Senate Environment, Communications, Information Technology and the Arts Legislation Committee

Report on the Broadcasting Services Amendment (Media Ownership) Bill 2002

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ENVIRONMENT, COMMUNICATIONS, INFORMATION TECHNOLOGY AND THE ARTS

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Committee Secretariat

Mr Michael McLean, Secretary
Ms Catherine Rostron, Principal Research Officer
Ms Jacquie Hawkins, Research Officer
Ms Christine Wilson, Executive Assistant

Committee Address:

Environment, Communications, Information Technology and the Arts Legislation Committee
S1.57, Parliament House
Canberra ACT 2600

Tel: 02 6277 3526

Fax: 02 6277 5818

Email: ecita.sen@aph.gov.au

Internet: http://www.aph.gov.au/senate/committee/ecita_ctte/index.htm

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Need for the Bill

- The Committee has carefully considered the views of commentators that tight regulatory controls can impede the development of competition by reducing the responsiveness of industries to changing demand and supply opportunities. It notes the view that in environments of rapid technological change, regulatory approaches should be neutral in their effect on both delivery systems and services so as not to distort incentive structures, economic efficiency and development.[1] The Productivity Commission *Broadcasting* Inquiry Report 2000 considered that 'regulation must be flexible enough to deal with uncertainty and change. It should not advantage some technologies or media producers at the expense of others.'[2] The Committee accepts that the present restrictions on ownership have limited opportunities to exploit economies of scale and scope and have encouraged the creation of new financial instruments and other arrangements to avoid the regulations. [Paragraph 2.45]
- The Committee agrees with the principle that outdated regulation of media ownership should be modified. It agrees with the views expressed in the Explanatory Memorandum that the existing regulations are complex, inflexible and tightly focussed and do not provide scope to reflect the changing influence of technology, and the evolution of the communications market over time.[3] [Paragraph 2.46]

Therefore, the Committee recommends that the Broadcasting Services Amendment (Media Ownership) Bill 2002 be agreed to, subject to Recommendations 1-4 below.

Foreign ownership and control

- The Committee believes that in relation to foreign owner influence, it is reasonable to assume that foreign owners will be motivated to maximise profits, rather than influence public opinion. Accordingly, it is to be expected that they would provide content with the aim of maximising consumer demand and therefore advertising revenues. There is, therefore, a commercial imperative for broadcasters to include Australian content. Furthermore, it is crucial to note that this Bill will in no way alter the existing Australian content rules. The Committee therefore considers that concerns about a diminution of locally produced programming should this Bill proceed are unfounded. [Paragraph 3.24]
- The Committee notes that the Productivity Commission had recommended removal of restrictions on foreign ownership in its *Broadcasting* Inquiry Report 2000. [Paragraph 3.26]

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1 Albon, R and Papandrea F, *Media Regulation in Australia and the Public Interest*, Institute of Public Affairs, November 1998, pp. 69, 80, 84

2 Productivity Commission *Broadcasting* Inquiry Report, Report No. 11, 3 March 2000, p. 6

3 Explanatory Memorandum, p. 7

- Regarding Australian cultural policy, the Committee notes that the Australian Content Standards will remain, and that the '[f]oreign ownership of commercial television and subscription television interests continues to be regulated by the *Foreign Acquisitions and Takeovers Act 1975* in the same manner as for commercial radio and newspapers. The *Trade Practices Act 1974* will also continue to apply.'[4] These provisions provide a floor both to the amount that foreign-sourced product could be used in the Australian media and the extent of foreign penetration of the Australian market. [Paragraph 3.27]
- The Committee also notes that, to ensure the maintenance of pluralism and diversity of information and opinions to all Australians, there will always be a requirement for media organisations to provide minimum standards of local news and information to regional and rural Australia. Therefore, irrespective of ownership, coverage of news and information of relevance to Australians and, in particular, to regional and rural Australians, including opportunities for local input and community service announcements, will be guaranteed. [Paragraph 3.28]
- In light of this and the evidence put to it, the Committee is persuaded of the benefits that would result from lifting restrictions on foreign ownership for media companies, advertisers and consumers, bearing in mind that foreign investment in the media will be regulated under the *Foreign Acquisitions and Takeovers Act 1975* and Australia's general foreign investment policy. It considers that the repeal of restrictions would provide opportunities for access to global capital, resources and expertise for Australian companies, as well as possibilities for Australian expertise to be promoted and advanced internationally. It considered that this increase in competition would lead to greater diversity in services and products for Australian consumers. [Paragraph 3.29]

