



Broadcasting Services Amendment (Media Ownership) Bill 2006

Rhonda Jolly
Social Policy Section

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Broadcasting Services Amendment (Media Ownership) Bill 2006

Date introduced: 14 September 2006

House: The Senate

Portfolio: Communications, Information Technology and the Arts

Commencement:

Schedule 1 Sections 1-3 and anything in the Act in addition to Schedules 1, 2 and 3 on 1 February 2007. Schedule 2 on Proclamation or if provisions do not commence before 1 January 2008, on that date Schedule 3 on 1 January 2009

Purpose

To implement new cross media ownership and foreign media ownership laws.

Cross-media ownership

The Bill permits cross-media mergers in radio licence areas where sufficient diversity of media groups remains following the mergers. At least five separate media groups will be required to remain in mainland State capitals and four groups in other licence areas following merger activity.

Foreign ownership

The Bill removes broadcasting specific restrictions on foreign investment in Australia's media sector. The media will remain a sensitive sector under Foreign Investment Policy, the *Foreign Acquisitions and Takeovers Act 1975*¹ and the Australia–United States Free Trade Agreement.²

Schedule 1 to the Bill amends provisions in the *Broadcasting Services Act 1992*³ (BSA) to:

- permit transactions involving commercial radio licensees, commercial television licensees and associated newspapers, including cross-media transactions, to occur subject to there remaining a minimum number of separately controlled commercial media groups in the relevant licence area;
- exempt commercial television and radio broadcasting licensees operating outside the broadcasting services bands of spectrum from media ownership and control provisions; and

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- require cross-media mergers and acquisitions involving a commercial radio licence, a commercial television licence and an associated newspaper in the same licence area outside mainland state capitals to obtain clearance from the Australian Competition and Consumer Commission (ACCC) prior to the transaction.

Schedule 2 to the Bill amends the BSA:

- to remove all provisions in the BSA that restrict foreign ownership of commercial television and subscription television interests;
- to subject commercial television and radio licensees and newspaper publishers with cross-media interests to disclosure obligations;
- to require the Australian Communications and Media Authority (ACMA) to impose licence conditions on commercial television licensees in regional Queensland, NSW, Victoria and Tasmania to provide minimum levels of content on matters of local significance;
- to require ACMA to impose licence conditions on regional commercial radio licensees to maintain existing levels of local presence if the licence is transferred to a third party, if a new commonly-controlled media group is created or if control over the licence otherwise shifts (a trigger event); and
- to subject regional commercial radio licensees to local content obligations if a trigger event occurs.

Background

Basis of policy commitment

Constitutional control

Powers to control media activities are specifically derived from the Commonwealth's power to make laws with respect to electronic communications under section 51 (v) of the Constitution⁴ and are contained in the BSA. This legislation allows the Commonwealth to impose prescriptive conditions on broadcasting licences, but control over print media is largely limited to other more generic controls in relation to commercial activities under sections 51(i) and 51(xx)⁵ of the Constitution. These controls, which can also be applied to broadcasters, are contained in Acts such as the *Trade Practices Act 1974*⁶ and the *Foreign Acquisitions and Takeovers Act 1975*.

Policy development

The BSA, introduced under the previous Labor Government, represented a significant reform of the *Broadcasting Act 1942*, imposing a regime of regulation on the ownership and control of commercial radio and television broadcasting licences. Subsequent amendments to the BSA were also made under the previous government.

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Summary of current media ownership controls

Current controls over media ownership contained in the BSA are:

Television

Section 53: A person must not control television broadcasting licences whose combined licence area exceeds 75 per cent of the population of Australia, or more than one licence within a licence area;⁷

Foreign persons must not be in a position to control a licence and the total of foreign interests must not exceed 20 per cent.⁸

Section 55⁹ sets limits on multiple directorships and section 58¹⁰ on foreign directors.

Radio

A person must not be in a position to control more than two licences in the same licence area.¹¹

Multiple directorships are also limited under section 55.

Cross-Media Control

Under section 60¹² a person must not control:

- a commercial television broadcasting licence and a commercial radio broadcasting licence having the same licence area;
- a commercial television broadcasting licence and a newspaper associated with that licence area; or
- a commercial radio broadcasting licence and newspaper associated with that licence area.

Section 6 of Schedule 1 of the BSA provides a simple ‘15 per cent’ rule for establishing whether a person has control of a company. If a person has interests in a company exceeding 15 per cent, then in the absence of proof to the contrary, the person is deemed to be in a position to exercise control of the company.

There are also similar limits on cross-media directorships.

Subscription Television Broadcasting Licences

A foreign person must not have company interests exceeding 20 per cent in a broadcasting subscription licence, and the total of foreign company interests in any licence must not exceed 35 per cent.¹³

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Foreign Investment Controls

There are a number of controls on foreign investment in the media in addition to those contained in the Act. All (non–portfolio) proposals by foreign interests to invest in the media sector, irrespective of size, are subject to prior approval under the Government’s Foreign Investment Policy. Proposals involving portfolio share holdings of five per cent or more must also be approved.

The maximum permitted aggregate foreign (non–portfolio) interest in national and metropolitan newspapers is 30 per cent, with a 25 per cent limit on any single foreign shareholder. The aggregate non-portfolio limit for provincial and suburban newspapers is fifty per cent.

Government policy position

Since its election in 1996, the Government has made it clear it considers Australia’s media ownership rules anachronistic. However, prior to the 2001 election it considered it futile to attempt a media reform agenda without the support of the Opposition.¹⁴

In March 1999, however, the Government sought advice from the Productivity Commission ‘on practical courses of action to improve competition, efficiency and the interests of consumers in broadcasting services’.¹⁵ In a Report published in 2000, the Commission recommended that foreign investment in broadcasting should be handled under Australia’s Foreign Investment Policy, that specific media controls in the BSA should be repealed and that the prohibition on owning more than one television licence, or more than two radio licences, in the one licence area should be removed.

The Commission also recommended the repeal of cross–media rules¹⁶ but only once certain conditions were met:

- removal of regulatory barriers to entry in broadcasting, together with the availability of spectrum for new broadcasters;
- abolition of BSA restrictions on foreign investment, ownership and control; and
- amendment to the Trade Practices Act to provide for a media-specific public interest test to apply to mergers and acquisitions.

On 21 March 2002, the Government introduced the Broadcasting Services Amendment (Media Ownership) Bill 2002.¹⁷

The purpose of this Bill was:

- to remove restrictions on the foreign ownership and control of commercial and subscription television and to discontinue newspaper specific restrictions under general foreign investment policy;

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- to grant exemptions to cross media rules subject to the application of a public interest test to be administered by the (then) Australian Broadcasting Authority (ABA).

The public interest test involved giving undertakings to retain separate and distinct processes of editorial separation amongst the outlets making up a set of media operations; and in the case of regional radio and television, to ensure that minimum levels of local news and current affairs were provided.

The Bill was referred to the Senate Environment, Communications, Information Technology and the Arts Legislation Committee, which agreed with the principle that ‘complex, inflexible and tightly focussed’ media ownership regulation should be modified, subject to certain amendments. These related to the public interest test and regional content. The Committee considered that the public interest was better protected by a disclosure requirement of commercial interest where co-ownership existed under a cross-media exemption.

In relation to regional markets the Committee recommended that cross-media exemptions should only be allowed in relation to proposals that could result in a media company having cross-ownership in only two of the three generic categories of newspapers, radio and television. It also made recommendations to promote regional news and current affairs coverage and to encourage disclosure of cross-media interests.¹⁸

The Government accepted the Committee recommendations and introduced the Broadcasting Services Amendment (Media Ownership) Bill 2002 (No 2),¹⁹ which incorporated the changes. The Bill was passed by the House of Representatives in December 2003 but it had not been approved by the Senate and lapsed when the 2004 Federal Election was announced.

Election commitment

The Government’s broadcasting policy for the 2004 election restated its commitment to the reform of media ownership regulation. The relevant sections of the election policy on broadcasting stating:

- The Coalition is committed to a twenty-first century media ownership regime that gives all media organisations maximum opportunity to grow and offer a wide array of innovative services to the Australian public.
- 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 the Foreign Acquisitions and Takeovers Act.²⁰

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While some negotiation took place following the election with ‘balance of power senators’ to attempt to introduce a revised media reform bill prior to July 2005 when the Government gained a majority in the Senate, by the end of 2004 this approach to media reform had been abandoned.

Discussion paper

On 14 March 2006, the Minister for Communications, Information Technology and the Arts, Senator Helen Coonan, released a discussion paper on media reform options.²¹

The paper proposed removal of the media-specific foreign ownership rules in the BSA as well as newspaper-specific foreign ownership restrictions in the Foreign Investment Policy under Foreign Acquisitions and Takeovers Act. The media was to continue to be considered a ‘sensitive sector’²² under the Foreign Investment Policy. Proposals by foreign interests to invest directly in the media sector, irrespective of size, would remain subject to prior approval by the Treasurer.

It also proposed that cross-media rules would be amended to allow cross-media transactions to proceed, subject to there remaining a minimum number of commercial media groups in the relevant market (four in regional markets, five in mainland state capitals). It proposed that existing limits on broadcasting licences would be maintained with a maximum of two commercial radio licences in a radio licence area; one television licence in a licence area and no more than 75 per cent national television reach. Public disclosure would be required when media outlets reported on activities of cross held entities. The ACCC would separately assess the competitive impacts of transactions, in accordance with the requirements of the Trade Practices Act.

The paper allowed for continued requirements for minimum levels of content on matters of local significance in key regional commercial television markets.

Policy justification

The Government argues that the current media regime is ‘strongly prescriptive’ and that it ‘creates an inflexible regulatory framework’ which cannot account for changes in the media industry or for the impact of the emergence of new media on the market and consumer behaviour.²³ Proposed changes to the BSA will address these types of problems while maintaining a number of safeguards to promote a diverse range of services.

Industry

The Government’s view is that the proposed changes will be advantageous to the media industry allowing it to pass on benefits to consumers.

It argues that the lifting of restrictions on cross-media ownership will allow companies to access economies of scope that may be derived from mergers as well as capital

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management and expertise from other media sectors. Lifting foreign ownership restrictions will provide Australian companies with access to foreign capital, opportunities to integrate into global markets and improve capacity to adopt new technologies.

Additionally, current foreign ownership and control provisions are inconsistent and have not been effective in maintaining Australian control of television and newspapers. Lifting foreign ownership restrictions in the television sector, which are currently inconsistent with regulation of the radio industry, will allow the television sector not only to access foreign capital, but it will also encourage the sector to pursue innovation and efficiency gains.

The Government argues that provisions under Foreign Acquisitions and Takeovers Act will ensure that proposals for investment remain consistent with Foreign Investment Policy and serve the national interest. The media will remain a sensitive sector under the legislation and final decisions on media foreign investment proposals will rest with the Treasurer.

