



Media ownership deregulation in the United States and Australia: in the public interest?

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Executive summary

A deregulatory media ownership regime, which reflects similar thinking to that which provoked important changes in the American media environment in 1996, has recently been introduced into Australia. Comparable arguments have been advanced to support deregulation of Australian media ownership as were put forward in America in the 1990s. These were principally that ownership deregulation would result in benefits for all sectors: for the traditional media, an emerging new media and the public. The traditional media would be released from restrictions, which had prevented it from competing with new media; from accessing new customers and opportunities. The new media would be free to develop, expand the boundaries of what has been labelled as newly-emerging citizen journalism and interactions with the old media. At the same time, the public interest would be served as increasing numbers of media sources and outlets enhanced diversity in the delivery of information and entertainment.

Reforms to the American media landscape were initiated in the 1980s. The most radical of these reforms, the Telecommunications Act, was introduced in 1996. At the time of its introduction the Telecommunications Act was seen as the means by which better services and enhanced competition in the media would be achieved. The Act was also promoted as protecting the public interest by safeguarding freedom of speech and allowing a diversity of viewpoints to continue in a broadening media environment.

In Australia, the idea that it would be more advantageous to deregulate media ownership radically was only seriously advanced with the election of the Howard Government in 1996. At that time, the views earlier espoused in America that media ownership regulation was anachronistic and that business and the public would benefit from a deregulatory regime, were iterated.

Changes to media regulation introduced under the Telecommunications Act have transformed the American media landscape, but there is debate about whether they have delivered promised benefits. It is possible to argue that the American experience suggests that the public interest may not be well served by media ownership deregulation.

This does not imply that prior to the passage of the Telecommunications Act that the American media landscape solely served the public interest. Clearly, commercial imperatives were a strong influence on media content. Nor is it to imply that offerings on commercial broadcasters always fulfilled the definition of public interest programming noted later in the paper. Rather, it is to note that following passage of the Telecommunications Act there were fewer restrictions on activity that worked solely in commercial interest, such as mergers, takeovers and standardisation and homogenisation of programming and less consideration of promotion of localism and diversity of opinion that had previously been seen as an essential component of the American broadcasting environment.

This research brief therefore considers the American experience of ownership deregulation from 1996 to the beginning of 2007 and makes comparisons with the Australian media landscape. It discusses whether differences in media traditions between the countries could deliver different outcomes from deregulation. It considers too if the existence of an entrenched public broadcaster culture in Australia is sufficient to counter the possible emergence of a private media landscape that may be more homogenised and more restricted and restrictive in content.

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Introduction

The media

There are a number of assessments of the role the media play in society. Most acknowledge their importance in shaping the way people think and their influence on personal choices. Generally, it is agreed that the media play multiple roles in society. The most obvious of these are: Collection and dissemination of information; transmission of social and cultural values; education; and entertainment.

These roles in turn can involve a number of aspects, for example, the information function of the media can include the generation of political and social ideas and the shaping of policy agendas and priorities. In providing information the media can also be responsible for the inspiration and mobilization of political and social groups. Or the media's information role can involve an accountability aspect; they monitor and criticise governments, bureaucracies and social institutions.

I acknowledge the importance of the various roles of the media. However, this research brief deliberately emphasises their role in providing the public with an informed basis upon which views can be expressed and decisions made about political and social issues. That is, the brief seeks to discuss the media in the context of their role as the collectors and disseminators of information and not to consider the other roles of the media. The paper emphasises also that the role of information collection and dissemination is multi dimensional – dissemination of information means therefore, not just providing information but providing a variety of information and views.

In short, the arguments in the paper have been presented from the perspective that the role of the media in civil society is not only to inform, but also to clarify and illuminate on the information provided. In this way the media act in the public interest.

In defining traditional media, this research brief also restricts discussion to mainstream media. It is not possible within the limitations of the brief to consider ethnic media in either the United States or Australia. It should be noted, however, that there are, for example, hundreds of ethnic newspapers in the United States and that these are published in over 40 languages.¹ Despite this, and while it appears that ethnic media in the United States is

1. It is estimated that over 51 million Americans access the ethnic media on a regular basis (55 per cent of Hispanics for example and 42 per cent of African Americans). Many Americans use the ethnic media to access information about their countries of origin and their local ethnic communities.

growing rapidly, there has been little attempt to date by large media companies to take over ownership of ethnic media outlets.²

In Australia, in the 2001 Census, over 3 million people identified themselves as speaking a language other than English. There are over 200 ethnic newspapers in languages ranging from Nepalese to Urdu, as well as a number of ethnic radio stations. The major media companies in Australia to date, have not shown interest in purchasing ethnic media.³

I am aware also that there is a community broadcasting sector in Australia that clearly can be defined as public broadcasting.⁴ The sector also clearly provides diversity of opinion and alternative media outlets for non English speaking Australians.⁵ Given the limitations of this research brief, I am unable to discuss this sector in depth. However, the arguments presented concerning the principal public broadcaster, the Australian Broadcasting Corporation, and the Special Broadcasting Service, apply similarly to the community broadcasting sector. These are principally that the sector needs to be appropriately funded and supported for it to function effectively.

United States

In America, the press has been afforded protection under the First Amendment to the American Constitution, ‘in appreciation of the crucial role it plays in maintaining a free society’.⁶ Judicial interpretation in relation to programming also indicates special protection rights apply similarly to broadcasters as protectors of democratic values.⁷

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2. See Survey undertaken by Bendixen and Associates, *Ethnic media in America: the giant hidden in plain sight*, June 2005 <http://www.ncmonline.com/polls/executivesummary.pdf> Accessed 29 May 2007. See also charts indicating media habits of ethnic groups at http://www.stateofthenewsmedia.org/narrative_ethnicalternative_ethnic.asp?media=9for
 3. See <http://www.crc.nsw.gov.au/ethnicmedia/radio.htm> and <http://www.crc.nsw.gov.au/ethnicmedia/index.htm>
 4. This sector involves some 484 community radio stations producing nearly 44,000 hours of programming per week and 6 long term licensed television stations (producing around 160 hours of local programming per week).
 5. Community radio has an estimated monthly national radio audience reach of more than seven million. The key reason listeners cite for listening to community radio is that it supplies local news and information. (McNair Ingenuity Community Radio National Listener Survey, September 2004 and McNair Ingenuity Research, Community Radio National Listener Survey, August 2006 http://www.cbonline.org.au/media/mcnair_survey_06/McNair_Report.pdf Accessed 20 May 2007).
 6. E. Cornog, ‘Let’s blame the readers’, *Columbia Journalism Review*, January/February 2005. <http://www.cjr.org/issues/2005/1/cornog-readers.asp> Accessed 30 October 2006. Note also in

United States media is most often perceived to be commercial media. While public broadcasting exists and commands a substantial audience, it is often not perceived as a central feature of the media landscape.⁸ This is possibly because American broadcasting ideology has maintained that a free commercial press, unfettered by public restraint, will deliver a more progressive, socially responsible private enterprise. As one commentator remarks, the fundamental American belief has been that possible failures in a privately-dominated media system 'could be corrected by appeals to private broadcasters' conscience, gentle regulatory coercion and an ETV [Educational Television] service supported at minimal levels'.⁹

For most of the twentieth century, it was generally accepted in the United States that some form of media ownership regulation of the commercial media was essential to serve the public interest. Ownership regulation was considered important because it ensured there were a number of media voices and that these voices delivered a plethora of opinion. Since the 1980s, this view has been challenged. The introduction of new media technologies and new types of media, which coincided in America with an ascendancy of thinking about freeing up the marketplace, resulted in moves towards a more deregulatory media environment.

Prior to the late 1970s, media ownership policy in the United States also relied on regulation created and applied under the auspices of a Federal Communications Commission (FCC). It aimed to achieve accountability through fostering diversity of opinion and opportunity for criticism of political and social mores. In the last thirty years, however, while the rhetoric of promoting democratic values has continued, media ownership policy under the FCC has increasingly moved from ownership regulation to embrace and encourage deregulatory action.

A number of ownership deregulatory measures have been introduced since the 1980s; the most radical of these was the Telecommunications Act 1996. This Act was initially well received as the changes it promised to telecommunications in five areas, including broadcasting, were promoted as potentially beneficial to all Americans. However, as noted

reference to this point that in the free society which the press initially maintained, freedom was restricted. Women and African Americans, for example, were excluded.

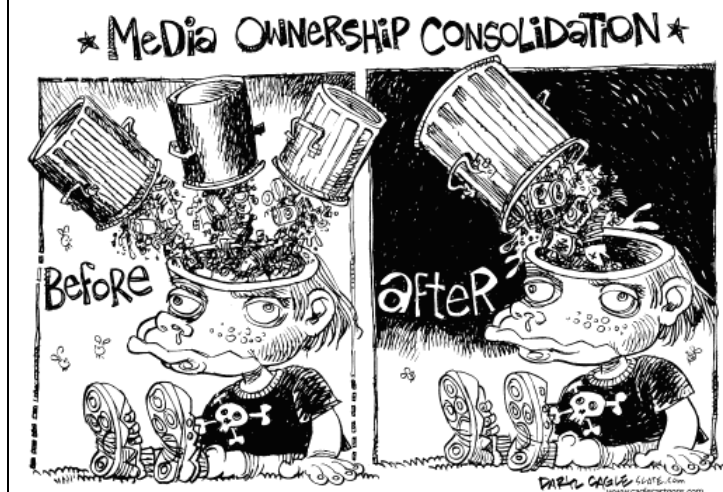
7. D. Croteau and W. Haynes, *The business of media. Corporate media and the public interest*, Pine Forge Press, London, 2006, p. 30.
8. In the United States, public radio and television broadcasting are provided by loosely organised, private, not-for-profit corporation networks. See <http://www.npr.org/about/> and <http://www.pbs.org/> for more detail. Accessed 5 June 2007.
9. A. Likhi, 'Public television in the United States of America', 4 July 2006, http://portal.unesco.org/ci/en/ev.phpURL_ID=17953&URL_DO=DO_TOPIC&URL_SECTION=201.html Accessed 8 January 2007.

throughout this research brief, some Americans have begun to wonder about the accuracy of the claims made about the Telecommunications Act. These were essentially that ownership deregulation would deliver an abundance of media types that would ensure an abundance of opinion would continue to be generated and promulgated to an abundance of people in a deregulated media environment. (See Appendix A for a discussion of the arguments in support of ownership deregulation).

There is evidence to suggest that despite realisation of the promised increase in media sources, ownership deregulation has at the same time reduced the range of media voices available. As such, some critics of ownership deregulation argue it has undermined free speech and homogenised opinion. (Appendix A considers the arguments against ownership deregulation in more depth).

The most recent proposals for media reform in America were launched amidst considerable ‘grassroots’ public protest. Prior to the 2006 Congressional elections further ownership deregulatory moves were also stalled in the light of judicial decisions. In tandem with judicial questioning of ownership deregulation, crucial debates about the extent to which media ownership regulation protects the public interest have polarised and intensified. (For a more detailed background on the history of American media tradition and the moves towards deregulation see Appendix B).

One view of American media ownership deregulation



Source: Daryl Cagle¹⁰

10. See cartoon at:

Australia

The print media in Australia enjoy a similar freedom from government regulation as in the United States, although there is no constitutional protection. The broadcast media have been subject to regulation in both countries and broadcasting rules were introduced around the same time. Nevertheless, there have been a number of differences between both media environments.

Unlike America, in Australia a number of authorities have been responsible for regulation of the broadcasting sector. The Australian Communications and Media Authority is the latest of these. ACMA's responsibilities are listed as including the protection of consumers and other users and fostering an environment in which the electronic media respects community standards and responds to audience and user needs.¹¹

Media regulation has been sporadic and inconsistent in the Australian context. This in part has contributed to a more concentrated media environment in Australia. Geography and population density have also been contributing factors in this concentration, as has the sometimes overt influence of major media owners.

The concept of the media as a vital tool to foster the public interest is also less frequently and passionately articulated in Australia than in America. It is possible this is because Australians are more confident that their version of public broadcasting, inherited principally from the United Kingdom, will provide the necessary diversity and media balance to serve the public interest.

Claims about the influence of major media owners on Australian governments, regardless of the political persuasion of those administrations, have been made frequently. Many Australian politicians have believed media barons can 'deliver' electoral consequences and as such, media owners' preferences have often been indulged in media policy-making.¹² One media observer claims, for example, that Prime Ministers Lyons, Menzies, Fraser, Hawke

http://politicalhumor.about.com/gi/dynamic/offsite.htm?zi=1/XJ/Ya&sdn=politicalhumor&cdn=entertainment&tm=7&gps=78_9_1072_820&f=00&su=p284.8.150.ip_&tt=14&bt=0&bts=0&zu=http%3A//cagle.slate.msn.com//news/MediaFCCvote/main.asp Accessed 16 May 2007.

11. See ACMA website

<http://www.acma.gov.au/ACMAINTER.1507598:HOMEPAGE::pc=HOME,tlp=HOME>

12. P. Jones, 'Regulating for freedom: Media lessons from Australia', http://www.opendemocracy.net/media-globalmediaownership/article_1492.jsp Accessed 17 January 2007.

and Keating blatantly favoured major media proprietors in allocation of broadcasting licences.¹³

Limiting expenses has been an important factor in the Australian media environment. This has been a constant in a market geographically almost the size of America, but considerably smaller in terms of population.

Arguably, diversity of views in the Australian media has always been less than in the American press (and the press in many other democracies, such as the United Kingdom). This may be because of the small Australian market place or the fact that there is less political polarisation in Australia. It is likely, however, that diversity has always been a potential casualty of the same economic considerations which limited outlays and encouraged media concentration. As Trevor Barr notes, the Australian media are dominated by a commercial ideology which, while it reflects the institutional reality of economics, also inevitably restricts the range of diverse and antagonistic views the commercial media system can offer the public.¹⁴

Print media in Australia has been on the road to concentration since the 1920s. In 1926, there were 26 capital city newspapers published on a daily basis and 21 independent owners. In 2005, this had reduced to 12 newspapers predominantly owned by John Fairfax Holdings and News Corporation.¹⁵

Radio ownership was initially dominated by major print owners and while this is no longer the case, it continues to be concentrated in few hands. Four metropolitan companies own the majority of metropolitan stations and each has a radio audience reach of over 50 per cent; one company owns almost 45 per cent of all regional stations.¹⁶

Television is a similar story. Kerry Stokes' Seven Network and the Ten Network (effectively controlled by the Canadian company Canwest, despite existing foreign ownership regulation

13. T. Barr, *Newmedia.com.au. The changing face of Australia's media and communications*, Allen and Unwin, St Leonard's, 2000, p. 5.

14. *Ibid*, p. 7.

15. Communications Law Centre, *Communications Update*, June 2005.

16. Austereo (59.5%), DMG Radio Australia (52.9%), Southern Cross Broadcasting (Australia) Ltd (52.6%) and Australian Radio Network (50.1%). Macquarie Regional Radio Networks (Macquarie Bank Ltd) owns 88 of the 206 regional radio stations in Australia. Communications Law Centre, *Communications Update*, June 2005.

– see later comment) own the majority of stations in metropolitan areas. Win Corp and Prime Television own the majority of regional broadcasters.¹⁷

The Australian version of media diversity?



Source: Nicholson¹⁸

The concept of a public broadcaster as an essential feature on the media landscape represents a vital difference between Australia and America. The public broadcaster idea easily transferred to Australia from Britain early in the twentieth century and since then public broadcasting has been seen as a type of public service. From this perspective it has been

17. *Communications Update*, op cit. Note that PBL owns the third commercial television channel in Sydney, Darwin, Brisbane, Melbourne. Sunraysia (Eva Presser) owns Channel 9 in Perth and Southern Cross broadcasting owns Channel 9 in Adelaide. There is speculation that PBL and Win Corp are interested in purchasing Channel 9 Perth.

See <http://www.abc.net.au/news/newsitems/200703/s1876678.htm> Accessed 20 March 2007

18. See cartoon at http://www.nicholsoncartoons.com.au/cartoon_4544.html Accessed 16 May 2007

defined as a 'cultural, moral and educative force for the improvement of knowledge, taste and manners'.¹⁹ At the same time, it has been seen as a unifying force 'in the creation of an informed and enlightened democracy',²⁰ just as the private media has been lauded as the guardian of American democracy. As such, it may be possible that the existence of a strongly supported and nurtured public broadcasting system could be a vital counter against any vagaries which may result from ownership deregulation, in a way not conceivable in the United States. The potential countervailing influence of an Australian public broadcaster culture is likely only to be influential in a deregulatory environment, however, if it is supported and nurtured to act for this purpose.

Donald McDonald notes that in the concentrated Australian media market, the Australian model of public broadcasting is unique. It is an amalgam of the British and American experiences and 'the software of effective democracy'.²¹ In McDonald's view, the principal public broadcaster, the Australian Broadcasting Corporation (ABC), therefore not only provides the public with news reports, but also with a variety of investigative and other fare not available from Australian commercial media.

Some have criticised the ABC as elitist and consider a public broadcaster unnecessary in an age where a certain proportion at least of the 'niche' programs it broadcasts can be seen on pay television and where pay television has more channels to cater responsively to the needs of audiences. But niche programming is only part of the public broadcaster role. The further functions of that role include producing innovative programming that promotes a sense of national identity and cultural diversity and encourages an understanding of the world.

It appears the value of a public broadcaster in achieving these aims is recognised by the majority of Australians²² and that they agree with the view that the ABC is the 'yardstick by which the commercials are kept honest'.²³ In short, as Ken Inglis notes, for Australians, the ABC as a public broadcaster is a cherished and trusted institution.²⁴ (For more detail on

19. E. Jacka, 'The future of public broadcasting' in S. Cunningham and G. Turner (Eds), *The Media and communications in Australia*, (Second edition), Allen and Unwin, Crows Nest, 2006, p.344.

20. Ibid.

21. D. McDonald 'Introduction' in J. Mills (ed) *Barons to bloggers. Confronting Media Power* Miegunyah Press, Melbourne, 2005, p.13

22. See for example comments on ABC news coverage from Roy Morgan Polling at <http://www.roymorgan.com/news/polls/2004/3789/> accessed 22 November 2006.

23. D. Altman, 'Imagine that' in M. Fraser and J. O'Reilly (eds) *Save our ABC*, Hyland House, South Melbourne, 1996, p. 40.

24. K. Inglis, *Whose ABC? The Australian Broadcasting Corporation 1983-2006*. Black Inc, Melbourne, 2006, p.588.

Australian media traditions, attempts to address concentration and the media landscape prior to the 2006 media ownership reforms, see Appendix C).

