Regulators[5]

The regulators were a bit more cautious of self regulation without the safety net of enforceable regulation – as they said moving up a bit on the Britton Regulatory Pyramid. For Pinnock, the current safety net should be higher; the industry still needs to demonstrate compliance with the current legislation and codes before it can argue for more self regulation. Cosgrave reminded the audience that a couple of the examples given in the seminar of successful industry self regulation – the ACIF Mobile Number Portability and Commercial Churn Codes – were in fact developed at regulatory insistence. And Horton repeated his earlier view that it would be a step backwards if the industry moves away from the self regulatory regime. The challenge for all stakeholders will be consumer involvement and industry compliance. For Hurley, the way forward is with the shared goals of the ACA and ACIF towards an effective and inclusive self regulatory regime for the telecommunications industry.

(Endnotes)

[1] ACA Self- Regulation Summit, held in Sydney on 11 August 2004

[2] Members of the Consumer Perspectives panel included Charles Britton, Australian Consumers' Association, Teresa Corbin, Consumers

Telecommunications Network, Dr. Christopher Newell, the ACIF Disability Advisory Body, Derek Wilding, Communications Law Centre, Ewan Brown, Small Enterprises Telecommunications Centre and Rosemary Sinclair Australian Telecommunications Users Group.

[3] Consumer organisations participating in the project include the Australian Consumers' Association, the Communications Law Centre, the Consumers' Telecommunications Network, Council on the Ageing National Seniors, Legal Aid Queensland, Small Enterprises Telecommunications Centre and the Telecommunications and Disability Consumer Representation.

[4] Members of the Industry Panel included Paul Paterson, Telstra, Gary Smith, Optus, David Havyatt, AAPT, Peter Stiffe, Vodafone, Matt Healy, Macquarie Corporate Telecommunications, Roger Bunch, FreeTV, Peter Coroneos, Internet Association, Jennifer Liston, AEEMA, Graham Chalker, AMTA, and Deb Richards, ASTRA.

[5] The Members of panel included John Pinnock, TIO, Colin Lyons, DCITA, Michael Cosgrave, ACCC, Bob Horton, ACA and Anne Hurley, ACIF.

Holly Raiche is Project Manager, Consumer Codes Reference Panel, ACIF

Media ownership laws – What change?

Raani Costelloe looks at the Howard government's pre-election position on changes to media ownership legislation with a view to what might be coming up

INTRODUCTION

The Howard government has been attempting to change the foreign ownership and cross-ownership laws relating to media since 1996 but has been unable to secure Senate approval.

Following the October 2004 federal election, the Coalition will have a majority in the Senate which will be effective from July 2005. The question now seems to be what form the amendments to the existing laws will take rather than whether change will occur.

Over the last 3 years, the government has attempted to negotiate the passage of media ownership legislation through the Senate with the result that the most recent but unsuccessful attempt, the *Broadcasting Services Amendment (Media Ownership) Bill [No. 2] 2002* (the **Bill**), was the product of significant compromise with non-Coalition Senate members.

It is uncertain whether the government will significantly change the Bill by removing the aspects of compromise or, alternatively, reintroduce the Bill in a relatively unchanged form. The interests of the National Party Senators are likely to take greater prominence given that they must also accept the amending legislation primarily driven by the Liberal Party members of the Coalition.

Another possibility is that the government will re-open negotiations with non-Coalition Senators and attempt to pass amending legislation before July 2005. It has been reported that Communications Minister Senator Coonan will hold talks with outgoing minor party Senators who previously opposed the Bill.

It is not clear what future change would involve, but elements it is likely to include are as follow.

REMOVAL OF SPECIFIC FOREIGN OWNERSHIP LIMITS RELATING TO MEDIA

It is likely that the restrictions in the *Broadcasting Services Act 1992* (the **BSA**) on foreign control of commercial television broadcasting licences (15% company interests for an individual and 20% foreign company interests in aggregate) will be removed.

It is also likely that the more liberal foreign ownership limits on subscription television broadcasting licences (20% company interests for an individual and 35% foreign company interests in aggregate) will be removed.

There are no specific foreign ownership restrictions on commercial radio licences in the BSA.

In addition, the general media investment rules under foreign investment rules are likely to be removed with the result that all investment in media will be subject only to the general foreign ownership laws that take account of national interest concerns.

Under current foreign investment rules, all direct foreign media investment (and all portfolio investment over 5%) requires prior approval from the Treasurer. For newspapers, the maximum permitted aggregate foreign (non-portfolio) interests in national and metropolitan newspapers is 30%, with a 25% limit on any single foreign shareholder. The aggregate non-portfolio limit for provincial and suburban newspapers is 50%.

