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The New Media Landscape

Paul Mallam reviews the new media landscape unfolding in Australia

Few legislative changes have had such a long gestation, chequered history and dramatic passage as the recently enacted media ownership reforms.

This paper gives an overview of:

- the new media ownership rules;
- the key underpinning concepts of the new rules; and
- some practical examples of how they could apply.

Over the past 20 years media ownership in Australia has been regulated by a pastiche of legislation. The *Broadcasting Services Act 1992* (Cth) (**BSA**) sets out the cross-media and media concentration rules. The foreign ownership restrictions are enforced through a combination of the BSA and the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (**FATA**), while the *Trade Practices Act 1974* (Cth) (**TPA**) provides an overarching completion framework. In practice, the operation of the cross-media rules have limited the role of competition regulation.

New Media Ownership Rules

Schedule One of the *Broadcasting Services Amendment (Media Ownership) Act 2006* (Cth) (**new Act**), which implements many of the new rules, commenced on 1 February 2007. The combined effect of the new rules and the repeal of the foreign ownership restrictions in Division 4 of Part 5 of the BSA on a date to be proclaimed will abolish the foreign ownership restrictions on commercial television and pay television (although in the latter case they have always been dead letter). After the proclamation expected in the first half of 2007, all foreign ownership of media will only be regulated by the FATA. Media will remain a sensitive sector for the purposes of the FATA. While it cannot be assumed that all foreign ownership proposals will be "rubber stamped" by the Treasurer under the FATA, the experience of radio is that foreign ownership has been permitted up to 100%. Whether or not the same levels are permitted in commercial television and print media, there will nevertheless be a substantial rise in foreign ownership, in part driven by the strength of the private equity market.

The new Act will not change the existing media concentration rules. Instead, it actually reinforces those rules, by providing that the new media diversity rules operate only in respect of media groups which comply with the media concentration rules, known in the new Act as the "Statutory Control Rules".

The central and most complex part of the new Act is, of course, the new media diversity test. The new test is not really an abolition of the cross-media rules, but a form of cross-media re-regulation. This is especially so with last minute amendments which limit the number of mainstream media which can be controlled

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by one person in any one market to 2 of 3 out of commercial radio, commercial television and major print media which are on the Associated Newspaper Register.

Media Diversity Rules

Turning then to the media diversity rules. There are two central prohibitions. First, a prohibition on transactions that result in a "situation of unacceptable media diversity." Second, a prohibition on transactions that result in an "unacceptable 3-way control situation."

As has been well publicised, the media diversity rules require a minimum of 5 media groupings in the major State capital cities of Sydney, Melbourne, Brisbane, Adelaide and Perth. A minimum of 4 media groupings is required elsewhere. The media grouping test is based on a hierarchy of concepts. First, groupings are determined by reference to commercial radio licence area. While those areas are largely co-terminus with major population centres (and in regional areas, the hinterland for those centres), this potentially leads to some odd results, discussed below. A media operation is any of a commercial radio licensee, a commercial television licensee or an associated newspaper in relation to that commercial radio licence area. A media grouping is determined by reference to common control of any media operations. For this purpose the elaborate control test established by the BSA applies. Consequently, common control could arise through a wide range of means, and not merely by holding a company interest which exceeds 15% in respect of 2 media operations. For example, common control, and therefore a media grouping, could arise through contractual arrangements.

Another aspect of the rules which deserves observation is that the 5 media groupings test applies only in the 5 major capital cities. Thus, quite large markets such as Canberra, Newcastle, Wollongong, Geelong and to a lesser extent Hobart and Darwin are regional markets for the purpose of the test. On one view this is an advantage, because the lower of the two media groupings test (four minimum groupings rather than five) will apply to those markets. However, especially for commercial radio licensees the sword is very much double-edged, because those markets are also subject to the highly prescriptive local content requirements which will apply to all regional markets, as a result of the very publicised pressure brought to bear by the National Party.