Media and the public interest

One view of the media is that it simply delivers what interests the public; it is no different from other commodities in producing and delivering goods.²⁵ According to this view, news and entertainment that has broad, mainstream appeal, which attracts and retains advertisers and sells products is valuable. Everything else is ‘narrow and highbrow’, the prerogative of elites who seek to impose their preferences on unwilling citizens. In defending this view in an American context, Adam Thierer accuses past policymakers of promoting ‘fairy tale’ rhetoric in attempting to direct the content or character of the media towards some obscure, non-existent noble end – what they label ‘the public interest’. According to Thierer, there is no such thing because in a democracy the public interest is indefinable. In a democracy there can only be ‘numerous and changing interested publics.’²⁶

Definition of the public interest is a challenging task. This is because the term necessarily alters over time to reflect changes in society and because it involves at least a degree of subjectivity. The public interest can be related to ideas, like ‘common advantage’, ‘common good’, ‘public good’, ‘public benefit’ or ‘general will’. For example, a common good can be defined as a factor or set of factors that direct a person’s collaboration with others and likewise, that directs their collaboration with each other and with that person. Following from this perspective, public benefits or goods must be protected in the public interest and for the common good.²⁷ Another interpretation is that the public interest can also mean more

25. This view was expressed in America, for example. In 1984 in arguing for deregulation of media industries, Mark Fowler, appointed FCC Chair by President Reagan, famously called television ‘just another appliance. It’s a toaster with pictures’. As critics pointed out, Fowler’s comment missed the mark: The societal impact of television, its power to shape our lives, goes way beyond that of sliced bread. If television is just a toaster with pictures, then paintings are just cloth with drawings, and books just paper and ink.

http://dir.salon.com/story/tech/feature/2003/05/08/future_tv/index_np.html?pn=2 Accessed 22 November 2006.

26. B. Compaine, ‘The myths of encroaching global media ownership’, http://www1.primushost.com/~bcompain/WOTM/media_myths.htm. Accessed 22 November 2006.

27. See D. Morrison and M. Svennevig, The public interest, the media and privacy, 2002 for varying interpretations of what constitutes the public interest, <http://www.bbc.co.uk/guidelines/editorialguidelines/assets/research/pubint.pdf>

generally what is considered beneficial to the public, that is, that the ‘public interest does not mean what is of interest to the public but what is in the interest of the public’.²⁸

There is also the issue of to what extent the public interest is a ‘moving feast’. Despite rhetoric in America about how the media should serve the public interest, there has been some discussion about whether original interpretations of the public interest are actually in contrast to current thinking. It has been argued, for example, that invoking the public interest as a condition for the licensing of radio stations in America in the 1920s meant that authorities could ban, in the name of ‘public interest, convenience and necessity’, broadcasts of the so called subversive ideas of ‘unions, socialists, communists, evolutionists, improper thinkers, non-Christians, and immigrants’.²⁹

With reference to the media and taking Thierer’s conclusion as a starting point, however, and for the purposes of the arguments put forward in this research brief, it is possible to define what constitutes the public interest in certain terms. These relate to the capacity of the media to provide citizens with the information, education and quality entertainment they need to participate in political and social life – to be interested citizens, or in Thierer’s terminology, publics. It is possible to conclude from such a definition that, unlike other industries, the media is unique in this capability.

A continuous diet of ‘Big Brother’ style entertainment,³⁰ or sensationalised news promoted in a homogenised and corporatised environment that discourages public dialogue and fails to expose people to new and /or different ideas, does not correspond with such a definition. In serving the public interest the media needs to:

- reflect the range of views and experiences which are present in a democratic society
- foster creative, original ideas and programs reflecting the vibrant nature of a society

28. See <http://www.itspublicknowledge.info/legislation/briefings/section41.htm>

29. United States’ *Congressional Record*, 1926, 12502. Cited by Mark Goodman, ‘The Radio Act of 1927 as a product of progressivism’, <http://www.scripps.ohiou.edu/mediahistory/mhmjour2-2.htm> Accessed 7 November 2006.

30. Big Brother is a reality television program. The program follows a number of contestants, who live for three months in a community house under the continuous gaze of television cameras. The program has been subject to frequent criticism. See for example A. Harris, ‘Emma’s haunting house moment’, *Courier Mail*, 14 June 2007, <http://www.news.com.au/dailytelegraph/story/0,22049,21903739-5012853,00.html> P. Dockrill, ‘Big brother turkey slap controversy threatens net freedom’, http://apcmag.com/3797/big_brother_turkey_slap_controversy_threatens_net_freedom Accessed 20 June 2006.

- address significant issues, devoid of sensationalism, and
- provide independent viewpoints not indebted to the largesse of government or corporations.³¹

This view of the media appears particularly to represent the ideas of a number of Americans, from varying political and social strata, who have rallied for a re-evaluation of the direction media policy in the United States has taken since the 1980s.

While the same intensity in rhetoric about the public interest is not commonplace in Australia, public interest considerations have not been entirely missing in references to the media's role. A 1954 Royal Commission, which considered the introduction of television to Australia, for example, stressed that the medium should be entrusted to commercial and public broadcasters on the basis that it was to be used to benefit all members of society.³²

On the other hand, a number of media critics argue the idea of a public interest has played no role in media policy making in Australia. In reflecting on the Hawke Labor Government's reshaping of the media industry in 1986, it is Julianne Schultz view, for example, that the public interest was not considered. According to Schultz, there was talk of takeovers, share price movements and accusations of deals for mates, but no discussion of why the ownership of the media is important in a liberal democracy.³³

Regardless of the extent to which the public interest has been of concern in determining past media policy in Australia, it clearly has not been as dominant a concern as in America. It is possible that the confidence Australians place in a principal public broadcaster explains this situation. The Charter of the Australian prime public broadcaster, the ABC, has been clearly framed to reflect public interest criteria. The public broadcaster is required to provide an independent national broadcasting service which educates, informs and promotes awareness for Australians about national and international affairs. Its service is also to contribute to a

31. Croteau and Haynes, op. cit., pp. 156/157.

32. Royal Commission on Television *Report*, Government Printing Office, Canberra, 1954, (G Paton, Chair), p. 144. quoted in Report by the Senate Select Committee on Information Technologies, April 2000,

http://www.aph.gov.au/senate/committee/it_ctte/completed_inquiries/1999-02/selfreg/report/contents.htm Accessed 19 December 2006.

33. J. Schultz 'Failing the public: The media marketplace' in Helen Wilson (Ed) *Australian communications and the public sphere*, Macmillan, South Melbourne, 1989, p.68.

sense of national identity and to reflect and enrich the cultural diversity of the Australian community.³⁴

Australians appear comfortable with this role for public broadcasters. It appears they are also comfortable with a situation where public broadcasters are charged with acting responsibly and independently in protecting the public interest.³⁵ Such a situation relies on the assumption that a public broadcaster of this type will always be adequately resourced to discharge its responsibilities.³⁶

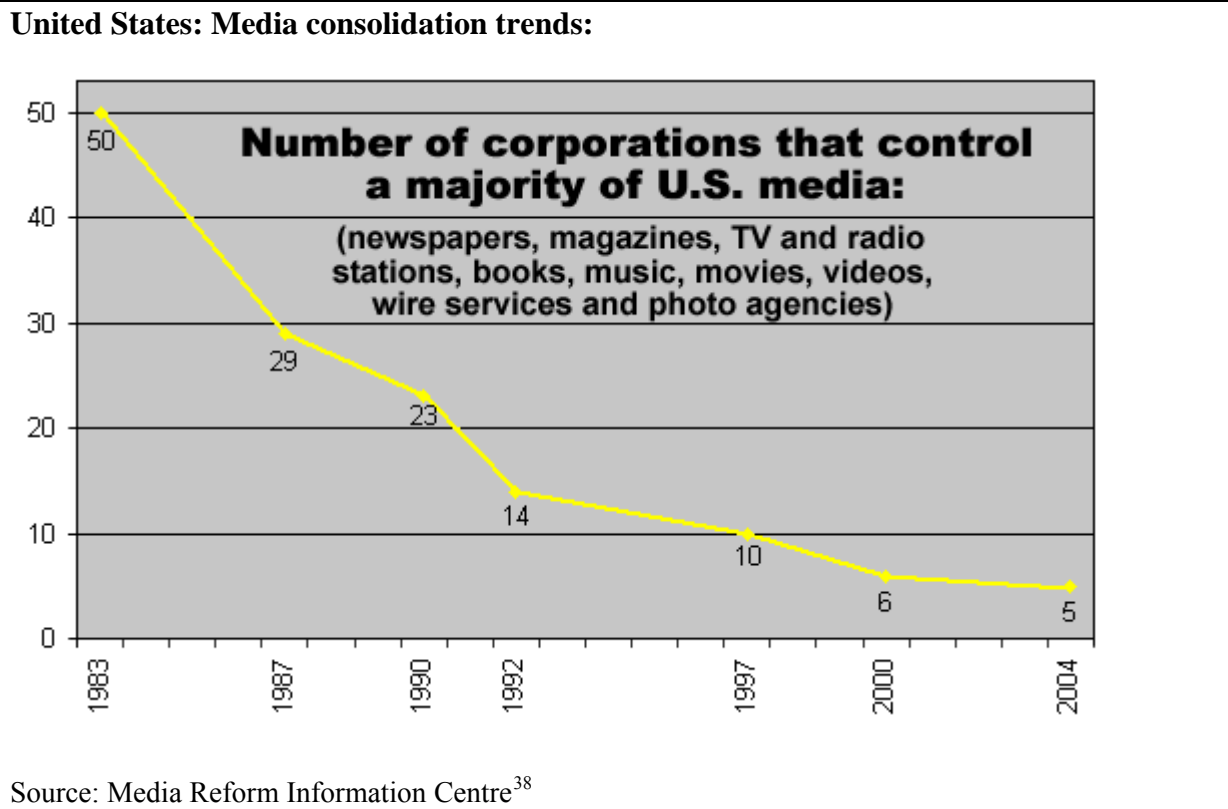
The American experience

Overview

On signing the Telecommunications Act in 1996, President Bill Clinton predicted an overhaul of media ownership regulation introduced under the Act would deliver lower prices for American consumers and better quality services and greater choices. At the same time it would ensure the benefits of ‘a diversity of voices and viewpoints in radio, television and print media’.³⁷

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34. Australian Broadcasting Corporation Act 1983, Section 6, Charter of the Corporation. See <http://www.abc.net.au/corp/pubs/ABCcharter.htm>. Accessed February 26 2007.
 35. Ninety per cent of Australians believe that the ABC provides a valuable service to the community. Australian Broadcasting Corporation, *Annual Report*, 2006, p.36.
 36. A large number of Australians (60 per cent) support increases to ABC funding. Australian Collaboration, Democracy Watch, <http://www.australiancollaboration.com.au/democracy/persistissues/publicbroadcasters.html> Accessed 16 January, 2006.
 37. ‘Telecommunications overhaul approved by Congress’, Facts on File, World News Digest, 8 February 1996.

The following table would suggest that the Act has not delivered these benefits.



Radio

Regulation of radio broadcasting from 1927 was beneficial to local American communities. It not only promoted competition between small local operators, but fostered a diversity of local viewpoints.³⁹ The Telecommunications Act immediately and dramatically changed this situation. By 2002, one out of every three previous owners had left the radio industry after sales saw more than 4400 stations bought and sold during 1996 and 1997 alone.⁴⁰ The

38. See Media Reform Information Center (sic) at <http://www.corporations.org/media/>

39. Arts Industries Policy Forum, 'Radio deregulation and consolidation: What is in the public interest?' July 2004.

<http://sitemason.vanderbilt.edu/files/h3qUh2/Final%20paper%20for%20Forum.pdf> Accessed 31 October 2006.

40. A. DeBarros, 'Consolidation changes face of radio', *USA Today*, 7 July 1998 and G. Williams and S. Roberts, 'Radio Industry Review 2002: Trends in ownership, format, and finance',

industry went from one serviced by a myriad of independent radio broadcasters, to one controlled by radio ‘giants’, (as is illustrated by the example of Clear Channel Communications in Box 1).

Box 1: Clearly an American radio giant - the case of Clear Channel Communications

Prior to the passage of the Telecommunications Act in 1996, no single radio corporation in America was able to own more than 40 stations. In 2006, one company, Clear Channel Communications,⁴¹ owned more than 1200 radio stations and boasted a listening audience of over 110 million. Ten companies dominated two-thirds of the American radio audience.

Clear Channel and Viacom, (the owner of Infinity Broadcasting), controlled broadcasting to 42 per cent of listeners and amassed 45 per cent of radio industry revenues.⁴² In addition, between 1994 and 2001, the number of full-time radio newsroom staff contracted by 44 per cent and part-time news staff by more than two-thirds. The common complaints from the public arising from these changes were about the loss of diversity in radio – there was less or no local news on radio and play lists were homogenised.⁴³

Clear Channel extended its dominance of radio through a concomitant take over of the live concert industry. It has since been accused of using its market position to indulge in anti competitive practices, selecting play lists based on the payment of promotional fees and on the basis of whether the company agrees with the politics or messages of performers.⁴⁴

The Media Access Project lobby group has claimed Clear Channel’s methods and efficiencies have virtually eliminated local music and local news and that the organisation relies purely on national play-lists, centralised news services and technology. More importantly in terms of maintaining diversity, Media Access has accused Clear Channel of determining which talk show hosts are syndicated, to ensure only one point of view is broadcast over its stations.⁴⁵

Federal Communications Commission, Media Bureau Staff Research Paper 11, September 2002.

41. See company profile at <http://www.clearchannel.com/> Accessed 7 November 2006.
42. See ‘Who owns the media?’ at <http://www.stopbigmedia.com/chart.php?chart=radio> Accessed 6 November 2006
43. Between 1994 and 2001, the number of full-time radio newsroom staff contracted by 44 per cent and part-time news staff by more than two-thirds. Common Cause, *Unintended consequences and lessons learned. The fallout from the Telecommunications Act 1996*. May 2005. http://www.commoncause.org/atf/cf/%7BFB3C17E2-CDD1-4DF6-92BE-BD4429893665%7D/FALLOUT_FROM_THE_TELECOMM_ACT_5-9-05.PDF Accessed 30 October 2006.
44. B. Holland and R. Waddell, “Congressman seeks Clear Channel probes,” *Billboard*, 2 February 2002, p. 96;
45. See Media Access Project, ‘Media ownership’, <http://www.mediaaccess.org/programs/diversity/index.html> Accessed 1 November 2006.

In opposition, it can be argued that while Clear Channel owns over 1200 stations, because of the extent of the American radio market place, dozens of other companies also own significant holdings in the radio sector.⁴⁶

It is argued also that the practice of 'voice tracking' used by Clear Channel generates significant savings in overhead and personnel costs at the same time as it develops a uniform voice and brand image. Further, the practice does nothing to prevent stations from adding 'local flair' to programs if they so wish.⁴⁷

The deregulated radio environment has been labelled as unresponsive to the needs and interests of local communities.⁴⁸ Other criticisms of radio ownership deregulation include the claims of one study that links an average 90 per cent increase in advertising rates between 1996 and 2002 to the decline in independent radio owners.⁴⁹ Programming decisions too are seen as increasingly affecting play time for local artists and there are allegations that broadcasting companies regularly ban particular songs for political reasons.⁵⁰

Australian comparisons

In Australia, local content requirements will apply to regional radio markets from January 2008, despite the introduction of a deregulatory media ownership regime. From that time licence conditions will require stations to broadcast a minimum level of material of local

46. Williams and Roberts, op. cit., p.3.

47. A. Thierer, *Media myths. Making sense of the debate over media ownership*, Progress and Freedom Foundation, Washington, 2005.

<http://www.pff.org/issues-pubs/books/050610mediamyths.pdf> Accessed 20 November 2006.

48. An incident at Minot, North Dakota is often cited to illustrate this claim. In 2002, emergency workers were unable to contact local radio stations to warn of the release of poisonous anhydrous ammonia from an early morning railway accident. Six of the eight local radio stations were owned by Clear Channel and were broadcasting by satellite from 2,000 kilometres away and not contactable. Critics point out that three hundred people were hospitalised from the episode and pets and livestock died, but Clear Channel was oblivious to the incident. 'Profile; FCC considers relaxing rules for broadcast properties' Morning edition transcript, NPR, May 29 2003. <http://www.npr.org>. Accessed 1 November 2006.

49. Williams and Roberts, op. cit.

50. For example, on 10 March 2003, criticizing the war in Iraq, singer Natalie Maines of the Dixie Chicks told a London concert audience she was ashamed the President of the United States was from Texas. As a result, two radio chains, Cumulus Media and Cox Radio, banned Dixie Chicks' recordings from their country stations. Cumulus owned 270 stations in 55 cities; Cox owned 78 stations in 18 cities.

significance.⁵¹ Local content plans will need to be submitted to ACMA when the ownership or control of regional stations is changed. There will also be a requirement that a minimum number of media groups remains in both metropolitan and regional radio licence areas, regardless of any media merger or take over activities. ACMA is to establish a register to identify the ownership and control of media groups.⁵²

Television

There is evidence to suggest changes to television ownership rules in America under the Telecommunications Act have led to greatly increased concentration in this market. Between 1995 and 2003, ten of the largest television station owners went from owning 104 stations to 299 stations and more than doubling their revenue return from (US) \$5.9 billion to (US) \$11.8 billion.⁵³

In 1996, mergers in the television market began even before the Telecommunications Act was passed by the American Congress, as corporations anticipated the relaxation of existing rules. Takeovers accelerated once the legislation came into force. Five companies – Viacom (owner of CBS), Disney (owner of ABC), News Corporation, NBC and AOL (owners of Time Warner), now control 75 per cent of all prime-time viewing in American homes.⁵⁴

Liberalisation of cable–broadcast cross–ownership rules under the Telecommunications Act prompted broadcast networks to expand their ownership of cable networks that commanded the largest audiences. Ninety per cent of the top 50 cable stations are now owned by the same parent companies that own the broadcast networks.

