FORUM: FOREIGN OWNERSHIP OF MEDIA

The Press: Paul Chadwick of the Communications Law Centre

During the Hawke-Keating years, foreign investment has surged through the Australian economy at an unprecedented level. Between June 1987 and December 1989 more than $50 billion of direct foreign investment arrived compared with $9.8 billion in 1985-86.

The arguments about the size or direction (mostly into real estate) of this inflow will not be debated here. The commentators tell us that Australia's pool of domestic savings is too small to support development projects, acquire equipment and buy the imported goods to sustain the living standards we expect. To finance it all, we can either borrow or allow foreigners to invest directly.

Assuming this context, should the newspaper industry be treated like the broadcast media, in which foreigners are to be limited to a 20 percent stake under changes steered through Cabinet last May?

The Minister for Transport and Communications, Kim Beazley, has said that "the government believes it is vital that Australia's radio and television stations are owned and controlled by Australians because they are major outlets for political debate and exploration of cultural identity".

The question whether similar considerations apply to newspapers arises under the Foreign Takeovers Act, which gives the Treasurer discretion to reject a proposed acquisition deemed contrary to the national interest. Paul Keating's record has been inconsistent.

The American citizen, Rupert Murdoch, was not prevented from acquiring most of the Australian press through his takeover of Herald and Weekly Times Limited early in 1987. But in December that year, Mr Keating ruled out Murdoch's attempted purchase of the bulk of the Australian Associated Press wire service. Murdoch was, however, allowed to acquire AAP's share of Reuter and half of Australian Newsprint Mills. The New Zealand group Fletcher Challenge bought the other half.

In April 1988, Keating and Hawke indicated that they would block a bid by Maxwell for the Melbourne Age. In June 1988, Keating also prevented the acquisition of 49.9 per cent of the Perth Daily News by a Malaysian company, MUI Australia.

Maxwell is persisting in his efforts to establish his Mirror Group in Australia. He is seeking approval for the acquisition of 49 per cent of West Australian Newspapers (WAN), a subsidiary of the Bond-controlled Bell Group. Maxwell already has secured 15 per cent of Bell.

Despite Keating's indication in June that approval would be withheld, Maxwell, supported by Bell, is formally seeking approval from the Foreign Investment Review Board (FIRB), which advises the Treasurer. The lobbying on the issue has included circulation of a Bell Group White Paper, "Foreign Investment in Australia: A Case for Consistency", which emphasises the double standard: Maxwell impeded while "a single, foreign-controlled group (Murdoch's New Corporation) owns 65 per cent (in circulation terms) of the metropolitan print media".

The FIRB application appears to be an attempt to flush out what Malcolm Maiden in the Financial Review describes as "Paul Keating's informal advice to the print media that the television foreign ownership limit of 20 per cent also applies to print".

At the time Cabinet set the new limit for broadcasting, a similar 20 per cent limit on foreign holdings in newspapers was suggested. It was attributed to ALP sources, but at present there do not appear to be serious moves in Caucus for such a scheme. The political obstacles to requiring News Corporation to divest are formidable. But if Murdoch were grandfathered, the concentration of ownership in the industry would be further cemented.

The most common argument against foreign control of newspapers assumes that owning newspapers brings with it the power to influence public opinion. A prospective owner's disavowal of any such intention (as Bell and Maxwell assert in the WAN proposal) is less important than the recognition of the potential.

The objection to foreigners also rests on assumptions about their primary loyalty. The former Liberal Prime Minister, Malcolm Fraser, has asked: "Is a US owner of Australia's media going to be interested in advancing Australia's arguments or is he going to be interested in advancing the interest of the US, to whom he owes his primary loyalty, to whom he is legally committed?"

Maxwell made a novel contribution to the debate in an interview with the Financial Review published last 20 July:

Q. "You are reported to have described newspapers as megaphones, is that correct?"

A. "Newspapers in a small country like England certainly are megaphones. In Australia it doesn't bear any relation."

Q. "So in Australia you don't believe that newspapers fulfil the same function?"

A. "They probably do, but I, as a foreigner, can't acquire newspapers in Australia and use them as a megaphone to tell Australians what to do. That must be left to the natives to tell them, not to foreigners. I don't interfere editorially anywhere except where I vote."

The objections summarised so far ne-

glect the multinational character of the media organisations likely to be interested in a slice of Australia's press. Policy must be framed in light of what Bell Group calls "the imperatives of global publishing".

If we accept, for argument's sake, that a Murdoch, Maxwell or the French Hersant is a "world citizen", untroubled by the simple conflicts of loyalties which Fraser foresaw, do we clear this way for foreign control in the press? On the contrary, it is in the respect that the strongest arguments against it arise. The first is practical: the multinational is tempted to treat any local operation as a mere source of venture capital or subsidies for exercise elsewhere. The obligations of the Australian operation to provide high quality news and opinion to its readers remain, but the advocacy of Australian managers and journalists, when viewed in a company's global context, may count for little and get even less.

The second and more important consideration is what might be termed Australia's "media sovereignty". It is vital to preserve local control of, and accountability for, the news and opinion which provide the basis of Australians' view of themselves, the world around them and their place in it.

