
**OWNERSHIP AND CONTROL OF COMMERCIAL
TELEVISION - FUTURE POLICY DIRECTIONS**

On 31 July 1986 the Forward Development Unit ("FDU") of the Department of Communication delivered its report on its study of ownership and control rules for commercial television to the Minister for Communications.

The purpose of the study was to:

- (a) evaluate the effectiveness of the current regulation of ownership and control of commercial television stations by the Broadcasting Act 1942 ("the Act");
- (b) identify principles which should underlie any new system of regulation; and
- (c) develop alternative proposals.

The study was to provide information, and identify issues and options, but not make recommendations.

Broad Recommendations

The FDU, however, did make a number of broad suggestions or recommendations. These were:

- (a) the Act should contain a statement of the broad objectives of the regulation of ownership and control.
- (b) the current '2 station rule' should be replaced by either a rule allowing a person to hold interests in licences serving up to a specified population limit, or to categorise licences according to market size and allow ownership of certain numbers of stations of such categories.
- (c) any rule in relation to cross media ownership should be discretionary, and tied to the public interest.
- (d) there should be a relaxation of the foreign ownership rules to permit ownership of commercial television stations by long standing residents of Australia, and perhaps by 'naturalised companies'.
- (e) the threshold of foreign ownership permitted should be lowered from 20%

to 15% in aggregate.

- (f) the current prescribed interest level should be lifted from 5% to at least 15%.
- (g) directors and chief executive officers of licensee companies should be treated as having prescribed interests in those licences.
- (h) the interests of associates of companies having an interest in a licensee should be taken into account when considering prescribed interests, as should those of parties to certain trusts.
- (i) the Tribunal's approval role should be limited to transactions having a possible adverse affect on the service provided by a licensee; and
- (j) approval of acquisitions by the Tribunal should only be mandatory if an interest in a licensee of 50% or more is acquired.

Introduction

The FDU started its report by outlining the present ownership and control rules. The licensees of commercial television stations must be Australian companies with share capital. Persons were then prevented from holding "prescribed interests" in more than two commercial television stations in Australia, one in a Territory or one in the capital city of a state. Persons then had prescribed interests if they were licensees, able to directly or indirectly control a licensee, its operations or programs or had a direct or indirect interest of more than 5% of votes, shares or financial interests in licensee companies. Every acquisition or increase in a "prescribed interest", through a share or loan transaction, was subject to approval by the Australian Broadcasting Tribunal ("the Tribunal").

General Principles

The FDU said there had never been a comprehensive statement by any Government of the purposes of the ownership and control regulations. From past statements by Ministers, regulatory authorities and committees of inquiry it identified the following key principles underlying the present system of regulation:

- (a) the need to avoid undue concentration of ownership or control of commercial television;
- (b) promotion of local ownership, and favouring "independent" applicants;
- (c) limiting foreign ownership and preventing foreign control;
- (d) preserving the integrity of licensing decisions; and
- (e) encouraging a diverse shareholding of licensee companies.

Another issue often raised was that of cross media ownership.

The FDU said that the objectives of promotion of local ownership and encouraging a diverse shareholding within licensee companies were no longer attainable. On the other hand, the avoidance of undue concentration of ownership or control and limiting foreign ownership were examples of policy objectives which were still highly relevant, although they would benefit from restatement. These key principles were not regarded by the FDU as a sufficient basis for understanding the current rules. It considered that it was necessary to have "system objectives" which would clearly set out the type of interest which was subject to regulation and in what markets. The FDU said that ownership was a well defined concept and regulation of ownership could be simple and effective. Regulation of "control" was more difficult. It seemed to the FDU sensible to relate ownership and control rules to persons able to affect services and programs, the output, of the system.

Limits on Interests

The principal policy associated with the limits on prescribed interests was identified as the avoidance of undue concentration of ownership or control of commercial television. As the Tribunal had pointed out in its Satellite Program Services report ("SPS report") the "2 station rule" took no account of the size of audiences served. As television companies earn most of their revenue from advertising (which depends on the size of the audience) the result was a great disparity in financial strength. This, in turn, affected the ability of television stations to produce or buy programs.

The FDU identified two potential means

of revising the two station rule. The first was to allow persons to hold interests in any number of licences, as long as the population served did not exceed a specified population limit. Another approach would be to divide licences into various categories, based on market size, and to have rules which, in effect, allowed persons to hold interests in a larger number of licences in smaller markets.

In addition, the introduction of competitive commercial television services to regional areas under the Government's equalisation policy would require extension of the "one station to a market" rule to regional areas to prevent people owning or controlling more than one commercial television station in a particular enlarged local market.