EXEMPTIONS FROM THE CROSS-MEDIA OWNERSHIP LIMITS

The cross-media restrictions in the BSA presently prevent any one person controlling more than one of the following in any geographic licence area:

- a commercial television broadcasting licence;
- a commercial radio broadcasting licence; or
- a newspaper associated with the licence area.

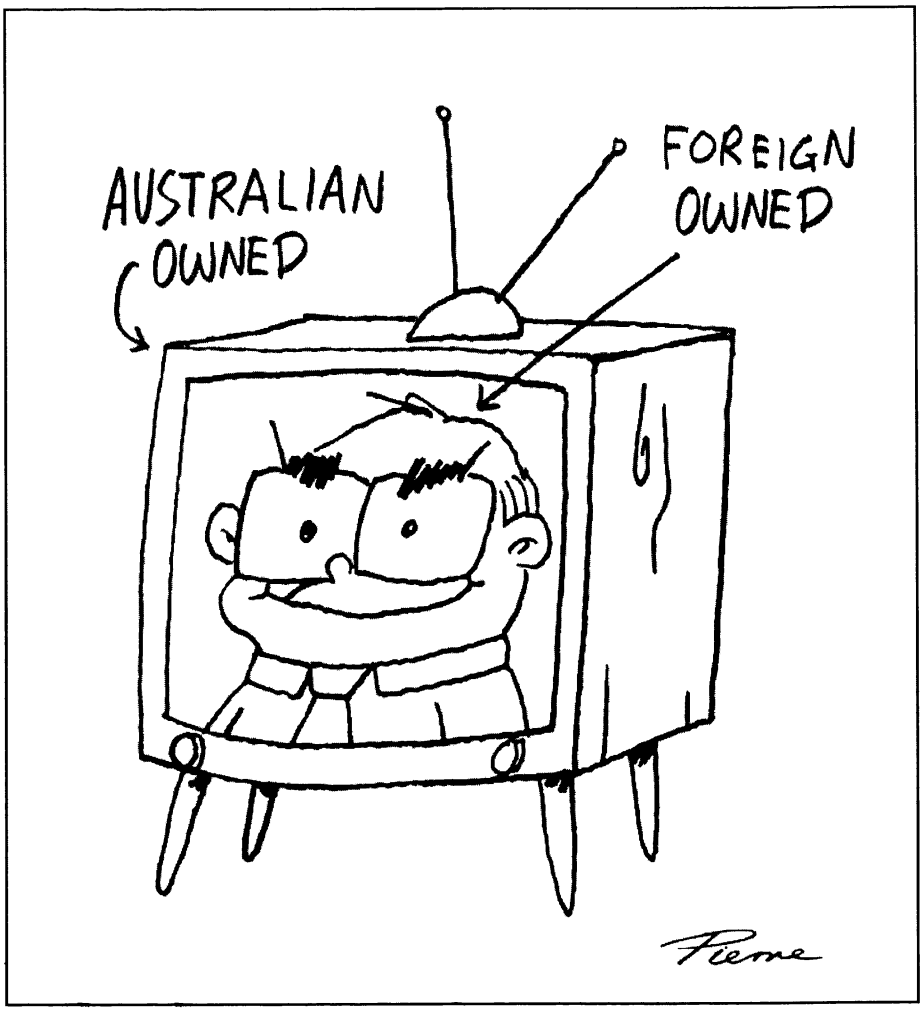
A person is regarded to be in a position to exercise control of a licence, company or newspaper if the person has company interests exceeding 15%. Company interests can be shareholding, voting, dividend or winding-up interests. The Australian Broadcasting Authority (**ABA**) may also have regard to other non-company interest factors in determining whether control exists.

There are no cross-media ownership restrictions relating to subscription broadcasting services.

The government is unlikely to attempt to completely repeal the cross-media restrictions. A more likely approach is that the government will persist with the exemption regime contained in the Bill, which will allow a person to control two out of three separate media operations in a licence area provided that person applies to the ABA for an exemption certificate. The holder of an exemption certificate will not be in breach of the cross-media rules, provided that the conditions of the certificate are met.

The application must identify the set of operations currently controlled and proposed to be controlled, and include proposed organisational charts and editorial policies that show how each media operation will achieve separate:

- editorial policies;
- editorial decision-making; and
- editorial news management, news compilation processes, and news gathering and interpretation capabilities.



Provided that separation is maintained in these areas, the relevant media operations may share resources and co-operate.

It is unclear whether the "minimum number of media groups test", a significant concession to independent Senators in the Bill, would remain part of a future proposal. This provided that a cross-media ownership exemption certificate cannot be approved unless there remains a minimum of five separately owned and controlled commercial media groups available in metropolitan markets after a merger or acquisition, and a minimum of four in regional markets.