As Australia increasingly attempts to engage that world, local control of the media becomes still more important. The deregulation of the financial system, of which the increased inflow of foreign capital is one spectacular feature, has made the economy more vulnerable. The need to adapt is obvious, but that imperative must be explained by Australians to Australians to be achieved.

Culturally, the fact that we speak English increases our vulnerability. Unlike other nations in comparable circumstances, we cannot retreat into a unique language to cultivate our unique culture.

Just as Beazley's rationale for the 20 per cent limit in broadcasting implies a wish to avoid Australian stations becoming merely extra outlets for drama made in Los Angeles for American audiences (to a greater extent than at present), so it is justifiable to prevent newspapers becoming passive carriers of articles researched and written in, say, London, for British readers (to a greater extent than they already are such carriers).

It must be acknowledged that the two major objections to foreign control of newspapers - directed coverage and diminution of sovereignty - can equally result from Australian ownership. But pressure may be more effectively applied to Australian controllers. As the Perth entrepreneur, Kerry Stokes, owner of the Canberra Times, said during discussion of foreign ownership of TV, Australian owners are that much more accountable.

Against objections must be balanced the costs of excluding foreign capital and expertise. It is plain, for instance, that Fairfax will require a substantial injection of capital if its papers are to avoid the journalistic anaemia which financial weakness can cause. Why prevent, say, the Washington Post, Le Mode, the British Independent or the US chain Knight-Rider from reviving what is our only substantial competitor to News Corporation?

'Australian owners are that much more accountable'

Short of picking and choosing among "acceptable foreigners", the unsatisfactory basis for policy we now have, is there a way to diminish the potential dangers without excluding the benefits? One option is to impose new limits on newspaper ownership and control by any person or corporation, Australian or foreign. If no owner were allowed more than, say, one metropolitan daily (with appropriate limits for other types of papers), greater levels of foreign investment in any one paper may be of less concern. Nobody's megaphone would be too loud.

It is worth noting that the primary objection to News Corporation's current grip on Australia's press is not Murdoch's foreigness, but the concentration of power and barriers to entry posed by News Corporation's position.

In current circumstances, Australia's best refuge is in diversity.

Telecommunications: Peter Waters of Gilbert & Tobin

Foreign ownership was one of the main issues around which a compromise is struck by the ALP factions over telecommunications policy. The other key issue was the competition between Telecom and new carriers in the basic networks. The two issues were closely interwoven.

Before turning to the political arguments over foreign ownership, lets consider the commonsense arguments for foreign ownership, since the two are unlikely to coincide. There are two simple reasons for participation of a foreign telecommunications company in the new Australian telephone company: cash and know-how.

The establishment of a second network, even if not duplicating the local loop, will be enormously expensive. The second carrier would have to build that network from scratch, whichever of the two smaller government carriers formed its nucleus. It is generally accepted that customers dislike satellite carriage of voice communications and, accordingly, a second carrier established around Aussat would need to build a terrestrial network. OTC also does not possess its own domestic network: Telecom capacity is used to carry OTC traffic to OTC's exit points.

Few, if any, Australian companies have a spare $5 billion to pump into establishing a fibre optic network. With Australia's growing notoriety amongst world bankers, few international financial institutions may be willing to lend the money. OTC's financial modellers claim it has enough cash, but this seems doubtful given the damage Telecom will do to OTC's international business if the duopoly was extended into international services, which would have been Telecom's consolation prize if the Megacom proposal (involving an amalgamation of OTC and Telecom) had been rejected.

Technology will, of course, be crucial to the success of any new Australian cellular or second telephone company. The technology, and the services delivered utilising that technology, will have to be at least as good as Telecom's, and will probably need to be superior if the new entrant is to gain public acceptance and to dislodge a sufficient number of Telecom's subscribers to survive. Sprint's dedication to building a complete fibre optic network in the US was an important promotional tool which distinguished it from "Ma Bell's" old-time copper network. This technical edge has helped sustain US Sprint through the other start-up difficulties it experienced, which initially put many customers off-side.

It is probably fair to say that there is no Australian company which has the technological capacity to take on a public mobile telephone licence on its own, let alone a comprehensive carrier licence. Most of the switching and other telecommunications skills reside with Telecom precisely because of its long-held monopoly, although there are a handful of private companies which have telecommunications experience in niche markets, such as AAP Information Services and Link Telecommunications. Even OTC would not possess all the skills needed to operate a full alternative carrier service, because Telecom is responsible for carrying and switching the domestic component of OTC's traffic.

The foreign telecommunications companies (telcos) are the sole repositories of the skills and expertise needed to develop Australia's new mobile networks and/or second carrier. Without the involvement of foreign telcos, the chances of setting up a sophisti-

ited and competitive network within a reasonable time frame are greatly reduced.

The new Australian telco also will need to be savvy and knowledgeable if it is to detect hidden cross-subsidies or anti-competitive practices in the interconnection offered by Telecom with its network. The bitter lessons learned by companies like Mercury, MCI or Sprint will be invaluable. A U.S. Regional Bell Operating Company ("RBOC") may also be valuable on the theory of (to use a convenient expression without impugning their's or Telecom's past history!) "setting a thief to catch a thief". The RBOCs occupy Telecom's position at the local loop level, and the competitive US carriers have to negotiate access and interconnect agreements with them.

