

The Deregulation Agenda for Australian Media Ownership: Can Competition do the Heavy Lifting?

In light of recent comments from the Communications Minister, Barry Dean, Jennifer Dean and Shyla Sharma consider the potential impact of reform of Australian media ownership regulation.

Many people have argued in recent years that the media ownership restrictions (Control Rules) in the *Broadcasting Services Act 1992* (Cth) (**BSA**) are outdated and do not reflect the current structure of the media sector.¹ The legislative intent underlying the media ownership regime has been to maintain diversity of control over the most influential media platforms.² There have always been “quirks” in the Control Rules.³ However, over time, the silence of the Control Rules in relation to services provided via the internet whether it be news websites, internet protocol television (**IPTV**) or news aggregators, has in our view, lent an air of artificiality to regulatory analysis of the sector.

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Recent comments from the Communications Minister Malcolm Turnbull, about the need for reform have therefore struck a chord

with many; but achieving a consensus on the form of any changes will be an extremely difficult task.

Although he has kept his comments relatively high level to date, the Minister has signalled his support for easing the Control Rules.⁴ He has stated that, in his view, the internet is providing more avenues for competition and that, as a result, platform-specific ownership rules dealing with newspapers, radio and television are no longer required.⁵ It has subsequently been reported that the Minister is leaning towards making the Australian Competition and Consumer Commission (**ACCC**) the sole referee in relation to media consolidation.⁶

At the time of writing, the government was engaged in consultation with stakeholders⁷ and had indicated that it planned to publish research outlining the history of ownership controls in Australia in May.⁸ The Minister has not ruled out the possibility of introducing legislation by the end of the year,⁹ however, Prime Minister Tony Abbott has said he does not intend to proceed with media reform unless there is a consensus view within the industry.¹⁰

In this context, it is at least possible that any future reforms could result in a wholesale repeal of the Control Rules. This would leave section 50 of the *Competition and Consumer Act 2010* (Cth) (**CCA**) (which prohibits acquisitions that would, or are likely to, result in a substantial lessening of competition (SLC)) as the principal restraint upon media consolidation.

1 This was the underlying rationale for the previous Labor government's Convergence Review (see the Terms of Reference set out at Appendix A to the Convergence Review Final Report, March 2012). See also, Neil Hume, 'Australia's new media law irks News Corp', *The Financial Times* (online), 12 March 2013 <<http://www.ft.com/intl/cms/s/0/0cf0b268-8add-11e2-b1a4-00144feabdc0.html#axzz2yoXOCfMj>>; Clancy Yeates, 'Media ownership laws in firing line', *Newcastle Herald* (online), 14 December 2011 <<http://www.theherald.com.au/story/941696/media-ownership-laws-in-firing-line/>>; Daniel Hurst, 'Malcolm Turnbull indicates easing of cross-media ownership laws' *The Guardian* (online), 9 March 2014 <<http://www.theguardian.com/world/2014/mar/09/malcolm-turnbull-indicates-easing-cross-media-ownership-laws>>; Michael de Percy, 'Archaic cross-media ownership laws won't save local content', *The Conversation* (online), 12 March 2014 <<http://theconversation.com/archaic-cross-media-ownership-laws-wont-save-local-content-24194>>; Dominic White, James Chessell and Jake Mitchell, 'Scrap cross-media ownership rules: Fairfax', *The Sydney Morning Herald* (online), 24 February 2014 <<http://www.smh.com.au/business/media-and-marketing/scrap-crossmedia-ownership-rules-fairfax-20140224-333chq.html>>.

2 Explanatory Memorandum, *Broadcasting Services Bill 1992*, 41.

3 For example, none of subscription television services, national newspapers or public broadcasting services are taken into account in relation to the voices test under Division 5A of Part 5 of the BSA.

4 Daniel Hurst, 'Malcolm Turnbull indicates easing of cross-media ownership laws' *The Guardian* (online), 9 March 2014 <<http://www.theguardian.com/world/2014/mar/09/malcolm-turnbull-indicates-easing-cross-media-ownership-laws>>.