In effect, the Government sees the foreign ownership and cross-media restrictions as limitations on investment and impediments to innovation in Australian media which consequently undermine an important objective of the BSA; to provide a regulatory environment that aids the development of the industry.²⁴ It is also concerned that current regulations are inconsistent with competition policy that requires uniformly applied rules to all forms of business.²⁵

Further, the Government considers that the current regulations do not take into consideration the fact that the proliferation of new media has eroded any basis for maintaining specific ownership restrictions. The current regulations target 'specific platforms', restricting their ability to compete against the unrestricted, extensive and growing sub-sectors of news and information available to consumers.²⁶

The argument for continuing foreign ownership restrictions because Australian media proprietors are more likely to provide content of relevance to Australians than foreign owners is also not justified, according to the Government. It cites Productivity Commission findings that all media proprietors respond to commercial imperatives, local content regulation and competition from other sources to deliver programming particular audiences want, and that it is possible foreign owners may be less likely to interfere in local content or have clashes of interest than Australian owners, as justification for this stance.²⁷

Consumers

The Government considers the legislation will not deny diversity to consumers in the delivery of media services, which it considers generally, will be maintained through the provision of a range of broadcasting categories including public broadcasting, community broadcasting and narrowcasting. Specifically, it believes that any threats to local content

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for rural and regional areas which may occur as a result of the legislation will be addressed through local content obligations.

It also sees the removal of restrictions as providing benefits to consumers by increasing ‘the pool of potential media investors’ arguing that this will prevent media concentration and provide greater opportunity for diversity of opinion.²⁸

Specific provisions for regional broadcasting

The problems associated with maintaining local regional programming in a changing media environment became obvious following the introduction of ‘aggregation’ in the late 1980s. Aggregation was introduced by the *Broadcasting Amendment Act 1987* and involved creating larger, more commercially viable regional television markets by combining existing licence areas. When aggregation was introduced it was argued that larger service areas would provide opportunities for licensees to expand and develop regional content and that viewer preference would provide an incentive for regional licensees to produce local programs.

This did not eventuate, however, with a 2001 House of Representatives Standing Committee on Communications, Transport and the Arts drawing attention to the decline of local radio programming²⁹ as various communities raised concerns following the closure of television news services in a number of regional areas.

A subsequent ABA investigation concluded that there was legitimate community concern about the lack of competition and diversity in regional media and markets. In moving to address these problems, in 2003, the ABA imposed the additional licence condition on regional broadcasters that minimum amounts of local content were to be broadcast in aggregated areas.³⁰ By September 2004 it appeared that commercial broadcasters had met local content quotas and some had substantially exceeded the requirements.³¹ It appears the Government is satisfied these arrangements will provide sufficient ongoing local content as it only intends to formalise the existing arrangement under the proposed legislation.

At the same time the Government acknowledges the removal of cross-media ownership restrictions ‘may lead to the diminution of levels of local content’,³² but it intends only to impose additional content requirements on regional radio licensees that change ownership.

The Government argues this will strike an appropriate balance ‘between meeting community concerns about levels of local content on regional radio, and imposing potentially costly local content obligations on regional radio licensees’.³³

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Position of significant interest groups/parties/media

Industry position-- Media owners

Media proprietors have for some time expressed the same opinion of the current media regulations as is expressed in the Government's justification of the reform under this legislation. They have argued reform will enhance efficiency in their industry and assist them to combat their increasing irrelevance as the result of the rise of the new media.³⁴

Proprietors have also argued that removal of foreign ownership restrictions would improve access to capital, increase the pool of potential media owners and that this would act as a safeguard on media concentration. One media group argued before a Senate Committee that a more commercial and practical approach is now required to the modern media environment. It considered that while cross media ownership rules were originally intended to deliver diversity of ownership and opinion, the 'strategic behaviour of industry participants across traditionally separate market sectors means that the rules are no longer suitable to deliver this key outcome'.³⁵

Clearly, the proposed legislation reflects these perspectives. The Government delivering a consistently similar argument to the media that the legislation will deliver efficiencies in the industry to allow it to cope with the rise of new media, while at the same time providing opportunities for the industry to access investment capital and partnerships.

Initially, most of the media welcomed the media ownership proposals with the general view being that the changes would deliver the desired increases in efficiency, competitiveness, flexibility and diversity, while allowing media companies to grow and compete better.

Notably, News Corporation argued from the outset that the ownership changes would distort the market and reduce diversity³⁶ but it is most likely that this criticism was motivated by the lack of benefit the reforms will deliver to the Foxtel pay television network which is part of News Corporation's television operations.³⁷

There has been a significant turnaround in media support for the proposed legislation, however. In July 2006, Fairfax considered the media ownership reforms would strengthen the media industry and the diversity of media as well as provide opportunities for strategic growth,³⁸ but by September this view had altered; Fairfax Chief Executive Officer, David Kirk remarking that the proposed changes were neither in the interests of the media industry nor media diversity.³⁹ Much of the criticism has stemmed from a belief that free-to-air television gains an unfair advantage resulting from the Government's decisions to allow free-to-air networks to bid for one of the two new digital television channels the Government will auction in 2007,⁴⁰ rather than from a change in attitude to removing ownership restrictions.⁴¹

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Industry position–Journalists

Certain commentators in the media have also been effusive in their praise for the idea of lifting media ownership laws with some arguing the industry would certainly be ‘better off with less regulation’.⁴² Since the announcement of the proposed changes, however, other commentators have been more cautious. Matthew Ricketson in the *Age* making the pertinent point that the argument that a variety of ownership in the ‘blogosphere’ does not necessarily mean that media regulation is redundant;⁴³ and similarly, Graeme Phillipson has rebutted the Government’s claims the legislation will allow the media to move into a dynamic world of digital content.⁴⁴

Journalists such as Brian Toohey have also noted the important argument that news collecting is a difficult, costly and labour intensive task, which it is likely that Internet bloggers would not be able to undertake effectively. Tellingly, Toohey has argued ‘there is scant reason to believe (new media technologies), or (the Government’s) rules changes, will empower consumers, let alone weaken governments and media giants’.⁴⁵

A Roy Morgan survey found that 82 per cent of Australian journalists believe changes to the media laws will impact negatively on the integrity of reporting and 85 per cent consider they will reduce diversity. A majority of journalists (71 per cent) believe Australian media companies/owners have too much influence in determining the political agenda.⁴⁶

Position of political parties

Australian Labor Party

Labor has consistently questioned the proposed legislation, arguing it will result in massive media concentration, which will not be in the public interest. Labor spokesperson for communications, Senator Stephen Conroy, arguing:

Media reform genuinely focused on consumers would protect diversity, promote competition and enhance consumer choice. Measured against these criteria the Government’s media package comes up well short... The proposal would inevitably narrow the range of news and opinion available to the public... Some argue that the emergence of new media renders the ownership restrictions irrelevant. Although it is true that digital technology has led to a proliferation of platforms the sources of the most influential content remain the traditional media companies... While there are thousands of blogs, their influence is minuscule in comparison.⁴⁷

Senator Conroy has also questioned if the ACCC will have sufficient power under the legislation to stop media mergers and argued that the timeframe for scrutiny of the legislation was inadequate.⁴⁸

The ALP expressed concern about the inadequacy of local content provisions⁴⁹ and the threat posed to Australian democracy by the legislation.

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Australian Democrats

Democrats' leader Lyn Allison noted in July that her party agreed some media reform was needed, but that she thought changes the Government may introduce would lead to a concentration of media ownership, which in turn would be a problem for diversity and freedom for journalists to critique governments. She saw grave dangers in how media voices would be defined under the legislation, was concerned that the ACCC did not have sufficient powers to control the merger process and believed a public interest test on mergers should be included in the legislation.⁵⁰

The Democrats' media spokesperson Andrew Murray was unconvinced that the proposed changes would be beneficial for democracy, noting that the Government had no evidence to support the assertion that reform would not lead to a concentration of the media market, and that there were insufficient safeguards in the legislation. Murray called for a strengthening of the Trade Practices Act and the imposition of a public interest test.⁵¹

Australian Greens

The Australian Greens leader, Senator Bob Brown criticised the removal of foreign ownership regulation in the proposed legislation as detrimental to democracy.⁵²

Family First

Family First's Senator Steve Fielding has made no public statements on the proposed legislation, but has been reported as being concerned about the extent to which safeguards in the legislation will be effective and the potential impact of the reforms on rural and regional media.⁵³

National Party

A number of National Party members have publicly expressed concern that localism, diversity and competition in rural and regional areas will be lost unless changes are made to the proposed legislation. The Nationals' changes would involve varying the requirement that four media groups remain in regional areas following media merger activity, restricting mergers so that companies could control only two of the three main media formats in regional areas.

The capacity of the ACCC to deal adequately with rural media issues has also been an issue leading to the suggestion that guidance on mergers and other matters should be included in the legislation and not left to the discretion of the ACCC (and ACMA).⁵⁴

While some Nationals have couched their concerns about the legislation in terms of a fear of the threat posed to democracy, it appears that there is no clear ideological objection to the legislation within the party.

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Interest and consumer group position

The Australian Consumers' Association and the Consumers Federation of Australia have made little public comment on the proposed legislation. In July the view was advanced that the Government's media reforms in relation to digital television were putting the interests of media owners ahead of consumers⁵⁵ and in September the general manager of policy at the Australian Consumers' Association, argued the reforms should do more to open the market to new players.⁵⁶

Australian Competition and Consumer Commission position

The ACCC released a paper in August 2006 which was intended to provide guidance about its role under the proposed legislation.⁵⁷

Under section 50 of the *Trade Practices Act 1974*, the ACCC would investigate proposed mergers to determine if they substantially lessen competition. In so doing it would consider the impact of media mergers on market concentration, on the number and market share of media outlets in a market and whether a merged media business could exercise market power by reducing the quality of the content it provides consumers, which could include reducing the diversity of the content.

In undertaking its consideration the ACCC would also, among other things, assess the ability of new players to enter the market.

As section 50 of the *Trade Practices Act* specifically requires the ACCC to consider the impact of proposed mergers on markets in regional Australia, it would take into account the differing circumstances in rural and regional Australia compared with urban areas.

The ACCC paper acknowledged that unique characteristics of the media sector would need to be identified, considered and weighed when determining whether a merger is likely to lessen competition substantially.

As a fundamental part of assessing media mergers, the ACCC would base its assessment on what a market would likely look like in the foreseeable future and as markets evolve so it would change its analysis to ensure that media mergers would not be hindered based on speculation about future technological development.

The ACCC would consider the following main assessment categories: the supply of advertising opportunities to advertisers and content to consumers and the acquisition of content from content providers as well as more specific products, such as premium content; classified and display advertising; and the delivery of news, information and opinion.⁵⁸

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Public reaction

A Roy Morgan Survey conducted in August 2006 noted that the reform package has failed to attract the support of Australians. A small majority of Australians (52 per cent) oppose the plan to drop cross-media restrictions, while a clear majority of Australians (64 per cent) oppose the plan to relax foreign ownership restrictions.⁵⁹

About one-third of Australians (36 per cent) believe changes to the media laws will have a negative impact on the integrity of reporting (only 14 per cent see it as positive), while thirty five per cent say the reforms will reduce diversity (17 per cent say diversity will increase).⁶⁰

Pros and cons

Pros

The essential argument in favour of deregulation in media ownership control is that it will address the declining interest in news and current affairs presented by the traditional media, which may be linked to a growing distrust of political and media institutions.

It is claimed that as people think the traditional media is ‘biased, inaccurate and unprofessional’, they are doing something about it. They have become ‘news grazers’ across all types of media, often using multiple sources of media simultaneously to assemble their own package of information, particularly by passing traditional sources. People’s news interests have also changed; they want news on health, hobbies and entertainment that traditional media are not providing.