The Beazley proposal required a higher level of foreign ownership than Keating's proposal, because more cash is needed. In addition to the $5 billion for the second carrier network and $600 million for the cellular network, there is $600 million of Aussat debt. Treasurer Keating has labelled Aussat as "space junk", although Aussat is probably not as useless to a new entrant as some would have us believe. Nonetheless, requiring the second carrier to acquire Aussat is really a disguised licence fee.

In the early discussion of the Megacom proposal, it was suggested that the new carrier might be 100 per cent foreign owned. However, Beazley recognised that high foreign ownership was the kiss of death for his proposal so far as the ALP left went, and he contrived a solution which met the cash and political dictates. His Cabinet submission proposed initial foreign ownership of 70 per cent, which would be sold down within 3 or 4 years to 30 or 35 percent, no doubt at a handsome profit to the foreign telco.

The Keating proposal was affectionately known as the "mixed bag of lollies", because it had something for everyone, including on foreign ownership. Building a second carrier around OTC had the singular advantage of access to OTC's international revenues: a licence to print money. Telecom was to be kept out of international traffic for 3-5 years, giving the new carrier a guaranteed income stream to fund its domestic network. Aussat's staggering debt could then begins to look bearable. In addition, OTC probably has a better knowledge of Telecom's network, vital for negotiating interconnection agreements, and possibly a better all-round management and technical team than Aussat. As a result, the dependence on foreign telcos would be less on several counts. The Keating proposed a level of foreign ownership of only around 25-30 per cent.

As Beazley and Keating slogged it out in Cabinet, it became clear that the Left and Centre Left were not particularly enamoured

Kim Beasley

of either proposal. The two factions weren't happy about chunks of the national telecommunications infrastructure passing into private hands, let alone foreign hands.

Keating stole a march on Beazley in the first week of September by repackaging his proposal to deal with this concern. He proposed that there would only be competition in the services currently reserved to the monopoly carriers, and not in networks over which services were provided, which would remain Telecom's, and therefore publicly owned. Telecom would resell network capacity to the competitive service provider. Keating was vague on exactly what resale meant, probably deliberately so, but it appears he intended that the competitive service provider could perform its own switching.

Excluding the new telco from network competition immediately cuts the capital needs, and hence the next Keating sweetener to the Left. He proposed that the OTC-Aussat entity would be privatised, but would be Australian owned. This seemed to do the job, and Bob Hogg and other Centre Left members were saying they could see sense in Keating's proposals.

After a promising start, the modified Keating proposal was dead in the water when the unions threatened political and industrial havoc if OTC was sold. Megacom staggered over the finishing line in Cabinet, although many Ministers remained deeply unhappy.

As is now history, the Special National ALP Conference voted for the Megacom proposal. As the price for its support, the Centre Left extracted amendments which require that the new carrier include a 'strong Australian participant in the ownership consortium, guaranteeing or leading to majority Australian ownership'. This resolution is probably flexible enough to accommodate the Beasley 'selldown' proposal to allow initial majority foreign ownership. However, the potential bidders should have got a loud and clear message that in any beauty contest for the licence maximising Australian participation in the bidding consortium will be an important plus.

The national interest probably, and nationalistic politics certainly, require that there be some upper limit on the level of foreign participation. However, the foreign telcos are not about to exchange their technology, expertise and the cash we need from them for a role as a minor player in the brave new world of Australian telecommunications.

Music industry: Phil Tripp of Aural Sect Records

In a recent submission I made to the Prices Surveillance Authority (PSA) regarding record prices, the quote that the media took to heart quickest, and out of context to a great degree, was one where I compared multi-national record companies to "oil sheiks" and their trade organisation, OPEC, to the Australian Record Industry Association (ARIA). In the sensational coverage of this volatile issue of possible cartelisation of major record companies, the media went for the sensational and the best sounding bite rather than reporting what is a complex debate with many points of view.

The point I was driving at was that in ARIA's past actions against small distributors, it tended to use lawyers like sledgehammers to cut off sources of supply to petty infringers of the copyright laws. It was stressed that this sort of action was really in the past and that, in light of the changes within the industry and more rational approaches to rectifying disputes, cooler heads had prevailed. The age of knee-jerk reactionaries in the complex and constantly dynamic industry is over.

We have moved from the Dark Ages of the music industry, where the major powers established feudal fiefdoms and never worked with their neighbours to a more cooperative industry where the once iconoclastic and dogmatic independent record companies are now utilising multinationals as their distributors and, in many cases, financiers. And the majors are seeing the benefit of having small, hungry and A&R (artists and repertoire) driven companies do their talent scouting and artist development. This is a worldwide trend which will be beneficial to the industry.

The book "Rockonomics", by Mark Eliot, describes how the music industry overseas

has evolved from its early days under the control of communications conglomerates to its most recent days under the control of even more monolithic communications giants. It not only traces the contributions of the record producers but contrasts this essential talent development against the dealmakers that have controlled the industry.

In our country, many of the ills experienced by the media conglomerates in print, radio and television are being experienced by record companies vying for the disposable income of listeners. It is unfair to state broadly that they are cartels but certainly one can draw parallels.

