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7 Ibid.

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9 Op Cit 1.

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12 www.itu.int/itu-t/bureau/circ/019E.doc

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Cross-Media Rules to be Revisited Again or Not

Raani Costello reviews the legislative and policy background of media ownership restrictions

Doing away with Australia's cross-media ownership laws is on the media policy agenda again following the Coalition's re-election to Federal Government in November 2001. The Coalition's election platform included the twin objectives of:

- giving media companies exemptions from the cross-media ownership restrictions if undertakings are given to maintain separate editorial processes and maintain existing levels of local news and current affairs; and
- abolishing the media-specific foreign ownership restrictions that apply to newspapers and television.

This article provides the legislative and policy background necessary to understand the present revival of this issue and why it may be difficult for the Government to achieve its policy objectives. Following his re-election, Prime Minister John Howard has made the comment that he is:

*"not going to bloody his nose on it if the minor parties in the Senate remain opposed"*¹

CROSS-MEDIA RESTRICTIONS

Over the last five years, the Coalition Government has unsuccessfully attempted to revisit and repeal the provisions of the *Broadcasting Services Act 1992* (Cth) (BSA) which prevent any single entity from controlling any two of the following in any geographic licence area:

- a commercial free-to-air television licence;
- a commercial radio licence; and
- a wide circulation newspaper.²

These restrictions were introduced by the Federal Labor Government in 1987 and the oft-quoted remark of then Treasurer Paul Keating that media proprietors

"may be princes of print or queens of the screen, but not both"

reflects the underlying policy intention of preventing a media company from controlling broadcast and print media in the same geographic area.

These restrictions have been criticised since their creation as stifling the growth of Australian media companies and have been a constant barrier to much anticipated changes in the control of the Fairfax newspaper group, publisher of the *Sydney Morning Herald*, *The Age* and the *Australian Financial Review*.

1996 REVIEW OF CROSS-MEDIA AND FOREIGN OWNERSHIP

In late 1996, the Coalition Government, through the Department of Communications and the Arts, commenced a review of the cross-media rules which it later abandoned without making any formal recommendations.

The Government also sought to review the media-specific foreign ownership restrictions. Australian foreign ownership policy is primarily controlled under the *Foreign Acquisitions and Takeovers Act 1975* (Cth) and associated policies (FATA). In summary³:

- all direct (ie, non-portfolio) proposals by foreign interests to invest in the media sector irrespective of size are subject to prior approval under the foreign investment policy. Proposals involving portfolio share holdings of 5% or more must also be submitted for examination;

- foreign investment in mass circulation national, metropolitan, suburban and provincial newspapers is restricted. All proposals by foreign interests to acquire an interest of 5% or more in an existing newspaper or to establish a new newspaper in Australia are subject to a case-by-case examination. The maximum permitted aggregate foreign interest (non-portfolio) investment/involvement in national and metropolitan newspapers is 30% with any single foreign shareholder limited to a maximum interest of 25% (and in that instance unrelated foreign interests would be allowed to have aggregate (non-portfolio) shareholdings of a further 5%). Aggregate foreign interest direct involvement in provincial and suburban newspapers is limited to less than 50% for non-portfolio shareholdings.

- aggregate foreign ownership of Telstra is restricted to 35% of the privatised equity (presently 49.9%) and individual foreign investors are only allowed to acquire a holding of no more than 5% of that privatised equity. Prior approval is required for foreign involvement in the establishment of new entrants to the telecommunications sector or investment in existing businesses in the telecommunications sector. Proposals above the notification thresholds will be dealt with on a case-by-case basis and will normally be approved unless judged contrary to the national interest.

The BSA also contains specific foreign ownership restrictions with respect to free-to-air and pay television licences, namely that:

- foreign interests in commercial free-to-air television licences are limited to a 20% company interest in

aggregate. A foreign person may not be in a position to exercise control of a free-to-air commercial television broadcasting licence. No more than 20% of directors of a licencee may be foreign persons⁴; and

- with respect to subscription (pay) television broadcasting licences, foreign interests are limited to a 20% company interest for an individual and a 35% company interest in aggregate.⁵

No change to the law was made arising from the 1996 review due to the opposition to the changing of the cross-media and foreign ownership rules both from within the Coalition Government (particularly regional National Party members) and the opposition parties.