The ‘news lectures’ of the traditional media are giving way to ‘news conversation’ also. Through blogs, people can share their perspectives and through citizen websites, user generated content or citizen journalism is emerging. This type of journalism is seen as adding value through citizen participation within trusted communities.⁶¹

As one blogger notes:

I can write about anything. I can write opinion. I can report facts. I can ask questions. I can jump from topic to topic to topic. Sports, the NBA, business, personal experiences, technology, movies, entertainment, hdtv, whatever I want to write about. One minute I’m a reporter, communicating what happened and where, the next I’m an opinion columnist. The next I’m op-ed, punching or counter punching someone in traditional media, just to see if they can take a punch as well as they can throw one.⁶²

Deregulation of the traditional media as an imperative for a world where consumers are demanding media on their terms, will ensure that traditional media companies can address consumer concerns. The traditional media will be able to transform their culture, operations and strategic thinking to respond to new market demands.

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At the same time as the proposed legislation will assist traditional media owners to counter and incorporate changing patterns of media usage, it is argued it will also potentially deliver more diversity of opinion in the traditional market. This will open up the concentrated media market that currently exists in Australia, while ensuring that the public interest is protected through legislative instruments and the Foreign Investment Policy.

Additionally, according to some commentators, there is no need for concern as smaller companies in the information and communications industries are taken over. The situation does not necessarily equate to less competition and more concentration because ‘the average size of the fish is growing, [and] so too is the overall size of the pool they are swimming in. This means the degree of market concentration may not be getting larger and may even be shrinking’.⁶³

Cons

Diversity and Democracy arguments

Democracy

A number of arguments raised in relation to the proposed media reforms, and the relaxation of media regulations generally, have essentially focussed on the possible threat they pose to democracy.

Specifically, critics such as former Prime Minister, Paul Keating, mount arguments that the reform to Australian media ownership rules could concentrate power in the hands of a few media owners and so potentially limit free speech, and as such, they are not only a threat to democracy but also to cultural diversity.⁶⁴

Contrary to the Government’s view that the media should be treated like any other commodity, a significant body of thought is that careful regulation of the media is so crucial to the functioning of a democratic society that it must not be treated like any other market participant. Underpinning this argument is the persuasive belief that:

Access to information is essential to the health of democracy for at least two reasons. First, it ensures that citizens make responsible, informed choices rather than acting out of ignorance or misinformation. Second, information serves a “checking function” by ensuring that elected representatives uphold their oaths of office and carry out the wishes of those who elected them.⁶⁵

The threat to democracy from deregulation of the media can be seen as coming from an inevitable concentration of media ownership on a global scale and the consequent promotion of uniform content and values that undermine differences in cultures, ignore minority voices and, at the best trivialise important issues. They cite scenarios where the monopolistic media are completely unaccountable and unwilling to present any information that may be damaging to their advertisers or interests they may wish to promote.

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These critics already see the results of media concentration in markets such as the United States, where it is argued public affairs reporting and local programming have declined as media companies have consolidated and grown so that communication is dominated by a few large entities. News reports, it is argued, are consequently biased or suppressed if they do not appear to serve the interests of these companies, which also interfere to ensure programming is 'suitable'.⁶⁶

Others support this argument that as owners of the media influence media content through employment of personnel, funding projects, and by providing a platform for interest groups, once the inevitable conglomerates emerge from a deregulated media environment 'a small group of powerful owners [will] control what is read by the population, what people see and hear—or do not read, see and hear'. The consequent question is: How can democracy function if information that people rely on to make political and social decisions is tainted by the influence of mega-media?⁶⁷

Diversity

A variant of the argument that democracy is threatened by the removal of media regulation is that diversity of sources and opinion will disappear with the removal of existing media regulations. Comment is the case to repeal media ownership laws is based on a flawed assumption that new media sources will guarantee a diverse range of opinion that will be freely available and exchanged in these new forums.⁶⁸ According to this argument, the new media do not enhance diversity, as they too are controlled by the traditional media.

Proponents of this argument have pointed out that the only significant new Australian news service provided by pay television operators is Sky News Australia,⁶⁹ which is owned by the existing networks, Seven and Nine, and British Sky Broadcasting. The latter is 40 per cent owned by News Corporation.

Roy Morgan research also indicates that the most popular Internet news sites are controlled by existing media operators; Fairfax, News Ltd, Channel Nine and the Australian Broadcasting Commission making up the top four. The news arm of the Internet portal Yahoo is a distant fifth.⁷⁰ The only major new operator in Internet news is Telstra Corporation. However, Telstra's new service consists of AAP news stories. AAP Information Services is jointly controlled by News Ltd and Fairfax.

Recent surveys and polls point to the continuing importance of free-to-air television, newspapers and radio, particularly for coverage of national politics and current affairs. For example, a Morgan Poll conducted in December 2005 revealed that for coverage of events in Australia, 56 per cent of people used free-to-air television, 18 per cent turned to radio and 11 per cent turned to newspapers (a total of 85 per cent). For coverage of political background and analysis of events in Australia, 41 per cent turned to free-to-air television, 27 per cent turned to newspapers, and 13 per cent turned to radio (a total of 81 per cent).⁷¹

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So while there is evidence to indicate a decline in utilisation of traditional sources of media as people turn to the Internet and pay television for entertainment and other types of information,⁷² there is a corresponding indication that people continue to turn to traditional sources for current affairs information and analysis.

Further to the diversity argument, the Productivity Commission broadcasting inquiry concluded that media proprietors' business and editorial interests may influence the content and opinion of their media outlets. So it is in the public interest in ensuring diversity of information and opinion and in encouraging freedom of expression in Australian media that there are more media proprietors. This is particularly important given the wide business interests of some media proprietors.⁷³

The Commission also noted that it was not necessary for proprietors to be heavy-handed about what was acceptable editorial content. So should more media concentration result from deregulation of media ownership, not only will diversity of opinion be lost, but what opinion and critique that remains will most likely be subject to subtle influences which will ensure that what is reported and how it is reported reflect the interests of the remaining, more powerful media owners.

Other issues

The role of the regulators—The Australian Competition and Consumer Commission and the Australian Communications and Media Authority

There is a question about whether the ACCC and ACMA will be able to fulfil the respective roles of regulator and decision maker adequately under this legislation.

It is clear that the ACCC has powers relating to the investigation of mergers under section 50 of the Trade Practices Act, but it is not clear what will be the consequences under the new regime of the media being considered simply as another market sector. The ACCC notes in its August 2006 report on media mergers that it will consider the unique characteristics of the media in making decisions regarding competition, but this assurance is couched in terms of competition policy alone and does not take into account the distinctly pivotal role for the media in a healthy democracy that does not apply to other business sectors. Indeed, it could be argued that such a role is not appropriate for an agency. It appears the media's role in providing information, analysis and a variety of considered opinions to assist people in understanding and participating in social and political life may be just another category to be considered in assessing competition. Or if the framework set out in the ACCC's report is any indication, not a consideration at all as the framework concentrates on the characteristics of product relevance, geographic and functional dimensions of a market and whether mergers will lessen competition in the foreseeable future.⁷⁴

So while it will be necessary under the legislation to notify the ACCC, for example, of three way, cross media mergers, approval of these mergers may not take into consideration

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effects such as the diminution of the number of viewpoints in a particular area as the result of syndication of news and information over television radio and newspaper services.

Equally, under the proposed legislation, ACMA's discretionary power over the media landscape is likely to increase. Although there is provision in the legislation for the Minister to be able to direct ACMA to undertake certain tasks and to take into consideration certain matters in making decisions, it appears that ultimately those decisions will remain with ACMA. The Government argues this will ensure independent assessment and process,⁷⁵ but again it could be questioned whether a regulator should be given the interpretative power to make assessments that may impact significantly on the functioning of democratic processes. Under section 61CC of the legislation ACMA is able to define what is meant by local, which in itself may be open to subjective interpretation. Certainly it is difficult to see how some subjectivity cannot be present in many of the areas where ACMA will be given discretion to make decisions - about whether radio broadcasting local content plans actually provide sufficient local content, or if local news bulletins actually adequately reflect local issues.

Public interest test and the issue of voices

There is an anomaly in the fact that the ACCC and/or ACMA will not be granted similar interpretative powers under a public interest test. After concluding that provisions in the Trade Practices Act were insufficient to address public interest considerations, in its 2000 report on broadcasting, the Productivity Commission suggested that a public interest test could be applied to media mergers 'at least until such time as competition among media firms can be adequately addressed under mainstream competition law'.⁷⁶

While the Commission did not suggest the format of an actual test, it did note that a clear definition and guidelines would be needed to ensure the continuance of diversity of opinion and sources and that the ACCC could administer such a test on recommendations from ACMA. The Communications Law Centre (CLC) made a similar point about the need for, and desirability of a public interest test in the context of criticism of the ACCC's approach to regarding all media content as 'digital data, rather than as a qualitative entity that can result in deep dissatisfaction within the community'.⁷⁷

The Government dismissed the inclusion of a public interest test as part of the media ownership legislative package because it considered that subjective judgement by an individual or organisation will inevitably occur in deciding what constitutes the public interest and that this would create uncertainty for industry.⁷⁸

Including some form of public interest test may, however, have been able to help in allaying concerns about issues such as what will constitute a media voice in a deregulated media marketplace. The proposed legislation requires that no less than five media groups remain in mainland state capitals and four in other areas following the removal of ownership restrictions. Media groups are defined as groups of two or more operations, with operations meaning a commercial television broadcasting licence, or a commercial

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radio broadcasting licence or a newspaper associated with a commercial television licence or a commercial radio broadcasting licence (section 61AA).

However, there is no account in the legislation for the differing corporate profiles of operations within groups. An operation could therefore be defined as a small community radio station, a broadcaster that simply provides racing information or a major metropolitan newspaper or television station. All are considered equal; but all are patently not equal. As the CLC recognises, the outcome of a situation where all operations are treated as equal, however, is likely to be that certain mergers may result in ‘damage to the public sphere’. A test could be developed which would help to ensure diversity by more fairly assessing what the CLC labels as ‘clout’, that is, the potential and/or real influence of media operations, by identifying the ‘mergers that matter’.⁷⁹

Additionally, in regional areas where the audience of the public broadcaster, in its various guises, often reaches over 30 per cent,⁸⁰ it is in the interests of diversity, as noted further below, for this voice to be enhanced to encourage the expression of political and social opinion and debate.

The following table illustrates the extent of media concentration and the lack of diversity of sources of opinion already apparent in the two largest mainland capital media marketplaces. Other mainland capitals exhibit similar media concentration, which existing legislation has failed to prevent. It is unlikely the central media ‘players’ in these markets will withdraw following deregulation and/or that an era of independent ‘voices’ of opinion will begin. The probability is that the opposite will occur, as significant media operations vie to consolidate and expand their interests.