A broad based public interest test

- The Committee concludes that the public interest is protected by the editorial separation requirements administered by the ABA, the preservation of the concentration rules and the retention of the rules regarding Australian content, and that a broad media-specific public interest test is thus not required. [Paragraph 4.53]
- The Committee believes that it would further protect the public interest if there were a requirement that commercial interest should be disclosed in the context of any article or editorial comment where co-ownership exists under a cross-media exemption, when one co-owned media outlet made editorial comment about another in the same locality. [Paragraph 4.54]

Recommendation 1: That where a media company has a cross-media exemption, it be required to disclose its relevant cross-media holding when it reports on issues or matters related to that holding (for example, where there is cross-promotion).

Constitutional Challenge

- The editorial separation requirements of the Bill are a response to concerns about diversity of information and opinion and the potential for proprietorial interference in editorial independence. The evidence has not been sufficiently compelling to convince the Committee that these provisions are an inappropriate response to these concerns. Furthermore, it is convinced that the ABA will act both responsibly and appropriately, with due discretion and sensitivity, in administering the editorial separation

4 Explanatory Memorandum, p. 1

requirements. The Committee rejects absolutely the view that these requirements will be the 'thin edge of the wedge' in facilitating Government intrusion into the freedom of the media. The Commonwealth, of course, already has the power to regulate newspaper organisations under Corporations Law. [Paragraph 4.59]

Conclusion – cross –media ownership regulation

- The Committee notes that Australian content requirements and the rules on concentration of control in the media will remain in place. [Paragraph 4.62]
- In light of this, and considering all the arguments put to it, the Committee concludes that the actual impact of the changes proposed in the Bill to the regulation of cross-media ownership will not be great, given the likelihood that around eighty per cent of Australians will continue to have access to three commercial television channels plus the national broadcasters. There will continue to be a diversity of radio and press. [Paragraph 4.63]

Regional considerations

- In recognition of the concerns that have been expressed that the local news and information requirements of the Bill are discriminatory, following the findings of the ABA investigation, the Committee considers that it may be appropriate to extend the requirements to non cross-media exemption certificate holders in regional Australia, provided that the financial viability of regional broadcasters is not undermined. This measure would also have the distinction of acknowledging the demand that exists in regional areas for local news and information. [Paragraph 5.11]

Recommendation 2: Following receipt of the ABA report into local news and information in regional Australia, the Government considers extending its requirement for the provision of local news and information to non cross-media exemption certificate holders in regional Australia. This should be done in a way that enables people in regional Australia to receive news and information about their local communities (including community service announcements), whilst ensuring that there is sufficient flexibility so as not to undermine the financial viability of regional broadcasters.

- The Committee believes that the Bill should be amended to permit co-ownership of only two of the three forms of media (that is, radio, television and newspapers) in a regional market. This would be an appropriate response to the different economics experienced by regional media, and recognises concerns about undue concentration of ownership in regional Australia. It would help to secure the financial viability of regional media, by allowing for enhanced economies of scale and a larger revenue base and therefore greater profitability. Larger scale regional media companies would also have a greater capability to maintain local content. [Paragraph 5.13]

Recommendation 3: That the Bill be amended so that in regional markets, cross-media exemptions only be allowed in relation to proposals that could result in a media company having cross-ownership in only two of the three generic categories of newspapers, radio and television.

- The Committee believes that the provision of incentives to regional media companies to encourage local content, such as licence fee rebates, would be an appropriate recognition of the higher operating costs and lower revenue base of regional media. [Paragraph 5.17]

Recommendation 4: That the Government investigate the feasibility of providing appropriate incentives for regional media to provide local content, such as licence fee rebates.

