

## **MEDIA OWNERSHIP AND THE PRODUCTIVITY COMMISSION: Market Theory and Regulatory Practice in the Global Age**

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This article will identify and analyse significant developments in Australian media ownership, focussing on the second term of the Howard government (1997-2000) and on the comprehensive inquiry which the Productivity Commission conducted into broadcasting during 1999-2000. It will be demonstrated that, despite the Coalition's vigorous opposition to the cross-ownership restrictions established by its Labor predecessors, a new policy on media ownership has been slow to emerge. After its ineffectual Cross Media Review (Cryle, 1995), the Howard government continues to advocate a policy of deregulating both the cross ownership and foreign ownership rules but has been inhibited by the complexity of the issues and the lack of support from other political parties. Compounding the ongoing dilemma of the Coalition is the cautionary advice of the Productivity Commission against deregulation without providing suitable checks and safeguards against further concentration. This article will discuss the case for and against deregulation drawing on submissions made to the Broadcasting Inquiry as well as to the Commission's extensive final report (2000).

### **Foreign Ownership**

Of these related issues, that of foreign ownership appears the least problematic for the Productivity Commission. For a decade, a precedent had been established in the print media with the purchase of Fairfax by Conrad Black's Tourang consortium and the dominance of News Corporation in the metropolitan press. Increasingly overseas media interests were looking not only to buy into Australian media but to consolidate their existing holdings across the media sector. As the tempo of globalisation quickened, newcomers emerged as voluble critics of the foreign ownership restrictions (15% single owner, 20% partnerships) and limits on control (20% as voting equity). If Black remained to the end a raucous critic of rules which limited his equity in Fairfax, Brierley and the O'Reillys were equally scathing of the restrictions

these owners were resisted by local companies including Rural Press which had itself diversified into broadcasting as well as offshore. Nevertheless, foreign ownership did increase with the partial deregulation of radio in the early 1990s (Collingwood, 1997). The upshot of these changes was a complex set of arrangements whereby a new entrant like Australian Provincial Newspapers (APN) was able to own a radio network in metropolitan Sydney along with regional newspapers, while another, Daily Mail Group. (DMG) Radio owned a regional network but not metropolitan stations. In a submission to the Broadcasting Inquiry, DMG made it clear that it had entered regional radio with the intention of buying into more lucrative metropolitan stations and argued that liberalising foreign ownership rules, while increasing overseas control, would also increase media diversity ( DMG, 1999).

Reviewing these developments in its Final Report, the Productivity Commission takes the view that networking is also practised by Australian groups including the ABC and insists that the deregulation of radio restrictions, combined with FM conversion, has “stimulated the demand for new licences (2000:311). The same body argues that increased overseas investment is necessary for the development and implementation of new media technologies. Its proposal to remove the existing restrictions on foreign ownership constituted an article of faith in global media markets, designed to counter the existing influence of nationally-based groups like Packer’s Publishing and Broadcasting Ltd (PBL). In particular, the Productivity Commission takes issue with former Primer Minister, Malcolm Fraser’s longstanding opposition to the presence of foreign ownership, on the grounds that it is capable of neglecting and misrepresenting local cultures as well as exercising undue influence on matters of national importance (2000:334). The Commission dissents from this long-held view in so far as any such intervention “can be expected to have a commercial cost” (2000:335). Yet it is a cost which owners like Murdoch were willing to bear, notably in his successive interventions of 1972 and 1975 on behalf of Whitlam and subsequently of Fraser. Proponents of globalisation, including Snape, appears to be neglecting the influence of the media on past politics in favour

Calls by the Commission to lift restrictions on foreign media investment reflect market theory rather than current regulatory practice. The Howard government was less sympathetic to overseas owners, notably in television where foreign interests were explicitly restricted to 20% for free to air and 35% for subscription television. The ABA decision brought against Can West, the Canadian investor in Channel Ten, for effectively exercising control in breach of the guidelines (*Weekend Australian*, 5-6 April 1997:1) provoked media criticism that the Coalition was discouraging overseas investment in television as well as print. Murdoch's decision, in December 1997, to sell down his shareholdings in Channel Seven was further evidence that overseas-based companies saw themselves on the outer in the wake of the Howard-Packer rapprochement.

