Australian Media Ownership Controls: Where To Now?

Dr Martyn Taylor examines the recommendations made by the Australian Convergence Review Committee in relation to the ownership and control of media entities.

The Final Report of the Australian Convergence Review Committee (***ACRC***) recommended substantive reforms to Australia's media ownership controls. The proposed reforms involve the repeal of Australia's existing media diversity rules and their replacement with simpler tests based on local media diversity and the national public interest.

Australia's media ownership controls

Australian media ownership is currently subject to four key controls, each with a different policy objective:

- **Merger rules:** Acquisitions are prohibited if they have the likely effect of substantially lessening competition in an Australian market. The merger rules apply to all sectors of the Australian economy and protect against excessive concentration of market power, such power potentially capable of use to raise prices to the detriment of consumers.
- **Foreign investment rules:** Foreign persons must seek approval for media investments of 5% or more. The Commonwealth Treasurer can block foreign acquisitions that are not in the national interest. The foreign investment rules protect against foreign control of strategic domestic assets, such control potentially exercisable in a manner contrary to Australia's national interest.
- **Media diversity rules:** The existing media diversity rules are complex and are set out in the *Broadcasting Services Act 1992* (Cth) (***BSA***). The media diversity rules are more onerous than the merger rules, effectively trading-off economic efficiency for the perceived social benefits of diverse media ownership. The media diversity rules protect against excessive concentration of media influence, such influence potentially capable of use to manipulate public opinion and restrict freedom of expression.
- **Suitability rules:** The suitability rules are also set out in the BSA and are a weaker variant of the 'fit and proper person' tests of other jurisdictions. The suitability rules ensure that ownership of certain media assets can be prevented if there is a significant risk that the owner may contravene the BSA.

In its Final Report, the ACRC considered whether the media diversity rules and suitability rules should be amended to reflect changes in technology and business models associated with the convergence of media content and delivery platforms.

Concerns with the existing media diversity rules

Australia's existing media diversity rules are complex. Generally, no person may exercise control of:

- commercial television broadcasting (CTVB) licences in multiple CTVB licence areas, if the combined population of those areas exceeds 75% of Australia's population;
- more than one CTVB licence in the same CTVB licence area;
- more than two commercial radio broadcasting (CRB) licences in the same CRB licence area; or
- more than two of three specified media platforms in a CRB licence area, such platforms being CTVB, CRB, and any substantial local newspaper.

Similar rules exist for directorships in Australian media companies.

Under a complex points-based system, no fewer than five independent media operators are also permitted in a *metropolitan* CRB licence area and no fewer than four in a *regional* CRB licence area. This rule is known colloquially as the '4/5 rule'.

The ACRC identified two principal concerns with these existing rules:

- First, the rules focus on local broadcasting licence areas, yet this measure of media diversity is historic and decreasing in relevance. Many alternative media platforms exist beyond broadcasting involving content delivery at a national, even global, scale. The existing rules may impede realisation of greater efficiencies that could arise by consolidating some of these historic media platforms.
- Second, the existing rules do not recognise the diversity flowing from new media platforms, particularly Internet delivery. The rules similarly fail to recognise the important role of national newspapers and subscription television services. The inequitable treatment of these platforms may distort investment in favour of new media and may permit excessive consolidation that could be adverse to media diversity.

To address these concerns, the ACRC recommended various reforms to the media diversity rules.

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Reform of the media diversity rules

The ACRC recognised that media diversity rules are vital in ensuring the free flow of news, commentary and debate in a democratic society. Accordingly, the ACRC proposed the simplification of the media diversity rules rather than their outright repeal.

The ACRC recommended the adoption of two new rules applying at the national and local levels:

- **National public interest test:** While media delivery platforms have diversified, the underlying news and information content is often sourced from the same traditional national media outlets. The ACRC therefore proposed a new public interest test to preserve *national* media diversity. Only the most influential and nationally significant media content providers would be regulated.
- Specifically, a new Communications Regulator (replacing the Australian Communications and Media Authority) would be empowered to block any 'change in control' of a content service enterprise (CSE) of national significance that was not in the public interest. A CSE would be defined as a media organisation suppling professional content in its control to a large number of Australian users (>500,000 per month) and receiving a high level of Australian-sourced revenue from that supply (>$50 million per annum). A CSE would be of national significance if it supplied content services in multiple markets across more than one State or Territory.
- **Local minimum number of owners (MNO) rule:** The greater availability of national and global content can crowd-out locally sourced news and information. The ACRC therefore proposed the MNO rule to preserve *local* media diversity. Only the most influential CSE in local markets would be regulated.

Specifically, no influential local CSE would be permitted to have a dominant influence in a local market, subject to public benefit exemptions. Different dominance thresholds would apply to metropolitan

and regional local markets, based on a minimum number of owners over all media platforms. An influential local CSE would be a media operator that had editorial control over news and commentary supplied either to a minimum number of users, or reaching a minimum population percentage, in that local market.