Submissions to the 1996 review by interested parties highlighted the following:

- some parties were generally favourable to the repeal of the cross-media rules but wished foreign ownership restrictions to be maintained. For example, Publishing and Broadcasting Limited, owner of the Nine television network, submitted that Australian media companies are forced to stay small and non-competitive due to artificial cross-media restraints and are unable to compete with foreign conglomerates.⁶
- some parties were favourable to the repeal of the cross-media rules and the relaxation of foreign ownership regulations. For example, News Limited (publisher of *The Australian*, *The Herald Sun*, *The Daily Telegraph* and *The Courier Mail* amongst others) submitted that foreign ownership rules remain a substantial barrier to entrants and investors in the media industry and combined with the cross-media limits are out of step with the trend in economic regulation which is to expose industry to competitive pressures.⁷
- the Australian Competition and Consumer Commission (ACCC), Australia's competition regulator, was of the view that the BSA and FATA could be impediments to international competition, as they could be used to block acquisitions of Australian media outlets by foreign media proprietors. The ACCC believed that

as competition is reduced, so are the prospects for greater plurality and diversity in the media.⁸

- it was the widespread view of media companies that the cross-media rules are antiquated and piecemeal because they did not acknowledge digital convergence and the rise of new media such as the Internet and pay television which they argued increased the plurality of views and made concentration of ownership and influence more unlikely. Critics of this position, such as public interest groups and the journalists' union, argued that the same media companies tend to dominate new forms of media such as pay television and Internet content portals and in any event, print media and free-to-air television remain the most influential media. As such, they maintain that cross-media restrictions prevent concentration in the ownership and control of the most politically influential media.

PRODUCTIVITY COMMISSION INQUIRY INTO BROADCASTING

In 1999, the Federal Treasurer Peter Costello referred the BSA and related broadcasting legislation to the Productivity Commission and asked the Commission to advise on practical courses of action to improve competition, efficiency and the interests of consumers in broadcasting services. As with the inquiry of 1996, consultation with key interest groups and affected parties was sought.

The Commission's *Broadcasting Inquiry Report*, released in April 2000⁹, recommended that:

- Foreign investment in broadcasting should be covered by Australia's general foreign investment policy. All restrictions on foreign investment, ownership and control in the BSA should be repealed.¹⁰ If the immediately preceding recommendation is not adopted, the BSA should be amended immediately to remove restrictions on investment by foreign managed, but Australian sourced, funds in Australian commercial television businesses.¹¹
- The *Trade Practices Act 1974* (Cth) (TPA) should be amended immediately to include a media-

specific public interest test which would apply to all proposed media mergers. This test would be administered by the ACCC, and require that the ACCC seek Australian Broadcasting Authority (ABA) input on social, cultural and political dimensions of the public interest.¹² The cross-media rules should be removed *only* after the following conditions are met:

- removal of regulatory barriers to entry by new entrants into broadcasting, together with the availability of spectrum for new broadcasters;
- repeal of BSA restrictions on foreign investment, ownership and control; and
- amendment to the TPA to provide for a media-specific public interest test to apply to mergers and acquisitions in the media industry.¹³

To date, the Commission's recommendations have not been formally commented on by the Government and no legislation was proposed arising out of the recommendations. While the Commission's recommendations on foreign ownership are not too far removed from the Government's election policy (see below), the Commission's recommendation that the cross-media rules should *only* be removed on the condition that new entrants be allowed into the broadcasting market is in conflict with the Government's policy regarding commercial free-to-air television and the introduction of digital terrestrial television. The Government has granted incumbent free-to-air licensees a period of protection, ending in 2007 at the earliest, in which no new free-to-air commercial television licences may be granted by the ABA.

The Commission also recommended that certain intra-media ownership restrictions be removed, namely, the prohibition on the control of more than one commercial free-to-air television licence in the same licence area;¹⁴ and the prohibition on the control of more than two commercial radio licences in the same licence area.¹⁵ The Commission is of the view that the normal competition provisions of the TPA are sufficient to achieve public policy objectives of competition and diversity.¹⁶

CURRENT POLICIES OF THE GOVERNMENT AND MAJOR OPPOSITION PARTIES

The newly re-elected Government's current policy on broadcasting, *Broadcasting for the 21st Century*, sets out their policy on media ownership¹⁷. In summary, the Coalition's position is as follows:

- the cross media rules are anachronistic and media organisations should be able to obtain exemptions from the rules if they give undertakings to maintain separate and distinct editorial processes; and retain existing levels of local news and current affairs production on television and radio;
- the existing media-specific foreign ownership rules that apply to television and newspapers are preventing the introduction of new players and a more competitive media sector. They should be abolished, with media acquisitions considered under FATA; and
- if the above objectives cannot be achieved, the restrictions on the broadcasting sector in relation to foreign managed funds will be reviewed as a matter of priority. This is an express acknowledgement of the Productivity Commission's recommendations on foreign media ownership policy.