NO CHANGE TO "SAME MEDIA" AND REACH LIMITS

The government has not stated any intention to remove the "same-media" and "reach" limits in the BSA which prohibit a person from controlling:

- more than one commercial television broadcasting licence in the same licence area;
- more than two commercial radio broadcasting licences in the same licence area; and
- commercial television broadcasting licences whose combined licence area populations exceed 75% of the population of Australia.

TRADE PRACTICES ACT

Any changes in the current media ownership laws need to be considered in the context of the general operation of the *Trade Practices Act 1974* (**TPA**) and the Australian Competition and Consumer Commission's (**ACCC**) enforcement of the TPA.

The ACCC has made post-election comments relating to its role in the monitoring of media ownership under the TPA. Chairman Graeme Samuel recently said that changes in the nature and delivery of media, such as the increasing popularity of the internet and subscription television, raise new issues for market definition. This may result in the ACCC having an interest in acquisitions across what have traditionally been seen as separate

markets, particularly commercial television, subscription television and print media. On this issue Mr Samuel has been quoted as saying:

> *"The ACCC could well be a major brake on cross-media acquisitions, particularly in the way convergence now is starting to blur traditional lines of market definition that we had in the past...In the past we have consistently taken the view that if an electronic media network were to acquire a print media network, well they were separate markets, and perhaps section 50 of the Trade Practices Act would not apply."*

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Open Source Software – Understanding the Risks

Nick Abrahams and Alan Arnott explore the legal issues associated with rolling out open source software solutions

INTRODUCTION

The use of open source software (**OSS**) is not just an issue for IT companies, it is an issue for all organisations. Most organisations' IT departments are probably using OSS in one way or another, and most likely they are making up their own minds about the legal issues involved. However, without proper risk analysis an organisation could face unpleasant consequences, including being forced to release its proprietary software to the open source community under the terms of an OSS licence. This could result in the disclosure of trade secrets to the general public. To mitigate the potential legal risks associated with developing, incorporating and deploying OSS code, organisations need to implement robust OSS policies that include effective risk management strategies encompassing both the proprietary software (i.e. Microsoft, Unix) and open source paradigms.

An explanation of open source

Open source refers to the open-ended availability of source code (readable by humans) that is used by software developers and programmers to create computer applications. Source code is compiled or converted into an object code version (readable by computers). Under the traditional proprietary or "closed" source code model, when organisations licence software, they receive the object code but not the source code and so they are not able to read/manipulate the code unless they surreptitiously decompile (reverse engineer) the object code, which is almost always strictly prohibited. Open source reverses this restrictive approach, by attaching a copy of, or otherwise making available, the source code to end users with each copy of the final object code version of the software application.

WHY IT'S HOT

OSS is gaining significant momentum as a result of the explosion of open source products onto the enterprise level software market. This is a frontier previously untapped by the OSS movement that is now receiving unprecedented support by public and private sectors organisations alike, most notably in relation to e-government initiatives.

In Australia, one only has to look at the run-up to the federal election, with the Labor, Liberal and Democratic parties having each issued releases endorsing OSS. Similarly, state government departments are rolling out open source, the most prominent project being the New South Wales Government's recent decision to boost its OSS commitment to a minimum of $40 million per annum in what is said to be the largest Australian public sector initiative ever focused on Linux, open source's flagship operating system. In the Australian Capital Territory, the legislature has even gone so far as to mandate under the *Government Procurement (Principles) Guideline 2002* that government entities consider OSS as far as applicable. Globally, the number of governments influenced by the undeniable benefits of open source is also extensive, ranging from Munich with its Limux (Linux for Munich) project to Malaysia's procurement policy which obliges government procurement departments to give preference to OSS *"in situations where the advantages and disadvantages of OSS and proprietary software are equal"*. The increasing prevalence of OSS means that all prudent organisations need to reassess their approaches to managing the associated commercial and legal risks.

PROS AND CONS

The primary benefit of using OSS, the majority of which is available for downloading via the Internet, is that it can be accessed, added to, modified and reconfigured by potentially thousands if not millions of programmers. The result is a system that is conducive to the collaborative development of source code resulting in software, at least in theory, that is more robust and secure than proprietary code developed by one organisation alone. This freedom to access source code is often misinterpreted as software free of licensing fees. The "free" concept of OSS is the freedom to copy, modify and distribute, not free as in "free beer". That is not to say that OSS cannot be free of licensing fees, which it often is. However, these savings are often abrogated by significant costs for ancillary services like maintenance and support.

Making source code available to potentially thousands of programmers undoubtedly makes it the biggest threat to the proprietary model ever. However, the "many eyes" benefit must be considered against a backdrop of significant risks, which if improperly managed, could leave an organisation vulnerable in a variety of circumstances. Further, there is now a heightened risk when using OSS as a result of a number of lawsuits launched by the SCO Group