PREFACE

Terms of reference

The Broadcasting Services Amendment (Media Ownership) Bill 2002 (the Bill) was introduced into the House of Representatives on 21 March 2002, with debate being adjourned at the completion of the Second Reading Speech. Later that day, the Senate referred the provisions of the Bill to this Committee for inquiry and report by 3 June 2002. On 16 May 2002 the Senate extended the reporting deadline to 18 June 2002.

The Bill

The purpose of the Bill is to amend the regulatory framework contained in the *Broadcasting Services Act 1992* (BSA) regarding foreign and cross-media ownership of media assets, to provide Australian media organisations with commercial flexibility and to enhance the potential for investment in the Australian media sector. The Bill aims to encourage greater competition while providing safeguards to ensure the continuation of diversity of information and opinion and appropriate levels of locally relevant news and information.

A more comprehensive summary of the Bill is given in Chapter 1.

Conduct of inquiry

The Committee invited submissions on the provisions of the Bill from interested parties in advertisements placed in the national and major metropolitan press on 27 March 2002. At the same time, the Chairman issued a media release inviting submissions and details were posted on the Committee's web page. The Committee set a closing date of 19 April 2002 for the receipt of submissions and, while several submissions were received some considerable time after this deadline, the Committee has sought to take their contents into account.

As shown in Appendix 1, the Committee received some 40 submissions. Most of the submissions were from media organisations or from community groups, staff associations or independent organisations with an interest in the media. Only a small number of submissions were received from private individuals.

The Committee held public hearings in Canberra on 21 and 22 May 2002. Details of witnesses at these hearings are shown in Appendix 2. Two documents were tabled by a witness in the course of the hearings. Details are given in Appendix 3.

All senators who took part in the public hearings were asked to make a declaration of any interest that they may have in relation to the inquiry. Each senator indicated that they had no such interests.

The report

The report has been structured to address the Bill's provisions in accordance with its two main components: the repeal of existing foreign media ownership rules and the introduction of a system of exemptions from the current cross-media ownership requirements.

Chapter 1 is a brief summary of the Bill. Chapter 2 is a general overview of the contextual environment relating to the Bill's introduction, including parallel developments overseas. Chapter 3 addresses the Bill's proposals for foreign ownership in the future. Chapter 4 addresses cross-media ownership regulation, while Chapter 5 discusses regional considerations.

Acknowledgments

The Committee would like to express its appreciation to all those who contributed to its inquiry, either by preparing submissions, by appearing at the public hearings, or both.

The Committee also wishes to recognise the efforts of its Secretary, Michael McLean, and its Principal Research Officer for this inquiry, Catherine Rostron, for the invaluable assistance they provided with the conduct of the inquiry.

Recommendations

The Committee recommends that the Broadcasting Services Amendment (Media Ownership) Bill 2002 be agreed to, subject to the following recommendations:

> That where a media company has a cross-media exemption, it be required to disclose its relevant cross-media holding when it reports on issues or matters related to that holding (for example, where there is cross-promotion).
>
> Following receipt of the ABA report into local news and information in regional Australia, the Government consider extending its requirement for the provision of local news and information to non cross-media exemption certificate holders in regional Australia. This should be done in a way that enables people in regional Australia to receive news and information about their local communities (including community service announcements), whilst ensuring that there is sufficient flexibility so as not to undermine the financial viability of regional broadcasters.
>
> That the Bill be amended so that in regional markets, cross-media exemptions only be allowed in relation to proposals that could result in a media company having cross-ownership in only two of the three generic categories of newspapers, radio and television.
>
> That the Government investigate the feasibility of providing appropriate incentives for regional media to provide local content, such as licence fee rebates.

Senator Alan Eggleston
Chairman

Chapter 1

SUMMARY OF THE BILL

1.1 The Bill is based on Commonwealth controls over media ownership in two respects:

- specific controls over broadcasting set out in the *Broadcasting Services Act 1992* (BSA), derived from the Commonwealth's power to make laws regarding electronic communications (section 51(v) of the Constitution); and

- general controls relating to commercial activity such as those contained in the *Trade Practices Act 1974* (TPA) and the *Foreign Acquisitions and Takeovers Act 1975* (FATA), derived from the Commonwealth's powers regarding trade and corporations under sections 51(i) and 51 (xx) of the Constitution.