Register of Media Controllers

To ensure transparency of the new regime, a new register of media controllers will be created and administered by the Australian Communications and Media Authority (**ACMA**). Within 5 days after 1 February 2007, all media controllers were required to provide a statutory notification to the ACMA. This included controllers of associated newspapers, which were not previously subject to these reporting requirements. The scope of the new Act, in applying to the print media, is a significant enlargement from the BSA in its present form. However, this mechanism was necessary in order to ensure a public and certain process by which the number of controllers in a market – and therefore compliance with the media diversity rules – could be determined, not only by the ACMA but also by media companies and their advisers.

There is also a significant benefit in being registered as a media controller. If registered, then the ACMA is precluded from exercising its consid-

erable divestment powers in order to cure any subsequent breach by requiring divestment in respect of the control previously notified, except in very limited circumstances. This is a considerable advantage in relation to, for example, a fiercely contested takeover. The party which first crosses the 15% control threshold, and is therefore notified on the register, has some advantage over another party that launches a subsequent takeover for the same media asset. The minimum voices test has been said to encourage first mover advantage, with a prospective scramble for media mergers and acquisitions taking place in the very near future. The creation of the register and the benefits of registration also encourage this outcome.

Impact of Commercial Radio Licenses

A further observation to be made is the importance of the number of commercial radio licenses in a market, when determining the total number of media groups. For example, when comparing Sydney and Melbourne, both markets have 2 associated newspapers (one published by News and the other by Fairfax), each of the 3 commercial television networks and in the case of Sydney, a total of 8 radio groups, while Melbourne has 7 such groups. On current calculations this gives rise to a total of 13 media groups in Sydney and 12 media groups in Melbourne prior to the commencement of the legislation. That suggests a considerable degree of flexibility, in relation to prospective media mergers, with several mergers taking place before the minimum number of 5 media groupings is likely to be approached. However, when Brisbane is taken into account, the situation is quite different. Brisbane has one print group (News), all 3 commercial television networks and 4 radio groupings, giving a total of 8 media groups. Nearly all of the groups represented in Sydney and Melbourne are also represented in Brisbane, with the result that when considering a possible media "marriage", its effect on the Brisbane market requires careful scrutiny. The number of mergers and acquisitions which could be undertaken, before hitting the minimum number of 5, is considerably lower, once Brisbane is taken into account. Obviously enough, the point is that when structuring a media transaction, the market with the lowest number of voices in which the relevant media operate, needs to be the base line to determine if the transaction would breach the new rules.

This point is further amplified once regional markets are considered. For example, Katoomba has a total of 6 media groups. Those groups consist of News, Fairfax, the 3 commercial television networks and Australian Radio Network. Consequently, while the driver in relation to any marriages between those media would be the metropolitan markets, the impact on Katoomba would also need to be considered.

Even further afield is the example of Darwin, which has only 4 media groups – the minimum number for a regional market. These are News, Nine, Southern Cross and Grant Broadcasters. Consequently, a merger between any of those parties could not take place without an immediate breach of the media diversity rule in Darwin.

These examples can be multiplied around Australia, with a great many differing and sometimes idiosyncratic results.

Such examples highlight the importance of the prior approval regime created by the new Act. This regime is similar to the regime already in place under section 67, under which prior approval can be obtained from the ACMA in relation to breaches of some of the existing media rules. In many respects the new prior approval regime mirrors the section 67 process, with which a variety of media groups are familiar, particularly in regional radio, where section 67 has most often been used. However, under the new prior approval process, the ACMA is not subject to a time limit when first granting approval, but must use its "best endeavours" to make a decision within 45 days. Here, the policy arguments compete. No doubt on the one hand there will be a good volume of material and a number of sensitive issues which the ACMA needs to consider, in determining whether to approve a potential breach and also to determine the period of dispensation from the breach. On the other hand a prior approval for breach is usually requested in circumstances where time is of the essence. At least in my experience, the ACMA and its predecessor the ABA have been very helpful in seeking to accommodate the commercial imperatives of parties who have used this process. However, the lack of a time limit for an approval does underline that, where 2 parties are competing for control of a common media asset, the party that does not require prior approval in relation to a potential breach, has a clear advantage in obtaining control of the contested asset.

Approval of a breach can be given for a maximum of 2 years, with an extension for the lesser of the original period of the approval or 1 year. This mirrors the existing mechanism under section 67. The new regime provides for enforceable undertakings, which are to be taken into account in the approval process. This is likely to result in a strong preference by the ACMA for undertakings to be proffered as part of an approval process.