Everyone is trying to introduce new A & R into a market which is resistant to change. The market generally would rather stick with tired and proven acts such as the Beatles, Rolling Stones, Dianna Ross and their clones than putting out new material that may fail to catch on. Band managers are the catalysts who nurture new acts through independent record distribution and pressing to the point where the major record companies are prepared to marshall their massive distribution and marketing systems behind such acts so as to get the tastemakers - print media and radio - to induce interest in them so that both the specialist record stores and mainstream record outlets (Brashs, Virgin, HMV megastores) stock and push their product.

Artists' first harvest of songs is usually unripe and immature but they have to be nurtured to produce better material every year. The object of the exercise is to create a desire in the public to buy this material as soon as it is released. Some would argue that the large companies find it in their interest to make the material as uniform and controllable as possible resulting in blandness.

The small local independent labels pride themselves on imaginative and fresh acts, the majors rely on portion control, market research, delivery systems and demographic targetted marketing and immense advertising and promotion campaigns. The majors also react quickly to each others' successful formulas and quickly introduce similar material.

The realities of the record industry are that multi-nationals satisfy a need. It's very easy to blame the woes of an industry on its most powerful players, but realistically, they are the ones that move the industry most rapidly through periods of change. True, they do have the power and opportunity to corrupt but the checks and balances that exist to rectify situations contrary to public interest in the end tend to manifest themselves when most needed.

The unfortunate aspect of the PSA enquiries is that instead of truly serving the public interest, they have been directed at changing copyright law in a reactionary mode. And even more unfortunate for the multi-nationals, a lot of sins of the past have come back to haunt them in terms of loss of power and bad publicity. Perhaps the worst problem we face is that our industry is one of the most visible in the world because the products we sell represent fame and fortune and people resent both. Within our industry, there is a constant power struggle fuelled by egos and lawyers: always a volatile combination.

The best thing to come out of the PSA inquiry is the mass of information that has been put forth by both the major and minor players in the industry. For those interested in more information, I suggest getting hold of copies of the submissions to that inquiry for a fascinating view of a complex industry.

Book publishing: Michael Webster of D W Thorpe

Observers of media proprietorship might be forgiven for thinking that book publishing was spared the takeover fever that gripped the 1980's.

After all, while changes of newspaper, magazine, radio or television ownership commanded front page attention, government inquiries and widespread community concern, the ownership concentration into fewer and fewer corporate hands of book publishing drew little, if any, attention. This is of particular concern considering the permanency of the book, its cultural significance and the educational and societal influence it has.

Those of us working within the industry were spared none of it. The appetites for acquisition were just as strong, as were the predators. Takeovers were endemic at prices that left us startled then, and concerned now, as owners struggle to justify investments that seem impossibly optimistic given the low profitability, over produc-

Table 1 WORLD'S LARGEST PUBLISHERS

Company	Owner (base)	Turnover ($A est)	Imprints
Harper & Collins	News Limited (USA/Aust)	1.8 billion	William Collins, Harper & Row, Marshall Pickering, Unwin Hyman, Holmes McDougall, Fount, Bartholomew, Fonatana, Flamingo, Paladin, Thorsons, Scott Foresman etc
Simon & Schuster	Gulf & Western (USA)	1.6 billion	Simon & Schuster, Prentice Hall
Hachette	Hachette (France)	1.3 billion	Grolier, Franklin Watts, Diamonds
Bertelsmann	Bertelsmann (Germany)	1.2 billion	Bantam, Corgi, Dell, Doubleday, Transworld, etc.
Harcourt Brace Jovanovich	HBJJ (USA)	1.1 billion	HBJ
Reed	Reed (UK)	1.1 billion	Octopus, Heinemann, Boweker, Saur, Butterworths, Mandarin, Focal, Hns Zell, Hamlyn, Secker & Warburg, Methuen, Kaye & Ward, Ginn Miller, Conran Octopus Mandarin, Minerva, etc.
Pearson	Pearson (UK)	1.0 billion	Penguin, Lognman, Viking, Ladybird, Hamish Hamilton, Michael Joseph, Rainbird, Arkana, Puffin, Fantail, Pelham, Frederick Warne, Sphere, New American Library, Pitman, etc.
Readers Digest	Readers Digest (USA)	1.0	Readers Digest
Times Warne	Time/Warner Bros (USA)	900 million	Time, Warner, Little Brown
Times Mirror	Times Mirror (USA)	700 million	Times Mirror Professional
Random House	S I Newhouse (USA)	700 million	Random House, Random Century, Jonathon Cape, Chatto & Windus, Bodley Head, Hutchinson, Arrow, etc.
Maxwell	MCC (UK)	700 million	Macmillan (USA), Pergamon, CommunicationsMacdonald, Merrill, Berlitz, etc.
Table 1 Elsevier	Elsevier (Netherlands)	600 million	Elsevier
Thomson	ITOL (Canada)	400 million	Sweet & Maxwell, Janes, Van Niostrand, Wadsworth, Edward Arnold, Thomas Nelson, Law Book Company, Gale Research, etc.