1.2 In this Chapter, the provisions of the Bill and the provisions of the Principal Act, the BSA, which the Bill seeks to amend are briefly described. The Chapter addresses first the issue of foreign ownership controls, then the cross-media ownership rules.

Foreign ownership

Proposed amendments to foreign ownership and control

1.3 The Bill proposes the removal of all restrictions on foreign ownership and control of commercial television and subscription television under the BSA. It also includes the proposal to discontinue newspaper specific restrictions under general foreign investment policy.

1.4 It proposes that the provisions of FATA and Australia's general foreign investment policy regulate foreign ownership of all Australian media assets in the same way that all other investments are regulated, taking account of national interest concerns that may arise regarding particular investments. The situation for commercial and subscription television would then become the same as for commercial radio and newspapers.

1.5 The TPA will continue to apply with administration by the Australian Competition and Consumer Commission (ACCC).

1.6 The Bill does not affect the requirement that a commercial or subscription television broadcasting licensee **must be a company formed in Australia**. Thus, a foreign owner would need to establish **an Australian subsidiary to be the licensee company**.

Current arrangements regarding foreign ownership and control

1.7 The aim of the BSA is to prevent foreign persons from being in control of a commercial television or a subscription (pay-TV) television licence. What is meant by **'control'** is the key to understanding the BSA's foreign ownership provisions. The concept of control can be equated to either (i) voting shares, or (ii) to the majority composition of company boards.

Voting shares

1.8 Section 6 of Schedule 1 of the BSA uses the benchmark of a fifteen per cent shareholding to establish whether a person has control of a company. Such a shareholder is considered to be the significant, or leading, shareholder; that is, someone who is in a position to influence other shareholders and therefore able to exercise 'control' of a company. However, a person with fifteen per cent of shares would not be considered to have a controlling influence if other shareholders had more than fifteen per cent of voting shares. Further, shareholders with less than fifteen per cent of shares may be considered to have a significant or controlling interest if they act in concert. The rule also applies to investments held in a succession or chain of companies.

1.9 For **commercial television**, foreign persons must not be in a position to control a licence (that is, may not hold more than fifteen per cent of shareholdings). This limit increases to twenty per cent for a combined foreign interest holding for two or more persons.

1.10 For **pay-TV**, a foreign person must not have more than twenty per cent company interests in a licence, and the combined company interests of all foreign persons cannot be greater than thirty five per cent.

1.11 For **radio**, there is no specific restriction on foreign interest holdings, but a person may not control more than two licences in the same licence area.

1.12 Apart from the BSA, under FATA, the Treasurer has the power to reject a foreign person's investment proposal in an Australian company valued at more than $50 million amounting to more than fifteen per cent (or forty per cent for a proposal involving more than one foreign person), if the bid is judged to be contrary to the national interest. Special takeover provisions in the *Corporations Law* also apply to shareholders having twenty per cent or more of shares in a publicly listed company.

1.13 Under foreign investment policy, the Government has determined that a single foreign person must not hold more than twenty five per cent of shares in a mass circulation (national or metropolitan) **newspaper**, with a maximum of thirty per cent for a combined foreign interest holding. The limit for a combined foreign interest shareholding increases to fifty per cent for regional and suburban newspapers. The Government can change these limits without parliamentary approval, since they have been developed by the FIRB.

Board composition

1.14 Majority control of the board of a company is another mechanism for control. Unless approved by the Australian Broadcasting Authority (the ABA) under special circumstances, the BSA has:

- placed limits on multiple directorships for radio and television licences (section 55); and
- imposed conditions on foreign directors for television licences (section 58).

Cross-media ownership

Current arrangements

1.15 Cross-media mergers and acquisitions are regulated through the BSA and monitored and enforced by the ABA. These rules apply in addition to general competition law.