Adam Thierer’s interpretation of FCC data contradicts claims that the largest networks dominate television broadcasting. Thierer argues the statistics show that the major companies own less than ten per cent of full power commercial television stations in the United States.⁵⁵

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51. The legislation has indicated that this will be 4.5 hours during daytime hours on business days. However, a review is being undertaken by ACMA to consider ‘the appropriateness’ of this requirement. The review is due to be completed by 30 June 2007.
 52. The unconfirmed Register of Controlled Media Groups was published on 27 March 2007. At the time of writing entries are progressively being confirmed.
 53. See ‘who owns the media?’ at <http://www.stopbigmedia.com/chart.php?chart=tv> Accessed 30 October 2006.
 54. ‘Returning oligopoly of media content threatens cable’s power,’ Bernstein Research, 7 February 2003.
 55. Thierer argues, of the 1340 full power commercial television stations in the United States, Viacom (CBS) owns only 39 (2.9 per cent), Fox Corporation owns 37 stations (2.8 per cent),

Thierer continues that the national ownership cap currently in place actually gives smaller operators an unfair advantage over the large networks since smaller operators 'face no artificial regulatory constraints when looking to expand their media operations'.⁵⁶

Another view, however, is that while the existence of hundreds of television channels can superficially be seen as an indication of diversity, in reality there is a paucity of programming choices. This is because the major corporations act as gatekeepers and decision makers for broadcast approvals and content inclusions.⁵⁷

According to Charles Layton of the *American Journalism Review*, local programming content has been reduced on American television.⁵⁸ In arguing against further deregulation, Alan Frank of *USA Today* notes also that even under existing rules, large networks have threatened to penalise individual stations that 'pre-empt more than a few hours of network programming' for local items.⁵⁹

The Media Access Project, a non-profit, public interest telecommunications law firm, considers that the experience of radio deregulation provides an object lesson on what can happen to television, cable and daily newspapers if the market is allowed to assess what is in the public interest.⁶⁰

National Broadcasting Company (NBC) owns 29 stations (2.2 per cent) and American Broadcasting Company (ABC) owns only 10 stations (0.8 per cent). Thierer, op.cit., p.78.

56. Ibid.

57. M. Khan, 'Media diversity at risk', <http://www.corpwatch.org/article.php?id=6850> Accessed 1 November 2006.

58. C. Layton, 'News Blackout', *American Journalism Review*, December 2003/January 2004. Layton cites the examples of News Corporation's withdrawal of locally produced programs when it acquired a second channel in Chicago, and Viacom's reporters in Los Angeles reporting the same news on its outlets.

59. A. Frank, 'Keep cap on number of TV stations for one owner', <http://www.usatoday.com/news/opinion/2002/02/25/ncguest2.htm> Accessed 6 November 2006. Frank cites a significant example – the NBC's demand that its affiliates broadcast baseball instead of a presidential debate during the 2000 election campaign. Only after considerable protest were local stations able to make their own choice of which program to broadcast.

60. The Media Access Project Group has for thirty years argued against the diminution of the American public's First Amendment right to hear and be heard on all forms of electronic media. See various comments on <http://www.mediaaccess.org/> Accessed 20 November 2006.

Australian comparisons

Australian television in the deregulated market will maintain a previous audience reach cap of 75 per cent in relation to ownership regulation. This is higher than the United States audience reach cap, which prevents a television network reaching more than 39 per cent of the American audience with broadcasts from stations it owns directly. The audience reach cap in Australia does not prevent affiliated stations from taking most of their programming from the major networks. For example, regional stations owned by Win Corp are affiliated with the Nine Network and able to broadcast Nine Network programming.

There is, however, a requirement for affiliated stations to broadcast ‘a minimum amount of programs about matters of local significance’. This requirement was imposed after community concerns were raised about the closure of a number of news bureaux in 2001 and the adequacy of local television programming and investigations by the then media regulator, the Australian Broadcasting Authority.⁶¹

Newspapers

The (free press) constitutional First Amendment limits United States’ government interference in the publishing of news, information and opinions. Lack of specific regulation has not, however, prevented the FCC in the past from prohibiting newspapers from purchasing broadcast radio and television stations in the same market. In justifying the introduction of this restriction, the FCC invoked public interest terminology: the rule both curbed media power in particular communities and promoted diversity of views.⁶²

It has been lamented that the print media has been in a slow decline in the United States since World War II.⁶³ In 1964, 81 per cent of Americans read a daily newspaper, but this figure has since dropped to around 54 per cent, with the slump most obvious for younger Americans. It has been reported that as recently as 1997, 39 per cent of Americans aged 8 to 34 were reading newspapers regularly. By 2001, the figure was as low as 26 per cent.⁶⁴ From the

61. Australian Broadcasting Authority, *Adequacy of Local News and Information Programs on Commercial Television Broadcasting Services in Regional and Rural Australia*, June 2004. http://pandora.nla.gov.au/pan/53013/20051005/www.aba.gov.au/newspubs/radio_TV/investigations/documents/general/LocalContent-June04.pdf Accessed 20 November 2006.

62. B. Campaign and D. Gomery, *Who owns the media?* (Third edition), Lawrence Erlbaum, New Jersey, 2000. Note: the cross-ownership ban does not prevent newspapers from owning broadcast stations in other markets. So many large newspapers – such as the *New York Times* and the *Washington Post* – own and operate broadcast stations outside their flagship cities.

63. E. Cornog, op. cit.

64. Ibid.

1970s, some attempts have been made to stem decline of the industry.⁶⁵ Such attempts have produced marginal results.

What is important in this context is that over the last few decades two thirds of the independent newspapers, which were the defining feature of the American print industry, have disappeared and large conglomerates are the norm (as can be seen in the case presented in Box 2). Less than 275 of America's 1500 daily newspapers are independently owned and more than half the market is dominated by one paper.⁶⁶ The combined weekday circulation of all daily newspapers in the United States decreased from 62.8 million in 1985 to 55.2 million in 2002.⁶⁷

Box 2: The Gannett Company – growth and consolidation, or domination?

In 2006, the Gannett Company was the largest newspaper publisher in the United States, owning daily newspapers with a combined paid circulation of approximately 7.2 million, or one out of every seven newspapers sold.⁶⁸

Following a number of acquisitions from 2000 onwards, the company owns 85 newspapers published daily. All these papers operate as local monopolies.

Gannett publications include *USATODAY* which has a circulation of approximately 2.3 million. *USATODAY* is also one of the most popular news websites in the United States.

In addition, Gannett owns nearly 1000 non-daily publications and *USA Weekend*, a weekly newspaper magazine with a circulation of approximately 23 million.

Gannett also owns 17 daily newspapers in the United Kingdom and 300 non daily publications.

The American newspaper sector contends a relaxation of current cross-media ownership rules will help stem the decline of print and at the same time increase diversity. The industry

65. For example, the Newspaper Preservation Act 1970 allows newspapers to enter into joint-operating agreements to share production, circulation and advertising staff, while maintaining separate editorial operations. P. Norris, *A Virtuous Circle: Political Communications in Post-Industrial Societies*, Cambridge University Press, New York, 2000.

<http://ksghome.harvard.edu/~pnorris/Acrobat/VIRTUOUS/CHAPTER4.PDF> Accessed 28 October 2006.

66. See <http://www.stopbigmedia.com/chart.php?chart=pub> Accessed 31 October 2006. For latest circulation see <http://www.clipmarks.com/clipmark/821C553A-F91C-4F09-9645-721DC8DB28DE/> Accessed 7 November 2006.

67. V. Crosbie, 'What newspapers and their websites must do to survive', Online Journalism Review, <http://www.ojr.org/ojr/business/1078349998.php> Accessed 31 October 2006.

68. See company profile at http://www.gannett.com/about/company_profile.htm Accessed 7 November 2006.

argues economies of scale generated in cross-sector news production will release resources for innovation; coverage of a greater number of topics and subjects will result and these could be tailored to the needs and interests of individuals.⁶⁹

The opposing argument is that consolidated newspapers are not in economic trouble and that newspaper corporation profits have risen. The argument continues that removing cross-media ownership regulation will not be the saving grace of the independent American newspaper; it has already disappeared. However, removing cross-media ownership will add to the profits of mega newspaper publishers. Indeed, it is argued that eliminating cross-ownership rules 'will have profoundly negative implications for the public interest' as newspaper/television combinations further 'dominate the local political and cultural discourse. This will seriously challenge the rights of individuals in a free society to speak and receive all manner of communications'.⁷⁰

Australian comparisons

Cross-media ownership rules in Australia have prevented newspaper/television combinations. These rules have not been able to prevent concentration within industry sectors, however. The print sector is perhaps the most vivid example of this phenomenon.

The newspaper industry in Australia is dominated by two companies, News Corporation and John Fairfax Holdings. This has caused concern because research indicates that notwithstanding the rise of new media, 54.6 per cent of the 16.5 million Australians who are over 15 years read a Monday to Friday newspaper, 63.5 per cent read a Saturday paper and 65.5 per cent read the Sunday newspapers.⁷¹

As the table in Box 3 indicates, these readership figures have remained relatively stable since 2002.

69. D. Demers, *Media concentration in the United States*, Center (sic) for Global Media Studies. <http://www.ojr.org/ojr/business/1078349998.php> Accessed 31 October 2006.

70. D. Gomery, 'The FCC's newspaper-broadcast cross-ownership rule', http://www.epinet.org/content.cfm/books_cross-ownership Accessed 7 November 2006

71. From Monday to Friday, 2.3 million Australians buy one or more national and metropolitan newspapers which are read by nine million people. This increases to more than three million on Saturday with 10.4 million readers and to 3.5 million with 10.8 million readers on Sundays. Australian Press Council, *State of the news print media in Australia 2006*, <http://www.presscouncil.org.au/snpma/ch03.html> Accessed 29 January 2007.

Box 3: Circulation of Australian metropolitan dailies Monday-Friday 2002-2006					
Title	2006	2005	2004	2003	2002
<i>The Australian</i>	131,538	133,841	133,711	132,213	130,378
<i>The Financial Review</i>	86,182	85,373	85,366	85,120	88,674
<i>The Canberra Times</i>	36,027	36,695	38,155	38,813	38,694
<i>The Daily Telegraph</i>	396,497	397,915	403,127	407,498	406,200
<i>The Sydney Morning Herald</i>	212,078	210,085	216,827	225,737	228,800
<i>The Age</i>	201,000	193,000	198,500	197,700	197,700
<i>The Herald Sun</i>	554,700	551,500	551,100	550,032	548,764
<i>The Courier-Mail</i>	216,075	211,279	214,814	219,451	215,371
<i>The Advertiser</i>	195,903	201,323	202,135	204,502	203,582
<i>The West Australian</i>	205,610	207,914	205,362	205,266	207,793
<i>The Mercury</i>	48,886	49,601	50,382	50,368	49,895
<i>The N.T. News</i>	21,172	22,090	22,367	22,409	22,151
TOTAL	2,305,668	2,300,616	2,321,846	2,339,109	2,338,002

Source: Australian Press Council⁷²

In light of these statistics, The Australian Press Council makes the point:

Public policy makers need to know both how many of the public are well informed about matters of public interest and how useful newspapers can be in communicating the thinking of the public or persuading readers of the desirability of policies they wish to pursue.⁷³

It can be argued that the actual numbers of newspaper titles are not indicative of the problem in achieving this Press Council aim. There are 49 English language newspapers that service a relatively small Australian population; the problem is the lack of diversity of opinion that Australia's concentrated ownership produces within these publications. Prior to the 2006 media reform legislation only two of the forty nine titles, *The Canberra Times* and *The West Australian*, were controlled by proprietors independent of News and Fairfax. Since the passage of the legislation, Fairfax has announced its intention to merge with the third largest media group, Rural Press, the owners of *The Canberra Times*, in what has been suggested is a move to make it less desirable as a takeover target under the new environment.⁷⁴

72. See Australian Press Council website at <http://www.presscouncil.org.au/>

73. Ibid.

74. Crikey, 6 December 2006 at <http://www.crikey.com.au/> Accessed 6 December 2006.

There is the risk, according to some, that not only would this move further restrict diversity, but management changes which would be a likely result of the proposed merger would potentially affect content and journalistic standards.⁷⁵

'New Media'

Cable/pay

In June 2003, there were approximately 70 million cable subscribers in America.⁷⁶ In exchange for the grant of local monopolies, cable operators have been expected to deliver a number of public interest benefits. These have included constructing, maintaining and operating facilities for public, education and government access (the PEG channels) and providing service guarantees and discounted rates for older, disadvantaged and disabled customers.⁷⁷

Some specific rules relating to cable systems were established by the FCC in 1965, but generally, until October 1984 cable television operators were subject to provisions similar to radio and television broadcasters. In 1984, Congress tempered regulations on cable broadcasters but as this action resulted in dramatic price increases, in 1992 certain conditions were re-imposed.⁷⁸

The 1992 regulations placed a 30 per cent (horizontal) limit on the number of subscribers each cable operator could serve nationally and a 40 per cent (vertical) limit on the number of cable channels operators could control. Limiting control and reach was seen as promoting the public interest: it allowed companies to expand within reasonable limits and restricted the

75. This argument cites sentiment expressed by John B. Fairfax, owner of Rural Press, which posits that newspapers are not just another business, which it is argued is in opposition to the way in which Rural Press conducts its business. (M. Simons, 'Fairfax get bigger, yet more local', *The Age*, 7 December 2006) Others have argued that the proposed new deputy head of a merged Fairfax/Rural Press group, Brian McCarthy, has a 'cost-cutting reputation to instil fear in Fairfax journalists' (K. Simpson, 'Rural media magnate moves into fast lane as deputy', *The Age*, 7 December 2006)

76. Federal Communications Commission, *Annual assessment of the status of competition in the market for the delivery of video programming*, Tenth Annual Report, FCC 04-5, 28 January 2004, p.5. Cable was initially developed in the United States in the late 1940s for areas unable to receive broadcast television signals because of terrain or distance. In 1950, cable systems only operated in 70 communities and served around 14,000 homes.

77. See Center (sic) for Digital Democracy, 'A citizen's guide to cable franchise negotiations', <http://www.democraticmedia.org/ddc/CCCIntro.php> Accessed 4 December 2006.

78. Federal Communications Commission Factsheet, op. cit.

market power of the largest companies, thereby ensuring diversity in ownership and program delivery.

Box 4: Suspending cable limit rules – the Adelphia Communications case

Suspension of cable limit rules in the United States has meant that the Federal Communications Commission (FCC) was able to approve a Comcast/Time Warner takeover of the local cable franchises of Adelphia Communications in July 2005.

This merger delivered over 28 million subscribers to a new entity and a significant portion of the cable market. Prior to the takeover, Comcast alone serviced about 29 per cent of homes paying for basic cable.⁷⁹

In approving the merger, the FCC imposed conditions to require Comcast and Time Warner to provide access to local sports programming to competitors. In 2003, it had imposed similar conditions on News Corporation's purchase of satellite television provider DirecTV. As part of the approval of that merger, News Corporation was to refrain from using DirecTV to withhold programming from competitors or to charge higher prices.⁸⁰

In approving the News Corporation takeover, the FCC argued customers would benefit from stronger competition; new services would be delivered and localism would be promoted.⁸¹

In March 2001, a federal appeals court ruled that restricting cable ownership limits was not constitutionally valid.⁸² The court found that the rules not only restricted the ability of operators to obtain customers and curtailed editorial control, but they also prevented them from responding to developments in the market.

The FCC reviewed the cable rules late in 2001. At that time public interest groups argued that the Commission needed to articulate better the rationale for the retention of regulation, as abandoning it would mean cable companies would dictate customer prices and terms of

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79. F. Ahrens, 'Cap could stop Adelphia deal' *Washington Post* 9 April, 2005. <http://www.washingtonpost.com/wp-dyn/articles/A38806-2005Apr8.html> Accessed 5 December 2006.
 80. See M. Reardon, 'Adelphia sale nears completion', CNET News, http://news.zdnet.com/2100-1035_22-6093793.html Accessed 5 December 2006.
 81. FCC fact sheet, 'Conditioned approval of News Corp – DirecTV merger', 19 December 2003. http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-242402A1.doc Accessed 6 December 2006.
 82. United States D.C. Circuit Court of Appeals, *Time Warner Entertainment v. FCC*, argued October 17, 2000. <http://laws.lp.findlaw.com/dc/941035a.html> Accessed 4 December 2006.

service. The largest operators would also inevitably stifle competition by excluding independent programmers from access to their services.⁸³

In response, the FCC concluded that while it was obliged to establish vertical and horizontal limits 'at some number', it would suspend this enforcement pending further consideration of the rules.⁸⁴ It sought additional comment on the cable horizontal and vertical ownership limits in May 2005, but no clear future policy direction emerged from that consultation.

The Telecommunications Act removed restrictions on rates charged to cable consumers for non-basic cable services, permitted the FCC to relax broadcast-cable cross-ownership and telephone-cable cross-ownership restrictions and prohibited states from enforcing laws impeding competition, for example, laws that required carriers to share their networks with potential competitors.⁸⁵

Since the removal of these restrictions, cable subscription rates to consumers have increased significantly; one estimate is by over 90 per cent.⁸⁶ The relaxation of cross-ownership restrictions has allowed the major broadcasting companies to expand their interests by acquiring successful cable networks. All cable news networks, including CNN, CNN Headline News, Fox, MSNBC, and CNBC are owned by Time Warner, GE and News

83. Submission of Consumer Federation of America, Consumer Union, Media Access Project, Center (sic) for Digital Democracy, the Office of Communications of the United Church of Christ Inc., Association of Independent Video and Filmmakers, National Alliance for Media Arts and Culture and the Alliance for Community Media to the Federal Communications Commission, implementation of Section 11 of the Cable Television Consumer Protection and Competition Act 1992, 4 January 2002.

http://www.mediaaccess.org/programs/diversity/Final_Cable_Comments_jan_06_02f.pdf
Accessed 4 December 2006.

84. H.J. Barr and M.J. Palchick 'Client alert: Cable horizontal and vertical ownership limits', 24 May 2005. <http://www.wcsr.com/default.asp?id=114&objId=84> Accessed 4 December 2006 and ISP Planet, 'FCC sends mixed signals', http://www.isp-planet.com/news/2001/cable_cap_suspended.html Accessed 4 December 2006.

85. See 'Telecommunications Act' at <http://www.answers.com/topic/telecommunications-act-canada> Accessed 7 December 2006.

86. L. Cauley, 'FCC hope to speed phone companies' entry into TV', *USAToday*, 1 December 2006 http://www.usatoday.com/printedition/money/20061201/1b_fcc_martin01.art.htm Accessed 5 December 2006.

Corporation. In addition, as cable companies have increasingly faced competition from digital television, they have begun to limit programming from external sources.⁸⁷

Australian comparisons

Pay television was introduced in Australia in the 1990s when the government owned domestic communications satellite, Aussat, was sold to private enterprise. Satellite delivery of pay television was given preference initially, but from the mid 1990s, cable and wireless platforms have also been used.

ACMA is the technical licensor and regulator for the telecommunications industry. The Australian Competition and Consumer Commission (ACCC), in addition to having a general role as competition regulator, is responsible for telecommunications-specific regulation of anti-competitive conduct, access and monitoring of price controls.

There have been few domestic ownership regulations imposed on subscription television in Australia.⁸⁸ Foreign ownership of pay television has been restricted, however,⁸⁹ and ACMA, has the power to specify conditions which may apply to particular licensees.