Table 2 AUSTRALIA'S TOP 10

Company	Owner (base)	Turnover (est)	Imprints
Collins/Angus & & Robertson	News Limited (USA/Aust)	$90 million	Overseas imprints , plus Angus & Robertson, Collins Dove, Gordon & Gotch, Golden Press, Shakespeare Head
Reed	Reed (UK)	$85 million	Overseas imprints, plus Budget Books, Treasure Press, Thorpe
Pearson	Pearson (UK)	$70 million	Overseas Imprints, plus McPhee Gribble, Greenhouse, Viking O'Neil
Readers Digest	Readers Digest (USA)	$50 million	Overseas imprints only
Thomson	ITOL (Canada)	$40 million	Overseas imprints, plus Nelson Education, Law Book Company
Ashton Scholastic	Scholastic Inc (USA)	$40 million	Ashton Scholastic
Pan/Macmillan	Macmillan (UK)	$35 million	Pan, Macmillan, Sun, Sidgwick & Jackson, St Martin's Press, Picador Piper
Transworld	Bertelsmann (Germany)	$30 million	Overseas imprints, plus Doubleday Book Club
Random-Century	Random House (USA)	$25 million	Overseas imprints, plus Hutchinson Aust
Universal Press	Universal (Aust)	$19 million	Greogory's, Scientific, UBD, Robinsons

tion and essential cottage-industry culture of the industry.

Not that the appetite has been suppressed. Acquisitions for strategic reasons continue both locally and internationally, no more so than in the USA, with its growing home illiteracy and unspectacular growth potential as its industry prepares for the full impact of a united and open-market Europe in 1992. The UK, the other major English-language publisher, must face this and other challenges to its traditional markets, not least of which is the effect of territorial changes planned by the Australian government to the Copyright Act in the next sitting of parliament.

In the space permitted me by the Editor, it's impossible to give a comprehensive "who's who" of book publishing. Suffice to say that many of the personalities will be familiar to you, as will the companies that control what is now a record output of around 100,000 new English-language titles a year (5500 from Australia and New Zealand) - that's 136 new books every morning and 136 each afternoon, every day of the year! On top of these new books there are the two million or so books in print at any time. And you thought you were well read!

So who are the big players, and what is their influence in Australia?

Based on turnover, the world's largest publisher last year was Harper & Collins, Rupert Murdoch's US $1.4 billion turnover religious, educational, general, cartographic and retailing empire. Here in Australia the names Angus & Robertson, Harper & Row, William Collins, Golden Press, Gordon & Gotch are just some of the familiar imprints. Australia's largest book retailer, the Angus & Robertson chain, was included, but in June it was sold to the locally owned Brashe' music retailer. The start of the 1990s dismantling, maybe?

Following, in descending order of turnover, are the USA's Simon & Schuster; France's Hachette; Germany's Bertelsmann; USA's Harcourt Brace Jovanovich; the UK's Reed and Pearson groups; America's Readers Digest, Times Warner, Times Mirror, and Random House; UK's Maxwell Macmillan; Holland's Elsevier; and then, probably, Canada's International Thomson (refer table 1). Closer to home, in the Australian retail market valued at around $1 billion (45 per cent local 55 per cent imported; 60 per cent general/40 per cent educational), the main players are decided by their control of distribution, as much as publishing output. Of the 1000 or so publishers operating here (a publisher being defined from inclusion in Australian Books in Print), it's the major 30 that control nearly 80 per cent of output and turnover.

Formal statistics covering the Australian industry are outdated and notoriously unreliable (as the Prices Surveillance Authority found during its recent inquiry into local prices and availability). However, based on educated guesses, the top 10 of Australian publishing/distribution are as set out in table 2. All of these publishers, whatever their ownership, are actively involved in publishing local books as well as distributing their own and others from overseas.

Whatever the shape of the industry by the late 1990s, speculation on which is for another article, ownership, especially in the education sector of the industry, is already sufficiently concentrated in overseas hands to demand more attention. But does anyone care?

Electronic media: Bill Childs of Minter Ellison

Xenophobia and jingoism are clouding the debate over the need for regulation of foreign ownership of the new forms of encrypted, subscriber supported electronic media services (electronic media services) in Australia, just as they continue to cloud the debate over the regulation of foreign ownership of commercial broadcasting.

When considering the overall need to regulate electronic media services (which includes pay/cable television) Australian politicians and commentators alike are too often influenced by the severe regulatory regime in which broadcasting is conducted.

The government's recently announced decision to place further limits on foreign ownership of radio and television licences will tend to exacerbate this situation.

The Minister for Transport and Communications, in a 22 May 1990 media release said that the need for increased foreign ownership restrictions arose because radio and television stations are "...major outlets for political debate and exploration of cultural identity".

The Minister said the government believes that it is of national importance that there be stringent limits on foreign ownership of the electronic media "... to reinforce the requirements for certain levels of Australian programming content".

He said the proposed legislation, which will be retrospective to 22 May 1990, will correct anomalies by:

- reaffirming that an individual foreign investor cannot exceed the current 15 per cent ownership limit, either directly or indirectly;
- strictly limiting aggregate foreign investment to a level of 20 per cent in direct and indirect interests;
- limiting the number of foreign directors of a broadcasting licensee company to no more that 20 per cent of the total;
- ensuring effective arrangements are in place to prevent collusive practices which would give rise to de facto foreign control;
- giving any licensee with interests currently in excess of the new ownership limits three years from 22 May 1990 to

comply, but providing for the Australian Broadcasting Tribunal (ABT) to consider an extension should it believe there are strong grounds for doing so; and

- giving any licensee company currently in excess of the 20 per cent rule for foreign directors twelve months from 22 May 1990 in which to replace their excess foreign directors with Australian directors.