5 Ibid.

6 Darren Davidson, 'Year-end timeline to roll out dramatic media reforms', *The Australian* (online), 31 March 2014 <<http://www.theaustralian.com.au/media/year-end-timeline-to-roll-out-dramatic-media-reforms/story-e6frg996-1226869244454#>> and 'Turnbull questions media ownership rules', *Sky News* (online), 10 March 2014 <<http://www.skynews.com.au/politics/article.aspx?id=956919>>.

7 Ibid.

8 Katharine Murphy, 'Australian media regulation research to trigger fresh debate about ownership' *The Guardian* (online), 5 May 2014 <<http://www.theguardian.com/media/2014/may/05/australian-media-regulation-research-to-trigger-fresh-debate-about-ownership>>

9 Darren Davidson, above n 6.

10 Katharine Murphy, above n 8.

The remainder of this article considers the recent changes in technology that are reshaping the media industry and compares the Control Rules and section 50 of the CCA in terms of their differing underlying policy rationales, operation and impact.

Changes in technology and their impact upon competitive forces in the media sector

The rate of technological change in the media sector since the ACCC released its "Media Mergers" position paper in 2006 has been remarkable. Twitter has changed how news is disseminated. The major television networks offer a significant proportion of their content on-demand online. Over 350 radio stations stream their transmissions online.¹¹ A consumer may access newspaper articles, live streaming of the 2UE radio broadcast, and on-demand television content including programs and movies from Fairfax Media website www.smh.com.au and news articles, live streaming of ABC radio broadcasts and on-demand ABC TV programming from the ABC website www.abc.net.au. Consumers can directly purchase and download or stream a wide variety of content online. Smart televisions and devices such as Apple TV may be used to aggregate online content on television.¹² The iPhone (from 2007), iPad (from 2010), similar mobile devices and mobile apps make the aggregation of online content even more accessible to the consumer.

There is an underlying tension here. On one hand, convergence online leads to lower barriers to entry, that is, less capital is required and there are no licensing restrictions. In addition, the product and geographic dimensions of relevant markets may be broader as a result of internet and mobile developments. These factors arguably constrain the ability of media consolidation to result in a SLC.

On the other hand, convergence may lead to established media companies having increased market power. In a converged media marketplace, media companies may need to provide audio, video and print content both online and over traditional platforms to meet consumer demands and therefore compete effectively.¹³ It is a common saying in the media context that "content is king" and companies with interests in television, radio and print media may have particular advantages in the new environment because of their existing rights or capabilities to supply premium or other higher-demand news and entertainment content in different formats.

Overview of the Control Rules

The Control Rules currently prohibit a person:

- from being in a position to exercise control over commercial television broadcasting licences with a combined audience reach of more than 75% of the Australian population (**75% reach Rule**);¹⁴ and

- from being in a position to control more than one commercial television broadcasting licence (**One-to-a-market Rule**)¹⁵, or more than two commercial radio broadcasting licences (**Two-to-a-market Rule**)¹⁶ in the same licence area.¹⁷

Any transaction that results in fewer than five independent and separately controlled voices (television, radio and newspaper) in a metropolitan radio licence area, or four in a regional radio licence area is also prohibited, unless prior approval has been obtained (**Voices Test**).¹⁸

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Finally, transactions that result in a person controlling a commercial radio broadcasting licence, a commercial television broadcasting licence and an associated newspaper in the same radio licence area without prior approval are also prohibited (**Two-out-of-three Rule**).¹⁹

The Control Rules vs section 50 of the CCA

The BSA is (amongst other things) supposed to:

- (a) promote the availability to audiences throughout Australia of a diverse range of radio and television services offering entertainment, education and information;
- (b) provide a regulatory environment that will facilitate the development of a broadcasting industry in Australia that is efficient, competitive and responsive to audience needs;
- (c) encourage diversity in control of the more influential broadcasting services; and
- (d) promote the availability to audiences throughout Australia of television and radio programs about matters of local significance.²⁰

