

CROSS-MEDIA OWNERSHIP LAWS: REFINEMENT OR REJECTION?

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I INTRODUCTION

During the long debate about media ownership rules in Australia, the Coalition Government argued for the repeal of cross-media restrictions. It did not achieve this. The law passed in October 2006 retains limits on cross-media holdings but they are less restrictive than their predecessors.¹ When the Federal Communications Commission ('FCC') last reviewed media ownership rules in the United States, it too proposed loosening but not removing cross-media limits.² A federal appeals court stayed the proposed rules in 2004, essentially leaving the existing rules in place.³ The FCC is now reviewing the rules, taking into account changes since then in the media market and the way people are using media.⁴ This article examines the background to cross-media ownership laws and compares the approaches to changing them in the two countries. It finds different outcomes generated by different media markets, political and institutional contexts, legislative histories and levels of policy analysis. The two countries are both moving away from blanket prohibition of cross-media holdings and trying to make any remaining restrictions more sensitive to the characteristics of individual markets.

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1 *Broadcasting Services Amendment (Media Ownership) Act 2006* (Cth).

2 Federal Communications Commission, *Report and Order and Notice of Proposed Rulemaking, In the Matter of 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996* (2003) <http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-03-127A1.pdf> at 18 April 2007 ('FCC 2002 Biennial Regulatory Review').

3 *Prometheus Radio Project v Federal Communications Commission* 373 F 3d 372 (3rd Cir, 2004) ('*Prometheus*'). Petitions for certiorari seeking review of this and related decisions were denied by the Supreme Court: *FCC v Prometheus Radio Project* 545 US 04-1168, 13 June 2005.

4 Federal Communications Commission, *Further Notice of Proposed Rule Making* (2006) <http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-93A1.pdf> at 18 April 2007. See generally, Federal Communications Commission, *2006 Review of the Media Ownership Rules* (2006) <<http://www.fcc.gov/ownership/>> at 18 April 2007.

II GETTING TO CROSS-MEDIA LIMITS

Cross-media ownership in Australia was widespread before limits were introduced in 1987.⁵ The four groups holding one or more of the commercial television licences in the two largest cities, Sydney and Melbourne, all had extensive interests in print, radio or both.⁶ The DOC FDU Report found several 'key principles' often cited as the basis for media ownership regulation, although no comprehensive policy statement had ever been made by an Australian government. Those principles were: to avoid undue concentration; to promote local ownership and favour 'independent' applicants for licences; to limit foreign ownership and prohibit foreign control; to preserve the integrity of licensing decisions; and to encourage diverse shareholding in licensee companies.⁷ Avoiding undue concentration was the most important.⁸ Legislative limits only addressed concentration within particular media, not across different media. From 1935, about a decade after broadcasting began, the number of radio stations that could be commonly owned in a city, a state and nationally was restricted. When television was introduced approximately 20 years later, owners were prevented from controlling more than two stations. Cross-media ownership, one form of concentration, was not specifically restricted, but it was considered in deciding who should be awarded the first commercial TV licences. One of the four main newspaper companies in the country was prominent in each of the four successful bids for the licences to serve Sydney and Melbourne, effectively making cross-media holdings a pre-condition for entry into the new medium.⁹ When the Australian Broadcasting Control Board considered applicants for the stations in Brisbane and Adelaide, it concluded it would not be in the public interest for powerful metropolitan newspaper companies to further expand their interests in television. The Government rejected this conclusion. When the Board considered applications for stations in country areas, localism trumped concerns about cross-media concentration. The Board explicitly argued that local newspaper groups could subsidise the early years of television, helping to establish television stations outside the major cities as local institutions.¹⁰

Cross-media rules were not introduced until the two station limit was relaxed. The new rules prevented common ownership or control of more than one of the three major media in an area: a commercial TV licence, commercial radio licence or a newspaper published at least four times a week. The government argued cross-media ownership 'is of concern because it can limit public access to

5 *Broadcasting (Ownership and Control) Act 1987* (Cth).

6 Department of Communications Forward Development Unit, *Ownership and Control of Commercial Television: Future Policy Directions, Vol 1, Report* (1986), 32 ('DOC FDU Report'). Consolidated Press (Packer) controlled the Nine stations; News Limited (Murdoch) controlled the Ten stations in Sydney and Melbourne; John Fairfax controlled the Seven stations in Sydney and Brisbane; and the Herald and Weekly Times controlled the Seven stations in Melbourne and Adelaide.