The Minister warned that interests acquired after 22 May 1990 would be taken to be in breach as soon as the legislation was passed and the three year period for divestment would not apply.

The debate surrounding the need to regulate electronic media services has also been influenced by "old fashioned" regulatory approaches to outdated American and European technology.

Future discussions of regulation generally and regulation of foreign ownership particularly, must recognise that delivery technologies are changing too rapidly to formulate regulatory policy on today's technology and vital differences exist between broadcasting and electronic media services. These differences include:

- conditional access to the service by encrypting or encoding the delivery signal;
- new methods of delivery to the consumer;
- choice by the subscriber of the precise nature and extent of the services for which they are prepared to pay; and
- the service provider's ability to address an audience as narrow or as wide as he or she chooses.

The Saunderson Committee said in its report To Pay Or Not To Pay?:

"There are also grounds for providing foreign ownership and control regulations [for pay/cable television] similar to that for television station operations in existing broadcasting legislation and for similar reasons - the importance of broadcasting and its potential to influence public opinion."

It is of particular note that such an important topic was dismissed by the committee in one sentence.

Electronic media services, because they are encrypted, are not "broadcasting" under the Broadcasting Act 1942. That Act defines broadcasting as operating a radio-communications transmitter for the purpose of the transmission to the general public of television programs.

When electronic media services are delivered by optical fibre cable, an ISDN network or some other technology which does not involve a radiocommunications transmitter, no possibility of "broadcasting" arises.

To date the Australian government has assumed that electronic media services fall under the Radiocommunications Act 1983. The fact that the first VAEIS service (Sky Channel) is delivered by radiocommunications transmitters located in AUSSAT's satellites supported this assumption.

Electronic media services which do not utilise radiocommunications transmitters should be recognised for what they are, an integral part of international and national "telecommunications services" which are regulated in Australia under the Telecommunications Act 1989.

These services are surely "value added services" (VAS) which fall within the VAS Class Licence issued by AUSTEL under section 75 of the Telecommunications Act.

Arguably, AUSSAT delivered electronic media services also qualify as VAS under that Act even though a radiocommunications transmitter is used by AUSSAT in providing its "network".

Indeed, in the report upon which the Telecommunications Act was based "Australian Telecommunications Services: A New Framework", the government recognised electronic media services as VAS.

'Xenophobia and jingoism are clouding the debate'

Further evolution of VAS is likely to encompass not only business applications, but also a greater degree of entertainment and education uses as the broadband transmission capabilities of the public network infrastructure are increased to enable improved video transmission.

The major connection between these new VAS services and broadcasting is that they may be viewed on the same receiving apparatus. They may at times also provide similar services. This does not mean they are the same, nor does it mean the same rules should apply.

Beyond the laws applying to traffic carried on telecommunications networks and the general law relating to community standards of decency, defamation etc, no provision is made under the Telecommunications Act for regulating foreign ownership and control of VAS providers or the content of services provided under a VAS Class Licence.

If foreign ownership or content regulation is to be imposed it should be imposed uniformly where the circumstances are the same. However it should not be imposed because a service is of a particular category but rather because there is a demonstrated need for regulation.

By the mid 1990's someone in the USA, Japan or Asia may supply electronic media services directly to subscribers in the south eastern regions of Australia via INTELSAT VII satellites.

When installation of the Pacific and the Telecom optical fibre cable networks is completed, Australian domestic subscribers using B-ISDN technology will be able to "dial access" electronic media services supplied from virtually anywhere in the world.

The particular country where the pictures, sounds or data (information) are generated and stored is unlikely to be of overwhelming importance to a subscriber who elects to pay for a service which provides him or her with that information. Indeed the technological transparency of the access systems will mean that subscribers might not even be aware of the country of origin. If subscribers to the electronic media services in Australia have unlimited access to these sources of information, the arguments which have influenced the regulation of broadcasting such as the "scarce resources" and the "capacity to influence public opinion" theories will have no or reduced application.

The introduction of these new services also raises the question of whether and, to what extent, there is a continuing need to regulate "free to air" television and radio broadcasting. Broadcasters should be treated fairly in the new regime, so that the "playing field" remains level.

The move to greater restriction on "free to air" broadcasters just before the introduction of the new regime could well turn out to be a massive and costly mistake because its consequences have not been considered in the appropriate context.

The Economic Imperative: Jeremey Kirkwook of Mariot Moore

Australia must prepare itself to accept more foreign involvement in its media. Alternatively, we will suffer an industry which supplies a lower quality product in less quantities at a higher cost. There is no doubt that media is becoming a global industry and if Australia is not plugged into that process its media industry will suffer.

While this article is supportive of increased foreign involvement in our media, it should not be taken as implicit approval of concentration of media ownership or channelling of power to international media companies, or indeed the loss of Australia's "identity" in our media. But they are separate

:o the issue of ownership and foreign capital. There are other ways of protecting Australia from such problems than limiting foreign ownership outright.