11 Australian Live Radio, <<http://www.australianliveradio.com/>>

12 See Wikipedia, *Smart TV* (12 April 2014) <http://en.wikipedia.org/wiki/Smart_television>; Wikipedia, *Apple TV* (10 April 2014) <http://en.wikipedia.org/wiki/Apple_tv>

13 See for example comments from Graeme Samuel as to the strategic importance of media companies owning a mix of internet, print, radio in Simon Evans, 'The future of Australian media', *Australian Financial Review* (online), 29 March 2014 <http://www.afr.com/p/national/the_future_of_australian_media_YsaRu415WuGwJFE16v13dl>

14 *Broadcasting Services Act 1992* (Cth) s 53(1).

15 *Ibid* s 53(2).

16 *Ibid* s 54.

17 There are complementary restrictions on the number of directorships a person may hold, which are consistent with the One-to-a-market and Two-to-a-market rules set out in Division 3 of Part 5 of the BSA.

18 *Broadcasting Services Act 1992* (Cth) ss 61AG, 61AH.

19 *Ibid* ss 61AMA, 61AMB, 61AEA. The Voices Test and the Two-out-of-three Rule speak to the position within specific commercial radio licence areas. A commercial television licence will be relevant if more than 50% of the of the radio licence area population is attributable to the licence area of the commercial television broadcasting licence (s 61AC(1) and s 61AEA(a)). A newspaper will be treated as being associated with the relevant radio licence area if the ACMA is satisfied that at least 50% of the circulation of a newspaper is within the licence area and the circulation amounts to at least 2% of the licence area population (s 59). As a result, newspapers with a national reach such as the Australian Financial Review and the Australian are not counted as voices under the Voices Test.

20 *Broadcasting Services Act 1992* (Cth) s 3.

The implicit assumption of the Control Rules is that ensuring minimum levels of diversity in ownership will promote a beneficial diversity of views across regulated platforms. This diversity is supplemented by local content requirements.²¹

The Control Rules (with the exception of the 75% reach Rule) look at individual licence areas (commercial radio and television) to ensure that certain minimum levels of diversity of control exist in relation to the regulated platforms (radio, television and print). One strength of this approach is arguably that it ensures that certain, minimum levels of diversity are protected in each licence area (to the extent that that diversity already exists). However over time, the exclusion from consideration of media that does not have a direct connection with a specific licence area has resulted in increasingly influential platforms being largely invisible from a BSA perspective and, arguably undermined the legislation's policy objectives.

companies with interests in television, radio and print media may have particular advantages in the new environment because of their existing rights or capabilities to supply premium or other higher-demand news and entertainment content in different formats

By contrast, the object of the CCA is relevantly expressed to be "to enhance the welfare of Australians through the promotion of competition". Specifically, section 50 is directed towards preventing a SLC when compared with the status quo rather than maintaining diversity above some specified minimum level.

In considering media mergers and acquisitions, the ACCC will look at markets relating to:

- (a) the supply of advertising opportunities to advertisers;
- (b) the supply of content to consumers; and
- (c) the acquisition of content from content providers.²²

Some markets will be national markets, but the ACCC has acknowledged that there are also local markets for some forms of advertising as well as for local content.²³

Historically, the ACCC has tended, with some exceptions, to treat free-to-air television, radio and print media as three distinct product categories that have little overlap in terms of content or advertising markets.²⁴ However, as a result of technological advances (particularly in terms of the internet and mobile devices), the possibility for overlap or convergence between content and advertising across print, radio, free-to-air television, and the internet continues to increase.

The theoretical basis for section 50 of the CCA is substantially different to that of the Control Rules, not least because it is solely concerned with the levels of competition in a given market, rather than diversity of ownership *per se*. However arguably, even though the Control Rules and section 50 of the CCA are directed towards protecting different things (diversity in the case of the former and competition in the case of the latter), the practical operation of each regime may not yield results that are as different as one might expect. Moreover, to the extent that they do, this may say more about the Control Rules' focus on form and relative lack of flexibility in the face of substantial change in the industry. These propositions are explored in more detail below.