7 Ibid.

8 Ibid 41-2.

9 See Australian Broadcasting Control Board, *Seventh Annual Report 1954/55* (1956) 31-3. Commercial radio interests were also prominent in this report.

10 DOC FDU Report, above n 6, 95-9.

diversity of opinion, news and commentary. It can inhibit competition, produce monopolies, and affect employment opportunities'.¹¹ The two station rule was replaced by a 'population reach' rule, limiting concentration within commercial TV to stations broadcasting to 60 per cent of the national population (initially proposed at 75 per cent and subsequently amended to that figure).¹² The government hoped this would encourage television operators other than the controllers of the three capital city based networks to take advantage of the expansion of commercial TV stations into east coast regional markets, which was also agreed at the time. The combination of the cross-media rules and the expanded population reach rule for television meant owners who wanted to expand their media holdings were effectively required to choose one medium in which to do it. Although existing cross-media holdings were 'grandfathered', the resulting rush of transactions rapidly dissolved the established cross-media empires. Since then, Australia's media has been dominated by organisations specialising in one of the three regulated media, although many, including Publishing and Broadcasting Limited, Seven Network Limited, APN News and Media Limited and Rural Press Limited, retained or built cross-media empires in sectors not affected by the cross-media rules, like magazines, non-daily country newspapers, pay TV and the internet.¹³

The United States has media ownership rules which are similar in principle, but very different in detail.¹⁴ A national television multiple ownership rule restricts the share of total TV households that can be reached by commonly owned stations to 39 per cent.¹⁵ A local television multiple ownership rule, broadly, prevents common ownership of two of the top four ranked stations in a market, and prohibits ownership of more than one station in a market unless eight independently owned television stations remain after the merger.¹⁶ The dual network rule effectively prevents common ownership of any of the four main

11 Second Reading Speech, Broadcasting (Ownership and Control) Bill 1987 (Cth), House of Representatives, 29 April 1987, 2193 (Michael Duffy, Minister for Communications).

12 Second Reading Speech, Broadcasting (Ownership and Control) Bill 1987 (Cth), House of Representatives, 29 April 1987, 2192-4 (Michael Duffy, Minister for Communications); *Broadcasting (Ownership and Control) Act 1987* (Cth) ss 22, 24; *Broadcasting Services Act 1992* (Cth) ss 53(1), 55(1)-(2).

13 See Communications Law Centre, 'Media Ownership Update' (2005) 168 *Communications Update* 1. PBL has recapitalised and reorganised its media interests since the passage of the new rules: 'PBL's \$5.5 billion recapitalisation and establishment of Australia's largest diversified media group, PBL Media' (ASX Release, 18 October 2006); 'PBL announces split into separate listed gaming and media companies' (ASX Release, 8 May 2007). Rural Press Limited, 'Merger with Fairfax Media Limited implemented' (ASX announcement, 9 May 2007).

14 These are summarised at Federal Communications Commission, *Rules under review in 2006* (2006) <<http://www.fcc.gov/ownership/rules.html>> at 10 May 2007.

15 This limit was initially set by the FCC at three stations in 1941, increasing progressively to 12 in 1984. A 25 per cent population reach cap was added in 1985. In 1996, a single new cap, set at 35 per cent population reach, was imposed in legislation. This was increased to 39 per cent in 2004: *FCC 2002 Biennial Regulatory Review* [502]-[503]; *Consolidated Appropriations Act* Pub L No 108-199, § 629, 118 Stat 3, 99 (2004).

16 See, *FCC 2002 Biennial Regulatory Review* [132]-[135] where the first limit of this kind was adopted in 1964. The changes made by the FCC at 47 CFR 73.3555(b) have no effect after *Prometheus*.

networks: ABC, CBS, Fox and NBC.¹⁷ A local radio ownership rule restricts the number of stations an entity can own in a single market to a figure dependent on the total number of stations in the market.¹⁸ Common ownership of a daily newspaper and a broadcast station is generally prohibited, although there are some 'grandfathered' combinations and a limited number of waivers have been granted for new combinations. A radio-television cross-ownership rule limits the number of radio and television stations that can be commonly owned in a market.¹⁹

