Media Ownership Conference Report

*The Communications Law Centre and Clayton Utz, in association with CAMLA, held a major conference on **Media Ownership in Australia**, at the offices of Clayton Utz at Sydney on 10 April*

Senator Richard Alston, Minister for Communications and the Arts, delivered no 'scoops', but suggested that the government continues to favour a more flexible regulatory regime of media regulation with a 'public interest' test as its cornerstone. Senator Alston stated that forms of vertical and horizontal integration were 'legitimate competitive efficiency aspirations which should only be curtailed for demonstrably public interest considerations'. He further argued that diversity of ownership cannot guarantee diversity of opinion, and that 'romantic' attempts to introduce new players to mass media markets are attempts to 'defy the commercial laws of gravity'.

Alston criticised excessive media focus on the fate of Fairfax to the exclusion of more profound issues that need to be addressed when re-casting Australia's media ownership laws. The majority of the Minister's speech was spent, in essence, arguing that most commentators overstated the contribution made by major metropolitan newspapers to providing diversity of opinion.

Alston's argument was twofold. First, that non-urban Australians rely far more on radio (especially talkback radio), local newspapers and television for at least local community news than they do on metropolitan newspapers. Second, that patterns of media use are changing significantly in Australia. Newspaper circulations (particularly those of metropolitan papers) are steadily declining. US statistics suggest that pay television subscriptions are likely to cut into the time spent watching free-to-air television. On-line services are likely to significantly change 'communications habits' in the future, although their impact has barely yet been felt.

The Minister's speech also provided several indications as to how his government will argue in support of any new laws:

- the base indicator used to assess the relative degree of influence exerted by various media will be time spent on watching/reading, with no discrimination made between news/information and entertainment material;
- 'diversity of opinion' will be interpreted more in terms of regionalism and community participation in the media (favouring local/regional newspapers and talkback radio) than the formation of views at national and state levels;
- diversity of opinion in metropolitan newspapers will be assured less by regulating ownership than by ensuring political counterpoints within individual newspapers

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The Hon Michael Duffy, former Minister for Communications, then provided an historical perspective on the development of the present cross-media laws, which followed on from the Hawke government's equalisation and aggregation policies of the mid 1980s. 'Equalisation' was the intention to provide regional inhabitants with three commercial television services, to make them equal with their urban counterparts. The policy was to be implemented primarily using incumbent 'solus' commercial operators, who were encouraged to take up an additional two licences. While some took up one additional licence, there was, argued Duffy, no incentive to take up the second supplementary licence. In response to this shortcoming, the government then introduced 'aggregation', which consolidated smaller licence areas into larger markets in which three incumbent commercial operations existed.

At that time, the 'two station to a market rule' was in place for commercial television – an absurd rule, Duffy argued, as it took no account of the size of a market. However, an unintended consequence of removing the rule without any replacement would be a concentration of ownership in particular markets. Both Keating and Duffy supported cross media rules, although Duffy sought the audience reach limits to be capped at 43%, the then levels of Channels Seven and Nine. However, Keating's proposal for the higher figure of 75% prevailed with Hawke's support. In retrospect, Duffy felt, the cross-media laws had achieved 'not a bad result'.

Influence, regulation and the political process

Professor Stuart Cunningham, Head of the School of Media and Journalism, Queensland University of Technology, observed that although media regulation was premised on the notion of the media's capacity to *influence* audiences, this central term is rarely interrogated.

Ideas about media influence stem from two main traditions: the psychological and cognitive models. Although these models are usually collapsed into one another in public

discourse, argued Cunningham, it is important to separate them out. The psychological model is based on the subjective 'impact' of a medium on its audience, whereby audiences are more susceptible to a proposition if it is the subject of media 'saturation'. Under this model, the dual audio-visual nature of television is afforded primacy. In addition, both television and radio are regarded as resistant to consumer 'choice', as audiences of these media tune into these media as technologies (in the sense of 'watching the television' as a social habit), as much as to experience a particular program being broadcast over a medium. This model, argued Cunningham, is clearly the most accepted in social debate.

The cognitive model, based on the political theory of elites, refers to the agenda-setting capacity of media organisations. Under this model, the media is most pervasively influential when it tells us not what to think, but what to think *about.*

Cunningham also referred to a third model of corporate influence, which relates to a media proprietor's exploitation of ownership for other commercial ends.