1.16 Table 1.1 contains a summary of the rules set out in section 60 of the BSA (excluding those involving 'control' via directorships).

Table 1.1: Cross-media Restrictions[1]

Television and Radio	A person must not control a television licence and a radio licence that have the same licence area.
Television and Newspapers	A person must not control a television licence and a newspaper associated* with the licence area of the television licence.
Radio and Newspapers	A person must not control a radio licence and a newspaper associated* with the licence area of that radio licence.
Pay TV	A person who controls a Licence A or Licence B subscription television licence must not have more than a 2% interest in the other licence, or be in a position to control that other licence.

* 'Associated' means that at least 50% of the circulation of the newspaper is in the broadcasting licence area.

1.17 In addition:

- a person must not control more than two radio licences, or more than one television licence, in the same licence area;
- a person must not control a television broadcasting licence whose combined licence area exceeds seventy five per cent of the Australian population, or more than one licence within a licence area (section 53); and
- there are limits on cross-media directorships (section 61), including that the names of directors of a licensee, and persons who, to the knowledge of the licensee, are in a position to exercise control of a licence, must be reported to the ABA regularly, as must any changes to the control of a licence.

Proposed amendments to cross-media rules

1.18 Rather than removing or amending the existing cross-media rules, the Bill proposes the granting of exemption certificates, subject to the application of a public interest test that would be applied to mergers and acquisitions that would normally be in breach of the cross-

1 B. Bailey, *Cross-media Rules OK?*, Commonwealth Parliamentary Library, Current Issues Brief 30 1996-97

media rules. The Australian Broadcasting Authority (the ABA) would administer the test under the BSA.

1.19 The test would supplement the evaluation of mergers by the Australian Competition and Consumer Commission (ACCC) for their effects on competition within a market under general competition law. The approach focuses on the maintenance of diversity of sources of information and opinion rather than plurality of ownership which is addressed through the proposed removal of foreign ownership controls and, incidentally, by the growth of new sources of information such as the Internet.

1.20 Exemption certificates would be issued by the ABA on the basis of written applications in which applicants must include:

- a statement of the conditions to which the certificate will be subject;
- charts setting out the structure of an organisation; and
- an assurance that the conditions of the certificate will be satisfied when the certificate is active.

1.21 Conditions of the exemption certificate would also be a requirement of licence conditions and, as such, would be subject to the reporting and monitoring scheme administered by the ABA.

1.22 Certificates could be issued prior to persons finalising mergers or acquisitions that would otherwise place them in breach of the cross-media rules. Certificates come into force from the time of issue and become active once a person assumes control of two or more media outlets, when they would otherwise be in breach of the cross-media regime.

1.23 Holders of active exemption certificates must meet the conditions and undertakings associated with the certificate as soon as possible or, at the latest, within 60 days of the certificate becoming active. The ABA will maintain a register of active exemption certificates.

Enforcement and review

1.24 The Bill provides for dual enforcement provisions that could lead to proceedings against either the controller and/or the licensee. On certificates becoming active, the ordinary mechanisms for enforcement of licence breaches apply. Breaches could be addressed through a hierarchy of mechanisms, from fines through to suspension of licences in cases of repeated or severe licence breaches.

1.25 There are no provisions for regular review of exemption certificates issued by the ABA, but that body has the power to investigate complaints and can direct persons to remedy breaches. It can also initiate reviews on its own account at any time, for example, if the ownership and control arrangements of an organisation were restructured.

1.26 Action to remedy a breach could be either:

- compliance with the conditions of the certificate; or
- action to divest one or other of the cross-media holdings (for example, selling shares).

Public interest test criteria

1.27 Two criteria are proposed for a media-specific public interest test in the Bill, namely the giving of undertakings:

- to retain separate and distinct processes of editorial separation amongst the outlets making up a set of media operations; and

- in the case of regional radio and television, to ensure that minimum levels of local news and current affairs are provided.