III LEAVING THE LIMITS

The Liberal/National Coalition, in opposition in 1987 and led by the current Australian Prime Minister, John Howard, opposed the cross-media rules. A small number of Queensland National Party senators crossed the floor to secure their passage. The Coalition supported the removal of the two station rule and was initially disposed to support a 75 per cent population reach rule for television, but considered that cross-media holdings were better dealt with under general competition law. It was, however, prepared to pass the legislation if the government would agree to allocate at least one more commercial TV licence. John Howard, Leader of the Opposition and Federal Parliamentary Liberal Party at the time, argued that it was 'of crucial importance to us that we open up the Australian television market to more diversity and competition'.²⁰ In office from 1996, the Coalition's long-standing criticism of cross-media rules was bolstered by changes in the media market. When introducing a bill to remove the rules in 2002, the Minister argued there was 'ongoing tension between the trend towards convergence ... and a regulatory framework which is based on sector specific regulation and an assumption that influential sources of news and opinion are limited to the traditional domestic media outlets'.²¹ The government was 'committed to the need for ongoing diversity of opinion and information in the Australian media'²² but 'does not believe that diversity of ownership is necessary to achieve this'.²³ Although the Australian Labor Party eventually opposed the

17 The original prohibition on common ownership of more than one radio network was applied to television in 1946. It was liberalised to apply only to common ownership of the largest networks in 1996 and 2001, partly at the direction of Congress: *FCC 2002 Biennial Regulatory Review* [592]-[594]. The current rule is set out at 47 CFR 73.658(g).

18 47 CFR 73.3555(a) and see *FCC 2002 Biennial Regulatory Review* [235]-[237]. The court in *Prometheus* remanded these rules to the FCC to modify or justify its approach to setting numerical limits: [115]-[124].

19 Cross-ownership restrictions were first adopted in the 1970s: *FCC 2002 Biennial Regulatory Review* [328]-[330], [370]-[374] and citations therein. The changes made by the FCC at 47 CFR 73.3555(c) have no effect after *Prometheus*.

20 Commonwealth, *Parliamentary Debates*, House of Representatives, 12 May 1987, 3002-04 (Julian Beale). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 13 May 1987, 3087-88 (John Howard, Leader of the Opposition and Federal Parliamentary Liberal Party). John Howard offered a personal explanation, claiming his position had been misrepresented.

21 Second Reading Speech, Broadcasting Services Amendment (Media Ownership) Bill 2002 (Cth), House of Representatives, 21 March 2002, 1924-25 (Peter McGauran, Minister for Science).

22 Ibid.

23 Ibid.

removal of the cross-media rules in the Parliament in 2002 and 2006, its former communications spokesperson Lindsay Tanner argued in 1999 that such restrictions would 'no longer be important' because 'the media dominance of newspapers and television is soon to end' and barriers to entry into the information industry were 'dropping at a staggering rate'.²⁴

In the United States, the *Telecommunications Act of 1996*²⁵ overhauled laws about access to telecommunications markets to create competition in local telephone markets and encourage telephone and cable companies to expand into each other's markets. Changes were also made to the broadcasting ownership limits.²⁶ The FCC was directed to revise its rules on local radio ownership, repealing the national limit²⁷ and raising the limits on the proportion of stations within markets of different sizes that could be commonly owned.²⁸ It was also directed to revise its restrictions on national television ownership to a single 35 per cent population reach limit and conduct a rulemaking into local limits,²⁹ extend its presumptive waiver policy, permitting television/radio combinations, to the top 50 markets³⁰ and repeal restrictions on cross-ownership of broadcast and cable networks.³¹ A general provision, reported to have been drafted by lobbyists for Rupert Murdoch's News Corporation Limited, further required the FCC to reassess and recalibrate these limits every two years (amended to every four years in 2004).³² In the 2002 review, the FCC concluded that its media ownership rules 'inadequately account for the competitive presence of cable, ignore the diversity enhancing value of the internet and lack any sound basis for a national [television] audience reach cap'.³³ It also noted the growth in the numbers of traditional media outlets. New York had 17 television stations, 128 radio stations and 8 newspapers in 1980, but 24 television stations, 148 radio stations and 9 newspapers in 2000.³⁴ Major changes to the rules were proposed, including removing blanket restrictions on cross-media combinations, while retaining a form of them in small and medium-sized markets. The question confronting media companies, the FCC said, was no longer 'whether they will be

24 Lindsay Tanner, *Open Australia* (1990), 175-76. Tanner led the opposition to the Broadcasting Services Amendment (Media Ownership) Bill 2002. See Commonwealth, *Parliamentary Debates*, House of Representatives, 25 September 2002, 7234-40 (Lindsay Tanner).