Peter Westerway, former Chair of the (now defunct) Australian Broadcasting Tribunal, argued that regulation of broadcasting was both justified and of continuing necessity. It was justified because of:

- the scarcity of the electromagnetic spectrum;
- the uniquely powerful impact of broadcasting on society; and
- the fact that the spectrum is publicly owned.

In his opinion, these justifications still apply. New technology merely has the *potential* to cause change and give rise to 'abundance', but will not cause change itself.

He also noted that, at any particular point in time, the regulatory environment is designed to suit some interests above others. He gave as an example Graeme Richardson's deferral until 1997 of consideration of the use of the sixth television channel, as well as Senator Alston's recent advice to the ABA that the government saw no need for its use as a fourth commercial network.

Westerway stressed that regulation should be automatic (ie, non-discretionary) as far as possible, regarding it as probably a mistake to give the ABA the power to conduct inquiries in private.

Tom Burton, journalist, *Australian Financial Review*, provided an eagerly received insiders' view of the progress of new media regulation. In short, it had stalled: no consensus had been reached in any public forum, and the Prime Minister is seen to be struggling to find an appropriate regulatory model. Of the three models being touted – the UK 'share of voice' concept, the ACCC as public interest regulator, and modification of existing laws – the ACCC model is still the government's preferred option. However, Senator Alston is unwilling to make a decision without first consulting with Howard – for whom the issue is a lower priority than the Wallis inquiry, Wik and China. Howard himself has been subject to heavy pressure from News, with both Lachlan Murdoch and Ken Cowley accompanying him on his recent visit to China.

In the meantime, lobbying has been heavy. PBL (Packer) urges legislative change that would allow it to purchase Fairfax. News Limited also pushes the deregulatory line, although a review of foreign ownership laws appears to remain off the agenda (a view consistent with the ABA's recent ruling on CanWest). A number of groups oppose change. Kerry Stokes could well be the leading figure here and, said Burton, enjoyed some credibility with journalists, although some questioned his commitment to editorial independence. Regional broadcasting interests generally oppose change and, due to the National Party's membership of the Coalition, are able to 'do a fair bit of damage when they get revved up'.

On another front, there is a regulatory battle between the ABA and the Foreign Investment Review Board (FIRB) over assessments of foreign ownership and control, in which the latter appears to have the upper hand.

In Cabinet, Costello and Alston are the hardliners for change; Reith, Fischer and Anderson are pragmatists (the latter two, significantly, having strong regional connections) who

are less committed to change; while Vanstone and Wooldridge are regarded as possibly supportive of the principles behind the existing cross-media laws. Not to be forgotten are the government backbenchers – who 'hammered' Alston over Optus Vision cabling – who may provide a voice for regional constituents opposing any increased liberalisation of the present laws.

Burton stated that the government would realistically need to introduce any draft bill to parliament by June 26 if it wished legislation to be passed during the life of the parliament.

Elements of a new regime

John Atkin, solicitor, Mallesons Stephen Jaques, prepared a paper ultimately delivered on his behalf by a colleague. The paper suggested a number of benchmarks against which any new legislation should be measured, together with issues that need to be considered when assessing any new regime's application. Noting that any new laws will be framed against a background of past and continuing industry change, Atkin called for the following elements to infuse any new laws:

1. Consistency and coherence: Atkin noted the differing, inconsistent foreign ownership rules under the Broadcasting Services Act (the Act) pertaining to print media, free-to-air television, pay television, the Internet and radio.
2. Technological neutrality as far as is practicable: again, Atkin referred to the present legislation; in particular, its assumption that pay television would be delivered primarily by satellite.
3. Anticipation of longer term trends: long-term trends that *can* be confidently predicted – such as the eventual impact of industry and technological convergence on concentration of media ownership – should be capable of being dealt with adequately under any new laws.
4. Appropriate regulatory framework: like Peter Westerway, Atkin criticised the Act's granting to the ABA the option of conducting its inquiries in private; claiming that this had added to the 'uncertain [and] totally unsatisfactory' position which arose immediately following CanWest's acquisition of a 57.5% economic interest in Network Ten.

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Atkin's paper stressed that any reconsideration of the present cross-media laws should consider the impact of convergence on cross-media rules and definitions of market power, as well as the operation of foreign ownership rules in borderless markets. In light of these issues, Atkin counselled caution in regard to the granting of consent for proposed acquisitions that contravene existing laws. Noting the government's approach in relation to the financial sector, Atkin suggested: 'If Don Argus has to wait, why shouldn't Kerry Packer also be asked to do the same?'