In the lead-up to the Broadcasting Inquiry, the commercial networks combined to press the government for the removal of ownership restrictions. Anticipating Hilmer, the outspoken Fairfax executive, Rupert Murdoch had previously extolled the virtues of free market reforms in New Zealand and contrasted them to the Australian situation (*Australian*, 25 March 1999:4). Supporting the removal of foreign limits for television, Packer cited the advent of global technologies and the breakdown of local ownership as compelling reasons for change:

You may as well recognise that and allow the companies to compete in the world market, and unless you do, you are going to sentence those companies to be bit players (*Australian*, 25 March 1999:4)

Despite Packer's growing influence, the coolness of both the Howard Ministry and the opposition to his statements suggested that deregulation of foreign ownership to include free-to-air television was still far from automatic.

In evidence to the Broadcasting Inquiry, the networks appeared united in a common stand against media regulation including foreign ownership restrictions. News Corporation, previously the second shareholder in Channel Seven after Kerry Stokes, announced its

sympathetic in seeking to enter into global partnerships with overseas media firms. Its main reservation was that foreign restrictions not be repealed unless the cross media rules were also abolished since:

Foreign companies would be able to make further inroads into major Australian media sectors while Australian media companies would be free only to look on ( Dawson, 1999:9).

News Corporation's bid for an independent licence nevertheless remained contentious for Seven on the grounds that a newcomer would jeopardise and dilute current advertising and Australian content quotas. The view that concessions on foreign investment should be balanced by a stronger commitment to local content and creativity found support in other submissions, most notably, that of the Communications Law Centre (1999:4).

The Productivity Commission, noting the consensus among commercial networks on the lifting of foreign ownership restrictions gives media owners its ringing endorsement in recommending that "all restrictions on foreign investment, ownership and control in the Broadcasting Services Act should be repealed" in favour of general foreign investment guidelines (2000:342). Such a recommendation, if implemented, would bring free-to-air TV in line with subscription television where foreign ownership rules still apply but where the absence of foreign control restrictions has allowed overseas companies to set up business arrangements with Australian-owned licencees. The Commission regards such arrangements whereby Optus and Austar are largely foreign owned but operated through local licences as retaining only "a vestige of Australianness" (2000:338). Even the compromise proposal by the Seven Network to raise foreign equity to 49% while retaining prohibition on foreign control is deemed unnecessary and injurious to further foreign investment (Productivity Commission, 2000:338). Not all participants in the Inquiry agreed with the Commission's recommendation to abolish specific foreign media ownership restrictions. The general acceptance of a lower threshold for overseas entrants is balanced by calls for a specific "declaration process" in the event of media mergers and contractual arrangements (Communications Law Centre, 1999:21).

## **The Cross Media Rules (CMR)**

While the Productivity Commission's recommendation to deregulate foreign ownership rules ran ahead of the Coalition agenda, the situation appeared the reverse in the case of cross-ownership. From the early 1990s, Coalition Ministers, when in opposition, condemned the cross ownership legislation as a political device used by the Keating Labor government against its political opponents (Cryle, 1998:82). More disconcerting, in retrospect, was the inability of such a policy to prevent Rupert Murdoch exercising a virtual monopoly over metropolitan newspapers. The Howard government, when pressured in September 1997 to remove both foreign and cross media rules, decided not to act, preserving the status quo of the 1990s at Packer's expense, since he had not relinquished his ambition to acquire Fairfax.

Within the Coalition divisions continued over the extent and effectiveness of deregulating media ownership. Nor were these divisions confined to the National Party as the minor Coalition partner. Significantly the Broadcasting Inquiry of 1999-2000 emanated not from Richard Alston's Communication portfolio but from Peter Costello in Treasury. In public, Alston continued to favour deregulation, attacking the cross-media rules as "silly and irrelevant" at an *Age* media forum (*Australian*, 21 March 2000:4) and invoking the success of the internet as evidence of growing diversity within the media. In the lead-up to the Inquiry, the major proprietors had also come out against the cross media regime on the grounds that it provided disincentives for convergence and digitised content. In this renewed public debate, Keating emerged as a strong dissenting voice. When Fred Hilmer of Fairfax joined other industry advocates, he was sharply reprimanded by Keating on the grounds that the relaxation of existing cross ownership limits would deliver Fairfax to Packer "with such alacrity and such speed we wouldn't see which way the share certificates went" (*Australian*, 26 May 1999:6).