25 Pub L No 104-104, 110 Stat 56 (1996).

26 Pub L No 104-104, § 202, 110 Stat 56, 110-2 (1996).

27 § 202(a), 110 Stat 56, 110.

28 § 202(b), 110 Stat 56, 110-1.

29 § 202(c), 110 Stat 56, 111.

30 § 202(d), 110 Stat 56, 111.

31 § 202(f), 110 Stat 56, 111.

32 § 202(h), 110 Stat 56, 112. See Andrew Jay Schwartzman, Harold Feld and Parul Desai, 'Section 202(h) of the Telecommunications Act of 1996: beware of unintended consequences' (2006) 58(3) *Federal Communications Law Journal* 581, 581-7.

33 *FCC 2002 Biennial Regulatory Review* [4].

34 *FCC 2002 Biennial Regulatory Review* [121]. In 1960, there were 7 TV stations, 74 radio stations and 8 newspapers. Australia's largest city, Sydney, has 6 broadcast television stations (3 commercial, 2 national, 1 community), 36 radio stations (12 commercial, 23 community, 1 open narrowcast, including stations serving all or part of the city) and 2 city-wide daily newspapers: Australian Communications and Media Authority, *List of Broadcasters* (2007)

<http://www.acma.gov.au/WEB/STANDARD/pc=PC_300387> at 18 April 2007.

able to dominate the distribution of news and information in any market, but whether they will be able to be heard at all among the cacophony of voices vying for the attention of Americans'.³⁵

IV THE AUSTRALIAN APPROACH

The first form of compromise offered in Australia under the Broadcasting Services Amendment (Media Ownership) Bill 2002 (Cth) had three elements. First, companies would be able to acquire interests otherwise prohibited by the cross-media rules if they obtained a 'cross-media exemption certificate' from the broadcasting regulator. Such certificates would only be granted where 'editorial separation' was maintained between the merging entities. This meant separate editorial policies, 'appropriate organisational charts' and 'separate editorial news management, news compilation processes and news gathering and interpretation capabilities'.³⁶ Second, when reporting on the business affairs of another media enterprise whose common ownership was authorised by a cross-media exemption certificate, the commercial relationship would have to be disclosed.³⁷ Third, regional television and radio licensees were required to broadcast minimum numbers of local news and weather bulletins, local community service announcements and, if requested by emergency service agencies, emergency warnings. Where they became part of a cross-media group authorised by an exemption certificate, they would also have to maintain prior levels of local news and information.³⁸ Although this legislation was not passed, public concern about the closure of news bureaus in several large regional centres led to the third element being implemented anyway by the broadcasting regulator. A licence condition was imposed on the east coast regional commercial TV operators with effect from 1 February 2004.³⁹ The editorial separation element, by contrast, was widely criticised, even by some media companies that strongly supported the removal of cross-media restrictions. Integrating editorial activities across different media was precisely what they wanted to do once cross-media holdings were acquired.

After the Government achieved a majority in the Senate at the 2004 election, enabling it to secure the passage of legislation without minor party support, a new bill was drafted.⁴⁰ The version finally passed after amendments in Parliament incorporated a second form of compromise with several elements. The idea of editorial separation was dropped, but the scope for cross-media

35 *FCC 2002 Biennial Regulatory Review* [367].

36 Broadcasting Services Amendment (Media Ownership) Bill 2002 (Cth), div 5A, sub-div B.

37 Broadcasting Services Amendment (Media Ownership) Bill 2002 (Cth), div 5A, sub-div BA.

38 Broadcasting Services Amendment (Media Ownership) Bill 2002 (Cth), div 5A, sub-div C. See also Second Reading Speech, Broadcasting Services Amendment (Media Ownership) Bill 2002 (Cth), House of Representatives, 21 March 2002 (Peter McGauran, Minister of Science).

39 Australian Communications and Media Authority, *Local Content* (2007)

<http://www.acma.gov.au/WEB/STANDARD/pc=PC_91817> at 18 April 2007.