The ABA's **Kerrie Henderson** identified a number of 'inherent tensions' operating in regulatory practice: between certainty and flexibility in the application of laws; between transparency and confidentiality in dealings; and between economy and thoroughness. Henderson noted that the mooted 'public interest' test would lie at the 'flexibility' end of the first spectrum, and suggested that, should this test be favoured, precise statutory criteria be included. Such criteria should, in her opinion, set out at least:

- whether the public interest is to be interpreted in the local area or nationally;
- the prioritisation of different aspects of the public interest (for ex-

ample, as between diversity of views, voices or sources); and
- how relevant media markets are defined.

Henderson outlined the 'share of voice' conceptual model, which attempts to assess the relative degree of influence exerted by a particular proprietor within the combined media market, by dividing the market into a number of sectors and attributing various 'weightings' to different forms of media.

Finally, Henderson proposed a further alternative model, involving the incorporation into a media organisation's business plan of a set of principles embodying relevant aspects of existing codes of practice, journalistic codes of ethics and principles of editorial independence. The business plans would then be registered with a regulatory agency and the organisation be required to report on them periodically. This process would provide a mechanism for public accountability and review.

Protecting principles of journalism

Chris Warren, Joint Federal Secretary, Media Entertainment and Arts Alliance (MEAA), noted the rapid globalisation and convergence of media organisations, through:
- horizontal and vertical integration (cross-media ownership, the content and carriage nexus);
- 'hardware/software alliances (such as Sony Corporation's expansion into musical and filmic content); and
- their incorporation into the portfolios of broader post-industrial conglomerates (Matsushita, Westinghouse, Packer interests).

Such activity leads to job losses, centralised resources and reduced diversity.

In this context, Warren posited, how are the rights of journalists underpinned and the role of the media in a democratic society assured? Warren identified a developing and indestructible 'autonomous space' for journalists, This space arises partly from the nature of journalism – a highly skilled job that attracts people with a belief in the principles underpinning the position, and which does not lend itself to rigid supervisory control – and partly from the nature of media organisations, which are forced 'by the logic of their position to at least mouth the principles of freedom of speech'.

Journalistic principles were traditionally asserted and protected through the development, imposition and application of codes of ethics. While there is no template for maintaining the 'autonomous space' for journalists, Warren argued, there are two essential elements. First, a collective organisation, which preferably comprises both a trade union and a professional body. Second, continued vigilance concerning journalistic principles and a struggle to make them work.

One Fels' whoop

Allan Fels, Chairman, ACCC, presented preliminary views on how the ACCC would approach an inquiry into a Packer acquisition of Fairfax, before outlining options open to the government regarding the regulation of media ownership.

Regarding Packer/Fairfax, Fels stressed that the present section 50 of the Trade Practices Act (TPA) (which prohibits acquisitions likely to result in a substantial lessening of competition in a particular market) embodies an economic conception of markets. While there may be 'diversity of voice' issues in any prospective media merger, the ACCC would therefore primarily examine *economic* outcomes and would only consider diversity as a critical issue required to do so by subsequent legislation. In the present example, the ACCC would ask whether Fairfax would be able to behave any differently with respect to either advertising or newsstand prices. Here, argued Fels, the TPA is likely to regard the 'newspaper industry' as a discrete market which only competes with other markets at the margins and which has no close substitutes. Importantly, it probably doesn't form part of a larger 'advertising market'. The ACCC has done alot of work in this area over the past year, with evidence suggesting that the different forms of media (as regards advertising) are complementary rather than substitutable. In other words, the TV advertising market doesn't directly compete with the print media advertising market.

Fels noted that while PBL is the dominant magazine publisher in Australian TV, it is not presently involved in newspapers. A PBL takeover of Fairfax, therefore, would really mean no more than a change in ownership. However, he pointed out that the ACCC considers all mergers on case by case basis, taking into account the latest changes in the nature of the industry at the time the transaction was occurring.

Fels repeated the five options open to the government first identified in his address to the National Press Club last July:
- keep the present cross-media laws;
- amend the present cross-media laws;
- replace the present laws with general competition laws alone;
- replace the present laws with general competition laws, together with a mandatory 'public interest' test for major media acquisitions administered by the ACCC; or
- replace the present laws with general competition laws, but also refer acquisitions to a specialised agency for a 'public benefit analysis'.

While the ACCC supported the application of the TPA to all areas of the economy, Fels said, it acknowledged that issues relating to cross media ownership do not directly involve competition matters. As such, the ACCC had no firm view on which policy approaches were preferable. ▫