One of more systematic critiques of the cross ownership rules was the Australian Press Council's submission to the 1999 Inquiry. After citing Keating's famous comment about

argued that the rules had “little relevance to today’s media” (1999). Echoing Alston’s position, the Council pointed to a “diverse and expanding” media market and to technological convergence in the case of on-line newspapers as positive new developments. The CMR, it contended, were too blunt and inflexible in today’s rapidly changing media markets. As an alternative, the Council recommended consumer use as a more meaningful measure of market concentration and a preference for reverting to general competition law rather than industry-specific legislation.

Before the Inquiry and in print, Keating remained a staunch defender of his government’s legislation in defiance of commercial interests and the Coalition. While conceding that foreign ownership rules should be relaxed, he nevertheless advocated that the Cross Media Rules be tightened from 15% to 5% cross equity in the case of print and television (2000:78). Keating also pointed to the achievement of his legislation in bringing new players into free-to-air television, adding that they had never been intended for new media. He sought to rebut what he labelled a technologically determined view which ignored media plurality in favour of commercial logic. The demise of the CMR and further horizontal integration could only weaken quality and news reporting in favour of rationalisation and syndication.

At odds with Keating from the outset, the Coalition under Howard had made little sustained effort to update the CMR or extend them to incorporate new media as some critics were proposing. Under the influence of Alston, it continued to associate new media with diversity rather than grappling with the incursions of old media interests into the areas of pay or digital television, despite accumulating evidence of cross ownership (Minehan, 1999). Yet a number of independent commentators still consider the Cross Media Rules to be the best available bulwark against growing ownership concentration in the current environment.

This school of thought points to the inroads made by Murdoch and Packer into subscription TV

arrangements including Skynews. PBL's plan for Optus is an example of his trend while Telstra's proposed purchase of Seven, cited by Julian Thomas (2000:14) is an example of 'new media' owners buying back into Australia's mass media. The presence and intentions of the Big Two in free-to-air and subscription television provides 'economics of scope' (Australian Key Centre, 1999:9) with the potential for using content in different formats but, as Keating warns, does so at the expense of further ownership concentration.

The Productivity Commission, in examining media diversity does not concur with Alston's optimism about the potential of new media. Acknowledging the relationship between new media and ownership concentration as "contentious" (2000:306), it identifies a long-established pattern whereby existing owners have been "quick to colonise the new media". It concurs with the findings of the MEAA submission that, with the exception of Austar, subscription television has been colonised by traditional media interests who are equally well represented on the internet. PBL, News Limited and the ABC are among the top ten Australian web sites while at least three others are dependant on traditional media sources for their online and information content (2000:307). By offering zero pricing on their content, these established outlets are able to effectively limit entry for newer players. Additionally, the Commission distances itself from the commercial network assurances that diversity of opinion exists in a concentrated media environment. While "diversity of programming may be enhanced", it noted, "diversity of sources of information and opinion may not" (2000:310).

Among the more publicised difficulties which the Productivity Commission experienced with the Coalition and the networks are the restrictive legislation it enacted in April 2000 to protect the entry of free-to-air incumbents into digital television until 2007. Politically, the Commission placed its extensive recommendations in jeopardy by openly criticising the ban on further commercial alliances and on new entrants into digital TV. While its position is consistent with the Treasury brief to encourage competition and limit regulation, it did not appear to take into

Corporation in the case of free-to-air and John Fairfax Ltd and News Corporation in the case of digital television. As with Pay TV, the emerging issue is a fundamentally one of cross ownership, since digital television only promises only further colonisation by the existing large players unless the cross media rules are retained in some form.