40 Broadcasting Services Amendment (Media Ownership) Bill 2006 (Cth). See Second Reading Speech, Broadcasting Services Amendment (Media Ownership) Bill 2006 (Cth), Senate, 14 September 2006 (Senator Sandy Macdonald).

mergers was restricted. Owners would be able to acquire substantial interests in two but not all three of the media covered by cross-media rules ('two-out-of-three rule'). Further, cross-media mergers would not be permitted if they resulted in less than five media groups controlling the commercial television licences, commercial radio licences and newspaper(s) in a metropolitan area, or four groups in a non-metropolitan area ('five/four media groups rule').⁴¹

The rules about disclosure when reporting on the business activities of a commonly owned entity were retained,⁴² and the localism requirements already imposed by the regulator on television licensees in the east coast regional TV markets were given legislative force. They were also extended in a modified form to regional radio. Radio stations were required to broadcast 'material of local significance' for at least 4.5 hours a day, or as otherwise set, for all licences or a class of them, by the Minister. In addition, regional radio stations were required to maintain their existing level of 'local presence', meaning staffing levels and studios and other production facilities, in certain circumstances, including where they merge into combinations that would have breached the old cross-media rules.⁴³

V THE UNITED STATES APPROACH

The FCC took a more conceptual approach to its review of cross-media restrictions, recognising that the existing rules took no account of different numbers of services in markets of different sizes, or of media other than broadcast television, radio and newspaper. In doing so, it developed the 'share of voice' concept that was explored but ultimately rejected as a basis for ownership regulation in Britain in the mid-1990s.⁴⁴ The FCC developed a Diversity Index to measure more precisely the contribution of different media to diversity within different markets. The Index measures the availability of various media outlets and assigns a weight to each based on its relative use by consumers as a source of news and information. Consumer use was determined by a survey undertaken by Nielsen Media Research. It investigated the contribution of cable television, magazines, the internet and other sources as well as those outlets already covered by existing cross-media restrictions. The result was an 'exchange rate' for converting newspaper, television, radio and other media into common units, allowing measurement of the extent of concentration in the 'markets of ideas'.⁴⁵ The weights determined for different media within this overall market were 33.8 per cent for television, 28.8 per cent for newspapers, 24.9 per cent for radio and 12.5 per cent for the internet. Cable TV and magazines were given no weight

41 See *Broadcasting Services Act 1992* (Cth) div 5A, inserted by the *Broadcasting Services Amendment (Media Ownership) Act 2006* (Cth) s 8. See especially *Broadcasting Services Act 1992* (Cth) ss 61AB-AC (five/four media groups rule) and s 61AEA (two-out-of-three rule).

42 *Broadcasting Services Act 1992* (Cth) pt 5B.

43 *Broadcasting Services Act 1992* (Cth) ss 43A-43C and div 5C.

44 Kim Jackson, 'The "Share-of-Voice" Approach to Cross-Media Ownership Control', Parliamentary Research Service Research Note No 39, 29 April 1996: <<http://www.aph.gov.au/library/pubs/RN/1995-96/96rn39.pdf>> at 4 May 2007.

45 *FCC 2002 Biennial Regulatory Review* [404]. The Diversity Index is explained at [391]-[408].

because the FCC decided they were not sufficiently significant sources of local as opposed to national news.⁴⁶

Having developed this tool, however, the FCC chose not to use it directly to set limits on the interests that could be commonly controlled, but only as a guide in analysing 'whether particular kinds of cross-media transactions in particular kinds of markets ... would likely result in high levels of concentration'.⁴⁷ Applying the Diversity Index to different sized markets, the FCC concluded that its existing blanket newspaper/broadcast and television/radio rules were no longer necessary to protect diversity in local media markets. Indeed, it felt they harmed it.⁴⁸ Modified cross-media restrictions, however, were still appropriate in small-medium markets at greatest risk of concentration. It proposed to retain the prohibition on newspaper/broadcast and television/radio cross-ownership in markets with three or fewer television stations, while allowing TV stations to start new newspapers.⁴⁹ For markets with between four and eight television stations, a single owner would be able to own a daily newspaper, one television station, and up to half of the radio station limit for the market, or two television stations (if permitted under the local television station rule) and up to the radio station limit for the market.⁵⁰ Only in markets with nine or more television stations were cross-media combinations permitted without limit, although the FCC indicated it would still consider granting waivers where a good case could be made in small-medium-sized markets.⁵¹ The appeal court in *Prometheus* affirmed both the proposed removal of the blanket ban on cross-media ownership⁵² and the constitutionality of retaining some cross-media limits.⁵³ It objected to the particular limits proposed, however, because of the way the FCC had developed and applied its Diversity Index. The court found it was irrational to include the internet in the Index while excluding cable, and to give equal weighting to all media within a class regardless of the size of their audiences.⁵⁴ In the light of the Court's criticism, the FCC has tentatively concluded that the Diversity Index is an 'inaccurate tool for measuring diversity' and will not use it further to justify changes to cross-media rules.⁵⁵