The next question was that of directorships and whether a directorship should be treated as conferring a prescribed interest. The current restriction in s92C of the Act, preventing a person from being a director of two or more companies which between them "controlled" more than 2 commercial licences was identified as supporting the current 2 station rule. It suffered from the same defects as that rule - as it applied to all companies deemed to "control" licensee companies. The FDU considered that there was a strong case for a radical change to the rule, and perhaps its abolition.

On the issue of cross media ownership, the FDU considered that there was a case for consideration of extended cross media ownership rules, particularly at local level. The perceived evils with cross media ownership were limiting diversity of opinion, inhibiting competition, resulting in monopolies and affecting employment opportunities. As the number of outlets at the local level was relatively limited, there was a stronger case for considering cross media ownership at a local level. However, any consideration of cross media ownership would have to take into account lack of Commonwealth power in relation to regulation of newspapers, film, video and tape production and news gathering organisations, together with substantial pre-existing cross media ownership. Certainly, the Commonwealth had power to take ownership of newspapers, film, video and tape production and news gathering organisations into account when considering broadcasting, and this was suggested. It was likely that divestment would be ruled out, and so any cross media rules would only operate in relation to

future transactions.

Rather than flat prohibitions of the type used by the Federal Communications Commission ("FCC") in the United States, the FDU preferred a discretionary test, requiring the Tribunal to take into account arguments that cross media ownership was not against the public interest in particular cases, and which would be consistent with the existing "media concentration" test for supplementary and remote licences. There would also need to be an amendment to the test relating to cross ownership between local radio and local television stations.

Foreign Interests

The current restriction on foreign ownership in commercial television restricts a single foreign person from holding more than 15% of the interests in a licensee company and a total foreign holding of in excess of 20% (s92D).

The FDU also considered the current "citizenship test". It contrasted this with the test in the Foreign Takeovers Act 1975 of a person "not ordinarily resident" in Australia. The FDU considered that if the citizenship test was retained, there were some areas in which more flexibility might be considered. One related to persons permanently resident in Australia for a long period of time. Prior to 1981 such persons were legally able to control television licensees and the FDU favoured an amendment in this regard. It also made reference to "naturalised companies". These are companies whose status is defined by the Foreign Takeovers Act, with majority Australia equity, a majority of directors who are Australian citizens and which have a general understanding between the company, major shareholding interests and the Government about the exercise of voting power in respect of the company's business activities in Australia. The FDU suggested either that the Act should be made consistent with the Foreign Takeovers Act or, alternatively, naturalised companies should have the right to put a case that their investments might not be against the public interest.

The FDU referred to the current Tribunal inquiry into the restructuring of the radio and television interests of News Corporation Limited. It noted that the Australian Labor Party at its recent national conference had amended the communications platform to read as follows:

"Protect the commercial sector again-

st foreign penetration of ownership and control. In particular, amend the Broadcasting Act's prohibition on foreign ownership provisions in such a way as to remedy any deficiencies revealed by the current Broadcasting Tribunal inquiry into the restructuring of the radio and television interests of News Corporation Limited."

(Australian Labor Party Platform, Resolutions and Rules, as approved by the 37th National Conference, Hobart, July 1986).

The FDU recommended simplification of the threshold of foreign ownership, by lowering the aggregate threshold to 15%, consistency with other foreign control prohibitions in other Commonwealth Acts, and ensuring that the provisions in the Act restricting foreign ownership and control should not be less than those applying to Australian interests.

Prescribed Interests or Attribution Rules

The FDU said that attribution rules could either be subjective, requiring determination that control exists in a given situation (discretionary attribution), or objective, requiring a measurement of quantifiable interests and identification of specified relationships. Discretionary rules based on a capacity to exercise control were seen by the FDU as overcoming some of the administrative difficulties in such rules. However, one drawback would be uncertainty in the application of the rules.

On the other hand fixed rules were unable to take account of individual circumstances. Rules with low thresholds, such as the present ones, captured large numbers of insignificant interests or relationships.

The FDU considered that discretionary attribution rules might be applicable where:

- (a) the actual effects of an interest or relationships on a licensee company or its operations cannot be readily assessed without an inquiry; or
- (b) where the interests or relationship would only give rise to the exercise of control in exceptional circumstances so that automatic attribution would not be warranted.

Automatic attribution rules would be appropriate:

- (a) in situations which were capable of objective measurement;
- (b) where the type of interest or relationship was ordinarily associated with the exercise of control; and
- (c) where the objective rule would provide a reasonable and realistic indicative control, or at least a substantial interest.