In its Draft and Final Reports, the Commission wrestles with the CMR in some detail before proposing a compromise along the lines of the Win submission which called for the removal of cross ownership limits in regional Australia (Lam, 1999:11). In this it was supported by Pay TV operators like Austar which supported a free and open market in theory but argued that some regulation be retained in practice (1999:11). The Commission undertook a modelling exercise in the Wollongong market to determine the impact of abolishing the CMR and confirmed a significant reduction of commercial broadcasting outlets from 5 to 3 (2000:306). A mitigating factor was the presence of national broadcasters ABC and SBS. Equally pertinent to any assessment of diversity in this instance is the extent to which diversity should apply within the commercial sector as well as across entire markets. Certainly the resulting recommendations of the Commission offer a rebuff to Alston and the Coalition position by setting out specific stipulations before the CMR should be removed, a rebuff which was promptly seized upon by the Opposition to deter further deregulation on the part of the Howard government.

In its concluding summary, the Productivity Commission invokes convergence as a market argument in favour of deregulation but adds that “repealing the cross-media rules in isolation from other initiatives would not be wise” (2000:364). It advocates the introduction of a media-specific public interest test for mergers and acquisitions as a more flexible alternative to the suggestion that the CMR be retained and extended to new media. In so doing, it attempts to bypass the regulatory double bind which stalled the Cross Media Review of 1996-97. Even so, the Howard Coalition, in its second term of office, appears unwilling to act, perhaps on account of the criticism directed by the Commission at its digital television policy. By March 2000, when

Productivity Commission's ownership recommendations. Moreover, without support from the Opposition, the Coalition was unlikely to implement the Inquiry in spirit or detail. Reactions to its inertia ranged from frustration and cynicism to mild optimism, with Tom O'Regan of Griffith University's Key Centre noting that a decade would be required for such substantive reform to be put in place (O'Regan, 2000:6).

### **Testing the market: the new-regulatory agenda**

In pursuing its broad agenda to 'mainstream' Australia's media industries and eliminate the policy compromises in which successive governments had become emmeshed, the Productivity Commission looked to the Australian Competition and Consumer Commission (ACCC) to implement and refine details of its proposed test (2000:358). The ACCC's own submission diverged from the standard procedures in proposing to regulate media mergers and acquisitions. Instead of a reactive approach to proposals which would substantially lessen competition, the ACCC advocated a reversal of the onus of proof whereby applicants would be required to demonstrate that a media merger was in the public interest. The ACCC's suggestion was nevertheless regarded as heavy-handed by commercial interests including the Seven Network which supported a test along the lines of the "lessening of competition" approach currently in use in the relevant sections 46 and 50 of the Trade Practices Act (Productivity Commission, 2000:359, 361).

A perceived weakness in using the Trade Practices Commission or its successor, the ACCC, as business regulators, was their common failure to consider the social and cultural implications of media acquisitions (Cryle, 1995:59). These ongoing concerns resurfaced in feedback to the Broadcasting Inquiry, notably in the Australian Consumer Association's scepticism of the suggestion that "the future of media diversity can be happily consigned to the TPA" (Productivity Commission, 2000:361). The Media Entertainment and Arts Alliance, which voiced support for the existing cross ownership regime, considered that any such test would

to encompass effects on localism and Australian culture in view of developments like Super League controversy. To achieve this breadth, the ACCC would require input from the media-specific regulator, the Australian Broadcasting Authority, when considering media transactions.

One school of thinking around the Broadcasting Inquiry regarded the ABA as the more appropriate body to administer the test than the ACCC. But the shifting emphasis on the Broadcasting Services Act during the 1990s towards 'light-touch' regulation was no guarantee that the ABA in its current role would prove sufficient to the task. The ABA under David Flint was caught up in the 'Cash for Comment' affair. Public confidence in it diminished after Flint's impartiality was called into question and he was forced to stand down from the talkback radio inquiry (Keating, 2000:75-76). The Communication Law Centre which supported the retention of the CMR preferred to invest media regulation in the ACCC "with formal advice from a revamped ABA with an enhanced research capacity and public education role" (1999:21). In its Final Report, the Productivity Commission persisted with the ACCC, responding to concerns about the limitations of that body with the suggestion that the Trade Practices Act be amended "to require the ACCC to seek advice from the ABA" (2000:364).