Facing the same challenges posed by proliferating media outlets and different market sizes several years earlier, policy-makers in Britain had also explored 'share of voice' models. Richard Collins and Christina Murroni argued 'concentration of ownership matters; cross-media ownership, in itself, does

46 *FCC 2002 Biennial Regulatory Review* [401]-[419].

47 *FCC 2002 Biennial Regulatory Review* [405].

48 *FCC 2002 Biennial Regulatory Review* [342]-[354] and [382]-[385].

49 *FCC 2002 Biennial Regulatory Review* [452]-[461].

50 *FCC 2002 Biennial Regulatory Review* [462]-[471].

51 *FCC 2002 Biennial Regulatory Review* [472]-[481].

52 48-52: <<http://www.fcc.gov/ogc/documents/opinions/2004/03-3388-062404.pdf>> at 14 May 2007.

53 *Ibid.*, 52-57.

54 *Ibid.*, 57-78.

55 Federal Communications Commission, *Further Notice of Proposed Rule Making* (2006) [32] <http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-93A1.pdf> at 9 May 2007. An alternate model is proposed in Brian C Hill, 'Measuring Media Market Diversity: Concentration, Importance and Pluralism', (2006) 58(1) *Federal Communications Law Journal* 169.

not'.⁵⁶ Their goal was to ensure pluralism and to prevent anyone controlling too great a share of the media. Admitting there was no objective answer to the question of what too great a share was, they simply asked what was the lowest number of media owners tolerable in Britain. They felt a market of 10 media owners did not threaten media pluralism but five would. Choosing a midpoint, they designed a model to ensure at least seven media owners in Britain. This implied a maximum 'share of voice' for any individual owner of 15 per cent of the total, notably higher than the five/four media groups rule set as the new thresholds in Australia, although the structures of the sectors, especially the dominance of national newspapers in Britain, is very different. The maximum individual share of voice was translated into proposed limits on owners' shares of four media sectors: national newspapers, regional newspapers, television and radio. The exclusion of pay TV was significant, given the control of Britain's dominant operator, BSkyB, by News Corporation Limited, the country's biggest newspaper publisher. Shares of the newspaper markets would be measured by circulation and shares of television and radio markets by ratings or the stations' declared advertising audiences. The proposed model would have limited owners to a maximum of 40 per cent of any one sector, or smaller shares of each of two (30 per cent), three (20 per cent) or four (15 per cent) sectors, if they held interests across more than one sector.⁵⁷ Despite intense interest in share of voice models, the government eventually settled on modified cross-media rules. Britain still outlaws cross-media ownership of the major commercial television operation, ITV/Channel 3, and national newspapers with a national market share of more than 20 per cent, or local newspapers with a market share of more than 20 per cent in the relevant coverage area.⁵⁸

VI CONTRASTS BETWEEN AUSTRALIA AND THE UNITED STATES

The approaches to revising media ownership rules in Australia and the United States in recent years owe much to their different institutional and political contexts and legislative histories. In Australia, where the rules are all set out in legislation, change was driven by an old political objection to the principle of cross-media limits. The outcome, modified cross-media rules, was a result of compromises made by the Government to secure the passage of legislation that came as close as possible to its long-standing goal. There was little chance of a successful legal challenge to the new rules because of the Commonwealth's sweeping constitutional powers over electronic communications.⁵⁹ In the United States, where many of the rules are made by the FCC and reviewable by the courts, and the power of Congress to make relevant laws is more circumscribed by the Constitution, the prospect of legal challenge was high. In this

56 Richard Collins and Christina Murrone, *New Media, New Policies* (1996), 67.

57 Ibid 68-72.

58 See Department for Culture, Media and Sport, *Media Ownership* (2006)

<http://www.culture.gov.uk/what_we_do/Broadcasting/media_ownership> at 18 April 2007.