Sydney Media⁸¹

	Owned by	Major shareholders	Ratings % Circulation (approx)
Radio			
2CH (Easy listening)	Macquarie Radio Network Ltd	John Singleton/Mark Carnegie/Alan Jones	(Nielsen Survey June 25 – Sept 2 2006) 5
2GB (News/Talk)	* (* Denotes as above)	*	13
2Day (New music)	Austereo	Village Roadshow (Kirby family)	9.7
2MMM (Rock music)	*	*	8.6
2SM (News/talk)	Broadcast Operations P/L	Bill Caralis	NA (Not available)

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	Owned by	Major shareholders	Ratings % Circulation (approx)
2SYD (New music)	DMG radio	Daily Mail and General Trust (GB/Viscount Rothermere)	7.5
2WFM (Classic hits)	Australian Radio Network	(JV)APN News and Media Ltd (Sir Tony O'Reilly) Clear Channel Communications (US)	6.6
2UUS (Classic hits)	*	*	5.6
2UE(News/talk)	Southern Cross Broadcasting (Australian)Ltd	Institutional investors	8.5
2MAC (Macedonian)	Win Corp P/L	Bruce Gordon	NA
2KY (Racing)	Tabcorp Holdings Ltd	Institutional investors	NA
Newspapers			
Sydney Morning Herald/Sun-Herald	John Fairfax Holdings Ltd	Institutional investors	Mon-Fri: 35.4 (214,000) Sat: 51.1 (352,000) Sun: 41.8 (514,000)
Daily Telegraph/ Sunday Telegraph	News Corporation	Rupert Murdoch and Murdoch family	Mon-Fri: 64.6 (390,000) Sat: 48.9 (337,000) Sun: 58.2 (716,000)
Television			
Channel 9	Publishing and Broadcasting Ltd	Consolidated Press Holdings (Packer)	(Source Oz tam 2006 to date) 29.9
Channel 7	Seven Network Ltd	Kerry Stokes & associated companies	27.9
Channel 10	The Ten Group P/L	CanWest (Canada/Leonard Asper), Ten Network Holdings	20.7
Community			
Television	TVS Sydney		
Radio	<ul style="list-style-type: none"> • Muslim Community Radio Inc. • Gadigal Information Service Aboriginal Corporation • Multicultural Community Radio Association Ltd • Christian Broadcasting Association Ltd 		

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	Owned by	Major shareholders	Ratings % Circulation (approx)
	<ul style="list-style-type: none"> • Music Broadcasting Society of New South Wales Co-operative Ltd • Sydney Educational Broadcasting Ltd • Radio for the Print-Handicapped of NSW Co-op Ltd • Radio Skid Row Ltd 		

Melbourne Media

	Owned by	Major shareholders	Ratings% /Circulation (approx)
Radio			
3AW(News/talk)	Southern Cross Broadcasting (Australia) Ltd	Institutional investors	(Nielsen Survey June 25-Sept 2 2006) 16
3EE(Golden oldies)	* (*Denotes as above)	*	3.8
3AK(Sports)	Pacific Star Network Ltd	Radio Australia P/L Ronald Hall/ Rosh Hagiborim/Southern Cross Broadcasting (Australia) Ltd	2.7
3MP(Easy listening)	*	*	3.1
3Fox (New music)	Austereo Group Ltd	Village Roadshow (Kirby family)	11.9
3MMM(Rock music)	*	*	8.3
3KKZ(Classic hits)	Australian Radio Network	(JV)APN News and Media Ltd (Sir Tony O'Reilly) Clear Channel Communications (US)	10.3
3TT(New music)	*	*	5.6
3MEL(New music)	DMG Radio Australia	Daily Mail and General Trust (GB/Viscount Rothermere)	8.3
3UZ (Sports)	3UZ Pty Ltd		NA
Newspapers			
The Age/Sunday Age	John Fairfax Holdings Ltd	Institutional investors	Mon-Fri: 26.2 (196,000) Sat: 36.3 (292,000) Sun:

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	Owned by	Major shareholders	Ratings% /Circulation (approx)
			24.4 (195,000)
Herald Sun/Sunday Herald Sun	News Corporation	Rupert Murdoch and Murdoch family	Mon-Fri: 73.8 (553,000) Sat: 63.7 (512,000) Sun: 76.6 (605,000)
Television			
Channel 9	Publishing and Broadcasting Ltd	Consolidated Press Holdings (Packer)	(Source Oztam 2006 to date) 30.8
Channel 7	Seven Network	Kerry Stokes & associated companies	27.2
Channel 10	The Ten Group P/Lk	CanWest (Canada/Leonard Asper), Ten Network Holdings	22.6
Community			
Television	MCTC		
Radio	<ul style="list-style-type: none"> • Joy Melbourne • Eastern Community Broadcasters Community Radio Inc. • North West Community Radio Association Inc. • Student Youth Network Inc. • Light FM Inc. • South Eastern Indigenous Media Association Inc. • Ethnic Public Broadcasting Association of Victoria Ltd • Music Broadcasting Society of Victoria Ltd • Progressive Broadcasting Service Co-operative Ltd • Triple R Broadcasters Ltd • Vision Australia Foundation • Community Radio Melbourne Pty Ltd • South Eastern Radio Association Inc. • Southern Community Broadcasters Inc. • Western Radio Broadcasters Inc. 		

Public broadcasting: the ABC and SBS

There should be some guarantee of certainty for public broadcasters associated with the proposed legislation, but the Government only notes that diversity will be ensured by the existence of public and community broadcasting once deregulation occurs.⁸²

There is, however, no certainty about the fate of public broadcasting to be gleaned from the current debate and this is concerning, given that the issue of privatising the Australian

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Broadcasting Corporation (ABC) has been raised a number of times in recent years. In August 2003, the Government argued for example that:

the ABC must find an additional revenue source and introduce between-program advertising... [It] cannot sustain its current reckless programming priorities unless it is prepared to find supplementary income'.⁸³

Similarly, it was noted in June 2006 that:

there has been a fair bit of talk in recent weeks about public broadcasters accepting advertising. That isn't so surprising given Helen Coonan's suggestion that the ABC might like to consider commercials and SBS's announcement that commercials will soon interrupt its programming.⁸⁴

The Government considers that allowing advertising would create incentives for the ABC to broaden its appeal to the large numbers of Australians whom it currently overlooks. It sees in between program advertising on the Special Broadcasting Service (SBS) as a success, noting that there have been no credible complaints that 'limited advertising on SBS has compromised that broadcaster's values and capacity to meet the standards and benchmarks set out in their charter'.⁸⁵

The Government believes that a new revenue source would ensure that quality programs continue and denies that commercialisation would 'dumb down' the national broadcaster. Such claims 'have also been thoroughly refuted by the experience of SBS'.⁸⁶

But the New Zealand experience, noted in a later section of this Digest, repudiates such claims. If the ABC were to be forced, by whatever means, to accept commercialisation, and albeit that commercialisation was partial, what the public broadcaster stands for is inevitably corrupted. The fundamental concept of public broadcasting is that it exists for the public, not for advertisers or media proprietors. As one media commentator notes:

Commercialisation as has already been demonstrated, without subtlety, at SBS, would influence the type of material commissioned and broadcast. This is because the people who hold the whip hand in any commercial broadcasting entity aren't the audience, program-makers or even station executives. The whip hand is held by advertisers. He who pays the piper must inevitably choose the tune.⁸⁷

The Australian public has agreed consistently that it wants and values an independent public broadcasting voice,⁸⁸ realising when governments sometimes fail to, that the public broadcaster presents balanced reporting and raises issues of vital importance that are often overlooked by commercial interests. There appears to be no guarantee that the public broadcaster will be given adequate resources to combat the 'media frenzy' some are predicting will follow deregulation, however. One scenario is that following deregulation, the trend to real funding cuts for the ABC and SBS over recent years will continue.⁸⁹ SBS has already succumbed by announcing it will accept advertisements during programming,

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so will this result in further funding cuts and the loss of the independence fundamental to a public broadcaster? Will the ABC be forced to follow the lead of SBS?

A public interest test may also be able to address some of the concerns noted earlier and raised in relation to the treatment of the media as simply another market sector, albeit a 'sensitive' one. A clear definition developed of 'public interest' could be developed gleaned from extensive consultation with relevant groups and most importantly with the public which could help allay concern about possible loss of diversity as a result of deregulation. While an element of subjectivity may remain in applying such a test, many would argue that all regulatory decisions in areas such as the media contain an element of interpretation.

Media regulation in selected international markets

The European Union

Because of the significant differences in culture, size and characteristics of media markets and legal and administrative traditions within Europe, media regulation in the European Union is a difficult and complex issue. It is unlikely that a common law for media ownership can exist in the European Union and attempts to introduce specific media regulation have been unsuccessful.

There appears to be within the Union, however, general acceptance that the rights to freedom of information and expression, combined with a plurality of media voices are vital contributory factors to the functioning of democracy. Article 10 of the European Convention on Human Rights reflects this view in emphasising that all European States have a duty to protect media diversity and to take positive measures to ensure it is maintained.⁹⁰

Media diversity is also seen across Europe as essential to maintaining the threads of European identity; allowing all citizens access to a variety of information, opinions and ideas, and at the same time presenting them from different cultural perspectives.

The European Commission argues that European competition law provides an important contribution to ensuring media pluralism in the Union by helping prevent the creation or abuse of dominant media positions, while ensuring market access for new entrants.⁹¹ But the Commission is of the view that competition law alone cannot replace the need for national media concentration controls and measures appropriate for each member state to ensure media pluralism in particular jurisdictions.⁹²

Nevertheless, despite general support across the Union for media pluralism in all its forms, ultimately, member states operate under different media ownership regimes.⁹³

What this means is that there are various applications of media ownership rules and regulations throughout the Union. In some states only general competition rules and

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criteria apply, while in others such as Ireland, Austria and the United Kingdom, some media specific general regulation exists. Cross media ownership regulation varies considerably also with limited rules applying in Germany, cross sector restriction in France and Greece and no restrictions applying in Spain, Sweden or Denmark.

A number of control mechanisms are employed across the Union. These can involve:

- Limiting the number of media licences or refusing to grant licences, based on ownership of other media outlets;
- Restricting individual ownership through limiting capital shares or voting shares which can be held by one broadcasting outlet or subsequently, in a second broadcasting outlet;
- Measuring market share through readership and audience;
- Measuring market share through advertising or industry revenue;
- Preventing ‘dominant’ position through measuring market share of media assets; or
- Assessing transparency of ownership.⁹⁴

Despite the varying application of these measures, it appears there are increasing trends towards concentration of traditional media across Europe as the result of less stringent rules on the numbers of licences operators can hold and more flexible cross-media ownership regulations. As a result, countries such as Sweden have considered introducing media ownership regulatory models based on a general clause of investigation, which would allow authorities to intervene if they found media concentration detrimental to freedom of expression and diversity of opinion.

Similar arguments have been raised to those currently being considered in the Australian context that new technologies undermine the rationale for stringent restrictions on media ownership as new technologies provide an increase in choice and diversity and that companies should not be hampered from competing in a global economic system by ownership restrictions. However, the Council of Europe dismisses this idea, convinced that it is appropriate for European states to maintain media ownership controls.

Foreign ownership of European media is also seen as a problem. Some states are particularly concerned with the encroachment of American media conglomerates and the effect these have both on diversity and neutralising unique European cultures. In Central Eastern Europe there is additional concern that encroachment by Western media groups *per se* has prevented or made difficult the development of independent or nationally-based media in these countries. For instance, in the Czech Republic, German and Swiss companies own 80 per cent of newspapers and magazines. German, Austrian, Swiss, French, and Scandinavian capital also dominates print media in Bulgaria, Hungary, Poland, and the Baltic states.⁹⁵

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The United Kingdom

A radical overhaul of media regulation in the United Kingdom was introduced under the Communications Act 2003. This Act resulted from government thinking which proclaimed the United Kingdom's media regulatory structures as 'a by-product of a bygone era'.⁹⁶

The Communications Act removed rules which limited the share of the television audience that any one company could control, the joint ownership of the two London ITV licences and the joint ownership of a national ITV licence and Channel 5. New rules liberalising radio ownership were also introduced with the proviso that at least two or more radio operators were required in local areas in addition to the British Broadcasting Corporation (BBC).

Limited media controls remain under the Act, but crucially, these are in relation to cross media ownership. A company holding a national ITV licence for example is not able to merge with a company owning 20 per cent of the national newspaper market, nor can a company holding a regional ITV licence merge with a company owning more than 20 per cent of the newspapers of that region. Complex provisions ensure that no merger can deny consumers at least two sources of local radio in addition to the BBC.