Ironically, limiting foreign investment in Australian media has concentrated ownership in fewer hands. In our view, this is of greater concern than having more owners, some of which are foreign.

Within the television industry, Australia has protection from undesirable foreign influence through two layers of defence: restriction on ownership of shares and control of a broadcaster; and conditions included in the licensing of television broadcasters. Only one layer is needed.

It is possible to regulate the editorial or programming aspects apart from the ownership aspects. The concerns of those interest groups who are reluctant to embrace increased foreign involvement in Australia's media can be embodied in such editorial responsibilities or licensing conditions. This is a far preferable method for dealing with genuine concerns associated with foreign capital than restricting its availability.

The newspaper industry has a greater level of natural protection than television. Consumers can choose not to buy a particular paper if its produces rubbish or pushes an unacceptable editorial line. Once turned on, television invades the subconscious until a conscious decision to turn off or switch channels is made.

Australia needs more capital in its media industry. Preferably that capital should come from a party who can add value to our media industry. This could be through management expertise, programming and other software procurement, or technology sourcing.

There are two fundamental reasons for the required capital to be foreign: the long term economics of the industry are global not national; and the current parlous state of the domestic industry coupled with our presently shallow and inactive capital markets (to be fair to Australia, most OECD capital markets are relatively paralysed at the moment).

In all sectors of the Australian media industry there is evidence of hardship: the television companies are crippled by debt and face increased capital expenditure to tool up for aggregation; radio is losing market share and is suffering from further auctioning of the spectrum and AM to FM conversions; print is also suffering from debt and capital expenditure requirements.

These problems are compounded by the lack of equity in the industry and the reluctance of funds managers to invest in highly geared companies. Sources of capital for the media sector are limited. Of the traditional media owners only Kerry Packer and John B Fairfax appear to be in a position to actually invest further capital. Others are restricted by their own financial problems or by regulations from expanding.

The cash rich investors, such as superfunds and life insurance companies are investing on very strict guidelines. These make it difficult for an entrepreneurial or inexperienced industry player to raise capital.

Companies not currently involved in media but with surplus capital are a potential source for the media industry. However the current corporate trend is against diversification. The amount of capital required by the media sector cannot be satisfied by Australian non-media related corporates.

'The media industry is now driven by international economics'

Foreign companies are prepared to invest in Australian television but are restricted from holding more than 20 per cent, or 15 per cent by any one group. This does not allow them to provide sufficient capital to assist in the current crisis.

Unless there is a change in Australia's capital markets we can look forward to a diminished television service. Evidence of this is already apparent: the mooted merger of Channels Seven and Ten; the slow process of aggregation in regional television; an increasing number of repeats and lower quality programs; and staff cuts at the networks.

With Robert Maxwell determined to take a major stake in "The West Australian", we will soon see the level of government's resolve to limit foreign ownership of the press. Whilst currently regulated under Foreign Investment Review Board requirements, the government appears to want to limit investment in the print media to around 25 per cent. Apart from Mr Maxwell's endeavours it will be interesting to see how the John Fairfax Group situation is resolved. Much of its subordinated and senior debt is held by foreign institutions.

In addition to the current pressing need for relaxing of foreign ownership restrictions, there is a more fundamental factor which is perhaps a greater imperative for change. The media industry is now driven by international economics. The cost of production of software (programs and copy) is determined by economics of scale. Thus the US and UK produce programs at a much lower cost per consumer hour or column inch than in Australia.

News, sport and current affairs is another major cost for the networks and demand for international content is increasing. This raises the cost of gathering material and putting programming together. The capital linking of international and Australian media companies would lead to reduced costs through sourcing product and greater efficiencies in gathering material.

Technology is also changing the economics of broadcasting with far more efficient and compact computer digital equipment replacing outmoded analog and shaft machines. An efficiently set up TV station can now go to air with as little as two or three staff operating the broadcasting equipment. Most of this equipment involves high capital costs and needs to be imported.

Australia can have media with quality product, wide choice and low cost without endangering the principles we want to protect. But we must act soon as our media companies are on their knees and currently the only source of sufficient capital is from overseas. We may not like it but that is the reality. So let's find a way to control the process and revive our media rather than kill it slowly.

Broadcasting in New Zealand: Bruce Slane of Cairns Slane

The Broadcasting Act 1989 (NZ) imposes special restrictions on the ownership and control of "broadcasters". The term broadcaster is used to describe persons or companies who broadcast programs for reception by the public through receiving apparatus whether or not the programs are encrypted.

By way of preface it should be noted that New Zealand's general policy in relation to overseas investment is liberal. In practice few proposals needing approval are declined.

Section 61 of the Broadcasting Act provides that no overseas person shall broadcast programs in New Zealand. The regime for persons who are companies is more detailed.

An overseas person is defined by the Overseas Investment Act 1973. It includes any person not ordinarily resident in New Zealand as well as foreign companies and their subsidiaries. New Zealand registered companies in which 25 per cent or more of any class of shares is held by overseas persons or in which an overseas person has the right to exercise or control the exercise of 25 per cent or more of the voting power at a general meeting are also caught by the definition.