Concentration across a single platform

In a world without the One-to-a-market rule for free-to-air television or the Two-to-a-market Rule for radio, transactions that result in substantial increases in concentration may still raise section 50 issues. For example, due the limited number of free-to-air commercial television licences in a licence area and the limited number of national free-to-air television networks,²⁵ an acquisition that resulted in one person acquiring two of the three commercial free-to-air television stations in a licence area (potentially seeing a reduction in competitors from three to two) would appear likely to result in a SLC.

On the other hand, section 50 may not prohibit all transactions that the Two-to-a-market Rule for radio currently prohibits. A transaction that results in a person acquiring two radio stations in a single licence area is unlikely to result in a SLC except in areas with a small number of radio stations where there are distinct markets for local radio advertising and/or content. ACCC enquiries in the past have found that television advertising, television news-content and print news-content may substitute for and compete in the same market as local radio advertising and content in certain circumstances.²⁶

Concentration across multiple platforms

Many transactions that would currently be prohibited under the Voices Test may also raise section 50 issues depending on the competitive constraint the lost "voice" imposes on the market. Competition issues are likely to be most acute in smaller regional areas in local advertising and news-content markets.

A hypothetical example involving Fairfax Media (**Fairfax**) and News Limited (**News**) may illustrate the extent to which SLC analysis under section 50 differs from the operation of the Two-out-of-three Rule. Since the Minister raised the review of the cross-media ownership restrictions there has been renewed speculation that News may attempt to acquire Channel Ten.²⁷ Because of Lachlan Murdoch's recent promotion to co-chairman of News Corp, the parent company of News, his ownership of Nova radio in Sydney, and News' ownership of the Daily Telegraph, this acquisition could not occur while the Two-out-of-three Rule remains in force (at least not without Lachlan Murdoch divesting his interest in Nova).

21 Local content requirements generally take the form of commercial television and radio licence conditions: sections 43A and 43C of the BSA require the ACMA to ensure that a licence conditions are in force setting out the local content obligations for commercial television and radio licences respectively.

22 ACCC, *Media Mergers* (August 2006) <<http://www.accc.gov.au/system/files/Media%20Mergers%20-%202011.pdf>>, 4.

23 See ACCC, *Public Competition Assessment : Macquarie Media Group – proposed acquisition of Southern Cross Broadcasting (Australia) Ltd and nine regional radio stations owned by Fairfax Media Limited* (27 November 2007) <<http://registers.accc.gov.au/content/index.phtml/itemId/801331/fromItemId/751043>>.

24 ACCC, above n 22, 5. However, there have been some exceptions, see for example, ACCC, above n 23.

25 See ACCC, *When three become two: Market concentration is a key factor* (13 September 2012) <<http://www.accc.gov.au/media-release/when-three-become-two-market-concentration-is-a-key-factor>>.

26 See ACCC, above n 23.

27 Jared Owens, 'Tony Abbott to avoid 'picking unnecessary fights' over media reform', *The Australian* (online), 10 March 2014 <<http://www.theaustralian.com.au/media/tony-abbott-to-avoid-picking-unnecessary-fights-over-media-reform/story-e6frg996-1226850054378>>; Bernard Keane and Glenn Dyer, 'Removal of 'two out of three' ain't bad for News Corp' *Crikey* (online), 4 February 2014 <<http://www.crikey.com.au/2014/02/04/removal-of-two-out-of-three-aint-bad-for-news-corp/>>

However, based on the ACCC decision to reject Seven's proposed acquisition of Consolidated Media Holdings in 2013, even if the Two-out-of-three Rule were repealed it is unlikely that the ACCC would permit News to acquire Channel Ten, Channel Nine, or Channel Seven, principally because of the opportunities that this would afford for joint bidding for premium sporting content with FOXTEL (which is 50% owned by News).²⁸ While in this example the outcome would be the same under both the BSA and CCA, the reasons for this are quite different and it is an open question whether, in the absence of News' subscription television interests, the transaction would be permissible from a competition perspective. A further hypothetical example illustrates this point.