Powers given to the Secretary of State to intervene in mergers which raise issues of media plurality in conjunction with a public interest test were introduced in the Act with the stated intention of protecting pluralism. Public interest is defined by the Act as the need for:

- a sufficient plurality of media to serve different audiences and localities throughout the United Kingdom;
- availability of a wide range of broadcasting in the United Kingdom which is both of high quality and calculated to appeal to a wide variety of tastes and interests; and
- media enterprises to have a genuine commitment to standards such as accuracy, impartiality, fairness and privacy in broadcasting).⁹⁷

Critics have argued that it is doubtful whether the particular public interest test introduced in the United Kingdom will indeed have any practical effect. They consider that changes under the Communications Act have indeed already delivered unprecedented opportunities for commercial television and radio broadcasters to expand their share of the market.⁹⁸ It appears there is some substance to this case, given that while competition authorities are supposed to vet television mergers closely to ensure the public interest is paramount, a merger between Carlton and Granada television has already delivered consolidated ownership and control over most regional ITV licences to one entity.⁹⁹

At the same time, however, it must be acknowledged that the powers given to the Office of Communications (Ofcom) under the Act mean that programming quotas are still enforceable in areas such as news and current affairs and local content. These powers

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‘represent represent a compromise on the Government’s original position on the relaxation of foreign investment laws and the promotion of media mergers’.¹⁰⁰

The United States

The Telecommunications Act 1996¹⁰¹ was the first successful attempt to reform American policymaking in the broadcasting and telecommunications sectors since 1934.

The Telecommunications Act abolished many of the cross-market barriers that prohibited dominant players from one communications industry, such as telephone, from providing services in other industry sectors, such as cable television. New mergers and acquisitions, consolidations and integration of services previously barred became legal under the Act.

The Telecommunications Act incorporates numerous changes to the rules dealing with radio and television ownership. Broadcast ownership limits on television stations were removed although a raised service cap area still only allowed proprietors to purchase television stations that serviced a maximum cap of 35 per cent of the population.

Limits on the number of the radio stations that may be commonly owned were lifted, though the Act did provide limits on the number of licenses that may be owned within specific markets or geographical areas. Also amended were restrictions on foreign ownership of stations.

Terms of license for both radio and television were changed to eight years and rules allowing competing applications for license renewals dramatically altered in favour of incumbent licensees.

The Act significantly altered rules regarding station affiliations and cross-ownership restrictions. Stations were able to affiliate with more than one network and while broadcasting networks were barred from merging or buying out other networks, they were able to establish new program services. Broadcasters were allowed to own cable television systems, but television licensees are still prohibited from owning newspapers in the same market.

The Act affirmed the continuation of local marketing agreements and removed the previous restrictions on common control of radio and television stations in the top fifty markets, the one-to-a-market rule.¹⁰²

President Clinton predicted that the Telecommunications Act would deliver lower prices for consumers, better quality services and greater choices while at the same time ensuring the benefits of ‘a diversity of voices and viewpoints in radio, television and print media’.¹⁰³

In reality, the result of these regulatory changes has been the creation of radio giants; prior to the passage of the Act no single radio corporation owned more than 65 stations, today

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Clear Channel owns more than 1,200 radio stations. It has also led to homogenisation of play lists and the broadcast of less local news.

The changes to television ownership rules in the United States encouraged greatly increased media concentration. Between 1995 and 2003 ten of the largest television station owners went from owning 104 stations with \$5.9 billion in revenue to owning 299 stations with \$11.8 billion in revenue. Five companies—Viacom, the parent of CBS, Disney, owner of ABC, News Corporation, NBC and AOL, owner of Time Warner, now control 75 per cent of all prime-time viewing.

The Act also permitted the easing of cable-broadcast cross-ownership rules and as cable systems increased the number of channels, the broadcast networks aggressively expanded their ownership of cable networks with the largest audiences. Ninety per cent of the top fifty cable stations are now owned by the same parent companies that own the broadcast networks, a situation which challenges the notion that cable is any real source of competition.

Since 1975, two-thirds of independent newspaper owners have disappeared. Currently, less than 275 of America's 1,500 daily newspapers are independently owned, and more than half of the market is dominated by one paper. The number of major media companies has reduced from around 80 in 1986 to five in 2005.¹⁰⁴

In June 2003, the Federal Communications Commission (FCC) attempted to change several of the remaining media ownership rules¹⁰⁵ such as those which limit the number of television stations one corporation can own and ban the cross-ownership of a television station and newspaper in the same market.

This attempt at further deregulating media ownership was criticised extensively in the United States with many arguing that it could only ensure that the largest firms¹⁰⁶ would be handed more power. It was also argued that allowing such media concentration not only violated the notion of competition in the marketplace, it also had negative implications for democracy in that media conglomerates would dominate journalism, culture and to a large extent, public opinion.¹⁰⁷

The FCC countered this type of criticism with a similar argument to that now being advanced in the Australian context that 'the proliferation of new sources of entertainment and information, such as the Internet, cable television and satellite services, justified relaxing the limits' on media regulation'. In an unprecedented decision, and after more than three million people protested to the United States Congress, a federal court overturned several of the FCC media ownership proposals until the Commission undertook a revision of its proposals.¹⁰⁸

In 2005, the Bush administration decided against appealing this court decision that FCC's justification for the new limits was insufficient and which put the rules on hold until the FCC addressed the court's concerns.

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The FCC also had tried to permit television networks to own more stations, to allow them collectively to reach 45 per cent of the national audience, a figure increased from 35 per cent, but Congress overruled the Commission on this matter also and set the ownership limits permanently at 39 per cent; a situation which most likely both reflects a desire to compromise and the power that the media has over Congressional deliberations. Both Viacom Inc.'s CBS network and News Corporation's Fox network are currently close to the 39 per cent limit.

In June 2006, the FCC announced that a comprehensive quadrennial review under the Telecommunications Act of all media ownership rules would 'determine whether any of such rules are necessary in the public interest as the result of competition'.¹⁰⁹

In terms of foreign ownership controls there are no laws specifically prohibiting foreign participation in United States print media, but in broadcasting, the FCC bars all aliens, alien governments and alien corporations from holding more than 25 per cent of the voting stock of a potential licensee.

Canada

Broadcasting policy in Canada has been strongly influenced by objectives stated in the Canadian Broadcasting Act 1991,¹¹⁰ which emphasises that broadcasting media should be Canadian owned and controlled and that it should provide programming that serves to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada. The idea of protection of Canadian identity and encouragement of Canadian expression, which underpins this Act, is crucial to understanding the media situation in Canada. As in many other aspects of Canadian life, there is an awareness of the proximity of the United States and its potential to overwhelm Canadian opinions and values unless specific steps are taken.

Consequently, while there are strict laws limiting non Canadian ownership of cultural industries of which the media is one,¹¹¹ there has been traditionally less objection to significant concentration of media ownership and high levels of cross media ownership.

Radio and television ownership in Canada is governed by the Canadian Radio-Television and Telecommunications Commission (CRTC),¹¹² which has a mandate to ensure that programming reflects the aims of the Broadcasting Act and provides access to reasonably priced, high-quality, varied and innovative communications services that are competitive nationally, as well as internationally.

The CRTC regulates over 3,300 broadcasters, including television, cable distribution, AM and FM radio, pay and specialty television, Direct-to-Home satellite systems, Multipoint Distribution Systems, Subscription Television and Pay Audio.

Almost all Canadian television stations and newspapers are owned by national media conglomerates. In radio, companies are normally restricted to owning no more than three

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stations in a single market, of which only two can be on the same broadcast band. Under certain circumstances, local marketing agreements may be implemented, or the ownership rule may be waived entirely.

Canadian content rules are also in place to combat the United States' influence over Canadian broadcasting. Content rules are requirements that radio and television broadcasters (including cable/satellite) must air a certain percentage of content that is at least partly written, produced, presented, or otherwise contributed to by Canadians.¹¹³

Simultaneous substitution rules require that when a Canadian network licenses a television program from a United States network and shows it in the same time slot, upon request by the Canadian broadcaster, broadcast distributors must replace the program on the United States channel with the broadcast of the Canadian channel, along with any overlays and commercials.

The CRTC also regulates which channels broadcast distributors must or may offer and approves distribution of signals to protect Canadian channels, arguing that allowing free trade in television stations would overwhelm the smaller Canadian market.

As noted, while the high level of media concentration is criticised in Canada, for some time there was a certain acceptance that this may be a necessity to preserve Canadian identity in the face of the overwhelming influence of United States media.

Recently, however, commentators have begun more frequently to compare media empires in Canada with feudal states, while others have warned of the potential for abuse of political power from concentration of power in the media. Still others have expressed concern about the lack of quality information which has resulted from media concentration; the Canadian experience is that stories are syndicated and investigative journalism is a rare event.

It is argued that Canada has 'backed itself into a corner' with regards to media concentration and that there are now only two choices for the Government: to split up existing media monopolies or open up the market to foreign competition. The first choice will probably involve a major political battle, but the second could mean domination by American media companies.¹¹⁴

Journalists have for some time also denounced what they have labelled as 'a disturbing pattern of censorship and repression of dissenting views' by Canada's largest media company Canwest.¹¹⁵

In an attempt to resolve the dilemma of balancing cultural identity needs with criticism about loss of diversity, the Senate Standing Committee on Transport and Communications examined media concentration in Canada in its June 2006 Report.¹¹⁶ The Report concluded that while there are many strengths in the existing Canadian system, serious problems are apparent. These include high levels of concentration in news media

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ownership and/or cross-ownership and the fact there is no recognised mechanism that allows the public interest in media issues to be discussed and reviewed in an open, transparent and democratic manner.

During the Committee deliberations, localism was discussed from a number of perspectives with some suggestion the closure of local newspapers that had occurred with increasing concentration may have an influence on voter turnout in elections; the idea being that when citizens lose local interpretation of national events, they feel less connected to national policies and less inclined to vote for those who set these policies.¹¹⁷

Similarly, centralised news coverage had created a perception that only the “centre” matters; one witness to the Committee noting that ‘listeners in the regions do not need to hear reports about traffic jams in Montreal while important stories in their own communities receive no mention’.

Concerns about the lack of diversity as the result of media concentration were also apparent to the Committee:

Public debate based on differing views is the cornerstone of democracy, and the news media provide a vital space where that debate is carried out. The right of proprietors to voice their opinions on their editorial pages has long been considered fundamental to freedom of the press. Difficulty arises, however, if one proprietor owns so many media outlets that his or her opinions crowd out others.¹¹⁸

The Committee acknowledged the privileged position of the media under the *Canadian Charter of Rights and Freedoms* accepting the principles that government not interfere in the news operations of media organisations, or in their espousal of whatever political position they choose in their opinion pages. However, it concluded that the media’s right to be free from government interference does not mean that proprietors should be allowed to own an excessive proportion of media holdings in particular markets.

It acknowledged that the current regulatory regime in Canada does little to prevent this occurring. It saw the future media challenge in Canada as determining an easily understood review mechanism to consider the public interest in news media mergers which was able to ensure no interference in the internal workings of the media, while at the same time including clear accountability mechanisms for the public interest in assessing media mergers. It recommended a number of ways to proceed which included enacting legislation that included considering dealing with the following aspects of media mergers:

- Cross-media ownership in particular markets;
- Development of a dominant position in particular advertising, production or distribution markets; or
- Mergers that involve acquiring more than, say, 35 per cent of a particular audience, or subscribers.¹¹⁹

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New Zealand

As Dwyer et al note, in New Zealand there are no comparable limitations on foreign ownership or cross-media ownership to those currently existing in Australia, the United Kingdom or the United States.