There are three major Australian pay television providers, Foxtel, Optus and Austar. Foxtel, which is jointly owned by Telstra, News Ltd (wholly owned by News Corporation) and Publishing and Broadcasting Ltd, has the largest number of subscribers and the widest reach on cable and satellite networks with almost 1.3 million homes directly connected, or in receipt of services provided to other companies on a wholesale basis. As such, prior to the

87. Common Cause, 'The fallout from the Telecommunications Act 1996. Unintended consequences and lessons learned', http://www.commoncause.org/atf/cf/%7BFB3C17E2-CDD1-4DF6-92BE-BD4429893665%7D/FALLOUT_FROM_THE_TELECOMM_ACT_5-9-05.PDF#search=%221996%20telecommunications%20act%20%22 Accessed 30 October 2006. Common Cause is a non partisan non profit advocacy organisation founded in 1970 by Republican John Gardener to provide a vehicle for citizens to make their voices heard in the political process and to hold elected leaders accountable to the public interest.

88. Major daily newspapers, commercial free-to-air television licensees and telecommunications carriers are prohibited from controlling more than two per cent of a class A satellite licence. Applicants for a licence must be Australian companies.

89. 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 per cent.

media reforms, Foxtel already controlled most of the programs available on pay television in Australia through ownership or distribution arrangements.⁹⁰

Internet

Americans originally accessed the Internet through dial up telephone lines which, according to laws relating to common carriers, were accessible to a variety of companies. During the 1990s, as cable operators developed broadband technologies, the right of entry to the Internet became the lines used to transmit cable television.

In 2002, the FCC agreed to a petition from cable operators that they were not common carriers. As such, the cable operators were not required to provide access to other operators; a decision confirmed by the Supreme Court in 2005. Following the Supreme Court decision, telephone companies also persuaded the FCC to deny other operators access to their telephone lines.⁹¹ These rulings have meant that cable and telephone companies now have considerable control over the Internet experiences of Americans. Some critics claim that despite rhetoric about the freedom the Web provides for participants, these companies control and restrict the range of sites people can visit, as well as divert traffic to their own, or preferred sites.⁹² Allegations that cable and telephone companies block Web sites are not proven, but there is evidence that tolls are charged for ‘priority’ services. This situation may imply that those who are unable to pay for ‘priority’ service may be marginalised.⁹³

Members of the American Congress and public interest advocates have expressed concern that such practices may become commonplace and have called for the introduction of a policy of ‘Net neutrality’. This concept is discussed in more detail later in this paper.

90. See Foxtel website <http://www.foxtel.com.au/168.htm> Accessed 29 January 2007.

91. Brennan Center (sic) for Justice, Free Expression Policy Project, January 2006.
http://www.brennancenter.org/dynamic/subpages/download_file_10316.pdf
Accessed 5 December 2006.

92. Ibid.

93. T. Wu, ‘Why you should care about network neutrality’, 1 May 2006
<http://www.slate.com/id/2140850/> Accessed 5 December 2006.

Considered opinion on the Internet?



"On the Internet, nobody knows you're a dog."

Source: The New Yorker⁹⁴

Australian comparisons

To date, the main debate on Internet access in Australia has focussed on whether laws that censor material deemed objectionable or unsuitable for minors should be in place. The federal government believes these laws have made the Internet safer⁹⁵ and ACMA argues regulation

94. See cartoon at <http://www.unc.edu/depts/jomc/academics/dri/idog.html> Accessed 29 May 2007

95. Senator Richard Alston, Minister for Communications and the Arts, media release, 21 August 2002.

has effectively addressed community concerns about content while not placing an unnecessary burden on the Internet industry and encouraging Internet take-up.⁹⁶

On the other side of this debate, Electronic Frontiers, an on-line civil liberties group, claims the laws are draconian, that they have not made the Internet safer and they have resulted in adults censoring their speech in offline publications in Australia or paying overseas Internet Service Providers or Content Hosts to host their web pages.⁹⁷

Further American reform?

Under the Telecommunications Act, the FCC is required to review media regulation every four years⁹⁸ and in its 2002 review a Republican-dominated Commission⁹⁹ adjudged that further media ownership deregulation would be in the public interest. In making this judgement the FCC argued a plethora of media choices and unprecedented access to information available to Americans in the twenty first century made broadcast ownership rules redundant.¹⁰⁰

96. A. Wright, 'Australia: a case study on Internet content regulation', 2002. http://www.acma.gov.au/WEBWR/aba/newspubs/speeches/documents/aw_UNESCO_paper.pdf Accessed 29 May 2007.

97. See report from Electronic Frontiers "Internet censorship. Law and policy around the world", at <http://www.efa.org.au/Issues/Censor/cens3.html> Accessed 9 February 2007

98. Originally reviews were to be undertaken every two years but Congress amended this requirement in 2002 to every four years. Telecommunications Act Pub L No 104-104, 110 Stat. 56.

99. The FCC is directed by five Commissioners appointed by the United States President and confirmed by the Senate for five year terms, except when filling an unexpired term. The President designates one of the Commissioners to serve as Chairperson. Three Commissioners may be members of the same political party, none can have a financial interest in any Commission-related business. In 2003, Republicans Michael Powell, (Chair), Kevin Martin and Kathleen Abernathy voted for deregulation with Democrats Michael Copps and Jonathan Adelstein in opposition. Copps, Adelstein and Martin are current members of the Commission. Martin is the Chair.

100. The FCC note: 'Our current rules inadequately account for the competitive presence of cable, ignore the diversity-enhancing value of the Internet, and lack any sound basis for a national audience reach cap. Neither from a policy perspective nor a legal perspective can rules premised on such a flawed foundation be defended as necessary in the public interest...Our current rules are, in short, a patchwork of unenforceable and indefensible restrictions that, while laudable in principle, do not serve the interests they purport to serve'. Federal Communications Commission FCC 03-127, Report and Order and Notice of Proposed Rulemaking. Adopted: 2 June 2003, pp. 3/4.

Two Commissioners dissented from this view. They claimed that the same big companies that owned networks and newspaper chains also dominated cable, satellite and Internet media. In a dissenting statement Democrat Commissioner Michael Copps insisted further that ownership deregulation would be disastrous, leading to ‘more media control by ever fewer corporate giants’.¹⁰¹

The majority Commissioners dismissed Copps’ argument and in June 2003 signalled their intention to relax ownership controls further.

Box 5: FCC: Further ownership relaxation proposals

Restrictions to be removed

- Remove the ban on companies owning television stations and daily newspapers in the same market;
- Allow companies to own television stations that together could reach up to 45 per cent of all households in the United States. In the case of UHF stations, a single company would be allowed to reach up to 90 per cent of all households; and
- Relax the rules on local television ownership to allow one company to own two stations in so-called ‘midsize’ markets and as many as three stations in the largest markets.

Restrictions to be retained

- In markets where there were less than four television stations, a cross-ownership ban would continue and in medium and larger markets only one of the stations in any group could be in the top four ratings.
- In recognition of the adverse consequences of its previous decision to deregulate radio, the FCC intended to amend radio ownership rules. These would be changed to prevent one company from owning all local stations in a city.
- A rule to prohibit mergers among the top four networks (ABC, CBS, NBC and Fox) would also be maintained.

Source: ‘What rules could change’¹⁰²

Response to the United States’ reforms

The FCC announcement caused immediate public outrage, with various critics decrying the failure of the Commission to convey its intentions regarding cross-media ownership and of the media to publicise the decision-making processes.¹⁰³

101. Quoted on Common Cause website, op. cit.

102. See <http://www.stopbigmedia.com/=fccrules>

Many groups also argued the FCC proposal could only deliver more power to the largest corporations.¹⁰⁴ Conservative organisations led by the National Rifle Association and the Parents Television Council, joined hundreds of other groups, from all sides of the political spectrum, to protest against the proposed rule changes. Concern expressed by these groups ranged from apprehension about the negative impacts on democracy which would result from the increased influence of media corporations over journalism, culture and public opinion, to fear that allowing further media concentration would violate the notion of competition in the marketplace.¹⁰⁵ The outpouring of dissent, the greatest in the history of the FCC, overwhelmed the Commission's phone lines and Internet server, but failed to elicit much response from the organisation, which held only one official public consultation.¹⁰⁶

Ironically, much of the initial conservative interest was kindled after pop star Janet Jackson, revealed one of her breasts to an estimated United States television audience of 140 million during half time entertainment at a football grand final. The conservative debate centred on the powers of the FCC to censure impropriety on radio and television, which initially distracted attention from the media regulation issue. It later combined with thinking about the ownership deregulatory regime, however, and led many to conclude that ownership deregulation had given large media corporations enormous political clout and 'defanged the FCC'.¹⁰⁷ Conservative religious and social groups blamed media concentration for the airing

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103. Charles Layton of the *American Journalism Review*, considered the uproar justified there had been virtually no coverage of the planned changes on the major broadcast networks. NBC ran no stories except for a single three-minute segment on 28 May, five days before the FCC was due to act, while CBS ran nothing until 13 May, when it broadcast a 50-word piece on its morning news program and Fox News ran nothing until 30 May. C. Layton, op.cit.
104. For a summary of the largest media owners in the United States, see <http://www.freepress.net/ownership/chart.php> Accessed 3 November 2006.
105. Protests included those from opponents of the United States' involvement in Iraq who decried what they saw as a one-sided coverage of the war. Trades unionists also protested about the loss of jobs that resulted from media concentration; ethnic and civil rights groups expressed concern that concentration had reduced the number of minority-owned media outlets; civic groups deplored the decreasing news and current affairs coverage in the media and even musicians and music fans protested against the failure of merged entities to provide air time to local artists and music. Layton, op. cit.
106. Croteau and Haynes, op. cit., p. 95.
107. K. Paulson, 'Flashpoint: Janet Jackson and government regulation of TV', June 2004. <http://www.firstamendmentcenter.org/commentary.aspx?id=12605> Accessed 3 November 2006.

of ‘vulgar and sexually explicit programs that offend community standards’,¹⁰⁸ and many believed more ownership concentration would exacerbate the problem.¹⁰⁹

Box 6: David, Goliath and the Court – the fight to restore cross-media ownership

In June 2003, public interest groups and some smaller broadcasters, under the label of the Prometheus Radio Project, petitioned a three-judge panel of the United States Court of Appeals for the Third Circuit to restore media cross-ownership restrictions.

The Prometheus Radio Project asserted that the FCC had originally used the wrong standard of review and flawed theoretical models about consumer behaviour to create the ownership rules. It asked the court, which consisted of a majority of Democrat nominees, to reverse rules that would make it easier for a broadcaster to own more television stations in one market.

At the same time, a group of newspapers, television networks and other broadcasters, including Clear Channel Communications, argued that the Commission had failed to deregulate the media industry enough.¹¹⁰

A year later the Circuit Court found largely in favour of the Prometheus petitioners and ordered the FCC to review its media cross-ownership proposals, effectively stalling their implementation.¹¹¹

In January 2005, the Bush administration decided against appealing the earlier Circuit Court’s decision to the United States Supreme Court.

A number of media companies, on the other hand, did appeal.

The Supreme Court rejected their applications in June 2005.

In June 2006, the FCC sought comment on ways to address the issues raised in the case as part of its review of media ownership rules required under the Telecommunications Act.¹¹²

108. Layton, op.cit.

109. Groups included the Christian Coalition of America, the Parents Television Council, the United States Conference of Catholic Bishops and the National Religious Broadcasters.

110. S. Labaton, ‘Court is urged to change media ownership rules’, *New York Times*, 12 February 2004 at <http://www.mediaaccess.org/news/NYTimesMOarticle02-12-04.htm> Accessed 31 October 2006

111. See decision at United States Court of appeals for the Third Circuit, Prometheus Radio Project vs. Federal Communications Commission, argued 11 February 2004, <http://www.fcc.gov/ogc/documents/opinions/2004/03-3388-062404.pdf>

112. See Federal Communications Commission Washington, D.C. 20554. In the Matter of 2006 Quadrennial Regulatory Review. Adopted: June 21, 2006 Released: July 24, 2006 http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-93A1.pdf Accessed 9 November 2006

Box 7: FCC: Current media ownership deliberations

The most recent FCC review of ownership regulation concluded on 21 December 2006, but the Commission's report is not as yet available.

Submissions from an initial public comment period, which concluded on 23 October 2006, provide some indications of the issues which were possibly raised for the FCC's consideration.

Comments from the October submissions include academic studies by the Benton Foundation and the Social Science Research Council. These focus on how the concentration of media ownership affects content, from local news reporting to radio music programming and how underserved minority audiences have fared in an increasingly deregulated media environment.¹¹³

Media ownership rules currently being reviewed by the FCC are:

- Local Television Ownership Limit allowing ownership of up to two television stations in the same market area, as long as one of the stations is not ranked among the four highest-ranked stations and the market has at least eight independently owned stations.
- Local Radio Ownership Limit allowing ownership of up to eight radio stations (on a sliding scale) in local markets, depending on the total number of stations in the markets.
- Newspaper/Broadcast Cross-Ownership Ban prohibiting ownership of a local radio or television station and a major local daily newspaper.
- Radio/Television Cross-Ownership Limit permitting ownership of up to two television and six radio stations (or one television and seven radio stations) as long as there are at least 20 independent voices in the market.
- Dual Network Ban preventing ownership of two broadcast television networks by a single entity. The rule only applies to the four largest networks (ABC, CBS, NBC, & FOX) and not to cable television networks or smaller broadcast networks. This rule remained untouched in the Commission's 2002 review and it is unlikely the ban will be lifted as a result of the current review.

The FCC's proposal also initiated considerable debate in Congress. The House of Representatives passed a resolution in July 2003 calling on the Commission to reconsider the decision to lift the audience reach cap from 35 to 45 per cent. The Senate approved a rarely invoked resolution of disapproval in 2004 for a repeal of the new rules and the restoration of stricter limitations on ownership. In response to these actions, President George W. Bush threatened to veto any legislation preventing the FCC changes and at one stage Congress considered the option of a congressional veto to override the President.¹¹⁴ In the end,

113. Benton Foundation, 'Media ownership', <http://www.benton.org/?q=initiatives/ownership> Accessed 9 November 2006.

114. A congressional veto has been used successfully only once. In 2001, the Republican-controlled Congress and White House used it to repeal workplace safety regulations issued during the Clinton administration.

Congress compromised by allowing broadcasters to own up to 39 per cent of media outlets in a local market.

Stanford Washington Research analyst Paul Gallant concluded from this effective closure of the review process that there was a low probability the FCC could significantly relax ownership rules in the future.¹¹⁵ The irony may be therefore, that at the same time deregulation succeeded in delivering the impetus for the consolidation major media companies desired, it released a social and political backlash, which may be a serious impediment to further amalgamation and concentration.

While support from conservative groups has waned, a plethora of interest groups, such as Free Press and Common Cause,¹¹⁶ remain committed to continuing protest action on media ownership rules.

Net neutrality – an added complication?

Since 2005, the American debate about the public interest has extended to encompass concern about the new media, particularly in relation to the Internet. Particular unease in this area is about proposals to impose fees on access to broadband infrastructure. Public interest advocates have argued that adopting such policies will further inhibit public debate by limiting information sharing on the Internet.

The code of Net neutrality is based on equal access by users to content of choice and the running of applications and devices they prefer. Maintaining Net neutrality means that the job of carriers is ‘to move data – not choose which data to privilege with higher quality service’.¹¹⁷ But this principle is considered under threat as the result of the actions and proposals of broadband carriers. Carriers who want to restrict access, have lobbied the

115. See Bloomberg news and commentary, ‘Media industry rejected by top US court on station ownership’, http://www.bloomberg.com/apps/news?pid=10000087&sid=abgsaV4QV41c&refer=top_world_news Accessed 20 October 2006.

116. Other groups include, MediaChannel, the Center (sic) for Digital Democracy, the Media Access Project, the Alliance for Better Campaigns, the New America Foundation, and the Center (sic) for Creative Voices in Media. D. Schechter, ‘One year on, Big Media More than willing to cover up than change’, Freedom of Information Center (sic) , 4 June, 2004. <http://foi.missouri.edu/mediacredibility/oneyron.html> Accessed 20 October 2006.

117. See Save the Internet, ‘Frequently asked questions’, <http://www.savetheinternet.com/=faq> Accessed 7 February 2007.

American Government to pass legislation which will allow them to discriminate and determine who is able to receive content and under what conditions.¹¹⁸

Box 8: FCC support for Net neutrality? – The AT&T/Bell-South Merger

The FCC stance on Net neutrality has allowed it to consider a proposed merger of the carriers AT&T and Bell–South without needing to impose a Net neutrality clause.

There was apprehension that the FCC approach would result in a merged entity that could dictate the terms of Internet access for customers and bring about the effective end of neutrality.¹¹⁹

AT&T/Bell–South merger stalled in the FCC for some time as the result of a declared conflict of interest by one Commissioner,¹²⁰ however, so called ‘legal manoeuvring’ eventually allowed the Commissioner to vote on the matter.¹²¹ It is speculated that the manoeuvring may have involved striking a deal to approve the merger in January 2007, after AT&T agreed to the continuation of a neutral network for two years.

An FCC press release predicted significant public interest benefits from the merger, such as the deployment of broadband throughout the entire AT&T and Bell–South territory in 2007 and increased competition in the market for advanced pay television services.¹²²

Interestingly, however, while critics of the merger did not agree it was in the public interest, they saw it as an opportunity to use it to that end because it involved a definition of Net neutrality. It could therefore serve as a ‘blueprint’ for members of Congress to reintroduce bills that would prevent ‘network operators like AT&T from charging extra fees to content providers for added perks’.¹²³

At the same time, it appears the neutral network condition of this merger may indicate a tempering of the previous FCC stance on the role of the media in light of the Democrat majority now in Congress.

118. C. Wexler and D. Holian, ‘Senators mull an Internet with restrictions’, *The Nation*, 8 February 2006. <http://www.thenation.com/doc/20060220/wexler> Accessed 6 December 2006.

119. See for example, <http://www.freepress.net/deadend/=neutrality> Accessed 6 December 2006.

120. See ‘FCC shopping for AT&T’s Christmas present’, <http://www.freepress.net/news/19500> Accessed 6 December 2006.

121. L. Cauley, ‘FCC chair acts to clear vote on AT&T–BellSouth merger by GOP panelist’, *USAToday*, 6 December 2006. http://www.usatoday.com/money/industries/telecom/2006-12-06-fcc-att-bellsouth_x.htm Accessed 6 December 2006.

122. FCC press release, 29 December 2006. http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-269275A1.pdf Accessed 20 January 2007.

123. A. Broache, ‘Net neutrality push expected to resume in Congress’, CNET News, 2 January 2007. http://news.com.com/Net+neutrality+push+expected+to+resume+in+Congress/2100-1028_3-6146678.html?tag=html.alert Accessed 20 January 2007.