59 *Australian Constitution* s 51(v).

environment, the FCC undertook a very thorough process of research, analysis and policy development when fulfilling its statutory obligation to regularly review its ownership rules, although even this did not completely survive court scrutiny.

In both countries, a central justification for change was the growth in old and new media services. This argument was more convincing in the United States, where cable television take-up is much greater (though not necessarily as a source of local news and information) and the numbers of broadcast television and radio services in comparable markets have always been higher. They have also kept growing over the last two decades. In Australia, the major metropolitan markets have had no new commercial television stations since the 1960s, and at most two new commercial radio stations since the early 1980s. Broadband take-up was also initially much faster in the United States, although it has quickened in Australia more recently and is now ahead of the OECD average (see Table below).

A Broadband subscribers per 100 inhabitants, Australia and United States⁶⁰

	2001	2002	2003	2004	2005	December 2006
Australia	0.9	1.8	3.5	7.7	13.8	19.2
United States	4.5	6.9	9.7	12.9	16.8	19.6
OECD Average	2.9	4.9	7.3	10.2	13.6	16.9

The level of published analysis of media ownership has been very different in the two countries. The FCC commissioned original research and published a detailed paper explaining the rationale for its proposed changes. In Australia, the Government did not publish any major research to support its argument about new services, although the Minister gave speeches arguing ‘technology and time are making a nonsense of the current media rules ... no amount of diversity of ownership on old platforms will help’.⁶¹ Those that did examine the question in any detail reached the opposite conclusion: ‘that despite the rise of new media over the past decade, only a very small proportion of Australians rely on the internet for news and current affairs, and amongst those who do, the vast majority turn to websites that are either controlled by traditional media providers or draw their content from traditional media sources’.⁶²

60 Organisation for Economic Co-operation and Development, *OECD Broadband Statistics to December 2006* (2006) <http://www.oecd.org/document/7/0,2340,en_2649_34223_38446855_1_1_1_1,00.html> at 9 May 2007.

61 Senator Helen Coonan, ‘Address to the Millennium Forum’ (Speech delivered at the Millennium Forum, Sydney, 3 October 2006) <http://www.minister.dcita.gov.au/media/speeches/address_to_the_millennium_forum> at 18 April 2007.

62 Christian Downie and Andrew Macintoch, *New Media or More of the Same? The Cross-Media Ownership Debate* (2006) Australia Institute <<http://www.tai.org.au/documents/downloads/WP86.pdf>> at 18 April 2007.

Both countries retained forms of cross-media restriction. Determined to put an end to such rules, the Australian Government ended up liberalising them and imposing new content obligations on media operators. Levels of concentration in new media, and across old and new media, were left to general competition law. Some sensitivity to market size was introduced through the five/four media groups rule, but only a little. As a report published by the Communications Law Centre ('CLC') found, the blanket application of the four media groups rule to regional markets of different sizes, with different mixes of service numbers and owners, will allow very different outcomes.⁶³ Although the Government argued few regional markets would be greatly affected by the new rules – 'no mergers could take place in 63 per cent of regional markets and 18 per cent of regional markets have five voices and so one merger could potentially occur'⁶⁴ – the CLC investigation of Toowoomba, Townsville, Wollongong and Launceston showed considerable consolidation would be possible in these larger centres, including common ownership of two of the most important outlets for local news and information which currently compete with each other.⁶⁵ In the United States, a more sophisticated analytical model was developed to take account of new media and market size, although it was ultimately used to inform rather than determine the FCC's proposed new ownership limits. The courts still thought the model and rationale were not sophisticated enough, and the FCC appears to have abandoned it, though without yet settling a new methodology.

As the Australian media industry proceeds with the extensive restructuring permitted under the new laws,⁶⁶ the United States is revisiting the whole question, applying its old legislative standard to reanalyse the changing media market and determining what, if any, restrictions on media ownership still serve the public interest.

63 Tim Dwyer et al, *Content, Consolidation and Clout: How will Regional Australia be Affected by Media Ownership Changes?* (2006).

64 Coonan, above n 61.

65 Dwyer, above n 63. See especially 165-71.

66 See Jesse Hogan, 'Media shares surge', *The Age*, 4 May 2007: <<http://www.theage.com.au/news/business/media-shares-surge/2007/05/03/1177788311072.html>> at 4 May 2007, for a summary of some of the most recent moves at the time of publication.