Indeed, New Zealand is one of the most deregulated media markets in the world and since the 1980s New Zealanders have been told this situation is good. But if this is in fact the case, why then is it as one commentator remarks, that common complaints in New Zealand about the news media are that it is biased and that the quality of content is poor?¹²⁰

Not only is the New Zealand market one of the most deregulated, it is also one of the most concentrated with four companies, all overseas owned, dominating the news media. There is a near duopoly in each of the three main media – print, television and radio – and a monopoly in pay television.

In 2003, Fairfax newspapers owned nearly half (47.4 per cent) the daily newspaper circulation, while their main competition, APN News and Media, boasted around 44 per cent circulation, about 30 per cent of this coming from the *New Zealand Herald*, the largest circulation daily newspaper in New Zealand. APN also held substantial radio holdings. Between them Fairfax and APN owned 87.4 per cent of audited daily press circulation of the provincial newspapers (those with under 25,000 circulation), and 92.2 per cent of the metropolitan readership (those newspapers with more than 25,000 circulation). In addition they had extensive and increasing ownership of community newspapers and magazines.

APN's main competitor in commercial radio was the Canadian company CanWest, which owned the second of the two largest radio networks, and two television channels. CanWest's competitors in television were the state-owned television network and News Corporation's Sky Television, which had a monopoly on pay television.¹²¹

The New Zealand Government has begun to recognise a problem exists as a result of the move away in the 1980s and 1990s from recognition that broadcasting has a cultural and educative role beyond economic imperative. Minister of Broadcasting Steve Maharey, has lamented that in its embrace of market driven policies, the government evaded its responsibility to ensure 'New Zealanders have access to a genuinely indigenous broadcasting system'.¹²²

Maharey argues further that since 2000 his government has reclaimed its obligation to involve itself meaningfully in the broadcasting sector, regulating broadcast content to ensure the promotion of national culture and identity, promote participatory democracy and to encourage diverse sources for information.¹²³

Nevertheless, it remains that the former public broadcaster has been broken up into separate state-owned corporations, Television New Zealand (TVNZ) and Radio New

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Zealand (RNZ) and while RNZ remains commercial-free, TVNZ's claims to be a public broadcaster, are questionable. About 90 per cent of its funds are derived from advertising and merchandising sales for its two stations; the remainder of its funding comes from government sources.

TVNZ operates under a Charter introduced in 2003 under the Labour Government, but the Charter involves a dual remit whereby the broadcaster has to maintain commercial performance, while simultaneously attempting to provide public service broadcasting.

The Charter requires TVNZ to feature:

- the highest standard of programming that informs, entertains and educates while maintaining high standards and contributing to shared experiences;
- a significant Indigenous voice to be heard in programming;
- the broadcast of programs of general appeal as well as those which appeal to smaller audiences;
- the broadcast of programs that appeal to all age groups;
- to seek to extend the range of ideas and experiences available to New Zealanders; and
- to 'encourage creative risk-taking and experiment' while supporting and promoting the talents and creative resources of New Zealanders and the independent New Zealand film and television industry.¹²⁴

In its defence of this situation, the New Zealand Government has argued:

in charging our publicly-owned television broadcaster with the dual remit of implementing its public service charter while maintaining commercial viability we have created an arrangement to meet our particular needs as a nation. We are forging a new approach that combines social and commercial objectives for public service television. In a country with the tax-base the size of ours, the government cannot hope to make sufficient funding available to fully support a public television service.¹²⁵

TVNZ's efforts to balance commercial performance with the Charter objectives have been unsuccessful. Despite some investment in local programs, the content on both its stations has remained 'commercialised', consisting mainly of a high proportion of light entertainment and reality shows.

One reason for this is that its dual remit to continue paying dividends to the Government is not matched by a modest subsidy paid to implement the 2003 Charter. The Government has proposed a Programme of Action for broadcasting which may review this current funding system, however.

Ironically also, NZTV has been criticised because its high ratings result in companies paying some of the country's dearest rates to advertise on the public broadcaster.

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There is much debate on the future of TVNZ, which focuses on the nature of public service broadcasting and whether it can have a commercial aspect. Three options have been outlined:

- TV One as a fully non-commercial network charged with delivering Charter values like the ABC in Australia, and possibly merging with Radio New Zealand;
- TV One as a semi-commercial broadcaster with no more than six minutes of advertisements an hour like the soon-to-change SBS arrangement in Australia;
- TV One and TV2 remaining unchanged, but two new public service channels being broadcast via digital television.¹²⁶

It appears that the Government is rethinking the current broadcasting situation and looking at adopting the third of the options proposed above in the near future.¹²⁷

In the present environment, a statutory body, NZ on Air also acts as a funding agency to promote New Zealand content in programming. It appears to be somewhat of a ‘toothless tiger’, as it has no control over decisions made by broadcasters on programming or advertising matters, nor over the content of programs it does not fund.

It does seek, however, to promote and foster the development of New Zealand’s culture by funding locally-made programmes.

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Australian Commercial Media ¹²⁸

Newspapers

Titles and combined circulation of the major types of newspapers.

Type of Newspaper	Titles	Total Circulation (million)
Capital City & National Daily – Mon to Fri	12	2.3
Capital City & National Daily - Saturday	12	3.0
Capital City Sunday Papers	11	3.5
Regional Daily	35	0.6
Regional Non-Daily	235	0.7
Capital City Community (free or partly paid)	126	7.0
Regional Community (free or partly paid)	154	3.7

Percentage of Circulation for Major Newspaper Owners

Controlling Interest	Capital City Mon-Fri (% of circulation.)	Capital City Saturday (% of circulation)	Capital City Sunday (% of circulation)	Regional Daily (% of circulation)	Regional Non-Daily (% of circulation)	Capital City Community (% of circulation)	Regional Community (% of circulation)
News Corp	68	61	78	23	4	56 (1)	18 (1)
John Fairfax Holdings	22	24	20	16		23 (2)	10
Independent Print Media Group							
West Australian Newspapers Holdings	9	12		1	5	1	3
Rural Press	2	2	1	21	31	2	21
APN News & Media				27	9		17
Other (3)				12	51	14	27

(1) Includes joint venture with West Australian Newspapers Holdings Ltd

(2) Includes joint venture with Torch Publishing

(3) Comprises 121 companies/owners

Television

There are 53 Australian commercial television licences. The main operators, together with the percentage of the population that their stations reach, are as follows:

- the Seven Network (Seven Network Ltd) has six licences reaching 73 per cent of the population
- the Nine Network (PBL) has four licences reaching 52 per cent
- Network Ten (Ten Network Holdings Pty Ltd) has five licences reaching 66 per cent

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- Southern Cross Broadcasting (Australia) Ltd has fifteen licences reaching 42 per cent
- WIN Television (WIN Corp P/L) has fourteen licences reaching 26 per cent
- Prime Television Ltd has nine licences reaching 25 per cent.

It should be noted that the three major networks are also broadcast by stations that they do not own, so that their actual reach and influence is greater than would appear from the above figures.

The national broadcasters, the ABC and SBS, also have television networks that reach most of the population. On average, the ABC is watched by around 13 million people each week. Over 7 million people watch the SBS each week.

The major pay TV operators are Austar United Communications Ltd (498 000 subscribers), Foxtel (more than 998 000 subscribers) and Optus Television (164 000 subscribers).

There are also seven community television licences and eighty remote Indigenous community broadcasting licences.

Radio

The following table summarises the radio services available in Australia.

Type of Radio Services	Number of Stations/Licences
Commercial Radio Services using the broadcasting services bands	261
Commercial Radio Services not using the broadcasting services bands	13
Community Radio Stations	359
ABC - Four national networks (Radio National, Classic FM, Triple J, NewsRadio) broadcast on stations in each capital city and Newcastle)	36
ABC - other radio stations	57

Those radio networks that reach over ten per cent of the population are listed below.

Name	Capital City Licences	Regional Licences	Percentage of population reached
Austereo Group Ltd	10		59
DMG Radio Australia	7	1	53
Southern Cross Broadcasting (Australia) Ltd	7		53
The Australian Radio Network	7	1	51
Broadcast Operations P/L	1	29	27
Macquarie Regional Radioworks (Macquarie Bank Ltd)	2	88	22
Macquarie Radio Network Ltd	2		19
Tabcorp Holdings	1		19
3UZ P/L	1	1	19
Pacific Star Network Ltd	2		18

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Possible impacts on media markets

The table below details the possible effect of the replacement of the current rules with the government's 5/4 proposal. It refers to only those markets (defined by the relevant radio licence area) that have an associated daily newspaper. This constitutes around 86 per cent of the population.

Market	Radio Licence Area Pop as a % of Australia	Current Media Outlets			Current Minimum Possible Owners	Minimum Possible Owners under 5/4
		Paper	Radio	TV		
Adelaide	5.91	1	6	3	7	5
Albury Wodonga	0.64	1	3	3	6	4
Ballarat	0.61	1	3	3	6	4
Bathurst	0.24	1	2	3	5	4
Bendigo	0.99	1	2	3	5	4
Brisbane	8.64	1	7	3	8	5
Broken Hill	0.11	1	2	2	4	4
Bundaberg	0.37	1	3	3	6	4
Burnie	0.31	1	2	3	5	4
Cairns	0.8	1	4	3	6	4
Canberra	1.88	1	4	3	6	4
Darwin	0.64	1	2	2	4	4
Devonport	0.34	1	2	3	5	4
Dubbo	0.35	1	3	3	6	4
Geelong	1.67	1	2	3	5	4
Gladstone		1	4	3	6	4
Gold Coast	2.33	1	3	3	6	4
Grafton	0.26	1	2	3	5	4
Gympie	0.57	1	2	3	5	4
Hobart	1.15	1	3	3	6	4
Ipswich	0.93	1	1	3	5	4
Kalgoorlie	0.18	1	3	2	5	4
Launceston	0.58	1	2	3	5	4
Lismore	0.72	1	2	3	5	4
Mackay	0.61	1	4	3	6	4
Maroochydore		1	2	3	5	4
Maryborough	0.39	1	3	3	6	4
Melbourne	17.91	2	11	3	11	5
Mildura	0.3	1	3	3	6	4
Mt Gambier	0.27	1	2	2	4	4
Mt Isa	0.13	1	2	1	3	4
Muswellbrook	0.25	1	2	3	5	4
Nambour	1.9	1	3	3	6	4
Newcastle	2.63	1	4	3	6	4
Orange	0.35	1	3	3	6	4
Perth	7.07	1	6	3	7	5
Rockhampton	0.81	1	4	3	6	4
Shepparton	0.84	1	3	3	6	4
Sydney	18.97	2	11	3	11	5
Tamworth	0.32	1	2	3	5	4
Toowoomba	0.96	1	4	3	6	4
Townsville	1	1	4	3	6	4
Tweed Heads		1	1	3	5	4
Wagga Wagga	0.52	1	2	3	5	4
Warrnambool	0.27	1	2	3	5	4
Warwick		1	4	3	6	4
Wollongong	1.36	1	2	3	5	4

Note: markets without given population percentages are part of other radio licence areas. It has been assumed that existing competition law would prevent any one owner from controlling more than one television licence in any one market direction, as self-censorship by journalists may achieve similar outcomes.

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Financial implications

There are no financial implications arising from the Bill.