Many critics argue the demise of Net neutrality would stifle the phenomenon of citizen journalism, which the new media has fostered. This, in turn, would further limit opportunities for people to access differing opinion and information. The media reform group, Free Press, cites possible situations that may result from allowing broadband carriers to restrict Internet access – some search engines would pay more fees to be able to open faster than others, advocacy groups would be required to pay ‘protection’ fees to ensure their sites work correctly and bloggers would be priced off the Net.¹²⁴

United States’ telephone companies in particular oppose the principle of Net neutrality. They consider they are entitled to practice net discrimination to exert control over material that is accessed through their high-speed networks. However, there is little evidence that any of them have actually prohibited access to their services.¹²⁵

The FCC has stated its support for the principles of Net neutrality, but arguably it has done little to enforce those principles. In 2006, it noted that Net neutrality operates within the construct of the freedom of Internet service providers to offer tiers of services with variable speeds of access to different sites.¹²⁶

Telecommunications companies have also opposed the delivery of non profit high-speed Internet services by some municipalities to remedy the fact that in 2005, only about 24 per cent of United States households in rural areas had this access.¹²⁷ The telecommunications companies have argued that providing public Internet access amounts to unfair competition with private enterprise. They have successfully lobbied some state governments to prevent government entities from offering these Internet services.

Since 2005, in the context of deliberations on the updating of the Telecommunications Act and consideration of the issue of public access to the Internet, Congress has debated the possibility of including Net neutrality in legislation a number of times. However, despite an increase in public lobbying and the receipt in 2006 of over one million signatures supporting

124. See <http://www.freepress.net/att/=threat> Accessed 6 December 2006.

125. In February 2005, however, the broadband provider Madison River Communications was proven to be restricting customer use of Voice over Internet Protocol (VoIP). The FCC acted to fine Madison River and the company was made to agree not to prevent customers from using VoIP applications for a period of 30 months. D. McCullagh, ‘Telco agrees to stop blocking VoIP calls’, http://news.com.com/Telco+agrees+to+stop+blocking+VoIP+calls/2100-7352_3-5598633.html Accessed 6 December 2006

126. FCC Policy statement, 23 September 2005, <http://www.cdt.org/speech/net-neutrality/20050923fcc-appropriate-framework-nprm.pdf> Accessed 7 December 2006.

127. Pew Internet and American Life Project, ‘Rural broadband Internet use’, February 2006, http://www.pewinternet.org/pdfs/PIP_Rural_Broadband.pdf Accessed 7 December 2006.

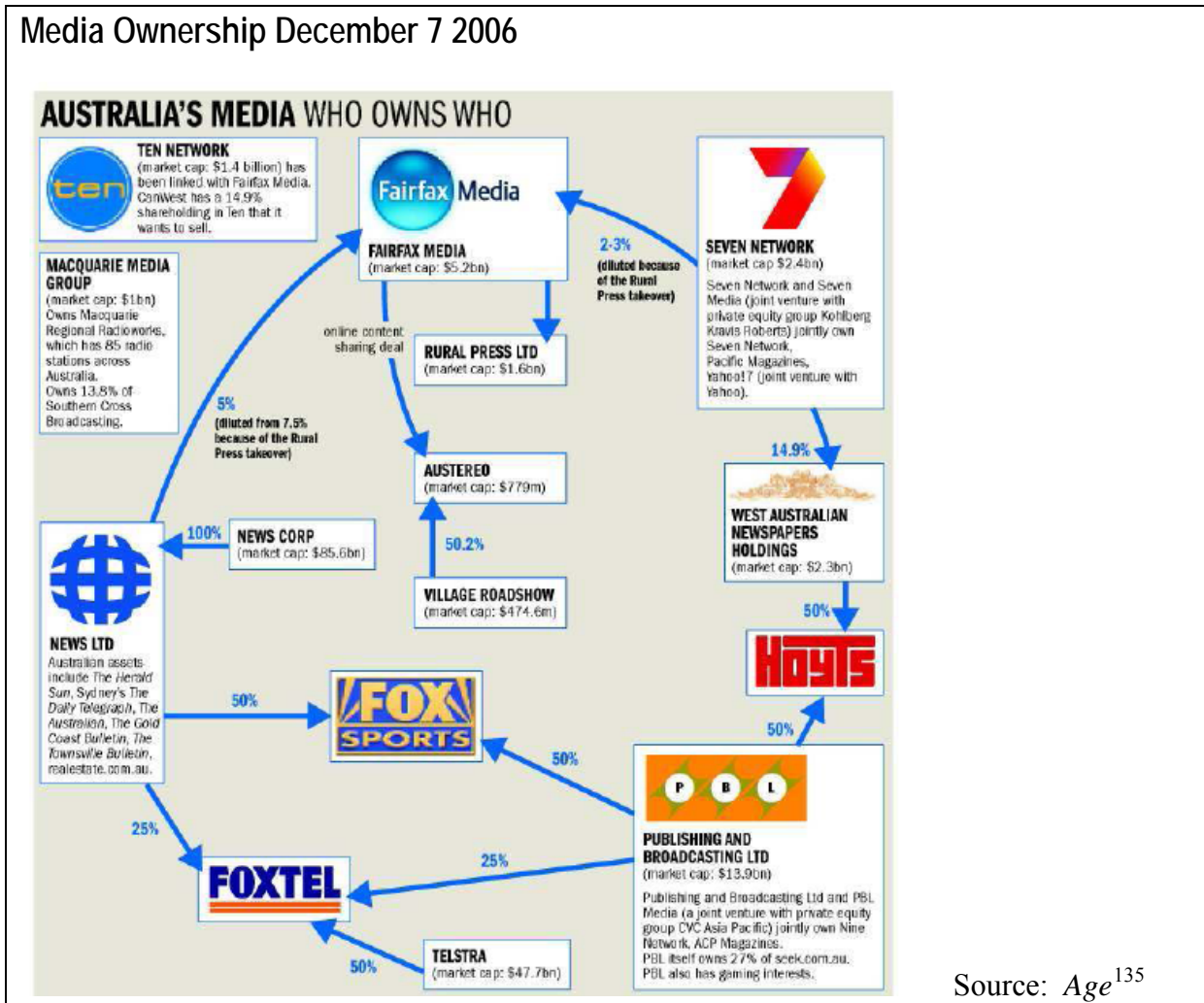
a 'fee free' Web, Congress failed to approve Democrats' proposals to include comprehensive Net neutrality provisions in telecommunications bills introduced in May and June 2006.¹²⁸ One Republican argued the enactment of Net neutrality would result in a reduction in broadband infrastructure investment, making it increasingly difficult to sustain necessary capital in the industry.¹²⁹ Other opponents considered the Democrat-backed proposal would let the FCC 'exercise complete discretion over the Internet' and 'begin down the dangerous path of Internet regulation'.¹³⁰

Australian comparisons

In Australia, the principle of Net neutrality is only beginning to elicit serious discussion. One blogger recently was amused to discover that service providers appear not to recognise the term.¹³¹ But that perception, as media commentator Dan Warne suggests, is naive. The major telecommunications carrier, Telstra, is not happy that competitors 'piggyback' on its network.¹³² It has hinted that it 'will start prioritising Internet traffic according to the type and source of the data'.¹³³ Journalist Nick Miller predicts that the end of Net neutrality in Australia is unavoidable because users have high expectations of what they can access and because prioritisation is necessary for next generation Internet applications.¹³⁴

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128. A. Cohen, 'Why the democratic ethic of the World Wide Web may be about to end', *New York Times*, 29 May 2006.
129. D. McCullagh and A. Broache, 'Senator: Net neutrality may not happen', 14 March 2006. http://news.com.com/Senator+Net+neutrality+may+not+happen/2100-1028_3-6049738.html Accessed 6 December 2006.
130. D. McCulloch and A. Broache 'Republicans defeat net neutrality proposal', 5 April 2006. http://news.com.com/2100-1028_3-6058223.html Accessed 6 December 2006.
131. See 'Net neutrality – Australia', http://web.mac.com/simon_griffiths/iWeb/Test/Blog/2FB5F602-1E4E-495E-8294-D473408852A5.html
132. D. Warne, 'A fairytale about Telstra and Net neutrality', 27 July 2006, http://www.apcstart.com/3845/a_fairytale_about_telstra_and_net_neutrality Accessed 29 January 2007.
133. N. Miller, 'BigPond boss has "lost the plot" on net rates', *Sydney Morning Herald*, 28 November 2006, <http://www.smh.com.au/news/biztech/bigpond-has-lost-the-plot-on-net-rates/2006/11/28/1164476144080.html> Accessed 30 January 2007
134. Ibid.

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Source: Age¹³⁵

What happens with regards to regulation of the Net in the United States will affect Australia, in spite of any local policy on the Net.¹³⁶ Nearly sixty per cent of Australian online visits are

135. Source for diagram, S. Mann, M. Ricketson, 'Subtle play from Fairfax dealmakers', *The Age*, 7 December 2007.

136. The Internet is regulated under Commonwealth and State/Territory laws. Federal law requires Australian ISPs and ICHs to delete content from their servers that is deemed 'objectionable' or 'unsuitable for minors' on receipt of a take-down notice from ACMA. State and territory laws vary. See Electronic Frontiers Australia, 'Internet censorship laws in Australia', Accessed 1 June 2007. <http://www.efa.org.au/Issues/Censor/cens1.html> for discussion.

currently directed to overseas websites.¹³⁷ These directions could be exclusively controlled by United States' telecommunications carriers unless the principle of Net neutrality is maintained in America.

Contemplating the Australian reforms

Proposal

The policy on broadcasting that the Howard Government took to the 2004 election contained similar justifications for reform as had been argued in the United States since the 1980s. Media regulation was antiquated; it needed to change to cope with the digital age. Abolition of out-dated rules would increase competition in the Australian media sector, which in turn, would benefit the sector itself and media consumers.¹³⁸ (Appendix A discusses the opposing arguments relating to ownership deregulation in more depth).

Following its third election victory in 2004 and some consultation with the public,¹³⁹ the government introduced legislation in 2006 to amend the *Broadcasting Services Act 1992* to

- remove foreign ownership restrictions; and
- amend cross-media rules to allow cross-media transactions to proceed.

Certain regulatory requirements were to remain under the new media regime. Cross-media transactions, for example, would not be allowed unless a minimum number of commercial media groups remained in relevant markets (four in regional markets, five in mainland state capitals) following takeovers or mergers. The legislation was also to maintain existing limits on broadcasting licences including a 75 per cent national television coverage limit. The

137 The website Hitwise quotes this figure for the week ending 17 June 2006). See 'Implications of Net neutrality for online marketers', <http://www.hitwise.com/news/au200607.html> Accessed 30 January 2007

138. The Howard Government 2004 election policy, op.cit.

139. The Minister for Communications, Information Technology and the Arts, Senator Helen Coonan, released a discussion paper, *Meeting the digital challenge: Reforming Australia's media in a digital age*, in March 2006. The paper sought public comments on the government's proposed media changes. See http://www.dcita.gov.au/data/assets/pdf_file/37572/Media_consultation_paper_Final_.pdf Accessed 17 January 2007.

ACCC was to assess the competitive impacts of transactions and the media was to remain a 'sensitive sector' under the nation's Foreign Investment Policy.¹⁴⁰

Box 9: A Public Interest Test for Australia?

The Howard Government dismissed inclusion of a public interest test as part of its legislative package arguing that subjective judgement by individuals or organisations would inevitably occur in deciding what constitutes the public interest and that this would create uncertainty for the media industry.¹⁴¹ In relation to media acquisitions involving foreign interests, however, the Treasurer was to be able to consider if such acquisitions were 'contrary to the national interest'.¹⁴²

It is interesting that the government dismissed the idea of a public interest test, given that the Australian

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140. See Foreign Investment Review Board website at <http://www.firb.gov.au/content/default.asp> Accessed 15 May 2007.
 141. Broadcasting Services Amendment (Media ownership) Bill 2006, Regulation Impact Statement, pp. 21/22.
 142. See Foreign Investment Review Board site op.cit.
 143. At that time the Commonwealth Bank take over of the Colonial Limited finance group created Australia's biggest financial services group. Both companies argued the deal was in the national interest and the ACCC did not oppose the merger because it considered any anti competitive outcomes were minimal. 'ACCC not to oppose Commonwealth Bank/Colonial merger', <http://www.accc.gov.au/content/index.phtml/itemId/323039/fromItemId/621419> But many opposed the merger which they argued would mean branch closures and job losses. 'Merger makes corporate history', PM radio program, 10 March 2000. <http://www.abc.net.au/pm/stories/s109529.htm> Accessed 1 May 2007.
 144. See *Financial Sector Legislation Amendment Act (No 1) 2000* [http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/0/AC8D7DA24CBC9155CA256F72000B6573/\\$file/160of2000.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/0/AC8D7DA24CBC9155CA256F72000B6573/$file/160of2000.pdf) and discussion of the need for public scrutiny by the Senate Economics Legislation Committee, August 2000 at http://www.aph.gov.au/Senate/committee/economics_ctte/completed_inquiries/1999-02/finsec2000/report/report.pdf
 145. Section 310 of the Communications Act 1934 imposes foreign ownership restrictions on United States broadcast, common carrier, or aeronautical radio station licensees. Section 310 covers foreign ownership restrictions applicable to FCC licences, and Section 310(b)(4) in particular, is implicated in the majority of cases where foreign ownership is an issue. In addition, applications from companies with foreign ownership or a transfer of control or assignment application in which foreign ownership is an issue may be scrutinised more closely by the Executive Branch, including the United States Department of Justice, the Federal Bureau of Investigation, and the Department of Homeland Security, for potential national security, law enforcement and public safety issues. The Departments of Justice and Homeland Security, and the Federal Bureau of Investigation typically intervene in the FCC review to ensure that foreign

Treasurer has a vital role in considering mergers and that the ACCC is entrusted with examining the potential competition effects of mergers in other industries. It is puzzling that the government did not respond to suggestions that a public interest test would enhance its legislative package, given that it had revised legislation in the past to accommodate public scrutiny. This was the case with its response to concerns about the lack of transparency in relation to bank mergers that were raised following the merger of the Commonwealth Bank and Colonial Finance in 2000.¹⁴³ Following that merger the government revised legislation¹⁴⁴ There is a legislative public interest component that at present applies to foreign ownership of United States media.¹⁴⁵ Similarly, a media public interest test applies in other jurisdictions such as the United Kingdom, which introduced such a test when it relaxed media ownership regulation. The United Kingdom Enterprise Act 2002 and the Communications Act 2003 specify public interest considerations which can be applied to mergers involving newspaper and broadcasting enterprises. The United Kingdom public interest test was intended as:

a safeguard to prevent media mergers bringing about undue concentrations of ownership, which may operate against the public interest... to ensure a sufficient plurality of media ownership, to protect the availability of a wide range of high quality broadcasting and to ensure that those with control of media enterprises have a genuine commitment to the broadcasting standards objectives set out in the Communications Act 2003.¹⁴⁶

Adopting the approach of defining matters of public interest that were to be addressed in relation to media ownership activity could possibly have dampened some of the criticism to which the Australian media reform package was subjected.

Similar promises also accompanied the recent media ownership legislation in Australia as had accompanied the Telecommunications Act in America; changes would advantage the media industry allowing it to pass on benefits to consumers.

In addition, the Australian legislation was promoted as promising a new media environment that would:

allow companies to access economies of scope that may be derived from mergers as well as capital management and expertise from other media sectors. Lifting foreign ownership restrictions [would] provide Australian companies with access to foreign capital,

investment in U.S. telecommunications assets does not impair United States law enforcement, national security or infrastructure protection interests. http://www.ictregulationtoolkit.org/content/practice_notes/detail/1803#_edn1#_edn1 Accessed 30 October 2006

146. Enterprise Act 2002: Public Interest Intervention in media mergers. Guidance on the operation of the public interest merger provisions relating to newspaper and other media mergers, May 2004. <http://www.dti.gov.uk/files/file14331.pdf> Accessed 17 April 2007.

opportunities to integrate into global markets and improve capacity to adopt new technologies.¹⁴⁷

Box 10: Press commentary on the proposed changes

During 2006 some comments in the Australian media were particularly scathing of the proposed media ownership changes, as the following example from the independent online media service, Crikey illustrates:

Removing or weakening the cross-media rules will reduce the number of 'media of influence'. The importance of the cross-media rules is not about the number of commercial media owners, it is about the number of media outlets which have the power to influence the public debate. Most media companies don't have that influence because they're in the entertainment business, not the news and current affairs business. The substantive "media of influence" are daily newspapers -- which set the news agenda, publish editorials, run campaigns and are highly influential in their communities -- and a handful of TV current affairs and radio talkback programs. If the new laws lead to a reduction in the number of owners of these "media of influence", media power will concentrate in even fewer hands. Furthermore, how can a law that legislates for the minimum number of media owners in the country's major markets to be cut from 11 to five be described as anything other than reducing diversity of media ownership?

Removing or weakening the cross-media rules is based on a myth about the current state of the media. The government's main rationale for introducing the new laws is that "new media" is rapidly assuming dominance over "old media", thus making cross-media regulation redundant. We would argue strongly that this is not the case. Firstly, the old media still totally dominate the flow of serious information in Australia. The arrival of websites and blogs may have added more numeric voices to the debate, but they are minute blips on the information radar compared to the societal and political influence that is wielded by newspapers or talk radio. Moreover, as a statement of fact, the biggest news and current affairs sites on the internet are overwhelmingly owned by the old media companies...

Removing or weakening the cross-media rules is against the spirit of a vigorous democracy. Axiomatically, the removal of the cross-media rules will result in fewer owners of the media that set the national agenda. By consolidating political and societal power in the hands of a tiny number of individuals, this legislation will curtail public debate and make Australia a less democratic country. In the process, the role of the fourth estate as the scrutineer of government will be weakened, perhaps irrevocably.¹⁴⁸

147. R. Jolly, Broadcasting Services Amendment (Media Ownership) Bill 2006. Parliamentary Library, Bills Digest no. 32 2006-07, <http://www.aph.gov.au/library/pubs/bd/2006-07/07bd032.htm> Accessed 17 January 2007.

148. Crikey, 14 November 2006, see Crikey website at <http://www.crikey.com.au/> Accessed 14 November 2006.

It was argued also that Australian consumers would benefit because a less concentrated commercial media market would emerge from a deregulated environment. Further, they would continue to enjoy a greater diversity of media delivered by the principal public broadcaster, the supplementary multicultural public broadcaster, the Special Broadcasting Service (SBS) and the community broadcasting sector.¹⁴⁹

Debates, minor concessions and the final outcome

As in the American case, the potential to enhance industry efficiency was an important 'selling point' of the deregulatory proposal. Some traditional media owners in particular lauded the legislation as their saviour; a means to combat what they insisted was increasing irrelevance as the result of the rise of the new media.¹⁵⁰

Similar arguments to those put forward in the American context surfaced in the reform debates and they were as passionate, if not as prevalent. (See Appendix A for a more detailed account of the arguments for and against deregulation). The press in particular was critical of the legislation with sections publishing warnings of the consequences of ownership deregulation (as can be seen in the commentary example in Box 10). Opposing views were largely ignored, however.

