Media Ownership: New Issues and Old Remedies

Mark Armstrong analyses some of the conundrums of regulation of media ownership and suggests new remedies

Each year produces a fresh media ownership crisis. Subscription television is the 1992 battleground. Last year, it was foreign ownership of television and control of the Fairfax newspaper group. Earlier years witnessed the battles over TV audience reach, control by financial institutions, equalisation and regional TV ownership. Telecommunications joined the pandemonium more recently, with ownership of the second carrier (now Optus) making headlines, and the AOTC privatisation likely to raise similar controversies before too long. The frequency and scale of the controversies has been increasing for a decade.

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Why does it happen? Why do other sectors such as mining, banking, agriculture and even airlines produce less controversy? What is so special about the media? Cynics might say that the media are self-indulgent: they like to dramatise their own fate; and politics are always interwoven, thus adding the spice of intrigue. However, there are deeper reasons for the recurring fits and fevers besetting our media ownership laws. If a patient keeps manifesting the same symptoms, despite medical treatment, there must be an underlying problem requiring further diagnosis. Parliament, its committees and the government have been our media doctors.

The most fashionable modern treatment, especially since 1981, has been number manipulation. Even in the new *Broadcasting Services Act*, we have examples like the 75 per cent audience reach for TV, the 20 per cent aggregate limit for foreign interests, the 50 per cent threshold for identifying a foreign person, and the 15 per cent deemed control threshold. The "science" of this treatment is alluring, because the formulae and schemes of regulation look so perfect on the blank page. They do not have the complex uncertainties of real-world communications. The formulae are particularly alluring to politicians, who are used to calculating electoral numbers.

"An older treatment is a stiff dose of administrative discretion"

An older treatment, now coming back into fashion, is a stiff dose of administrative discretion. Some prescribers are politicians, like the Treasurer making foreign ownership decisions. Others are independent administrators, like the new Australian Broadcasting Authority (ABA) which will be deciding when control of a company actually exists. Administrative discretion lacks the false science of the percentage formulae. But it requires great faith in the doctor. A wise, experienced doctor can produce excellent results. But an inexperienced, biased or unethical practitioner can wreak havoc on the patients.

This is the first in an occasional series of articles in which leading communications thinkers have been asked to write on a major communications policy issue of their choice. We thank Professor Mark Armstrong for providing this thoughtful article on media ownership.

A third approach is to let nature take its course, by applying no treatment at all. This approach was applied in the early days of commercial radio, and adopted again for VAEIS services in the 1980s. It still applies to most telecommunications services except carriers, to some new broadcasting services like narrowcasting, and to print media. However, the modern media environment is polluted by many laws, so that relief from industry-specific remedies actually reduces immunity to general laws like the *Trade Practices Act* and the *Foreign Acquisitions and Takeovers Act*. The real choice is between the whims of the specialists (communications lawyers) and the ignorance of the general practitioners, in the form of the *Trade Practices Act* and the *Foreign Acquisitions and Takeovers Act*.

Opinions differ on the specialist-GP issue. The media certainly attract unique freedom of speech issues which do not apply to steel Y-bars, breweries and biscuit factories. The March 1992 *News and Fair Facts* report of the House of Representatives Committee expressed bipartisan reservations about the ability of the current Trade Practices regime to handle sensitive media ownership issues. The majority recommended that special print media values like freedom of speech be included in the *Trade Practices Act*. This is an interesting hybrid solution, akin to requiring a general practitioner to take a special diploma before practising surgery.

Whatever the preferred treatments or practitioners, it is certainly true that none of the clinical experience to date has produced an agreed or refined approach to media ownership. The *Broadcasting Services Act* has revised and clarified the existing rules and processes affecting radio and TV. It has set new balances between all three traditional therapies. The percentage formulae and their related rules are simplified. The discretions given to the ABA are broader and clearer than those of the ABT, and a number of new areas (except subscription TV) are to receive no special treatment. The Act takes reform about as far as could be done without major policy changes, which were not its objective.

The laws we have are not suited to the new media environment. For example, old media like broadcasting which attracted separate rules are combining with new services like telecommunications. The boundaries of the separate legislative categories will continue to move. Subscription TV has many features of a point-to-point communications service, and will have more when it migrates to cable. On-line information services and data networks are moving towards becoming a new form of press or broadcasting, as are some radiocommunications and VAEIS services. Rights to "software" in news, sport and movies are cutting across old boundaries. International newsagencies offer the same satellite services to a variety of different media.