Labor's media ownership policy is part of their overall arts policy entitled ALP Platform 2000 and had not been formally revised during the election campaign.¹⁸

In summary:

- Labor is committed to diversity in both the ownership and operation of free to air and pay television, radio, newspapers and emerging online media. Labor recognises that the convergence of new technologies does provide new opportunities and challenges for Australia's media but believes that the strategic objective of diversity can continue to be secured by a range of measures. To this end Labor will retain cross media ownership laws.
- no express mention is made of Labor's position on foreign ownership of media companies. However, Stephen Smith (the Shadow Minister for Communications) was reported during the election campaign as stating that:

*"the continuing existence of the cross and foreign media ownership rules as the tactical devices currently needed to secure a very fundamental strategic objective in media and broadcasting laws, and that's called diversity".*¹⁹

The Democrats' media ownership policy²⁰ does not expressly state the party's position on the cross-media rules. However,

- the Democrats' policy states that:

"Australia has one of the highest concentrations of media ownership. This has serious political and economic consequences which must be addressed. The best guarantee of independence in the media is the widest possible spread of ownership. The Democrats believe that Australians should own the majority of Australian media outlets, but acknowledge there may be special circumstances where overseas proprietors add to the diversity and plurality of content."

- a spokeswoman for Democrat Senator Vicki Bourne was reported during the election campaign as saying:

*"We think the regime as it stands has added to Australia's diversity of ownership and plurality of opinion and that's served audiences as well as can be expected. Unless we actually see what the Government is proposing then we can't say one way or another whether we'd support it."*²¹

Along with Labor and the Democrats, the Australian Greens are likely to be an important force in the Federal Senate and the composition of the Senate may impede the Coalition's chances of achieving its policy objectives. The Greens' policy objective with respect to media ownership is:

*"the regulation of media and publishing to ensure diversity of local, regional and national products."*²²

It will be interesting to observe how the Government goes about pursuing its policy objectives – whether it will conduct another public inquiry as it did in 1996 and 1999 or alternatively, introduce legislation into Parliament without undertaking such a process. It appears

that the Coalition strategy of characterising the changes to the cross-media restrictions as one of creating exemptions rather than wholesale repeal of the cross-media rules supports the view that it might be a lower profile attempt this time round. However, even this may prove too difficult given the composition of the Senate, as noted by Prime Minister Howard in his recent comments.

It should be noted that the non-BSA foreign ownership restrictions are easier to change than the cross-media and foreign ownership restrictions in the BSA relating to television. For example, the Government could relax the 30% foreign limit on newspapers without the need for Senate approval.

11 Gilchrist M and Doman M, "PM Takes Back Promise to Media", *The Australian* (15 November 2001) at http://theaustralian.news.com.au/common/story_page/0,5744,3252530%255E2702,00.html

2 BSA, s 60.

3 See the Foreign Investment Review Board's website for a summary at http://www.firb.gov.au/policy_pubs/policysummary1a.htm#Media

4 BSA, s 57 and s 58.

5 BSA, s 109.

6 Publishing and Broadcasting Limited, Submission to the Cross-Media Review, 1996, p 4.

7 News Limited, "Reforming Media Policy", Submission to the Cross-Media Review, 1996, p 13.

8 ACCC, Submission to the Cross-Media Review, 1996, para 7.4.

9 Available at <http://www.pc.gov.au/inquiry/broadcst/finalreport/index.html>

10 Recommendation 10.1.

11 Recommendation 10.2.

12 Recommendation 10.3.

13 Recommendation 10.4.

14 BSA, s 53(2).

15 BSA, s 54.

16 Recommendation 10.6.

17 Pt 4, p 18. It can be accessed at <http://www.liberal.org.au/policy/Broadcasting%20policy.pdf>

18 http://www.alp.org.au/policy/platform2000/chapter_14.html#6

19 Crabb A and Lawson A, "Media Ownership Limits May be Relaxed", *The Age* (30 September 2001) at <http://www.theage.com.au/news/national/2001/08/30/FFXNSAJQYQC.html>

20 <http://www.democrats.org.au/policies/>

21 Banham C. "Alston Flags Overhaul on TV, Newspaper Ownership", *Sydney Morning Herald* (30 September 2001) at <http://www.smh.com.au/news/0108/30/national/national11.html>

22 <http://www.greens.org.au/>

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