Direct Interests

At the present time the Act focuses on measurement of voting power, shares and loans. The FDU said there was a strong case for a change in the interests regulated. There was also a need to take account of other forms of company control, such as the power to appoint or veto directors and changes in memorandum and articles of association of licensee companies. It said that a simple measurement based on a number of voting shares was inadequate as a measure of voting power. This was because the Memorandum and Articles of Association of a company might divide shares into various classes, with differing amounts of votes or rights to vote on different issues. Even a measurement based on the proportion of total votes which could be cast at a general meeting was inadequate, because it did not take account of different kinds of issues on which votes might be taken.

The Companies Code defined "voting shares" as excluding shares which carried voting rights only in relation to issues not affecting the ordinary course of the company's operation (s5(1)). Such issues included proposals to reduce share capital, to affect rights attaching to classes of shares, to wind up the company or to dispose of property or assets. The effect was to exempt "preference" shareholders, with guaranteed rights to dividends, but only limited voting rights.

Like the Act, the Foreign Takeovers Act 1975 measured the share value as an indicator of equity, but referred to issued rather than paid up, capital. The shareholding test had the disadvantage of widening the regulatory net to catch shareholders which a voting power test would exempt, ie, those with no control over the company and who were holding shares purely for investment purposes.

The FDU certainly considered the current 5% prescribed interest level as having little significance for current ownership patterns. Both the commercial radio ownership and control provisions of the Act and the Foreign Takeovers Act adopted a 15% threshold. The Companies Code adopted a 20% threshold.

If loan interests were to be subject to automatic attribution, the FDU said that alternative rules would have to be applied. It considered a more realistic measure would be to attribute a prescribed interest to loans above a fixed monetary amount, or dealing with loan interests under discretionary rules so that regulation would only exist in situations where control was real.

The FDU considered that if de facto control of the operations of a licensee company would be subject to limits, directors and chief executives should also be covered by the attribution rules. Given the direct controls such persons continually exercised in relation to a licensee company, there was a strong case for treating them as if they held prescribed interests. This was the case in any event in the United States.

Indirect Interests

The FDU agreed that the current legislative scheme was not effective to limit regulation to interests directly held in licensee companies. It found the current methods of tracing indirect interests not to be effective and to regulate insignificant interests. They caught people who neither owned or controlled or influenced licensee companies.

Unlike the Companies Code and the Foreign Takeovers Act, they ignored the company's associates. The Companies Code has a wide definition of "associate" for its takeover provisions (s136(3)), extending to "influence" as well as "control". It covers people acting in concert, and automatically deems the directors and secretaries of a company, and the companies related to it, to be "associates". The Foreign Takeovers Act includes family members, partners, companies of which a person is an officer, employees and employers and corporations or directors who are under an obligation to act on the instructions of a person.

The FDU suggested that the Act should include a list of possible associate relationships and empower the Tribunal to deem persons to be associates if there

was a probability that a real association existed. Alternatively, deemed associate provisions could be subject to rebuttal.

As well as associates, trusts should be regulated, as they have been used to avoid limits on interests. One approach to reducing the risk of avoidance would be to deem certain powers exercised through a trust as establishing an attributable interest. For example, this would apply where a person under a trust deed has power to either exercise voting rights attached to shares, dispose of shares, replace a trustee or vary or revoke the trust. Automatic "associate" provisions could also have particular application to trust arrangements. For example, trustees and beneficiaries could have attributed to them each others' interests as disclosed by the written agreement if immediate family relationships were involved.

The FDU concluded that reliance on mathematical formulae in the tracing of indirect interests was a poor substitute for identifying the interests or relationships of concern.

Operational Control

The current operational control provisions in s92A(1)(c) of the Act were found to be defective and uncertain in their application and to create problems with administration, proof and enforcement. The FDU considered that if the Act clearly identified the types of arrangements which were of concern, application of the limits to persons having operational control could be left to the Tribunal. In addition, new provisions could take account of legitimate commercial arrangements essential to the normal operation of commercial television stations. These would include advertising and networking arrangements. The FDU suggested the following alternatives to replace the existing operational control provisions:

- (a) a clear identification of the nature and degree of control and the types of relationship and arrangements which were of concern;
- (b) proper regard to the effects of any proposed regulation of legitimate commercial arrangements which are important to the operations of commercial television stations;
- (c) adequate measures for enforcement which were administratively workable;

and

- (d) integration with Tribunal's approval procedures.