Editorial separation

1.28 The term 'editorial' is intended to relate to the selection, interpretation and presentation of news across all media covered by the regime. To demonstrate editorial separation, applicants will be required to:

- publish separate editorial policies within a timeframe developed by the ABA;

- provide accurate organisational charts in connection with editorial decision-making responsibilities, at the time of application; and

- maintain separate editorial news management, separate news compilation processes, and separate news gathering and news interpretation capabilities.

1.29 Holders of active exemption certificates must make both editorial policies and organisational charts available for inspection on the Internet.

Local news and information

1.30 The requirement to comply with minimum service standards for local news and information applies to non-metropolitan licences only. The requirement would be imposed as a licence condition and would have regard to specific standards. The ABA would establish minimum service standards for local news, local community service announcements and for emergency warnings to be applied in regional broadcasting licence areas.

1.31 The Bill defines regional licence areas as all areas outside mainland state capitals. The legislation provides for the ABA to be able to define what is meant by 'local' for the purposes of this condition. The Explanatory Memorandum states that subsection 61R(1) relating to 'local news' is intended to provide some flexibility because it applies to both commercial television and commercial radio. It suggests that areas in which separate programming (particularly separate advertising) is provided could provide the ABA with a good indication of the relevant local area for the purposes of the local news and information requirements.[2]

1.32 Minimum service standards for local news and information could comprise, for example, five news and weather bulletins per week, provision of community service announcements and emergency services warnings. Broadcasters would be required either:

2 Explanatory Memorandum, pp. 35-36

- to maintain existing levels of regional news and information programming (that is, if those existing prior to the merger or acquisition were considered to meet the minimum standard service standards); or

- to provide, after a period of grace, the prescribed minimum standards for the duration of the certificate's currency, whichever is the higher.

1.33 Certificate holders must meet minimum service standards for local news and information within six months of certificates becoming active. Written reports must be provided to the ABA on the standards of local content in news and information provided during each week that an exemption certificate was active.

1.34 As is the case for other licence conditions, the criteria for a media-specific public interest test would be subject to current ABA monitoring, compliance and reporting arrangements.

Chapter 2

INTRODUCTION

Overview

2.1 There is a range of factors driving change across the media and telecommunications industries which has led to the need to amend the existing foreign and cross-media ownership regime contained in the ten year old *Broadcasting Services Act 1992* (the BSA).

2.2 Recent and increasingly rapid advances in communications technology, including digitisation and transmission of video, image, sound and text, have allowed telecommunications and computer services to become integrated or converge. These changes are driving the emergence of new services, delivery platforms and businesses resulting in many new channels of communication since the enactment of the BSA.

2.3 The development of new services and delivery platforms that allow seamless change between the means of reception and communication has resulted in an increasingly globalised media environment. New media services such as the Internet, online, digital and interactive services are providing information, views and opinions that were available formerly only through traditional media (newspapers, radio and terrestrial television).

2.4 The increasing complexity of these changes together with developments in competition policy since the BSA was introduced mean that the existing media regulatory regime is out of step with industry policy generally and in danger of becoming increasingly irrelevant. With the development of new forms of media and communications, the regulations also apply inconsistently across the industry.

2.5 Convergence makes it desirable for media organisations to ensure their interests range across all forms of media and the Committee heard evidence that the regulations impede commercial flexibility and hinder the ability of Australian media organisations to compete in the new environment through limiting investment, innovation and the development of economies of scale and scope. The Committee was advised that the existing regulations acted as a barrier to the attraction of capital and managerial expertise that investment in digital technologies required for the development of new services.

2.6 UBS Warburg claimed in evidence that the success of larger Australian companies is increasingly dependent on access to global capital markets:

> The ability for media companies to consolidate across different media (ie make cross-media acquisitions and mergers) is important as it provides opportunities to increase scale and enrich content and other consumer services. It is also a key part of the convergence of media, telecommunications and information technology. In addition to these matters, restricting media companies from such activity also decreases their attractiveness to investors both locally and internationally… This restriction also further limits Australian media companies' ability to compete with

> global competitors and their ability to provide the best content and services to Australian consumers.[1]