Main provisions

Schedule 1

Cross-media ownership

The proposed changes to the BSA will allow permit cross-media mergers in radio licence areas where it is considered sufficient diversity of media groups remains following the mergers.

Schedule 1 will:

- permit transactions involving commercial radio licensees, commercial television licensees and associated newspapers, including cross-media transactions, to occur subject to there remaining a minimum number of separately controlled commercial media groups in a relevant licence area;
- exempt commercial television and radio broadcasting licensees operating outside the broadcasting services bands of spectrum from media ownership and control provisions; and
- require cross-media mergers and acquisitions involving a commercial radio licence, a commercial television licence and an associated newspaper in the same licence area outside mainland state capitals to obtain clearance from the ACCC prior to the transaction.

Summary

Under Schedule 1 media transactions involving commercial broadcasting licences and/or associated newspapers can proceed if at least a minimum number of **media groups** remain in a relevant **radio licence area** following completion of a transaction and the transaction does not breach existing licence holdings and reach limits.

The minimum numbers of groups for mainland metropolitan areas will be 5 and for other licence areas, 4.

If numbers of groups drop below these levels then an ‘unacceptable media diversity situation’ will be said to exist. Causing an unacceptable media diversity situation will constitute a civil offence and will be subject to a civil penalty.

- The Australian Media and Communications Authority (ACMA):

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- will be required to establish and maintain a Register of Controlled Media Groups to identify ownership and control of media groups in each licence area;
 - to monitor compliance; and
 - to investigate and respond to breaches of the BSA.
- Cross-media mergers and acquisitions involving commercial radio licences, commercial television licences and associated newspapers in the same licence area outside mainland state capitals will be required to gain clearance from the ACCC prior to the transactions.

Certain statutory controls will continue to apply under existing sections 52-56 of the BSA so that a person (or directors of companies) may not control:

- commercial television licences with combined licence area of more than 75 per cent of the population and more than one commercial television licence in the same licence area;
- more than two commercial radio broadcasting licences in the same licence area;
- a commercial television licence and a datacasting transmitter licence.

Further detail

Section 50(A) is a new section in the BSA to provide that licensees operating outside broadcasting services bands will be exempt from media diversity rules and will not be considered in assessing an unacceptable media diversity situation (this is because these licences do not have access to the limited radio frequency spectrum; licences are issued to authorise content, licensees need to make their own arrangements to carry their services).

It is considered also that these licences have the potential ‘to add to the range of media services available’.¹²⁹

Section 52(A) will be inserted so that measures in the legislation relating to newspapers are not only supported by the communications power in the Constitution, but also by the corporations power, the trade and commerce power, the Territories power and the external affairs power.¹³⁰

New subsections in section 59 are inserted to prevent newspapers being established to avoid media diversity rules.

Section 59 requires ACMA to maintain an Associated Newspaper Register. The Register must be available for public inspection and ACMA may charge fees for inspections. The Register must also be available on the Internet without charge.

Section 61 defines an unacceptable media diversity situation which will exist if the number of points in a metropolitan radio licence area is less than 5 and if the number of

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points in a regional area is less than 4. A ‘point’ is roughly equivalent to a separately controlled media group, which in turn will mean a grouping of one or more operations

Media group is defined as: a grouping of one or more of a commercial radio licence, a commercial television licence and an associate newspaper where there is at least one person in a position to exercise control over each of the media entities in the media group and where the media operation complies with the statutory control rules (operations meaning a commercial radio or television licence or an associated newspaper)

Radio licence areas are specific geographic areas which are determined in a Licence Area Plan. The ACMA defines Licence Areas in terms of areas defined by the Australian Bureau of Statistics for the purposes of the Australian Census.

61AC Points

(1) Use the table to work out the number of points in the licence area of a commercial radio broadcasting licence (the *first radio licence area*):

Points		
Item	This	is worth
1	a group of 2 or more media operations, where: (a) a person is in a position to exercise control of each of those media operations; and (b) each of those media operations complies with the statutory control rules; and (c) if a commercial television broadcasting licence is in the group—more than 50% of the licence area population of the first radio licence area is attributable to the licence area of the commercial television broadcasting licence; and (d) if a commercial radio broadcasting licence is in the group—the licence area of the commercial radio broadcasting licence is, or is the same as, the first radio licence area; and (e) if a newspaper is in the group—the newspaper is associated with the first radio licence area	1 point.
2	a commercial radio broadcasting licence, where: (a) the licence complies with the statutory control rules; and (b) the licence area of the licence is, or is the same as, the first radio licence area; and (c) item 1 does not apply to the licence	1 point.
3	a newspaper, where: (a) the newspaper complies with the statutory control rules; and (b) the newspaper is associated with the first radio licence area; and (c) item 1 does not apply to the newspaper	1 point.
4	a group of 2 or more commercial television broadcasting	1 point.

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Points		
Item	This	is worth
	licences, where: (a) each of those licences complies with the statutory control rules; and (b) more than 50% of the licence area population of the first radio licence area is attributable to the licence area of each of those commercial television broadcasting licences; and (c) the core commercial television broadcasting services to which those commercial television broadcasting licences relate pass the shared content test in relation to each other; and (d) item 1 does not apply to any of those commercial television broadcasting licences	
5	a commercial television broadcasting licence, where: (a) the licence complies with the statutory control rules; and (b) more than 50% of the licence area population of the first radio licence area is attributable to the licence area of the commercial television broadcasting licence; and (c) none of the commercial television broadcasting services provided under the licence passes the shared content test in relation to any of the commercial television broadcasting services provided under another commercial television broadcasting licence, where more than 50% of the licence area population of the first radio licence area is attributable to the licence area of the other commercial television broadcasting licence; and (d) item 1 does not apply to the first-mentioned licence	1 point.

- (2) If, apart from this subsection, all the media operations in a group of media operations mentioned in an item of the table are also in one or more other groups mentioned in an item of the table, then, for the purposes of subsection (1), ignore the existence of:
- (a) if one of the groups has the highest number of media operations—the remaining group or groups; or
 - (b) if 2 or more of the groups have an equal highest number of media operations:
 - (i) all but one of the groups that have an equal highest number of media operations; and
 - (ii) the remaining group or groups; or
 - (c) if the groups have an equal number of media operations—all but one of those groups.

Section 61AG makes it an offence to cause an unacceptable media diversity situation or to cause the number of points in a licence area to reduce. The maximum number of penalty units under the *Crimes Act 1914* will be 20,000 for persons and 100,000 for bodies

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corporate. The same conduct will also be a civil offence with the same pecuniary penalty payable as for the criminal offence.

Under new subsection 61AJ ACMA may approve a transaction that would result in an unacceptable media diversity situation.

- it may seek information about the transaction before making a decision;
- it must specify a time period during which action is to be taken to alleviate the unacceptable media diversity situation (at least one month and no more than two years);
- it may specify action to be taken; and
- it must provide its decision in a notice to the applicant.

ACMA may grant an extension to allow compliance with its decision although it must not grant more than one extension which can be no longer than the original period specified in a notice or one year whichever is shorter. In deciding whether to grant an extension ACMA must consider what endeavour had been made to comply with a notice and difficulties encountered in attempting to comply.

If ACMA considers an unacceptable media diversity situation exists on or after commencement day, it may give remedial directions to ensure the situation ceases to exist under section 61AN. Remedial directions must:

- specify a time period for compliance not more than two years;
- ACMA can grant one extension for no more than three months;
- Breaches of remedial directions are civil and criminal offences.

Under the new section 61AS, ACMA can accept undertakings that specified action will be taken to ensure an unacceptable media diversity situation does not exist or if one already exists specified action to ensure that there is not a reduction in the number of points in a licence area. Once accepted by ACMA, undertakings will be enforceable by the Federal Court.

Register of Controlled Media Groups

ACMA is to establish and maintain a Register of Controlled Media Groups. The Register will be maintained electronically and will be available for inspection on the Internet; the Register will not be a legislative instrument (section 61AU).

For the purposes of establishment of the register ACMA need not consider if an unacceptable media diversity situation exists. This concession is included to ensure the interests of existing group controllers (persons in positions to exercise control of media

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operations in a media group) are not unduly affected by the new concept of an unacceptable media diversity situation and the establishment of the Register.¹³¹

A change in the media operation of groups on the Register will mean they cease to exist, although this does not apply if one or more operations cease in the group and at least two operations remain and there is no increase in the number of operations in the group (section 61AX). If ACMA is satisfied that a media group has ceased to exist it must remove the group's name from the Register (section 61AZA).

ACMA is able to register new groups if it is satisfied that their registration will not cause an unacceptable media diversity situation or a reduction in the number of points in an area where an unacceptable media diversity situation exists (section 61AZ).

ACMA must register changes of controllers of registered media groups (section 61AZB) and changes in the composition of media groups (section 61AZC).

ACMA is required to review unconfirmed entries on the Register. It may reconsider its decisions on these at any time or upon application from persons whose interests are affected by its decisions (sections 61AZE and AZF).

A new section 61AZJ requires transactions involving three way mergers of commercial radio licences, commercial television licences and associated newspapers to gain prior clearance from the ACCC in addition to the mergers not resulting in an unacceptable media diversity situation. It will be an offence not to obtain clearance from the ACCC for these transactions.

According to the Government, the intention is that mergers that may significantly reduce levels of diversity in regional markets will be required to demonstrate compliance with the Trade Practices Act.¹³²

Commercial television, radio and datacasting licensees and newspaper publishers must report annually to ACMA giving details of a person (or persons) in a position to exercise control of these media operations and changes in control of the operations. It will be an offence not to provide this information to ACMA.

Schedule 2

Foreign ownership of the media will only be regulated as the result of the removal of restrictions under the BSA by the government's Foreign Investment Policy under the *Foreign Investment and Takeovers Act 1975*. Items 4 and 6 of Schedule 2 repeal sections 57, 58, 60 and 61 which impose the current foreign ownership limitations.

The Government argues these sections are no longer necessary as media diversity will be protected under new provisions in the BSA.¹³³

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- Foreign owners of media would need to establish an Australian subsidiary to be licensee companies.
- Local content obligations will be imposed by ACMA in regional aggregated television markets and will involve the licence conditions requiring the broadcast of minimum amounts of material ‘of local significance’. ACMA must ensure that on and after 1 January 2008 a condition exists that requires licensees of regional aggregated commercial television markets to broadcast under this licence condition. Aggregated markets are defined under subsection 43A (2).
- Under Schedule 2 (**new Subdivision 5B**), cross-media ownership will need to be disclosed:
 - this will apply to commercial television broadcasters and newspaper publishers at the time they broadcast or publish matter (other than advertising) that is wholly or partly about the business affairs of a cross-controlled media organisation (the business affairs model).
 - radio broadcasters will be able to adopt this model or a regular disclosure model, which will require them to broadcast cross-media relationships at regular intervals.
 - compliance with this requirement will be a licence condition for television and radio broadcasters. As newspapers are not subject to a licensing regime, it will be a criminal offence not to comply with this requirement.
 - the Minister may make a written determination that specifies types of material that are exempt from this requirement.
- ACMA will also impose conditions on non metropolitan commercial radio broadcasting licences if a ‘**trigger event**’ occurs in a licence area for the purpose of maintaining existing levels of local presence (section 43B). ACMA is to define existing level of local presence in the licence condition. (A trigger event will occur if a commercial radio licence is transferred to a third party or a new media group is created or there is a change in the control of a media group of which the radio licence is a part).
- ACMA will require regional commercial radio broadcasters to provide a prescribed minimum level of local news and information services if a licence has been transferred to a third party or a new commonly controlled media group has been created. ACMA may define what is meant by ‘local’.
 - (minimum standards of local news will be met if in a week at least five local news bulletins are broadcast on different days of the week during prime time. Minimum standards of community service announcements will be met if at least one community service announcement is broadcast. Minimum standards for emergency warnings will be met if licensees comply with requests from emergency service to broadcast warnings. ACMA is able to define ‘local’).