Section 62(1) of the Broadcasting Act provides that no overseas person shall, either alone or in association with any other

person, be in a position to exercise control of:

- The operations of a company that broadcasts programs;
- The management of any broadcasting station operated by a company that broadcasts programs;
- The management of the programs broadcast by a company; or
- The selection or provision of programs to be broadcast by a company the broadcasts programs.

The control provisions of Section 62 are similar to the provisions of regulations made under the previous Broadcasting Act. As they have not been the subject of any significant or contentious interpretations by the now defunct Broadcasting Tribunal or the courts, their importance could easily be underestimated. They can have an inhibiting affect on management arrangement linked with overseas shareholdings.

Section 62 also limits the aggregate voting power of overseas persons to not more than 15 per cent of the total voting powers exercisable by all the members of the company.

However, with the approval of the Minister, overseas persons may, in respect of a sound radio broadcaster, have shareholding interests which, when aggregated are between 15 per cent and 25 per cent of the total voting powers.

The Minister has first to be satisfied that the overseas person would not be a person who would, either alone or in association with any other person, actually exercise the types of control set out in Section 62(l)(a), (b), (d) or (d).

The Minister must also be satisfied that the holding would not, in all the circumstances, be contrary to the public interest.

The Minister may give approval subject to conditions. The Minister may withdraw his approval and any condition may be revoked, varied or added to by the Minister. Complex tracing provisions capture significant shareholding interests held indirectly.

Section 64 provides for the Minister to approve excessive holdings by overseas persons where he is satisfied that the overseas person intends to dispose of the interest or reduce it or take any other action to comply with the Act and needs time to do so.

Such an approval may include conditions and can be withdrawn at any time. The conditions may be revoked, varied or added to by the Minister. In practice the Minister is likely to impose a time limit but no other special conditions.

A special provision enables an insurance company which is an overseas person to be deemed not to be an overseas person for the purposes of Section 62 (and for the purpose of determining whether any other company is an overseas person for the purposes to Section 62). This requires the approval of the Minister who is to be satisfied that the shareholding interest was acquired out of funds usually held by the insurance company for investment in New Zealand. He also has to be satisfied that the insurance company will not actually exercise the control set out in Section 62(1) (a), (b), (c) or (d). The Minister must also be satisfied that the shareholding would not, in all the circumstances, be contrary to the public interest.

Special provisions have been made for overseas companies financing broadcasters. Most banks in New Zealand are overseas persons.

'The Minister must also be satisfied that the holding would not....be contary to the public interest'

An overseas person is not prevented by Section 62 from holding note, debenture, mortgage or other security in which a broadcaster is a debtor. Nor is that overseas person prevented from exercising any of the rights or remedies under the security.

Where the security confers voting rights which are exercisable:

- during a period in which any payment is in default;
- on the proposal to reduce the capital of the company;
- on a proposal that affects rights attached to the debenture mortgage or other security;
- on a proposal to wind the company up;
- on a proposal for the disposal of the whole of the property, business, and undertaking of the company;
- during the winding-up of the company, an overseas person is not prevented from holding or exercising those voting rights.

The holding of any such notes, debentures, mortgages or other security or such voting rights is deemed not to be the control of the exercise of voting power or the holding of a shareholding interest.

Section 68 makes it lawful for an overseas person to continue holding a shareholding interest which was held before 17 May 1989.

While there are no restrictions on the participation of overseas persons as directors of a broadcaster as such, care has to be taken that they are not in a position to exercise the control set out in Section 62(1)(a), (b) (c) and (d). There are no special controls on the aggregation of ownership of broadcasters. However the relevant competition legislation, the Commerce Act, applies.

tection of defamatory material which involved a matter of public concern, a grey area emerges as to the distinction between matters of public concern and matters of purely private concern.

It is anticipated that similar questions arise in defining who is a *"public figure"*.

Limitation period

Victoria remains committed to its existing six-year limitation period. However, Queensland and New South Wales consider a shorter limitation period would be beneficial. Both States recommend the limitation period be reduced to six months from the date the plaintiff first learned of the publication with an absolute limitation period of three years.

In support of the Queensland and New South Wales position, the discussion paper states:

"... it is argued that the very nature of a defamation action requires that a person take action to restore their reputation as soon as becoming aware of the defamatory publication. Any further delay in commencing action could result in problems in obtaining evidence or locating witnesses and may impose unnecessary hardship on publishers."

Criminal Defamation

New South Wales and Victoria are in favour of retaining some form of criminal defamation. Queensland is considering abolishing it.

In New South Wales, Section 50 of the Defamation Act provides that a person shall not without lawful excuse publish a matter which is defamatory of another living person, either with intent to cause serious harm, or with knowledge that the publication will cause serious harm to any person. The section can only be acted on with the consent of the Attorney-General.

In Victoria, the Director of Public Prosecutions has discretion in the filing of presentments. Queensland considers there to be little purpose in retaining criminal defamation because of its extremely limited use in the past.

Contempt

Queensland, New South Wales and Victoria are all considering the creation of a new tort, committed where a publication prejudices a trial to the extent that it has to be delayed or aborted. Liability would depend on establishing either that:

- the publisher ran a deliberate risk of aborting the trial; or
- there was serious editorial or managerial indifference to the duty to establish risk minimisation procedures.