Coupled with the prior approval process, are very considerable powers of divestment. These powers will potentially need to be exercised not only in relation to those who run the gamut of regulation, but also innocent parties. For example, in a simple case of 2 contemporaneous and confidential media transactions, it may be that completion of either of those transactions takes the number of media groups in a market to the minimum. In that circumstance the party which completes second, will be in breach of the law. This situation may have arisen through no fault of the party itself. For this reason a period of up to 2 years is available to divest assets which would rectify a situation of unacceptable media diversity, where the person in breach acted in good faith and took reasonable precautions. An extension of 1 year is also available. While these periods appear generous, many of us would struggle

to explain to a client that after spending handsomely on a bevy of advisers and investing tens, hundreds or even billions of dollars in a media transaction, divestment was required.

The new regime has been fortified with some very prescriptive requirements in respect of regional radio (which, as indicated above, includes commercial radio licensees serving markets such as Wollongong, Newcastle, Geelong and Canberra), which will commence between 1 February 2007 and 1 January 2008. Upon a trigger event taking place, a regional commercial radio licensee must submit a local content plan and comply with various prescriptive local content requirements. While these requirements are subject to review by the ACMA, they are nevertheless a throwback to media regulation of the kind not seen since the Australian Broadcasting Tribunal. Furthermore, a trigger event could occur in a wide range of situations. As a simple example, a trigger event includes a change of control. However, there are many situations in which a change of control can occur quite innocently, such as the death of a shareholder or a company restructure undertaken for entirely unrelated tax or accounting reasons, where there is no change in ultimate control. These are trigger events which would require the hapless regional radio licensee involved to comply with the new regime.

Conclusion

From the political sidelines it is easy to be critical of the new Act. As has been well publicised, it is a compromise and therefore highly compromised. Leaving to one side the policy debate of whether cross-media reform is a necessary or good thing, and the compromises themselves, it is very clear that the new Act is in many areas, complex. It will have reverberating effects and consequences – no doubt, some of which will be unforseen or unintended. That is usually good news for lawyers and various other advisers. However, it is also contrary to the policy objective of simple streamlined regulation, in which the role of regulators and therefore the advisory industry which grows up around them, is as unobtrusive as possible.

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Focus On Copyright

Fair Use and Copyright in Australia

In August 2006, the Attorney General, The Hon Philip Ruddock MP addressed the Communications and Media Law Association to set the scene for the amendments to Australia's copyright laws that ultimately came into effect in December 2006. The address provides an insight into the Federal Government's main concerns about the challenges digital media present for copyright regimes the world over. We have reproduced it here in full with the Attorney General's permission.

Fair Use and Copyright in Australia

Firstly, may I acknowledge the traditional owners of the land we meet on and pay my respects to their elders, both past and present.

I am delighted to be with you to talk about the changes we are making to copyright law.

Many of the issues we are facing are not new – copyright recognition in one form or another has been traced back to ancient times. Even the dark ages of Europe had the occasional dispute over the right to copy. For example, some of you may be familiar with the story of the dispute in the sixth century between two Irish monks – Abbot Finnian and Columba.

While accounts of the disagreement differ – not surprising after 1400 years – they agree on the key facts. Columba copied without permission a rare psalter of St Jerome belonging to Abbot Finnian thereby reducing its value. Abbot Finnian complained to the King. The King ruled Columba should hand over his copy to Abbot Finnian with the words: *"To every cow her calf and to every book its copy".*

According to some reports this was not the end of the matter – Columba's clan successfully contested the King's decision in a bloody battle in which thousands were killed. The controversy and resulting warfare doesn't seem to have irreparably damaged the reputation of either man. Columba apparently went on to live an exemplary life and both were canonized after death and were made Saints!

Happily copyright disputes today, even if vigorously contested, rarely result in bloody battles. But there's not a lot of saints around either!

Achieving a Balance

When Johannes Gutenberg developed the first commercial printing press around 1436 – he not only set the scene for an explosion in knowledge – he also unwittingly set in train the processes which have ultimately led to the issues facing us today.