage of matters of local significance; and
- (h) to encourage providers of broadcasting services to respect community standards in the provision of program material; and
- (i) to encourage the provision of means for addressing complaints about broadcasting services; and
- (j) to ensure that providers of broadcasting services place a high priority on the protection of children from exposure to program material which may be harmful to them; and
- (ja) to ensure that international broadcasting services are not provided contrary to Australia's national interest; and
- (k) to provide a means for addressing complaints about certain Internet content; and
- (l) to restrict access to certain Internet content that is likely to cause offence to a reasonable adult; and
- (m) to protect children from exposure to Internet content that is unsuitable for children; and
- (n) to ensure the maintenance and, where possible, the development of diversity, including public, community and indigenous broadcasting, in the Australian broadcasting system in the transition to digital broadcasting.⁷

⁷ *Broadcasting Services Act 1992* (Cth) s 3. Sections (aa), (ba), (fa) and (n) were introduced after the Productivity Commission Inquiry.

The Australian colloquialism for such an obviously ad hoc concoction is 'a dog's breakfast'. There is no reference to 'moguls' (or comparable terminology) within these objectives but (c) and (d) speak of 'the more influential broadcasting services' and 'diversity of control'. Because of a constant tendency towards technological determinism in Australian policy discussion, 'the more influential services' is often interpreted as if 'influence' is solely a conjectured 'effect' of 'the technology' on 'the audience'. This tendency has been consolidated in the form taken by the objectives referring to the internet and datacasting. If the presence of moguls is added to such an interpretation, then the conjecture becomes one concerning the degree of influence those moguls exert on actual journalistic 'content'. Each of these conjectures has been the subject of much international social scientific research. However, as Rodney Tiffen has argued, such conjectures tend to miss the key point that it is far more significant that, regardless of the current state of 'effects' research, those politicians who direct Australian media policy firmly believe that moguls *do* have the capacity to influence voters and so shape media policy accordingly.⁸ It is not unreasonable to conclude that 'fear of mogul influence' is a de facto objective of Australian media policy and that courting 'media mates' remains part and parcel of its *realpolitik*.⁹

If 'influence' is a kind of disincentive within the BSA's objectives, 'diversity' might be thought to be the likely positive bearer of freedom of political communication principles. When then Minister Duffy presented the CMR to Parliament, it still was. Duffy stated that the CMR's three goals were to support competition policy, discourage concentration of media ownership in local markets and enhance public access to a diversity of viewpoints, sources of news, information and commentary.¹⁰

Of these goals, the last has an obvious debt to John Stuart Mill's 'diversity of opinion', one canonical source in discussions of press freedom and freedom of speech. Yet this goal has also been the least discussed in each round of public debate surrounding the Howard Government's attempts to abolish or modify the CMR since 1996. This third goal has tended to be an assumed consequence of the first two. In ad hoc public discussion the situation is exacerbated by a further conflation with the 'cultural diversity' of objective (e) and the references to a 'diverse range of services' that have recently proliferated within the objectives. The Commission endorsed a recommendation by the regulator for further research on 'influence'. That research – on news production and audience reception – was produced quite quickly in 2001. It confirmed that there was no journalistic or public consensus on the meanings of either 'diversity' or 'influence'.¹¹

8 Rod Tiffen, 'Political Economy and News' in Stuart Cunningham and Graeme Turner (eds), *The Media and Communications in Australia* (2002).

9 This, now classic, phrase comes from Paul Chadwick's account of the CMR's introduction: Paul Chadwick, *Media Mates: Carving up Australia's Media* (1989).

10 Derived from Jackson: Jackson, above n 4.

11 Mark Pearson and Jeff Brand, *Sources of News and Current Affairs: A Research Report in Two Stages Conducted by the Bond University for the Australian Broadcasting Corporation* (2001).

Certainly, clarification of the objectives of the CMR (as distinct from those of the BSA) did take place within official documents between 1996 and the previous round of proposed legislation in 2002. A consensus usage developed around distinctions such as that between 'media plurality' (of ownership) and 'plurality of views'.¹²

III THE PRODUCTIVITY COMMISSION REPORT AND THE REGULATORY DOUBLE BIND

The role of the Productivity Commission Inquiry in these semantic contestations was significant. Its brief had included clarification of the objectives of all legislation relating to broadcasting (understood to include 'new media' as well) and much of its work was directed to this end. This was especially evident in the questions put to those who chose to appear before the Commissioners at the Inquiry's public hearings (themselves indicative of an unusual level of public transparency for this policy field).