How would a national public interest test be applied?

The use of a public interest test can involve challenges due to the inherent subjectivity of any such test. To mitigate such issues, the ACRC has recommended that guidance be provided as to how the test would be practically implemented:

- The test would focus on maintaining diverse content at the national level. Key factors would include whether a transaction would diminish the number of unique owners providing content or diminish the number of content services.
- Second, the existing suitability rules would be repealed and instead conflated into the new national public interest test. Another key factor would therefore be whether there was a significant risk that an owner of a CSE could not comply with its obligations.

We would expect a regulator to give greater weight to suitability where a market was more concentrated. To some extent, media diversity is a safeguard against the need for a more pervasive suitability test. If media ownership is diverse, there is less ability for any individual to have any disproportionate influence over public opinion. Accordingly, in a diverse market there is less need to screen for suitability because any media owner that is 'unsuitable' will have little influence.

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How would a local market be defined?

A key issue in the application of the new MNO rule is the definition of a local market. A list of local markets will ultimately be determined by the new Communications Regulator and updated from time to time.

The 'local market' concept proposed by the ACRC is conceptually different from the 'market' concept used in competition law. For the media diversity rules, the relevant concept is media *influence* not market power:

- The product scope of a local market is straightforward to predict. The ACRC implicitly assumes that all forms of news and commentary exert influence, hence co-exist in the same market, irrespective of the media platform. A local market therefore covers all media delivery platforms.
- The geographic scope of a local market is more difficult to predict. The ACRC recommends adoption of the historic planning criteria used to determine broadcasting licence areas. While these criteria give significant discretion to ACMA, this discretion has normally been exercised in favour of the geographic status quo. A status quo approach would mean that the new local markets would be strongly influenced by existing broadcast licensing boundaries. A key issue would be how the new regulator would reconcile the (many) CRB licence areas with the (few) CTVB licence areas. Ultimately, we would expect local markets to reflect a geographic compromise between CRB and CTVB licence areas.

Can media diversity be addressed by merger rules alone?

One argument directed at the ACRC during its review was that media diversity rules should be repealed entirely and merger rules alone should be relied on to ensure sufficient media diversity.

In most instances, merger rules do indeed ensure continued media diversity. An acquisition in a concentrated media market may lead to both excessive market power and media influence, hence may be prevented by both merger rules and media diversity rules. However, the different policy objectives of merger rules and media diversity rules mean that they do not always perfectly align.

When applying the merger rules, the ACCC is normally restricted to considering market power effects. Media diversity and suitability are irrelevant considerations in most merger analysis. Accordingly, the ACCC could permit an acquisition because it did not substantially lessen competition, even though it removed an important independent voice.

By way of example, a large media outlet may seek to acquire a small media outlet that is also an important and independent voice. The small outlet may not materially constrain the market power of the larger outlet. The ACCC may permit the acquisition, notwithstanding that the larger outlet subsequently exercises editorial control over the smaller outlet and removes its independent voice.

What is the likely practical impact of the reforms?

If the proposed changes to the media diversity rules were implemented, we would expect the level of regulation imposed on 'traditional media' to decrease, while the level of regulation imposed on 'new media' would increase.

The removal of the existing diversity rules will generally have four key effects on traditional media:

- First, greater aggregation of commercial radio stations will be permitted.
- Second, common ownership of commercial television stations may be permitted, subject to the merger rules and the national public interest test (involving considerations whether other media platforms are sufficient to ensure continued media diversity).
- Third, greater cross-media ownership of radio, television and local newspapers will be permitted, particularly if the geographic parameters of a "local market" are increased.
- Fourth, metropolitan television stations may merge with regional television stations to achieve greater national population coverage.

The enactment of new diversity rules will in theory increase the level of regulation applied to 'new media' (such as Internet delivery and subscription television), but the practical impact of any such increase in regulation is lessened by the simultaneous regulatory recognition of a much greater diversity of different media owners and platforms:

- A 'new media' provider will become subject to regulation if it has editorial control over news and commentary supplied to a minimum number of users, or reaching a minimum population percentage, in a local market. In such circumstances, the new media provider could be restricted from acquiring too many other independent sources of news and commentary in that local market.
- A 'new media' provider may also become regulated if it became a CSE that supplied content services across multiple States or Territories. In such circumstances, the CSE would become subject to the national public interest test, involving potential considerations of suitability as well as restrictions from acquiring too many other sources of nationwide content, news or commentary.

However, in both cases restrictions may only arise in practice if the relevant local or national market already has concentrated cross-media ownership and insufficient media diversity.

Conclusions

While the proposed reforms to the media diversity rules have been criticised by some quarters, the reforms are widely recognised as long overdue. While some key issues remain to be resolved, the proposed reforms are sensible and appear to strike an appropriate balance between efficiency and media diversity. If implemented, the reforms should ensure Australia is better placed to appropriately regulate convergent media content in a 21st century broadband world.

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