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- As a licence condition, radio licensees must submit Local Content Plans (LCPs) to ACMA for approval and registration. ACMA will be able to impose its own plans if it is dissatisfied with those submitted by licensees. Draft LCPs must be submitted within 90 days of a trigger event. ACMA must maintain and make publicly available a register of LCPs. ACMA is required to review LCPs every three years and can require variations as a result of its findings. The Minister may direct an investigation into whether additional licence conditions should be imposed in relation to local content.

Concluding comments

Media regulation in Australia should be reformed as it has proven problematic for the current regulations to accommodate developments in technology adequately. The media landscape is decidedly different from the one that produced the BSA in 1992 and new legislation needs reflect this fact. But that being the case, it does not unavoidably follow that all regulation of the media, which is a vital feature of a functioning democratic society, should be discarded. As the experience of deregulation in some nations and the concerns expressed by others about the consequences of treating the media as simply a market commodity illustrate, this type of action is likely to have negative impacts in terms of availability of information, opinion and critique.

The proposed changes in this Bill do not address the concerns of many who fervently believe the media is not just another market sector, and the public are not just consumers of media content. It is more in the public interest that regulation, albeit flawed, should continue in place to foster at least the current level of media diversity than it appears will be likely to result from deregulation.

The Government has argued consistently that the proposed changes to the BSA will ensure that a balance is achieved between commercial media interest and the public interest, it seems that failure to acknowledge that the media's unique role and, as a result to provide adequate safeguards to ensure current levels of diversity are protected, have tipped the balance in favour of commercial, rather than public interest.

Endnotes

1. For a full text of the current Act see:
<http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/all/search/AA1C2617808E9AA9CA256F89001094E6> Foreign Investment Policy at Foreign Investment Review Board website at <http://www.firb.gov.au/content/default.asp>
2. Explanatory Memorandum, pp1/2.
3. For a full text of the current Act see:
<http://www.comlaw.gov.au/ComLaw/Management.nsf/lookupindexpagesbyid/IP200401834?OpenDocument>

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4. Section 51 (v) of the Constitution: The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: Postal, telegraphic, telephonic, and other like services.
5. Section 51 of the Constitution: The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:- (i) Trade and commerce with other countries, and among the States; and (xx) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.
6. See http://www.austlii.edu.au/au/legis/cth/consol_act/tpa1974149/ Accessed 20 September, 2006.
7. Section 53 of the BSA - Limitation on control of commercial television broadcasting licences:
(1) A person must not be in a position to exercise control of commercial television broadcasting licences whose combined licence area populations exceed 75 per cent of the population of Australia. (2) A person must not be in a position to exercise control of more than one commercial television broadcasting licence in the same licence area.
8. Section 57 of the BSA - Foreign person not to be in position to control commercial television broadcasting licence (1) A foreign person must not be in a position to exercise control of a commercial television broadcasting licence. (3) 2 or more foreign persons must not have company interests in a commercial television broadcasting licensee that exceed 20 per cent
9. Section 55 of the BSA: Limitation on numbers of directorships—television (1) A person must not be a director of a company that is, or of 2 or more companies that are, between them, in a position to exercise control of commercial television broadcasting licences whose combined licence area populations exceed 75 per cent of the population of Australia. (2) A person must not be: (a) in a position to exercise control of a commercial television broadcasting licence; and (b) a director of a company that is in a position to exercise control another commercial broadcasting licence whose combined licence area population exceeds 75 per cent of the population of Australia (3) A person must not be (a) a director of a company that is in a position to exercise control of a of a commercial television broadcasting licence; and (b) a director of a company that is in a position to exercise control of another commercial television broadcasting licence;; if each of those licences have the same licence area. (4) A person must not be: (a) a director of a company that is in a position to exercise control of a commercial television licence; and (b) in a position to exercise control of another commercial television broadcasting licence ; if each of those licences have the same licence area.
10. Section 58 of the BSA: (1) Subject to subsection (2), not more than 20% of the directors of each commercial television broadcasting licensee may be foreign persons. (2) The ACMA may, in writing, approve the board of a commercial television broadcasting licensee containing a higher percentage of foreign persons for a period not exceeding 28 days if the ACMA considers special circumstances exist that require such an approval (3) If the ACMA has approved a breach of subsection (1), the ACMA is not to grant another approval of the same breach.

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11. Section 54 of the BSA: A person must not be in a position to exercise control of more than two commercial radio broadcasting licences in the same licence area.
12. Section 60 of the BSA: A person must not be in a position to exercise control of: (a) a commercial television broadcasting licence and a commercial radio broadcasting licence that have the same licence area; or (b) a commercial television broadcasting licence and a newspaper that is associated with the licence area of the licence; or (c) a commercial radio broadcasting licence and a newspaper that is associated with the licence area of the licence.
13. Section 109 of the BSA: (1) A foreign person must not have company interests of more than 20% in a subscription television broadcasting licence. (2) A foreign person must not have company interests in a subscription television broadcasting licence that, when added to the company interests in that licence held by other foreign persons, exceed 35%.
14. Prime Minister John Howard. Radio interview transcript, 1 September, 2000. See <http://www.pm.gov.au/news/interviews/2000/interview429.htm> Accessed 28 September 2006.
15. Terms of reference, March 1999. Productivity Commission, *Broadcasting Inquiry Report No 11*, 3 March, 2000. <http://www.pc.gov.au/inquiry/broadcast/finalreport/broadcast.pdf> Accessed 28 September 2006.
16. Productivity Commission, op. cit., Recommendation 10.4.
17. See http://parlinfoweb.parl.net/parlinfo//view_document.aspx?TABLE=OLDBILLS&ID=1291
18. Senate Environment, Communications, Information Technology and the Arts Legislation Committee. *Report on the Broadcasting Services Amendment (Media Ownership) Bill 2002*, June 2002. http://www.aph.gov.au/senate/committee/ecita_ctte/completed_inquiries/2002-04/media_ownership/report/report.pdf Accessed September 18 2006.
19. See http://parlinfoweb.parl.net/parlinfo//view_document.aspx?TABLE=OLDBILLS&ID=1554
20. The Howard Government election 2004 policy, A stronger economy, a stronger Australia, 21st century broadcasting. See http://www.liberal.org.au/2004_policy/21st_Century_Broadcasting_merged.pdf Accessed 19 September 2006.
21. Department of Communications, Information Technology and the Arts, *Meeting the digital challenge, reforming Australia's media in the digital age*, March 2006. See http://www.dcita.gov.au/_data/assets/pdf_file/37572/Media_consultation_paper_Final_.pdf Accessed 15 September 2006.
22. Sensitive sectors: The Government determines what is 'contrary to the national interest' by having regard to community concerns. Reflecting community concerns, specific restrictions on foreign investment are in force in more sensitive sectors such as residential real estate, banking, telecommunications, shipping, civil aviation, airports and the media. Generally these categories include sectors where other Government agencies or relevant interested

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parties would be involved in the screening process or have major carriage. See <http://www.firb.gov.au/content/default.asp> Accessed September 26 2006.

23. Regulation Impact Statement, p.13.
24. *ibid.*
25. *ibid*, p.20.
26. *ibid*, p.13.
27. *ibid*, pp.14/15.
28. *ibid*, p.18.
29. See http://www.aph.gov.au/house/committee/cita/regional_radio/irindex.htm Accessed 18 September 2006.
30. See http://www.acma.gov.au/acmainterwr/aba/newspubs/radio_tv/investigations/documents/geral/localcontent-june04-execsumm.pdf accessed 19 September 2006.
31. ABA, 'Regional television exceeds local content quotas', News Release 106/2004. 7 September, 2004. See: http://www.acma.gov.au/ACMAINTER.262384:STANDARD::pc=PC_91497 Accessed 19 September 2006.
32. Regulation Impact Statement, p.39.
33. *ibid*, p47.
34. See the submission by Network Ten on the Broadcasting Services Amendment (Media Ownership) Bill 2002: http://www.aph.gov.au/senate/committee/ecita_ctte/completed_inquiries/2002-04/media_ownership/submissions/sub08.doc Accessed 21 September 2006.
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36. Alex Wilson, 'Most media welcome new rules, but Murdoch group not happy', *Canberra Times*, 14 July, 2006.
37. See News Corporation website <http://newscorp.com/operations/dbst.html> Accessed 4 October 2006.
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 46. Roy Morgan Research, 'Australian's oppose government's media laws' August 15 2006. See <http://www.roymorgan.com/news/polls/2006/4065/>
 47. Stephen Conroy, 'Proposed media reforms staff up to a no show', *Age*, 28 August 2006.
 48. Senator Stephen Conroy, *House of Representatives Debates*, Questions on Notice, 12 September 2006 and 24 September, 2006.
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 50. Senator Lyn Allison interview on Meet the Press, 16 July, 2006.
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75. Regulation Impact Statement, p.49.
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78. Regulation Impact Statement, pp.21/22.
79. Dwyer et al, op. cit.
80. Conclusion drawn from analysis of Nielsen regional radio and television ratings.
81. Sources for table: Nielsen radio and television ratings.
http://www.nielsenmedia.com.au/MRI_pages.asp?MRIID=11
http://www.nielsenmedia.com.au/MRI_pages.asp?MRIID=22
 Australian Radio online. <http://www.adonline.id.au/radio/>
 Oztam <http://www.oztam.com.au/html/>
 Australian Film Corporation ratings <http://www.afc.gov.au/default.aspx>
 Communications Law Centre, *Communications Update*, June 2005.
 Note in addition to the media cited in the table a considerable number of suburban community newspapers are published in all mainland capitals. These are mainly owned by John Fairfax Holdings and News Corporation in Sydney and Melbourne although a number are owned by South East Newspapers P/L in Melbourne. All accessed October 8/9 2006.
82. Regulation Impact Statement, p.8.
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85. Christopher Pyne, op. cit.
86. ibid.
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88. Opinion polls show that 82% of Australians think the ABC is doing a good job (Newspoll, 2002) and that 90% of Australians continue to believe that the ABC provides a valuable service to the community (ABC Annual Report, 2005). A large number of Australians (60%) also support increases in the ABC's budget through government funding. A Newspoll survey found that only 2% believed that funding should be less (Newspoll, 2002). See <http://www.australiancollaboration.com.au/democracy/persistissues/publicbroadcasters.html>
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89. The ABC's budget has continued to be cut and applications for new funding have consistently been rejected.

YEAR	ABC PROGRAMMING FUNDS
2005–06	\$625 million
1985–86	\$868 million

Source: ABC Annual Report 2005, p.56
http://www.abc.net.au/corp/annual_reports/ar05/pdf/ABC_AR05_Complete.pdf

The table above shows the ABC's funding has decreased by 29.7% since 1985-86. The BBC, the British public broadcaster, gets almost five times the ABC's funding on a per capita basis. The BBC 2004/2005 Annual Report estimated that funding in total to the BBC group income was estimated at £3835.3 million for 2005 (BBC Annual Report, 2004-5, p.96). See <http://www.australiancollaboration.com.au/democracy/persistissues/publicbroadcasters.html> Accessed 4 October, 2006.

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