The government did make some concessions to placate the concerns of a number of its backbenchers, but these did not satisfy all the backbencher demands. One government Senator, who crossed the floor in support of further amendments, expressed particular disappointment that more people were not willing to stand up to protect the freedom of the fourth estate.¹⁵¹

The media ownership legislation was passed by both houses of the Australian Parliament in October 2006.¹⁵²

149. Explanatory memorandum, Broadcasting Services Amendment (Media Ownership) Bill 2006.

150. See: the submission by Network Ten regarding 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 18 January 2007.

151. Senator Barnaby Joyce, Queensland. Senator Joyce quoted in an interview with the radio program PM, 12 October 2006.

152. See the principal ownership legislation, the Broadcasting Services Amendment (Media Ownership) Act 2006

<http://www.comlaw.gov.au/comlaw/legislation/act1.nsf/framelodgmentattachments/B9BB24F8BAD2B1BACA257305001A10AA>

The new media regime will not entail the total deregulation that some in the industry desired. It will retain certain 'safety net' provisions. These include:

- Proprietors are not allowed to own newspapers, radio and television in the same licence areas – what has been called the 'two out of three' rule.
- Media mergers can only take place if a certain number of media groups (what some have labelled media voices) remain in particular areas (five in metropolitan areas and four in regional and rural areas).
- ACMA will keep a register of media groups to ensure unacceptable ownership situations do not occur.
- Media groups will need to disclose any cross-media ownership.
- Regional radio is to broadcast a certain amount of local material (local content on regional television is already subject to controls under the Aggregated Markets and Solus Operator regulations imposed by ACMA. These were not affected by the reform package).¹⁵³

There is speculation that these protections will not achieve their stated aims. Some critics argue for example that the 'two out of three' rule will do little to protect diversity of ownership or opinion. They say this is because in devising the rule there was no consideration of who controls pay television, magazines and Internet sites; it was focussed only on traditional media – television, radio and newspapers. So it is possible, despite this restriction, for powerful media owners effectively to dominate five of the six current sources of information and opinion in markets across Australia.

Similarly, the legislation has been criticised because it does not take into account the disproportionate power of certain media voices. The legislation defines media groups, not individual voices. Media groups are two or more operations, with operations meaning a commercial television broadcasting licence, or a commercial radio broadcasting licence or a newspaper associated with either a commercial television licence or a commercial radio broadcasting licence. But the differing corporate profiles of operations are not taken into consideration; all operators – big or small, influential or inconsequential – are considered equal under the new environment. All are patently not equal. According to the critics, small, regional radio stations and newspapers do not have the resources or influence of metropolitan radio and television in Sydney or Melbourne. Nor does a small, independent metropolitan

153. See Executive Summary of this investigation and findings at http://www.acma.gov.au/acmainterwr/aba/newspubs/radio_tv/investigations/documents/general/localcontent-june04-execsumm.pdf Accessed 1 February 2007

radio station devoted to broadcasting horse racing, provide a competing voice against a national media group.

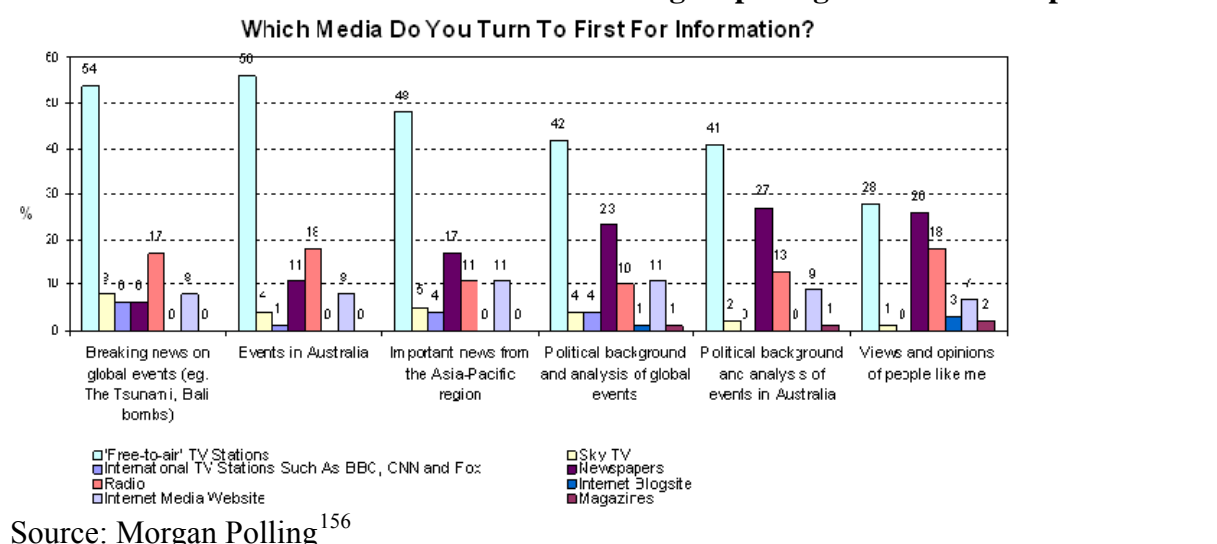
There is speculation also that the local content requirement may not actually be enforced. The requirement is currently under review by ACMA and its final form will not be known until after the review is completed in June 2007. The suggestion is that the broadcast requirement of four and a half hours of local content each business day may well be diluted in deference to the arguments of regional radio owners.¹⁵⁴

Change: First indications

The public

The only formal public comment to date on the media changes was recorded in August 2006. A small majority recorded opposition (52 per cent) to the removal of cross-media restrictions and a clear majority (64 per cent) opposed relaxation of foreign ownership restrictions.¹⁵⁵

Table 1: Media sources for information. Morgan polling of Australian preferences.



154. See for example North East Broadcasters Submission to Senate Standing Committee Inquiry into Media Ownership Bill, op. cit.

155. Roy Morgan Research 'Australians oppose government's media laws', 15 August, 2006. <http://www.roymorgan.com/news/polls/2006/4065/> Accessed 18 January 2007

156. See polling at <http://www.roymorgan.com.au/> Accessed 18 January 2007.

Over one-third of Australians (36 per cent) believed changes to media laws would have a negative impact on the integrity of reporting and 35 per cent believed reform would reduce diversity in the media landscape.¹⁵⁷

These results are significant, particularly given Australians' reliance on traditional media sources to obtain information and opinion as is illustrated in the following table.

The regulators

The ACCC released a report prior to the passage of the legislation that provides an indication of how it will approach the new media environment. The report acknowledged to some extent that assessment of potential media mergers will need to consider whether they will reduce the quality and diversity of media content. Despite this acknowledgment, the agency saw its job primarily as investigating mergers in terms of the ways they may substantially lessen competition.¹⁵⁸

While the ACCC claimed it will consider the unique characteristics of the media in making decisions, there is no clear statement that these characteristics will include reflections on the pivotal role the media plays in a democracy. On the contrary, the Commission specifically noted that the media is like all sectors of the economy in that each sector exhibits particular features. As such, it appears the ACCC has defined 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 as only a category to be considered in assessing competition.¹⁵⁹

It will therefore be necessary under the new media regime in Australia to notify the ACCC about cross-media mergers. But approval of the mergers may not involve consideration of media specific effects of the mergers, for example, 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.

ACMA will be the principal, day-to-day regulator under the new media landscape. ACMA, like the FCC, will have considerable discretionary power. There is provision for the Minister for Communications, Information Technology and the Arts to direct ACMA in certain

157. Ibid

158. ACCC, Media Mergers, August 2006.

<http://www.accc.gov.au/content/index.phtml/itemId/758231/fromItemId/3737>

Accessed 18 January 2006.

159. Ibid, p.19.

instances, but generally decisions will remain with the regulator. In fashioning the legislation the government argued this situation would ensure independent assessment and process.¹⁶⁰ It can be argued that the risk in giving a regulator such powers, as the United States experience suggests, is that its interpretations can impact significantly on the functioning of democratic processes. Some Australian broadcasters in criticising this aspect of the reforms believe the expansion of ACMA's power is an affront to democracy. They have expressed concern that 'non elected bureaucrats' will have the power to determine content and editorial control and have called for an independent court to be established to make these decisions.¹⁶¹

Given the recent United States' experience, which has seen the FCC continue to make decisions clearly dismissive of public opinion, this suggestion is not without merit. Under such an arrangement, comprehensive public interest guidelines could be established in consultation with all stakeholders, so that judicial interpretation with regard to all aspects of media regulation could help to 'regulate' the deregulated ownership environment.

The industry

The ownership deregulation debates illustrated that media proprietors were keen for media reform generally. Despite this, some argued against specific aspects of the recent regulatory reform. News Corporation was not supportive of the final package for example,¹⁶² possibly because it saw too few benefits for its Foxtel pay television network arising. Similarly, Fairfax Holdings withdrew support for the reforms in light of the government's decision to allow free-to-air networks to bid for one of two new digital television channels to be auctioned in 2007.¹⁶³

As happened in America, since the passage of the media reform legislation, the major media proprietors have begun manoeuvring strategically to ensure they are in the most favourable positions to take advantage of the new media regime.

There is talk of many other 'deals' in the pipeline. Journalist Lisa Murray remarks, '[t]he list of potential deals is long, with media analysts devoting pages of research reports to possible

160. Broadcasting Services Amendment (Media ownership) Bill 2006, Regulation Impact Statement, p.49.

161. DMG Radio Submission to Senate Standing Committee Inquiry into Media Ownership Bill, op. cit.

162. A. Wilson, 'Most media welcome new rules, but Murdoch group not happy', *Canberra Times*, 14 July, 2006.

163. Reported on the ABC's *The World Today*, 14 September 2006
<http://www.abc.net.au/worldtoday/content/2006/s1741037.htm>

tie-ups, asset swaps and ownership changes'¹⁶⁴ but at the same time analysts do not appear to have anticipated all the nuances involved in ownership moves. News Corporation's quick turn around of its Fairfax purchase for example.¹⁶⁵

Box 11: Media Manoeuvres

Some of the media 'deals' done in the first weeks following the passage of the legislation:

- News Corporation spent around \$170 million to buy the 25 titles in Federal Publishing Company's magazine business from Sydney's Hannan family.¹⁶⁶ The purchase made it the third largest magazine owner with ten per cent of total readers after Australian Consolidated Press (ACP) and Pacific Magazines. ACP is part of the Packer family's Publishing and Broadcasting Limited and the largest publisher of magazines in Australia with 48.3 per cent of the market.¹⁶⁷ Pacific Magazines is wholly owned by the Seven Network Limited and controls a number of websites at Yahoo!7.¹⁶⁸ Pacific Magazines accounts for approximately 23.5 per cent of Australia's total magazine circulation.¹⁶⁹
- News Corporation also spent \$360 million in October 2006 buying a 7.5 per cent share in Fairfax Media.¹⁷⁰ (It sold the share in May 2007 for \$280 million.¹⁷¹)

164. 'Form guide for the coming media race', op.cit.

165. Equally so, News Corporation's bid of (US) \$5 billion for Dow Jones and Co, owners of *The Wall Street Journal* has surprised many people. The Bancroft family which owns more than 50 per cent of Dow Jones rejected the bid. See ABC news article at S. Mayerowitz, 'Murdoch's News Corp bid for Dow Jones rejected', <http://abcnews.go.com/Business/IndustryInfo/story?id=3105688&page=1> because many members of the family object to Rupert Murdoch's brand of journalism, and consider he might slant *The Wall Street Journal's* news coverage to suit his business interests and conservative political views. R. Perez-Peria, 'Bancroft family holds discussion of Dow bid by Murdoch', '<http://www.ihf.com/articles/2007/05/15/business/15dow.php> Accessed 29 May 2007.

166. J. Schulze and T. Boreham, 'News in vogue as it stirs up the market with magazine publisher purchase', *The Australian*, 11 November 2006. Accessed 2 February 2007. <http://www.theaustralian.news.com.au/story/0,20867,20736888-7582,00.html>

167. See PBL annual Report 2006. <http://pbl.republicast.com/ar2006/republicast.asp?page=1&layout=1&control=yes&zoom=100> Accessed 2 February 2007

168. Pacific Magazines publications include: New Idea, FAMOUS, That's Life!, Better Homes and Gardens, Diabetic Living, Heart Healthy Living, Home Beautiful, Your Garden, Monument, Men's Health, Marie Claire, Girlfriend, K-Zone, Total Girl and TV Hits.

169. See FPC Magazines website. <http://www.fpc.com.au/page/fpcmags.php?pg=50> Accessed 2 February 2007.

170. See ABC Newsonline, 20 October 2006.

- The Packer family's Publishing & Broadcasting sold most of its media assets into a new joint venture with the private equity firm CVC Asia Pacific in a deal worth \$4.5 billion dollars (\$3.4 billion in cash and \$900 million in equity).
- Kerry Stokes' Seven Television Network bought 14.9 per cent of West Australian Newspapers for \$193 million as well as five per cent of Fairfax.¹⁷²
- Macquarie Media Group bought 13.8 per cent of Southern Cross Broadcasting, which owns Channel Nine in Adelaide, regional affiliates of Channel Ten and Sydney's 2UE and Melbourne's 3AW radio stations.¹⁷³
- Fairfax Media announced a proposal to merge with Rural Press to create a combined company with assets worth more than \$9 billion.¹⁷⁴

ACMA has warned media owners that it will use its powers to stop mergers that threaten to undermine media diversity and will compel media owners to divest assets if necessary.¹⁷⁵ At this stage it remains to be seen to what extent ACMA is willing to use its powers in this manner and to what extent the largest media companies may seek to evade legislative requirements.

Conclusion – lessons for Australia?

In 1996, in light of the decline of traditional readership and viewing patterns in America and the emergence of new forms of media that promised to revolutionise the media landscape, the passage of the Telecommunications Act was marketed as essential and visionary. It was cited as the catalyst for the transformation of tradition and culture, operations and strategic thinking in response to an America where consumers increasingly demanded news and

<http://www.abc.net.au/news/newsitems/200610/s1769294.htm> Accessed 3 February 2007.

171. 'Murdoch says Fairfax safe from predators', *International Business Times* <http://au.ibtimes.com/articles/20070509/murdoch-says-fairfax-safe-from-predators.htm> Accessed 29 May 2007

172. ABC Newsonline, op.cit.

173. 'Form guide for the coming media race', 13 January 2007
<http://www.smh.com.au/text/articles/2007/01/12/1168105177047.html> Accessed 3 February 2007.

174. C. Kruger and P. Liras 'Fairfax in \$9 bn media deal', *The Age* 6 December 2006.
<http://www.theage.com.au/news/business/fairfax-in-9bn-merger/2006/12/06/1165080983324.html> Accessed 4 February 2007.

175. H. Westermani, 'Media chiefs told to toe the line', *The Age*, 6 December 2006.
<http://www.theage.com.au/news/business/media-chiefs-told-to-toe-the-line/2006/12/20/1166290613074.html> Accessed 4 February 2007.

information on their terms. At the same time, it was promoted as a tool that would nurture the public interest. It would deliver more competition, diversity, lower prices, industry jobs and economic advantage.

The same type of argument for reform has recently been advanced in Australia. The promises about what ownership reform can deliver have also been familiar. The media reform package recently passed by the federal parliament has been promoted as a far-sighted approach, which will allow the traditional media to respond to ongoing change, encourage the growth of new media and deliver positive outcomes for consumers. In addition, the Australian package has been promoted as maintaining safeguards that will ensure media diversity.

Evidence from the past ten years in America suggests the Telecommunications Act has indeed transformed the traditional media landscape. But it appears that transformation has not encompassed promised outcomes in the public interest. The numbers of media outlets have diminished, takeovers and mergers have consolidated the power of major groups and independent media voices have declined in America since 1996. Opportunities for the expression of political and social viewpoints and commentaries in the traditional media have also been reduced. Outlets for artistic expression, a source, arguably, of some of the most influential and profound ideas, have been closed. Similarly, while the citizen journalism of the Internet has compensated to some extent for the loss of traditional media 'voices', the potential of this media source is threatened if the power of infrastructure corporations and merged media conglomerates increases further.

Not all concerned Americans agree with the United States' Senator Ron Wyden's prediction:

The country is really standing on a cliff when it comes to media concentration. When you go over that cliff you are going to be fundamentally changing what this country is all about, and not for the better.¹⁷⁶

But it appears many consider that further ownership deregulation is not in the public interest.

First indications are that there is a strong risk a similar, comprehensive transformation of the media landscape may take place in Australia. More safeguards are in place than in the American case and these are premised on acknowledgement that it is not the numbers of media voices as much as the diversity of opinion those voices deliver that is important. Furthermore, diversity in the Australian environment is enhanced by the existence of a public broadcaster culture and by the esteem in which it is held. At the same time, however, the Australian media has been more concentrated than its American counterpart at the time of ownership deregulation. As the Productivity Commission noted in its 2000 report, this

176. Senator R. Wyden quoted in D. Ho, 'FCC Democrats frustrated on media review'. The Associated Press, 10 May 2003

situation is potentially problematic for the public interest, unless countervailing conditions are in place.

In this context, the lesson that could be taken into a deregulated media ownership environment in Australia is that maintaining the role of a public broadcaster with a clear charter that directs it to work in the public interest is critical. Therefore, it is crucial to consider that while the Australian model of public broadcasting at present continues to represent diverse and sometimes controversial viewpoints, real budgetary cuts in recent years,¹⁷⁷ combined with board appointments that some have seen as contradictory to the public interest,¹⁷⁸ have possibly reduced the counter effectiveness of this tool. In a similar context, pressures exist, such as those for the public broadcaster to accept advertising, which may need to be re assessed to ensure the ability of public broadcasters to produce programming in the public interest is not undermined.

SBS, for example, has accepted advertising, but until recently, not within programs. This policy change at SBS may have undermined its ability to produce programming which will continue to be in the public interest. While it can be argued that SBS (and the ABC if it takes this road) would always be able to refuse advertising, the experience of TVNZ which operates under a Charter introduced in 2003 under the New Zealand Labour Government illustrates the difficulty a public broadcaster experiences when it accepts advertising. TVNZ is required to maintain commercial performance, while simultaneously attempting to provide public service broadcasting. The TVNZ Charter, however, requires it also to feature the highest standards of programming that informs, entertains and educates general and niche audiences as well to provide a significant Maori voice in programming.¹⁷⁹ TVNZ's efforts to balance commercial performance with these Charter objectives appear to have been unsuccessful. Despite some investment in local programs, content on its stations consists mainly of light entertainment and reality shows.

Similarly, the American experience illustrates that public broadcasting of the type that has developed in Australia is a valuable asset that needs to be protected in a deregulated media ownership environment. But it is likely this asset will only remain valuable if it is independent and well resourced.