The viability of many different visual services is likely to depend on rights to movies. Audiovisual industries are integrating horizontally and vertically. Ownership is becoming more global as strategists take advantage of the economies now offered by satellite and the

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prospect of optical fibre undersea cables. In the next few years, direct satellite broadcasts from overseas will become common in Australia as they are already doing in the rest of Asia and in Europe.

Media concentration

What kinds of laws can address these changes? Extending the percentage formulae to proliferating sectors may become impossibly complex as the forms of media transmission merge, converge and multiply. Increasing the discretionary powers of Ministers, governments, or bodies such as the ABA, AUSTEL and the TPC can certainly produce flexibility, but it holds obvious dangers. Yet "letting nature take its course" may produce Orwellian results. The natural economies of telecommunications and media transmission are towards concentration. That power, affecting the terms of access to satellites, cables, integrated switched digital networks (ISDN), digital audio broadcasting (DAB), spectrum access rights and other innovations may, with the wrong planning, affect the structure and independence of those who provide news, information, entertainment and culture.

What support can the law offer to the growth and freedom of our media? One advance would be to change the legislative agenda from treating supposed illnesses to the positive agenda of encouraging health. All agree that freedom of speech and information are the ideal, so why not recognise them in our communications laws? There is no need to open a whole Bill of Rights debate. They can be written into our communications laws in quite a practical manner now.

At the moment, we have a void. The objects in section 3 of the *Telecommunications Act* speak of "efficiency", "accountability to customer needs" and "new and diverse telecommunications services", but neither the objects nor the body of the Act recognise the great influence which telecommunications channels and services have on freedom of speech. Yet media (especially broadcasting) are daily more dependent on the telecommunications system. The objects of the *Broadcasting Services Act* go so far as to recognise "diversity in control of the more influential broadcasting services", but the Act stops short of recognising freedom of speech.

Regulation of carriers

Control of carriage is another obvious issue which should be addressed directly. As all the media, including even the press, become more dependent on the providers of cables, satellites, radio frequency transmitters and other electronic pathways, it is time to ensure that control of the hardware is not abused.

This issue has been addressed in telecommunications, from an economic view at least. The *Telecommunications Act* contains the germs of a scheme to protect rights to interconnect with carriers and to prevent carriers from improperly favouring their own services. We need broader principles which apply to those who occupy the role of carrier, regardless of whether the medium is cabled or radiated. The US economy is large enough to support content-carrier separations in telecommunications and broadcasting. In a country like Australia where more resources must be shared, a clear statement of the rights of non-carriers may be the best approach, to ensure that there are opportunities for new and independent players to co-exist with the major teams.

Access to information

Another remedy is access to information. If the community knows who controls a media outlet, that information may be enough to prevent abuses, or to dispel the suspicion of abuse. Disclosure may also operate as a substitute for more intrusive forms of regulation. Furthermore, it favours competition, because disclosure narrows the gap between the industry intelligence of major established players and the smaller and newer entrepreneurs. Surprisingly, this idea is unfashionable. The statutory ABT function of assembling information and making it available to the public has not been conferred on the ABA. AUSTEL's main reporting and informing obligations are owed to the government, not to the public. As for radiocommunications, the terms on which existing operators have access to the spectrum have not always been regarded as public information. Conveniently published information about licensing and ownership in all three sectors would improve the lot of consumers and business.

Inevitably, there will also be a need to improve the old remedies. For example, the procedures which govern the Treasurer's discretion under the *Foreign Acquisitions and Takeovers Act* have been recognised as too loose and too private, and there are similar problems with the grant of licences under the *Radiocommunications Act*. But we must also look at new approaches like the three examples mentioned here. Detailed investigation may show that other, or different remedies will also be needed. What is clear is that the old remedies cannot on their own cope with the changes now under way.

Mark Armstrong is a Professor at the University of Melbourne Law School, which is planning to establish a research centre for media and telecommunications law. With Sally Walker and other colleagues, he is conducting research supported by the Administrative Review Council into ownership of new channels of media communication. He is also chair of the ABC Board. The views expressed in this article are his own personal views.