In formulating its new regulatory agenda, the Productivity Commission looks overseas for precedents to support its proposed arrangements. In the case of Germany and the United States, the process is shared between general competitors and media-specific bodies, while in the United Kingdom, the assessment of ownership concentration is based on an assessment of the market share of participants combined with a public interest test (2000:359) which includes plurality of ownership and diversity of sources as well as economic impacts. Lucy Maguire's review of the United Kingdom situation confirms allegations of subjectivity by the Key Centre for Cultural and Media Policy, in so far as the existing arrangements afford regulators "a substantial degree of discretion" (Maguire, 2000:4). Moreover regulators like the ACCC, even after advice from other bodies, will still encounter difficulties in balancing the

Maguire states, “a clearer rationale and greater accountability for interventions are developed” (2000:6).

In defending the need to reform the existing cross-ownership regime, the Commission recognises the need for further work in a number of areas including “the definition of the test, the development of guidelines, the specifics of which sectors should be included in the test, the process of administering the test and the process of appeals against decisions” (Thomas, 2000:15). Above all, further research will be needed into the nature of media influence and on the interrelationships and developments of media markets in the age of globalisation and of convergence. In opposing the CMR, the Press Council proposed three alternative mechanisms for assessing cross media ownership, the best known of which is “share of voice”, a concept “based on a formula that combines the circulation/ratings of an outlet with the percentages of that outlet owned by any particular owner” (1999). Such an approach, if ever adopted, would in all probability disadvantage Packer’s PBL in view of Nine’s ratings dominance and its high circulation magazines, as yet omitted from cross ownership considerations. Not surprisingly, PBL’s Nicholas Fallon, in evidence before the Broadcasting Inquiry, advocated the application of competition law to the Australian media “without the need for additional media specific provisions” (Dawson, 1999:9). Any systematic assessment of cross media holdings could only jeopardise PBL’s plans to further expand into newspapers and pay television.

The Productivity Commission approaches the question of measuring concentration in a cross media world by disputing assumptions implicit in the CMR and licence restrictions that “a radio licence is as influential as a television licence or a newspaper” (2000:353). By contrast, the UK’s ‘share of voice’ system downplays radio’s role in media markets, a view which has been rightly questioned in Australia by Cunningham and Romano in the wake of the ‘Cash for Comment’ affair (2000:23). The use of financial returns and advertising, as an alternative guide to cross ownership tends to understate not only the role of radio, now widely used by

media. The Commission, in its review of alternatives to the CMR notes the limitations of financially-based approaches in failing to measure how consumers use the media and failing to account for "differences in the influence of each form of media" (2000:354).

A second alternative, mooted by the Productivity Commission is the use of audience surveys and information as a guide to market power. Unlike 'share of voice' techniques, audience-based techniques tend to minimise the influence of the press while emphasising the ubiquity of television. Yet such a technique would not necessarily favour a print proprietor like News Corporation over PBL for the purposes of cross ownership. In discussing cross media use, the Commission points out that *Age* readers who watch little commercial television and the ABC more regularly would be less affected by a merger between a commercial television station and a daily newspaper than *Herald Sun* readers, for example, who tend to be heavier commercial TV viewers (2000:344). Such a broad-based distinction between quality and popular readerships and audiences, when applied across the media, would appear to disadvantage a down-market proprietor like News Corporation in so far as quality viewing is likely to be associated with national broadcasters (the ABC, SBS) rather than commercial broadcasters. Such an approach, based on media surveys which produce considerable divergence in results, may well reproduce the ambiguities of the existing CMR while necessitating greater documentation and research on the part of an under-resourced ABA.

Given the Coalition's agenda of providing limited resources to agencies like the ABA and the FIRB, the audience-based approach may be less attractive than the 'share of voice' concept, while despite problems, is currently in use elsewhere. Nevertheless, the 'share of voice' approach would also require additional resources and commitment. Irrespective of the Productivity Commission's genuine efforts, it may still be politically expedient for the Howard Ministry, as it was in 1996-97, to maintain its longstanding opposition to the existing cross ownership regime, without supporting alternatives or accepting the uncertain political

recommendations of the Broadcasting Inquiry look to be setting a long-term political agenda rather than providing a short-term fix. Commentators as diverse in their views as Fred Hilmer of Fairfax and Tom O'Regan of Griffith University consider the time-frame for change to be 5-10 years rather than a political cycle. Even so, this article has demonstrated that the Productivity Commission's findings, while not without merit, confirm a dichotomy between market theory and regulatory practice which is yet to be resolved.

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