2.7 Some submitters argued that convergence was blurring the boundaries between services so that the existing regulatory distinctions were becoming meaningless, and that an increasing number of media outlets combined with changing patterns of media consumption mean that ownership limits were no longer required to preserve media diversity. In News Limited's view:

> It is no longer appropriate to regulate media based on a perceived power hierarchy of different delivery platforms. The issue today is content, particularly where a newspaper can be distributed in its traditional hard copy form or electronically and each being regulated differently. This environment has made cross-media and foreign ownership restrictions inappropriate and, to a certain extent, irrelevant.[2]

2.8 Witnesses referred to opportunities for synergies that would result from the proposed removal of foreign ownership restrictions and relaxation of the cross-media rules. The importance of economies of scale in encouraging the growth and development of companies to ensure capacity to provide new services and respond to consumer demand for niche products was also emphasised. Publishing and Broadcasting Limited (PBL) pointed to 'systemic disadvantages of scale and scope vis a vis international competitors'[3] as a result of the existing regulations. Others claimed that only a few integrated media operators would be able to gain the scale needed for production of increasingly expensive content.

2.9 One of the pressing arguments for the Bill is that retention of the existing regulatory arrangements will result in reduced quality of content in Australian media products. The Committee was advised that opportunities for investment were essential if existing media organisations were to grow in scope and scale. This was especially important in light of the advertising recession that has occurred over the past two years. John Fairfax Holdings Limited considered that it was very difficult to reverse trends leading to reduced quality once commenced, for example, reduction in television news bulletins in regional and rural Australia:

> We are today in the main well served by high quality media. However, the threat to quality by perpetuating the current regulatory regime is real. The early signs are that such threats are indeed materialising – as we have seen as a result of the constraints placed on the entire industry due to the advertising recession, which is now into its second year – and once they do, the results cannot be easily reversed. Under the current industry structure, certain television news bulletins in regional and rural Australia will likely never be restored…..Without new future investment – which can only be spurred by the prospects for real growth in the scale and scope of the business – there are limits to the ability of these media companies, inside and outside the major metropolitan markets, to grow and to contribute further to high quality media services in their markets. Maintaining and building on the quality media businesses already in place is both attractive and feasible.[4]

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1 UBS Warburg, *Submission 30*, p. 2

2 News Limited, *Submission 17*, p. 1

3 Publishing and Broadcasting Limited, *Submission 12*, p. 7

4 John Fairfax Holdings Limited, *Submission 18*, p. 2

2.10 A recent large scale study of the effects of relaxing media ownership regulation by the management consultancy firm A.T. Kearney found that change was needed to provide Australian media organisations and local content suppliers with the benefits of scale and scope both now and into the future, for the purposes of providing the Australian public the best possible service, in terms of quality and diversity.[5] The Committee noted that the study found that 'where foreign and cross-ownership relaxation has occurred, there has not been any negative impact on diversity, rather the opposite.'[6]

International comparisons

2.11 The Committee was informed in its consideration of the Bill by recent international developments concerning media ownership. It noted that there appeared to be a trend internationally to removing outdated regulation. Regulatory arrangements in the United Kingdom and Canada in particular were discussed in submissions and at public hearings and are discussed below.

United Kingdom

2.12 Several submitters referred to proposals to simplify and liberalise the rules on media ownership in the UK that were recently released in conjunction with the new UK Draft Communications Bill. The Draft Bill foreshadows regulatory action that focusses on transfers that appear to raise competition or plurality concerns, while only a minimum level of media ownership regulation is proposed to be maintained to ensure diversity of information and views.

2.13 The Department of Communications, Information Technology and the Arts (DCITA) advised the Committee that the UK proposals were based on a number of considerations including the following:

- "competition law cannot always guarantee the plurality that is a necessary bedrock to our democratic process";
- newspapers are "the most editorially influential medium";
- Channel 3 (or ITV) in the UK is "the only mass audience commercial public service television station with universal access";
- reform is needed to "provide a clear set of rules that will give businesses the certainties they need to invest and expand";
- the "existing rules are outdated:
    - they are not flexible enough to respond to the rapid change we have seen in media markets; and
    - *they appear inconsistent and directed at particular media interests".*[7]

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5 A.T. Kearney, Media Release - *Media Ownership Restrictions in Australia: The Case for Change*, May 2002, p. 1

6 A.T. Kearney, Media Release - *Media Ownership Restrictions in Australia: The Case for Change*, May 2002, p. 3

7 Department of Communications, Information Technology and the Arts, *Submission 36*, p. 7

2.14 The Committee understands that, under the UK proposals:

- all rules on foreign ownership will be abolished; and
- cross-media regulation will consist of a core set of three rules that together retain democratic safeguards at national, regional and local levels.