177. R. Jolly, 'Funding of the Australian Broadcasting Corporation', Parliamentary Library E Brief, November 2006. See <http://www.aph.gov.au/library/intguide/SP/fundingabc.htm> Accessed 2 February 2007.

178. See comment on Keith Windschuttle's appointment to the ABC Board. 'Keith Windschuttle denies existence of rage at his ABC appointment', 29 June 2006, http://www.chaser.com.au/index.php?option=com_content&task=view&id=3189&Itemid=72 Accessed 2 February 2007.

179. See the TNNZ charter at http://tvnz.co.nz/view/about_tvnz_index_skin/816472

Future media policy in the United States will have to take account of, and work within a transformed media landscape. There can be no going back to a pre Internet media environment. The outcome of current FCC deliberations will be crucial in shaping a future media environment in the United States. Prior to the November 2006 Congressional elections, it seemed that more ownership deregulation was inevitable; that the views of a Republican-dominated Commission would not be swayed by public concern or judicial directives. The Democrat mid term election victory, however, suggests the Commission may need to be more circumspect in its decisions. Initial indications are the Democrats disagree with the FCC in a number of key areas – Net neutrality and the relaxation of cross-ownership rules in particular.

While it is not conclusive, it appears the FCC will need to scrutinise decisions which result in further ownership deregulation in the context of thinking that the media should work firstly, and principally, in the public interest. As such, the media are not simply a commodity to be left to the vagaries of the market. The FCC's recent decision regarding the AT&T merger does indicate a minor and subtle shift towards this type of thinking.

A further lesson for Australia it could be argued may be that there is a need to heed the recent United States' experience in relation to media regulators. It may be that the ACCC and ACMA will not act in the same manner as the FCC; that they will avoid the trap of being captured by the 'ideological' and/or political thinking of the day, but it seems unlikely, given statements already made by the ACCC¹⁸⁰ and the failures of ACMA and its predecessors to 'get tough' on media infringements. Although it should be acknowledged that ACMA will be able to function more effectively (if it so chooses) as the result of new powers it has gained from legislation passed in conjunction with the ownership package. It will therefore be able to be more flexible and to use a set of graduated powers, not previously available to it, in assessing media situations.¹⁸¹

It may be impossible to achieve, but it is worth attempting to create a truly independent media regulator with specific power to deal with media proposals. The supplementary legislation to give ACMA more 'real power' is a step in this direction, but it has yet to be seen if this body has sufficient 'clout' and resolve to 'regulate' an unregulated market.

180. See ACCC Chairman's speech to the ACMA Information, Communications, Entertainment Conference, Canberra, 24 November 2006. Reported at http://www.acma.gov.au/acmainterwr/_assets/main/lib101060/acmasphere_15.pdf Accessed 2 February 2007.

181. See R. Jolly and J. Clarke, , Communications Legislation Amendment (Enforcement Powers) Bill 2006 Parliamentary Library, Bills Digest No 37, 2006, <http://www.aph.gov.au/library/pubs/bd/2006-07/07bd037.pdf> Accessed 2 February 2007.

Appendix A

Media Ownership debates

In favour of deregulation

Traditional media owners in America contend that media regulation is a relic of the past. They say it hinders transition processes for the old media to assist it to cope with a dynamic and changing media landscape. Large corporations in particular insist the removal of cross-media ownership restrictions will help them deliver better quality news and public affairs.¹⁸² They accuse critics of further reform of relying ‘on emotion, utopian visions, and anecdotes’ to the detriment of sound media policy making’.¹⁸³

American media owners insist the media is not more highly concentrated as a result of the Telecommunications Act. They argue the Act has delivered a more vibrant landscape that allows major players to change market positions frequently, to appear inexplicably and, at times to disappear. They see this as representative of a strong, competitive market, which in turn functions in the public interest.

Owners of the ‘old’ Australian media have argued along similar lines that media reform is essential for traditional sources to survive. They have been reported as saying that the recent media reforms either do not go far enough or that they are not well targeted.¹⁸⁴

Supporters of more ownership deregulation in the American market argue that critics falsely claim a loss of diversity in the industry. One makes the point that twenty five years ago there were few programming choices, but:

Today there are three 24-hour news channels (CNN, Fox News, and MSNBC), plus the financial news channels CNBC and CNNfn. There are regional all-news channels like New England Cable News. Channels such as the History Channel and Biography Channel provide daily programming similar to the documentaries that used to be ‘specials’ on the

182. See The National Association of Broadcasters comments for example at <http://www.tvweek.com/news.cms?newsId=10938> or the Newspaper Association of America’s views at http://www.naa.org/ppolicy/NAA_Media_Ownership_Remand_Comments.pdf Accessed 7 November 2006

183. B. Compaine, ‘Domination fantasies. Does Rupert Murdoch control the media? Does anyone?’ January 2004. <http://www.reason.com/news/show/29001.html> Accessed 14 November 2006.

184. N. Chenoweth, ‘There’s a new game in town’, *The Australian*, 14 July 2006.

broadcast networks and PBS [Public Broadcasting Service]. The programming on these channels comes from many sources, including independent and freelance producers.¹⁸⁵

Further, supporters of ownership deregulation dismiss the idea that diversity is fostered by smaller media entities and that these entities produce better quality and quantity of news and public affairs. They continue that claims commonly-owned media in the same market create a single voice are equally invalid. They cite proof from the Federal Communications Commission Media (FCC) Ownership Policy Working Group reports. These indicate that local television stations owned by large broadcast networks receive more awards for news excellence and produce more news and public affairs programming than non-network-owned affiliates.¹⁸⁶

The notion that local owners are inherently more objective than large corporations is equally contentious they say. Some of the most biased United States newspapers of the past for example were locally owned and local owners are more likely than corporate owners to have ties to local political and business establishments.¹⁸⁷

A version of this argument was used in support of the lifting of foreign ownership restrictions in Australia. According to the Productivity Commission, regulatory requirements or commercial imperatives were the reasons Australian owners, like other media proprietors, broadcast or printed stories in the national interest. At the same time, the Productivity Commission considered it was possible that foreign owners may be less likely to interfere in domestic reporting or to experience local conflicts of interest.¹⁸⁸

Arguments for ownership deregulation favour mergers and acquisitions because they consider these play an important role in the evolution of the media. Mergers are a defensive strategy that achieves economies of scale to meet the demands of modern media consumers and to respond to competition from new outlets and technologies.¹⁸⁹ The economics of the mass media in the twenty first century 'are not those of a lemonade stand' according to one commentator. Scale and scope is needed to provide information and entertainment at a reasonable cost and small outlets are not able 'to provide coverage from the front lines of an overseas conflict one minute and then switch back to coverage of a local trial the next'.¹⁹⁰ This argument was cited specifically in the case for the removal of Australian cross-media

185. Compaine, *op. cit.*

186. *Ibid.*

187. *Ibid.*

188. Productivity Commission, *op. cit.*, Chapter 10.

189. Thierer, *op. cit.*

190. *Ibid.*

restrictions, which were seen as significant deterrents to media organisations pursuing economies of scope.¹⁹¹

The plethora of new media sources, which have delivered ‘an age of abundance and hyper-choice’ and the convergence of media sources, makes the question of who owns what media irrelevant for supporters of deregulation. They argue this is because:

In the new media environment, it is fundamentally unfair to impose asymmetrical regulations and ownership controls on one class of information providers while leaving others completely free to arrange their affairs — and, by extension, their speech — as they wish... Should it really be unlawful to own a newspaper bit and a television bit in the same place? What if the newspaper bit is an elaboration of the TV bit in a complex, personalized multimedia information system? The consumer stands to benefit from having the bits commingle and the reporting being at various levels of depth and display quality. If current cross-ownership rules remain in existence, isn't the American citizen being deprived of the richest possible information environment?¹⁹²

Against deregulation

In opposition, American consumer groups in particular maintain regulation serves the public interest well. Regulation should not be abandoned therefore unless it can be clearly shown that to do so would further enhance that interest.¹⁹³ From this perspective, there are profoundly negative implications for democracy if cross-media ownership rules in particular are relaxed. It is argued further that if further ownership deregulatory changes are introduced in America by the FCC they will produce media custodians able to dominate local political and cultural discourse and prevent people from voicing opinion or hearing the opinions of others.¹⁹⁴ Retention of cross-ownership rules are crucial therefore in preventing media monopolies which would be able to constrain reporting by ‘carefully avoiding some subjects and enthusiastically pursuing others’.¹⁹⁵

American critics have keenly embraced the notion of tradition in mounting their arguments to retain media regulation. Profit, they contend, has not been the sole intention of United States’

191. Explanatory Memorandum, Broadcasting Services Amendment (Media Ownership) Bill 2006, p.22.

192. Thierer, op.cit

193. I. Teinowitz, ‘Groups weigh in to FCC on media ownership’, TV Week, <http://www.tvweek.com/news.cms?newsId=10938> Accessed 7 November 2006

194. Gomery, op.cit.

195. B. Bagdikian, *The Media Monopoly*, (Second edition), Beacon Press, Massachusetts, 1987, p.17.

communications policy; public interest has been the crucial component. This is inevitably diminished if media discourse is increasingly provided by one voice, albeit over different formats.¹⁹⁶

Moreover, the American critics of deregulation cite United States' jurisprudence support for the proposition that acceptable media policy is about more than economics; it requires 'concern for preservation of a vigorous debate that includes the presentation of a diversity of views on a broad array of issues'.¹⁹⁷

Supporters of regulation conclude that the media represents not a marketplace, but a 'marketplace of ideas' in which there will be long-term and transitory effects from concentration; long-term effects, such as censorship, and short-term effects, such as the manipulation of opinion for specific purposes or gain.¹⁹⁸

The choice is not between regulation and deregulation they say, but between:

[R]egulation that reflects publicly determined values and regulation that is strictly concerned with satisfying the needs of powerful corporations, the kind that have inordinate influence over the FCC. The latter is called deregulation, but it is based on the government granting and enforcing monopoly licenses to scarce radio and TV channels.

Ironically, deregulation implies a commitment to market forces and competition. But the relaxation of media ownership rules always leads to more concentrated markets and less competition. The last thing the giant firms that lobby the FCC want is competition because that interferes with their dreams of monopoly profit.¹⁹⁹

196. Gomery, op.cit.

197. For example, *Associated Press v. United States*, 326 U.S. 1, 20 (1945); *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1047 (D.C. Cir. 2002). *Red Lion Broadcasting v. FCC*, 395 US 367, 390 (1969) *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 638-39 (1994). *Associated Press v. United States*, 326 U.S. 1, 20 (1945). *Red Lion Broadcasting v. FCC*, 395 US 367, 390 (1969).

198. Comments of Consumers Union, Consumer Federation of America and Free Press to FCC's 2006 Quadrennial Regulatory Review. See

http://www.hearusnow.org/fileadmin/sitecontent/2006_-_1023_Comments_-_CU-CFA-FP.pdf
Accessed 14 November 2006.

199. See 'Media ownership rules', <http://freepress.net/rules/page.php?n=fcc> Accessed 14 November 2006

Australian context

These key themes were continually raised in the Australian media reform debates. For example, academic Franco Papandrea argued:

The primary objective of the existing cross-media rules is to ensure diversity of opinion in influential media. Repeal of the rules will be likely to lead to a substantial reduction in the number of independent media owners in local markets and consequently to a reduction of diversity of views in those markets... there is widespread agreement that a substantial social loss is generated by reductions in viewpoint diversity. Consequently, the proposed changes are unlikely to be in the public interest.²⁰⁰

Paul Neville, National Party Member for Hinkler, also argued that diversity of opinion and an informed community were not esoteric concepts but essential components of democracy that entailed some form of regulatory control to ensure they persisted.²⁰¹

The Communications Law Centre, an independent, non-profit, public interest organisation stated its belief that:

the public interest in Australian media is served by a broad range of high quality services, competitive and diversely controlled, relevant and accountable to Australians, widely available and at affordable prices. As such, our starting point in reviewing the Bill has been: what will consumers gain?

The answer, in our view, is that consumers gain little. The [Broadcasting Services Amendment (Media Ownership)] Bill as it stands will not create a media environment that meets our definition of public interest. Its intent and potential effect appears to be to increase media ownership concentration rather than facilitate the entry of new players into the market. Significantly, we are yet to hear a convincing public interest case for the changes contained in the Bill.²⁰²

200. F. Papandrea, Submission Senate Standing Committee on Environment, Communications, Information Technology and the Arts Inquiry into the Broadcasting Services Amendment (Media Ownership) Bill 2006 and related bills.

http://www.aph.gov.au/Senate/committee/ecita_ctte/cross_media/submissions/sub08.pdf
Accessed 29 January 2007.

201. P. Neville, Member for Hinkler, Submission to Senate Standing Committee Inquiry into Media Ownership Bill, op.cit.

202. Communications Law Centre, Submission to Senate Standing Committee into Media Ownership Bill, op.cit.

Arguments for retention of regulation inevitably address the claims that regardless of the effects of deregulation, the public interest will be served by the Internet and the numerous citizen journalists who inhabit it. These arguments note that clearly, the Internet does deliver information, but they ask whether the Net can consistently deliver considered opinion. More importantly for the question of what constitutes the public interest, they ask: can the Net actually take the place of traditional media?

American critics pose the question:

[W]ho can furnish serious proof that new technologies are shaking the foundations beneath the entrenched media giants. If anything, the Web and cable and satellite have expanded the reach of media conglomerates. Ninety per cent of the top 50 cable channels are owned by media giants. Every single one of the top 20 news Web sites [in the United States] is under the thumb of a media giant²⁰³ (See the following table).

Top 20 Current Events & Global News Sites Nielsen//Net Ratings, February 2003

Brand or Channel	Audience (000)	Time Per Person (hh:mm:ss)
All Current Events & Global News	63,079	1:01:43
MSNBC	19,640	0:24:33
CNN General News	17,283	0:29:36
AOL News	16,800	0:28:59
Yahoo! News	16,214	0:25:23
NYTimes.com	8,349	0:39:44
Internet Broadcasting Systems Inc.	7,798	0:13:35
Gannett Newspapers and Newspaper Division	7,301	0:17:16
ABC News	6,347	0:09:03
washingtonpost.com	6,194	0:21:43
MSN Slate	5,596	0:08:14
USATODAY.com	5,400	0:20:16
Hearst Newspapers Digital	4,819	0:15:50
CBS News	4,451	0:08:03
Fox News	4,343	0:30:23
WorldNow	3,960	0:09:27
Time Magazine	3,920	0:05:22
McClatchy Newspapers	3,729	0:15:32
LA Times	2,777	0:15:22
Netscape News	2,552	0:07:44
Cox Newspapers	2,492	0:12:58

Source: Nielsen/NetRatings²⁰⁴

203. F. Majoo, 'Can the Web beat big media?'

http://dir.salon.com/story/tech/feature/2003/05/21/web_vs_big_media/index_np.html Accessed 7 December 2006.

204. See <http://www.netratings.com/> Accessed 7 February 2007

A similar situation applies in Australia. The top news websites are mostly under the control of 'media giants'. Fairfax, News Ltd, Channel Nine make up the top three. The only major new operator in Internet news is Telstra Corporation. However, Telstra's new service consists of AAP news stories and AAP is jointly controlled by News Ltd and Fairfax.²⁰⁵ As a counterpoint, it is worth noting that the Internet news site of the principal public broadcaster ranks fourth in popularity.

These arguments about deregulation in relation to the Internet will most likely become increasingly important. Clearly, this is because of the thinking that there is a new world where everyone can be a journalist, publisher, opinion writer or social commentator. At the same time, however, the opposing view is that: 'A Web site may be great – but it becomes even greater, and only really valuable, when you also own TV stations and newspapers'.²⁰⁶

As long as innate problems plague citizen journalism, it will be argued that ownership regulation of the traditional media cannot be abandoned. All citizen journalists, even those with the most influence, have limited time and resources to engage in investigative journalism. This is because, for the moment at least, citizen journalism is mostly a voluntary activity. As a result, many issues are only cursorily explored, despite suggestions to the contrary. Additionally, the informational value of citizen journalism is undermined by partisan bloggers who focus on issues and events that reinforce particular views, ignoring anything that may question their approaches.²⁰⁷ These flaws it can be claimed necessarily distort claims that the Internet has delivered a new world of honesty and accountability in journalism to replace biased reporting in the traditional media.

The reach of the Internet it can be claimed is equally problematic. Whereas the less affluent have traditionally been able to access opinion and information on radio or in their local newspaper, the Internet is mostly accessible in the United States and Australia to more affluent citizens. It could be argued that it is hardly in the overall public interest if affluence equates to access, as research indicates is the case at present in both the United States and Australia.²⁰⁸

205. Survey 1 March, 2006. 'Old Media Dominates Online' See <http://www.roymorgan.com/news/press-releases/2006/464/> Accessed 5 October 2006

206. Majoo, op.cit.

207. D. Drezner and H. Farrell, 'The power and politics of blogs'. Paper to American Political Science Association, July 2004. <http://www.utsc.utoronto.ca/~farrell/blogpaperfinal.pdf> Accessed 7 December 2006.

208. Families with incomes of less than (US) \$30,000 are four times less likely to have broadband Internet access than those with incomes of (US) \$75,000 and higher. M Bosworth, 'US still lags behind in broadband access', 17 September 2006.

The Australian case proves that not all regulation delivers diversity of reporting or opinion. Even with cross-media ownership rules in place a media situation has existed in which a select group of proprietors, who represent similar ideological perspectives, wielded potentially at least, immense power to influence editorial policy and content. Numerous claims have been made in fact that this power has been regularly used. Kerry Packer is cited as exerting ‘a direct and at times hands-on influence on the content of news bulletins’, for example.²⁰⁹ It may be, however, that rather than proving the case for deregulation, the Australian context emphasises a need for better regulation.

Appendix B

United States: Media tradition

Beginnings

From the 1790s, the American press has been subject to little regulatory constraint. However, when radio developed in the early 1900s, its requirement to function within a limited electromagnetic spectrum, made regulation of this new media sector media appear desirable and practical. Radio licences were therefore introduced to ensure only those who served the public interest were able to broadcast.

The Radio Act 1927 was the first standard imposed on broadcast licensees in the United States to guarantee they operated within assigned technical and programming requirements. The Communications Act of 1934²¹⁰ expanded upon principles in the Radio Act to include regulation for telephone and telegraph and later, for television and cable. Despite the introduction of consequent legislation, which modified a number of its provisions, the Communications Act remains a cornerstone of broadcast communications policymaking in

http://www.consumeraffairs.com/news04/2006/09/cfa_broadband.html Accessed 7 December 2006.

In Australia in 2002 the proportion of households with Internet access was: 19% of households with an income of \$0 to \$24,999 81% of households with an income of \$100,000 or more Source: ABS, [Household use of Information Technology, Australia, September 2003](#) (8146.0). See <http://www.lawfoundation.net.au/ljf/app/&id=/6C542B026BAA35D9CA25714D00052595> Accessed 30 January 2007.