It said that operational control must be concerned with situations of effective commercial control, in relation to the nature and quality of the services provided to the public.

Attribution could be limited to situations where the control would, in the opinion of the Tribunal, have a significant impact on the service provided by the licensee. There would need to be a factual inquiry by the Tribunal. Station management agreements, which do not exist at present in relation to commercial television, would be subject to attribution of ownership.

Approval Requirements

The FDU considered that the Tribunal was required to approve many ownership transactions which had no impact on the performance of licensee companies, which was wasteful of its resources and imposed an unnecessary regulatory burden.

The problems caused by setting unrealistically low prescribed interest thresholds was that if a company acquired a direct controlling interest, greater than 15%, in a licensee company it would be subject to the Tribunal approval, which treated it as the holder of the licence despite the existence of a majority shareholder with more than a 50% interest, being a majority shareholder which in fact exercised direct control. In addition, bonus share issues would trigger the Tribunal approval process, even though there was no change in the proportion of interests held and, therefore, no possibility that any greater degree of control or influence could be exercised.

The criteria which the Tribunal must apply were highly artificial. For example, an investor acquiring a 16% direct interest in a licensee company is required to have the financial, technical and management capacity to provide an adequate and comprehensive service. This is despite the fact that the licensee company itself has a primary responsibility to provide this capacity and the Tribunal will assess it on this criterion at its licence renewals. It would be more relevant to assess whether as a consequence of the transaction there was likely to be an adverse affect on the capacity of the licensee to meet its obligations.

Where a share transaction results in an actual transfer of the control of a licensee company the FDU considered that formal Tribunal approval requirements could be justified. The grounds were that changes in the nature and quality of the service provided by the licensee could occur in a period between the transaction and the next licence renewal inquiry. However, it saw no justification for requiring formal approval of other interest holders.

The FDU suggested that the Tribunal could be given discretion to require approval of a transaction which in its opinion:

- (a) gives the interest holder a capacity to exercise effective control of the company holding the licence; or
- (b) could have an adverse impact on the capacity of the licensee to meet its obligations under the licence, or breach the Act or be contrary to any specified objects or regulations.

The FDU also suggested that consideration could be given to placing the primary reporting obligation on the direct parties to a transaction, rather than indirect parties caught by the current rules.

If only significant transactions which might have an adverse impact were to be subject to formal approval processes, there would be a stronger argument for requiring prior approval of transactions. However, the FDU considered that this would need to be accompanied by streamlined procedures. For example, notification to the Tribunal by respective purchasers, and if the Tribunal did not respond within 14 days, the transaction might proceed. If it directed a transaction not to proceed, the Tribunal could freeze a transaction until it had reached a determination.

The FDU recommended consideration should be given to requiring prior approval of transactions which resulted in a person holding more than a 50% direct interest in a licensee company. This would mean that the procedures for licence transfers would automatically apply in the obvious cases where direct control over a licensee company was acquired through a share transaction.

Contraventions

Despite regular reporting of contra-

ventions by the Tribunal to the Minister and the Department of Communications, no prosecutions appear ever to have been launched under the Act. The Tribunal has stated that it considers that the processes of the criminal law may be too severe and cumbersome in this area (Annual Report 1984, para 2.320). The FDU considered that the noticeable lack of prosecutions suggested that there should be review of offences, with the strong presumption that some be deleted from the Act.

Future Approaches

The FDU considered that the current system of ownership and control regulation displayed such fundamental flaws that major change was necessary. The heart of the problem was the failure of the Act clearly to identify the general principles and "system objectives" intended to underpin the detailed statutory rules. Central to this was the extent to which the Tribunal, as the expert administrative body, should be given discretionary powers and whether it should be empowered to determine detailed rules to implement the principles or system objectives set out in a Broadcasting Act.

Since the decisions of the High Court in Herald & Weekly Times v The Commonwealth (1966) 115 CLR 418 and R. v Australian Broadcasting Tribunal; Ex Parte 2HD Pty. Limited (1979) 27 ALR 321, and the 1981 amendments to the Act the Tribunal's power to refuse share and loan transactions had been heavily circumscribed. The FDU considered that the Tribunal should be given discretions which were exercisable within the parameters of clearly defined policy objectives incorporated in the Act.

The matters contained in the report are now open to public discussion and it is anticipated that any legislative amendments will be introduced gradually.

Robyn Durie

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At the Annual General Meeting of the Copyright Society on 25 September 1986 the following officer bearers were elected:

Peter Banki	- President
Brett Cottle	- Vice-President
C. Mary Still	- Secretary
and	
William S. Lloyd	- Treasurer.