The commissioners tried to break through what Denis Cryle has called 'the regulatory double bind' that besets the CMR:¹³ (on my understanding) the recognition that they are insufficient in themselves to guarantee a Millian diversity of sources of news and opinion but that, equally, their abolition without some other safeguards would likely make things worse by permitting further concentrations of ownership. Against this, proprietors, neoclassical economists and neoliberals often offer the utopian view that either 'the market' or 'new technology' would make up for such a likely 'market failure'.

While the Report did embrace a version of free market/new technology utopianism to a considerable degree, this was largely confined to its discussion of restrictions on new entrants to media markets.¹⁴ Crucially, it recommended that the CMR should not be abolished without the safeguard of a public interest test on the consequences of future media ownership concentration by merger.¹⁵

In discussion of the existent 'players', however, it also made the key – and previously largely repressed in Australia – linkage between the need for regulation of *content* as a possible solution to the regulatory double bind.¹⁶

One of the little-known features of the Australian system of regulation of commercial broadcasting is its remarkable under-usage of regulatory devices designed to compel broadcast journalism to conform to professional journalistic norms. We have no history comparable to that of the UK's positive program codes (which formerly included monitoring by the regulator) or the former US

12 Department of Communications and the Arts, *Review of Cross Media Rules*, Issues Paper (1 October 1996).

13 Denis Cryle, *Australian Media Ownership and the Productivity Commission: Market Theory and Regulatory Practice in the Global Age* (2001) Ejournalist <<http://www.ejournalism.au.com/ejournalist/cryle%20doc.pdf>> at 8 November 2005.

14 Australian Government Productivity Commission, above n 2, 303–30 (ch 9).

15 Ibid 38–9.

16 Ibid 379–422.

Fairness Doctrine (which was never subjected to a full First Amendment challenge). The dominant pattern here has been instead one of 'industry self-regulation' in which the regulator's intervention is heavily dependent upon a process of public complaint via the self-regulating industry agencies or the commercial broadcasters themselves. The result is what Julianne Schultz has called (in a related but different context) 'a weakening of the editorial culture'.¹⁷ The 'cash for comment' affair exposed the folly of this situation as the Inquiry was proceeding.

It was in this context that the Report recommended the provision of compulsory regulatory *standards* for fairness and accuracy in broadcast journalism and an increased role in 'active monitoring' by the regulator.¹⁸ This recommendation sits in the same chapter as the proposal to adopt 'freedom of expression' as a further objective of the BSA.¹⁹

Was the advocacy of both these positions by the Productivity Commission contradictory?

IV THE POTENTIALLY CLARIFYING ROLE OF THE IMPLIED FREEDOM

US media regulation scholars such as Judith Lichtenberg work with a useful distinction between structural and content media regulation that partly corresponds with the shorthand separation of free speech freedoms into 'negative' (freedom from, for example, overt censorship) and 'positive' (freedom to, for example, adequate means of informed citizenship) categories. According to this view structural regulations such as CMR are more likely to survive a First Amendment challenge because they constitute the lesser (negative) 'burden' on content.²⁰

Lichtenberg's distinction is too neat as it cannot adequately account for what remains, for me, the most relevant regulatory instrument untried in Australia: the continuing UK practice of requiring most free-to-air commercial television licensees to carry news produced by a separate entity, 'the nominated provider' chosen by the regulator (historically, ITN). Even so, to cut a very long and nuanced story short, some at least argue that a 'positive' case can be mounted for 'post-print' content regulation that meets a clear public interest.²¹

While the Productivity Commission's simultaneous embrace of both 'freedom of expression' as a BSA objective *and* a new content standard regulating the

17 Julianne Schultz, 'Another Lost Generation' (Speech delivered at the Fabian Society, Sydney, 21 September 2005) <http://fabian.org.au/library/event_papers_2005/1128429283_4482.html> at 8 November 2005.

18 Australian Government Productivity Commission, above n 2, 457–62.

19 Ibid 462–7.

20 Judith Lichtenberg, 'Foundations and Limits of Freedom of the Press' in Judith Lichtenberg (ed), *Democracy and the Mass Media* (1990).

21 See Paul Jones, 'The Implied Constitutional Freedom of Political Communication and Australian Media Policy' (2004) 5 *University of Technology Sydney Law Review* 65.

exercise of speech was not in itself contradictory, no 'positive' free speech rationale was provided for such a 'burden on content'. Significantly, the case for the freedom's use as a BSA objective was argued *both* from some High Court cases²² and as a counter against the arbitrariness of 'community standards' as a justification for content regulation in the existing BSA objective.²³ The implication was plainly that 'community standards' risked arbitrary content restrictions while 'freedom of expression' offered the counterweight principle of 'the benefits of independent and open media in a democratic society'.²⁴ This is a very defensible freedom of speech rationale but it was not extended to a 'positive' justification of the proposed fairness and accuracy content standards. The appearance of self-contradiction remained.