The Two-out-of-three Rule currently prevents a merger between Fairfax (that controls the Sydney Morning Herald and 2UE in Sydney and The Age and 3AW in Melbourne) and Channel Ten. However, should the rule be repealed, it is less clear that such a transaction would result in a SLC. The combination would provide the merged entity with unique reach for advertising and news-content but News and other media operations would continue to exert significant competitive constraints.

Generally speaking, in regional areas, where there are likely to be fewer competitive constraints and there may be combined markets for local advertising across television, radio and newspaper platforms, it is more likely that cross-media ownership of the kind proscribed by the Two-out-of-three Rule would result in a SLC.

Audience reach

Going forward, the operation of section 50 of the CCA is unlikely to restrain transactions that are currently prohibited by the 75% Reach Rule. Arguably, local content and local advertising markets would not be affected by an increased audience reach. Any potential competition issues would arise in national markets. In this context, it is difficult to see how regional free-to-air television would provide effective competition in national markets against Channel 7, Channel 9 or Channel 10. Any repeal of the 75% reach Rule is likely to result in a series of mergers between the national networks and their regional affiliates. Indeed, a number of such transactions have already been canvassed in the press.²⁹ However, given the substantial overlap of content between the major networks and their regional affiliates, it is hard to see how this would result in any significant detriment to competition or diversity.

Conclusion

If the current government's media ownership reform agenda results in the repeal of the Control Rules, how might the media landscape change? It seems likely to us that a certain amount of consolidation that would be currently prohibited under the BSA might be permitted, especially:

- (a) in capital cities (or other well serviced areas) where high levels of competition (and diversity) exist; and/or
- (b) between the major television networks and their regional affiliates.

The great unknown at present is the extent to which internet-based services such as those offering streaming and on demand television and radio content and news aggregation will become substitutes for traditional print, radio and television services or the extent that this will result in less concentrated media markets

In our view, such consolidation is unlikely to have a significant affect upon media diversity (except in a purely formalistic sense). Conversely, areas that are less well served are more likely to be protected from further substantial consolidation, by the ACCC's focus on the markets for local content and advertising.

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The ACCC has accepted that internet-based services are relevant to the competition analysis in relation to television content and advertising and that they may operate as a competitive constraint.³⁰ However, this argument still has some way to run. Moreover, given the ACCC's willingness to consider the markets for the acquisition and supply of local content services,³¹ convergence, and the availability of national and international content online may not necessarily result in substantially more mergers of media operations in the same local markets, especially where those markets are in regional areas.

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28 ACCC, *Public Competition Assessment: Seven Group Holdings Limited – proposed acquisition of remaining shares in Consolidated Media Holdings Limited* (15 February 2013) <<http://registers.accc.gov.au/content/index.phtml/itemId/1084318>> where at p 8-10 the ACCC concluded that due to ability to influence Fox Sports Australia or FOXTEL and the importance of premium sports to free to air television the acquisition would substantially lessen competition in the free-to-air market.

29 Madeleine Heffernan, 'John Singleton eyes Prime Media after board departure' *Sydney Morning Herald* (online), 3 March 2014 <<http://www.smh.com.au/business/john-singleton-eyes-prime-media-after-board-departure-20140302-33ty9.html>>; Jared Owens, above n 27; David Crowe, 'Malcolm Turnbull faces media reform fight', *The Australian* (online), 10 March 2014 <<http://www.theaustralian.com.au/media/malcolm-turnbull-faces-media-reform-fight/story-e6frg996-1226849779831#>>

30 ACCC, *Public Competition Assessment: FOXTEL - proposed acquisition of Austar United Communications Limited* (14 June 2012) <<http://registers.accc.gov.au/content/index.phtml/itemId/1044881/fromItemId/751043>>

31 For example, ACCC, above n 23; ACCC, *Public Competition Assessment: Fairfax Media Limited – proposed acquisition of Southern Independent Publishers Ltd's Kiama Independent and Lake Times newspapers* (3 May 2011) <<http://registers.accc.gov.au/content/index.phtml/itemId/961950/fromItemId/751043>>