209. P. Andren, Member for Calare, House of Representatives, *Debates*, 1 September 2003.

210. See ‘Communications Act of 1934’ <http://www.fcc.gov/Reports/1934new.pdf> Accessed 1 November 2006.

the United States. The FCC established by the Act, continues to act as the regulating body for interstate and international communications by radio, television, wire, satellite and cable.²¹¹

Prior to the 1980s, the FCC consistently viewed broadcast licensees as public trustees with obligations to provide as many opportunities as possible for discussion of contrasting points of view on controversial issues of public importance.²¹² Consequently, it prohibited cross-media ownership, which might have diminished such opportunities.

After Republican Ronald Reagan was elected to the American Presidency in 1981, policy approaches generally began to change as arguments were advanced that the Communications Act represented anachronistic legislation, not suitable to regulate media in a digital age.²¹³

Fairness doctrine

Accompanying the gradual deregulation of media regulation in the United States was the dissolution of what had become known as the ‘fairness doctrine’, an important component of the media’s public interest ‘trusteeship’.

The ‘fairness doctrine’ required broadcasters to provide equal opportunity for the presentation of all viewpoints in news, interviews and documentaries. It had been promoted by the FCC as the means to ensure even handedness in reporting.²¹⁴

The doctrine had been criticised, however, by many journalists who saw it as a violation of the rights of free speech and a free press. Some reporters refused to cover controversial issues because of the fairness doctrine requirement to present all sides of arguments.²¹⁵

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211. S. Zechowski, ‘Public interest, convenience and necessity’,
<http://www.museum.tv/archives/etv/P/htmlP/publicintere/publicintere.htm> Accessed 6
November 2006.
212. V. Kimburg, ‘Fairness Doctrine’,
<http://www.museum.tv/archives/etv/F/htmlF/fairnessdoct/fairnessdoct.htm> Accessed 6
November 2006
213. C. Stirling, ‘US Policy: The Communications Act 1934’
<http://www.museum.tv/archives/etv/U/htmlU/uspolicyc/uspolicyc.htm> Accessed 24 October
2006.
214. The FCC fairness policy was given particular prominence in 1969 when the United States Supreme Court ruled that a station licensed by Red Lion Co., had aired a ‘Christian Crusade’ program attacking an author, Fred J. Cook and in refusing to allow Cook the right of reply, had breached a duty of obligation.
215. The fairness doctrine disturbed many journalists, who considered it a violation of First Amendment rights of free speech/free press, which should allow reporters to make their own

The FCC approach to the 'fairness doctrine' changed dramatically with the appointment by President Reagan of a new FCC Chair, Republican Mark Fowler, who authorised a 1985 report which concluded that despite its intention, the net result of the doctrine was the stifling of free speech and diverse viewpoints.²¹⁶ It was maintained also that the 'fairness doctrine' was a remnant of the past; irrelevant in an era of abundant sources of information available to present all sides of public issue debates.

As a result, the fairness doctrine was discontinued in 1987.²¹⁷

The Telecommunications Act 1996

While deregulation commenced under President Ronald Reagan, the most significant change to broadcast regulation, the Telecommunications Act 1996,²¹⁸ occurred under the administration of Democrat President, Bill Clinton (1993–2001). After a Republican-controlled Congress passed the Telecommunications Act with a clear majority, on signing the Act in February 1996, President Clinton also showed his support for the Act. He argued the Act would enable telecommunications laws to deliver benefits for consumers and the broadcast industry, while at the same time enhancing competition and private investment, promoting universal service for customers and providing flexible government regulation.²¹⁹

decisions about balancing stories. Fairness, in this view, should not be enforced by the FCC. In order to avoid the requirement to find contrasting viewpoints on every issue raised in a story, some journalists avoided any coverage of some controversial issues. This 'chilling effect' was the opposite of what the FCC intended.

216. Federal Communications Commission, Report No. MM-263, 4 August 1987, p. 1.

217. By 1985, the FCC issued a report asserting that the fairness doctrine was no longer having its intended effect and that it might indeed be in violation of the First Amendment. In a 1987 case, *Meredith Corp. v. FCC*, the courts declared that the doctrine was not mandated by Congress and the FCC did not have to continue to enforce it. The FCC dissolved the doctrine in August of that year. Museum of Broadcast Communications, 'Fairness doctrine',

<http://www.museum.tv/archives/etv/F/htmlF/fairnessdoct/fairnessdoct.htm> Accessed 31 October 2006

218. See <http://www.fcc.gov/Reports/tcom1996.pdf> Accessed 30 October 2006

219. E. Boehlert, 'One big happy channel? The Telecommunications Reform Act handed over control of the radio airwaves to a chosen few. Will TV be next?' June 2001. http://archive.salon.com/tech/feature/2001/06/28/telecom_dereg/index.html Accessed 31 October 2006.

Reforms under the Act were introduced in five major areas: radio and television broadcasting, cable television and telephone services, Internet and on-line computer services and telecommunications equipment manufacturing.²²⁰

Telecommunications Act: Changes to broadcasting regulation

The Telecommunications Act:

- Removed a cap limiting the number of radio stations one company could own
- lifted the number of local television stations a corporation could own from 12, and expanded an audience reach limit from 25 to 35 per cent
- permitted the FCC to ease cable–broadcast cross–ownership rules
- increased the term of a broadcast license from five to eight years and
- made it more difficult for citizens to challenge license renewals.

Under the Act, the FCC was to re evaluate regulations every two years to determine if they were still necessary to serve the public interest.

Foreign ownership restrictions imposed by the Communications Act continued under the Telecommunications Act²²¹ allowing the FCC to deny common carrier licenses to corporations with more that 25 per cent foreign ownership or control if it considered that rejection to be in the public interest.²²²

From the outset, however, not everyone shared President Clinton’s enthusiasm for the Telecommunications Act. The *New York Times*, for example, argued that the Act’s antiregulatory zeal went too far, and in so doing it endangered the competition it was meant to create.²²³

220. F. Messere, ‘US Policy: Telecommunications Act 1996’,
<http://www.cato.org/pubs/regulation/reg19n3d.html> Accessed 30 October 2006.

221. See footnote 148.

222. See <http://www.fcc.gov/Bureaus/Wireless/Orders/da961107.txt> and
http://www.ictregulationtoolkit.org/files/1617_file_MOD6_SEC3_FCC_Foreign_Ownership_Guidelines.pdf

223. Croteau and Haynes, op. cit., p. 92.

Appendix C

Australia: Media Tradition

Beginnings

As was the case with the United States, the press in Australia has been largely unconstrained by specific regulation. Historically, it is most likely this was for similar reasons as in the United States, although in Australia, there has been little accompanying rhetoric about the crucial role of the press in a democratic society.

Australia: Sources of media regulatory control

While there is no specific ‘press power’ listed in section 51 of the Australian Constitution, the Commonwealth is able to make laws that affect the press. Powers which enable it to do so include:

- Section 51(i), which enables the Commonwealth to make laws in relation to trade and commerce with other countries and among the states; and
- Section 51(ii), the Commonwealth’s taxation power.²²⁴

Specific powers in the Australian Constitution under section 51 (v) give the Parliament jurisdiction to make laws with respect to postal, telegraphic, telephonic, and other like services.

As in the United States, the first specific broadcast media regulations were introduced in Australia in the 1920s. Regulation was initially concerned with licensing and operational and technical standards. Unlike the United States, the task of protecting culture and ensuring programs were suitable for the public has been undertaken by a number of regulatory agencies. Initially, the task was allocated to the Postmaster General’s Department, but over time responsibility transferred to a number of statutory authorities, the latest of which is the Australian Communications and Media Authority (ACMA). ACMA is responsible for the regulation of broadcasting, radio communications, telecommunications and online content. ACMA’s responsibilities are listed as including the protection of consumers and other users and fostering an environment in which the electronic media respects community standards and responds to audience and user needs.²²⁵

224. D. Butler and S. Roderick, *Australian Media Law*, LBC Information Services, Sydney, 1999, p. 464.

225. See ACMA website

<http://www.acma.gov.au/ACMAINTER.1507598:HOMEPAGE::pc=HOME,tlp=HOME>

Public broadcasting: ABC background

The ABC was established in July 1932, with sixteen outlets in the capital cities and four in regional cities. From the beginning, broadcasting Australian content in the name of promotion of culture and social cohesion was an important feature of ABC radio programming.

By 1942, the relevant Minister was given power to direct the ABC to broadcast in the public interest. ABC television, which came online in the mid 1950s, continued ‘to create and reflect the diversity and perspectives of Australians’.²²⁶

Funding for the ABC in the first instance was derived from individual radio, and later television license fees. These fees were abolished in 1974 by the Whitlam Labor Government.

From 1948, the national broadcaster has received an annual appropriation from Parliament.

A supplementary source of revenue however, has been the sale of its goods and services.

From time to time the government has established committees to investigate particular aspects of the national broadcaster with the intention of ensuring that the public interest continues to be served by its programming and activities.²²⁷

From at least 1935, various Australian governments expressed concern about increasing ownership concentration in the broadcast media. As a consequence, media ownership rules were introduced in the 1930s to restrict the number of radio stations a single proprietor could control. But as W.G. Gibson, Chair of the Parliamentary Committee on Wireless Broadcasting noted, these were ‘watered down’ within weeks of their introduction; the result of the concerted efforts of broadcasters.²²⁸

The influence of broadcasters over government has been a source of concern to a number of Australian media commentators. Trevor Barr argues for example that Australia’s media history is littered with special manifestations of “Ozzie mateship” towards media barons’.²²⁹ Barr cites a number of these instances including amendments to legislation made under the Fraser Government that removed the power of the then regulatory body to make decisions on broadcasting licences with reference to the public interest.²³⁰

226. See <http://www.pressreference.com/A-Be/Australia.html>

227. Ibid.

228. W. Gibson, Chair, Joint Parliamentary Committee on Wireless Broadcasting, *Report*, Australian Government Printing Office, Canberra, 1942. Quoted in R. Albon and F. Papandrea, *Media Regulation in Australia and the public interest*, Institute of Public affairs, November 1998, p.90.

229. T. Barr, *Newmedia.com.au. The changing face of Australia’s media and communications*, Allen and Unwin, St Leonard’s, 2000, p.10.

230. Ibid, p.12.

By 1942, a Joint Parliamentary Committee on Wireless Broadcasting was concerned that misuse of the power and influence of radio broadcasting should not corrode the fabric of the nation. The Committee considered there should be some measure of public control to prevent improper use of the medium. It expected also that the medium should exercise 'a positive influence for good on the individual and national character'.²³¹ This Committee was influential in the framing of the *Broadcasting Act 1942*, many of the provisions of which were only substantially rewritten fifty years later in the *Broadcasting Services Act 1992*.

The Australian Broadcasting Control Board (ABCB) was established in 1948 to ensure commercial broadcasters presented programs that served the public interest. But as Albon and Papandrea point out, the ABCB saw existing broadcasters, not the public, as its constituents and its actions reflected this perception.²³² Consequently, it restricted the issue of licences to assist incumbent broadcasters to remain financially viable.

When television was introduced in the 1950s, radio broadcasting legislation was extended to encompass this medium and the ABCB was given licensing control. Australian commercial operators were restricted to ownership of a maximum of two licences and foreigners were precluded from owning or controlling television licences.

While local content rules have been in place in Australia since the early 1960s, maintaining local content has been problematic and various solutions have been sought to ensure rural and regional areas in particular, receive local views and information. For example, in 2003, in response to community concern about declining local news and programming, the then regulating body, the Australian Broadcasting Authority, imposed additional licence conditions on regional television broadcasters to broadcast minimum amounts of local content in certain regions.²³³

Addressing media concentration

Despite attempts to limit ownership, by the 1970s it was obvious the Australian media was highly concentrated. Critics including Paul Keating, who as Prime Minister was later to

231. W. Gibson, Chair, Joint Parliamentary Committee on Wireless Broadcasting, *Report*, Australian Government Printing Office, Canberra, 1942, p.10. Quoted in Senate Select Committee on Information Technologies, *In the public interest: Monitoring Australia's media*, April, 2000. http://www.aph.gov.au/senate/committee/it_ctte/completed_inquiries/1999-02/selfreg/report/a01.pdf Accessed 11 January 2007.

232. Albon and Papandrea, op.cit. p.91.

233. Australian Broadcasting Authority, *Adequacy of local news and information programs on commercial television broadcasting services in regional and remote Australia*, June 2004. See: http://www.acma.gov.au/acmainterwr/aba/newspubs/radio_tv/investigations/documents/geral/localcontent-june04-execsumm.pdf Accessed 20 January 2006.

oversee major regulatory changes under the Broadcasting Services Act, argued that such situation would have been intolerable in other democracies.²³⁴

In 1987, a Labor Government introduced substantial changes. These included abolition of a two-station television ownership rule, which was replaced with a national population reach limit for commercial television.²³⁵ But it appears that contrary to any intention that these changes would increase diversity, within twelve months, media ownership and control had concentrated further. Indeed, Julianne Schultz argues that the Labor changes triggered a 'fundamental and far reaching transformation' that at the time received little public scrutiny and resulted in the media becoming just another business – albeit one with 'greater power than any other to influence society'.²³⁶

Yet another attempt at addressing media concentration, the *Broadcasting Services Act 1992* (BSA), intended to impose a new broadcasting regime by introducing certain cross-ownership regulation provisions. The BSA prevented common ownership of newspapers and radio and television broadcast licences in the same region. It also supposedly prevented foreign ownership of television. Despite these intentions, during the 2006 media ownership debates it was argued the BSA was as ineffectual as its predecessors in regulating the media. For instance, its existence did not prevent the Canadian media giant Canwest from effectively owning over 50 per cent of the Network Ten television network.²³⁷ Nor was it able to prevent considerable cross-media ownership between new and old media. Additionally, under the BSA, audience reach limits were considerably higher and more flexible (75 per cent audience reach) than those imposed under a deregulated American regime (39 per cent).

The emergence of new media in the 1990s was seen by some as illustrating the inadequacies of existing legislation in Australia. In addition, arguments about the impact of new media along the same lines as those already raised in the United States surfaced. Specific

234. House of Representatives, *Debates*, 1976, p.3016. Quoted in J. Shultz, 'Failing the public: The media marketplace', in H. Wilson (Ed), *Australian communications and the public sphere*, Macmillan, South Melbourne, 1989, p.70.

235. These changes were introduced by the *Broadcasting (Ownership and Control) Act 1987* that amended the *Broadcasting Act 1942*. Under this legislation, a person owning a television licence could not own more than 15 per cent of a newspaper which had more than 50 per cent of its circulation in the same area as that of their commercial television broadcast licence.

236. Schultz, op.cit., p.75.

237. Canwest has a 14.9 per cent share in Ten, but it has provided additional financing to the network in the form of subordinated debentures, which effectively amounts to a 57 per cent 'interest' in the company. In 1998, the Australian Broadcasting Authority after a series of investigations was satisfied that Canwest had addressed concerns regarding a controlling interest in Network Ten through the Ten Group Shareholders Deed.

restrictions on the ownership and control of media enterprises were increasingly criticised, as ‘old’ media moguls argued their businesses could not cope with the challenges of a changed media landscape – and as they calculated the potential commercial opportunities offered by new phenomenon, such as globalisation and convergence.

The Howard Government

Under the influence of such ideas and armed with a deregulatory philosophy, in 1996 a newly-elected Liberal/National Government undertook a review of cross-media and foreign ownership regulations with a view to liberalising the laws. Despite receiving in principle support from most major media organisations, no changes resulted, however.

One important reason for this was that the government was unable to develop a proposal for change that satisfied the ambitions of all the major media owners. Political reality was also a factor – the opposition parties, which at the time commanded a Senate majority, opposed the idea and a number of the government’s own backbenchers were concerned any liberalisation would further concentrate media ownership.²³⁸

Productivity Commission Findings 2000

The Productivity Commission’s conclusions in its report to government in 2000 had some minimal influence on the drafting of the government’s later legislation, but many of its conclusions were variously interpreted. For example, the Commission noted that diversity of opinion and information would be likely to be encouraged by greater, rather than less diversity in the ownership and control of the media. This conclusion was used to justify removal of regulation. But at the same time, a number of the Commission’s findings appear not to have been heeded in framing later legislation.

Perhaps one of the most crucial of these was the reservation attached to the Commission’s recommendation regarding the abolition of cross-media ownership rules. While it clearly supported deregulatory reform, it believed it should only occur once a more competitive Australian media environment was established. Further it considered that as:

traditional media businesses in Australia are concentrated, [they] could become more so if the cross-media rules are relaxed and no other compensating measures, such as freeing entry [to broadcasting], are taken.²³⁹

The Commission believed also that it was not sufficient for multiple media ‘voices’ to exist if those voices were not accessible to the public, or if they were effectively controlled by main media interests.²⁴⁰

238. J. Given, ‘Media ownership in Australia. The laws. The players’, January 2001. <http://www.cem.ulaval.ca/CONCAustralie.pdf> Accessed 11 January 2007.

239. Productivity Commission *Broadcasting Inquiry Report No 11*, March 2000, <http://www.pc.gov.au/inquiry/broadcst/index.html>

240. Ibid

The Productivity Commission also recognised the need to consider the public interest in framing media policy. It suggested that a public interest test should be a fundamental aspect of a more deregulated media ownership environment. It did not attempt to define the test, but fundamentally it advocated that proposed media agreements, actions, acquisitions and mergers would need to prove they would not substantially lessen 'plurality of ownership and thereby lessen diversity of opinion in the media market'.²⁴¹ It argued too that a public interest test would be beneficial in overcoming any criticism about determining bodies 'being unsuitably qualified to consider the social and cultural dimensions of the public interest'. Additionally, applying a public interest test would subject the actions of regulators to public scrutiny.²⁴²

The government was, however, seriously committed to media reform. To this end, in 1999, it directed the Productivity Commission to inquire into broadcasting regulation. Following from the Productivity Commission inquiry, the government decided to introduce legislation in 2002 to remove controls on the foreign ownership of television, to introduce exemptions to cross-media rules and to ensure that local news services were maintained in regional areas subject to those exemptions. The legislation was passed by the House of Representatives in December 2003 with amendments, but was not approved by the Senate and lapsed with the Federal election of October 2004.

Appendix D

Summary of Australian media ownership controls in the *Broadcasting Services Act 1992 (BSA)* revised under the Howard Government reform package.

Television

Under section 53 of the BSA : 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;

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

Section 55 sets limits on multiple directorships and section 58 on foreign directors.

Radio

A person must not be in a position to control more than two licences in the same licence area. Multiple directorships are also limited under section 55.

Cross-Media Control

Under section 60 a person must not control:

241. Ibid. Submission 151, p.2

242. Productivity Commission, op. cit.

- 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.

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.

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