A similar situation developed during the 2002 attempt to change the rules. The implied freedom was invoked more widely during the inquiry into the Bill by the Senate Environment, Communications, Information Technology and the Arts Legislation Committee.²⁵ Leading the charge was, again, the Australian Press Council but it was also joined by the Fairfax group and the friends of Fairfax.

The draft legislation – in its own apparent attempt to sidestep the regulatory double-bind – proposed to revise the CMR by introducing a public interest test in the event of a merger in breach of the former rules. The chief criterion in this test would have been to secure, 'an undertaking to retain separate and distinct processes of editorial decision-making' – between, for example, television and newspapers – in the event of a merger.²⁶ However, as submissions to the Senate Inquiry made plain, this mechanism was quite muddled. In Lichtenberg's terms, the Bill would have introduced into a structural regime what were arguably content provisions. Further, it would have resulted in an unprecedented extension of the powers of the regulator to investigate the role of newspaper as well as broadcast newsrooms, so breaching the distinction usually drawn in democracies between broadcasting's susceptibility to regulation and newspapers' absolute freedom from it.

Minister Alston's Department was forced to produce a legal opinion defending the proposal's constitutionality in a late submission.²⁷ Both the Chair and the

22 See, eg, *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

23 *Broadcasting Services Act 1992* (Cth) s 3(h).

24 Australian Government Productivity Commission, above n 2, 449–50. As if to underscore the anti-censorial intent the subchapter lists the opponents of this proposal, almost all of whom are conservative religious organizations.

25 Senate Environment, Communications, Information Technology and the Arts Legislation Committee, Parliament of Australia, *Report on the Broadcasting Services Amendment (Media Ownership) Bill 2002* (2002).

26 Explanatory Memorandum, *Broadcasting Services Amendment (Media Ownership) Bill 2002*, [105].

27 Evidence to Senate Environment, Communications, Information Technology and the Arts Legislation Committee, Parliament of Australia, 28 May 2002 (Department of Communications, Information Technology and the Arts).

Dissenting Minority structured their reports in response to ‘the constitutional challenge’.²⁸ The Bill eventually failed in the Senate.

V ONE STEP FORWARD, TWO STEPS BACK?

To move to 2005 and the current plans to change the CMR, we need to add to our *realpolitik* the Howard Government’s majority in the Senate and a change in Minister. The Senate majority is not an absolute guarantee of success, as the Government had difficulty achieving a united Coalition position on the rules in 1996. However, it is very clear from Minister Coonan’s National Press Club speech of August 31²⁹ that, rather than building on the tortuous ‘progress’ made under Minister Alston, we have returned more completely to a corporatist *realpolitik*. The key link, which I have not space to develop here, is digital television policy. Suffice to say that the kind of *realpolitik* that allowed the newspaper moguls easy access to television licences in 1956 – when CMR could have made a real difference – has operated most recently to keep ‘new players’ out of the digital television spectrum by committing most of it to high definition transmission of the existing free-to-air commercial networks instead of to the ‘diverse services’ it makes technically feasible (and prevented the ABC from developing a digital platform comparable to the BBC’s). The likely postponement of the ‘analogue shutdown’ will also benefit the existing free-to-air licence holders.

There seem to be three currently dominant ways of critically interpreting this situation. First, with technologically determinist optimism in the eventually liberating power of digital technology; second, with resignation to the terms of Australian *realpolitik*; and finally, with a ‘medium term’ perspective, continuing to build on the limited gains of the 1996–2002 policy debates.

I would advocate the third option for two reasons. Firstly, the implied freedom cat is now out of the bag within media policy circles and at some point it will have to enter more fully into the calculations of the main players of media policy *realpolitik*. Secondly, and ironically, as long as some or all of the major corporate interests continue to play such a disproportionate and ‘blocking’ role in policy development, policy instruments designed elsewhere for the ‘pre-digital’ broadcast era will still have relevance here as ‘left field’ policy options. (My own favourite to complement or even replace the CMR remains the outsourcing of commercial television news.) These options in turn are, in my view, very defensible within the discourse of freedom of political communication.

28 Senate Environment, Communications, Information Technology and the Arts Legislation Committee, above n 25, 41–2, 59–60.

29 Senator Helen Coonan, ‘The New Multimedia World’ (Speech delivered at the National Press Club, Canberra, 31 August 2005) <http://www.minister.dcita.gov.au/media/speeches/the_new_multimedia_world_-_address_to_the_national_press_club_-_canberra_-_31_august_2005> at 8 November 2005.