Ownership and reach provisions

2.15 The core UK cross-media rules are:

a) A rule limiting joint-ownership of national newspapers and Channel 3:

i) (a) no one controlling more than 20% of the national newspaper market may hold any licence for Channel 3;

ii) (b) no one controlling more than 20% of the national newspaper market may hold more than a 20% stake in any Channel 3 service;

iii) (c) a company may not own more than a 20% share in such a service if more than 20% of its stock is in turn owned by a national newspaper proprietor with more than 20% of the market.

b) A parallel, regional rule: no one owning a regional Channel 3 licence may own more than 20% of the local/regional newspaper market in the same region.

c) There will also be a scheme to uphold the plurality of ownership that exists in local media. This should ensure that at least 3 local commercial radio operators, and at least 3 local or regional commercial media voices (in TV, radio and newspapers) exist in most local communities. [8]

2.16 The Committee notes that, in Australia, the following provisions relating to limitations on ownership and reach are preserved:

- ownership of no more than one commercial television station in the same licence area;
- no ownership of television licences which together reach more than 75% of the population; and
- ownership of no more than two commercial radio licences in the same licence area.

2.17 DCITA provided the Committee with the following information about the effects of the *Broadcasting Services Amendment (Media Ownership) Bill 2002*, taking into account the fact that the provisions outlined above are not affected by the Bill.

- The five biggest licence areas in population are Sydney, Melbourne, Brisbane, Adelaide and Perth. In total these represent some 63% of the Australian population. The four largest regional licence areas in total represent an additional 27% of the population.

(Note: figures are based on ABA licence area figures, which are derived from the 1996 census. See table below.)

8 ibid

- Section 53(1) restricts holdings in these (and all other) licence areas to licences whose licence areas comprise 75% of the population.
- Three commercial television services operate in each of the following licence areas: Sydney, Melbourne, Brisbane, Adelaide, Perth, Northern NSW, Southern NSW, Regional Vic, and Regional Qld (estimated 90% of the Australian population).
- **Section 53(2) provides that the number of separately controlled commercial television services in these markets could not reduce through acquisition or mergers should the Bill be passed, irrespective of other radio or newspaper interests. National broadcasting services would also continue to operate.**
- There are two service markets in Darwin, Mildura/Sunraysia, Remote and Regional WA, Remote central and eastern Australia and Tasmania (estimated 8% of the population). The number of separately controlled commercial television services in these markets could not reduce through acquisition or mergers should the Bill be passed, irrespective of other radio or newspaper interests. National broadcasting services would also continue to operate.
- The remaining licence areas are single owner markets where one or two services are provided. These are Broken Hill, Mount Gambier/South east SA, Riverland, Griffith/MIA and Spencer Gulf (estimated 1.6% of the population).

Three Commercial Service Markets	**Population***	**Population per cent**
Adelaide	1188407	6.65
Brisbane*	1761142	9.85
Melbourne*	3409357	19.065
Northern NSW*	1453971	8.145
Perth*	1279516	7.16
Regional QLD*	1290023	7.21
Southern NSW*	1183771	6.625
Sydney*	3610867	20.2
Regional VIC*	981548	5.485
Total	16158602	90.39
Single Owner Markets		
Broken Hill*	21536	0.125
Mount Gambier / SE*	62579	0.35
Riverland*	33875	0.195
Griffith & Mia*	53921	0.305
Spencer Gulf*	107542	0.6
Total	279453	1.575
Two Commercial Service Markets		
Darwin*	100133	0.56
Mildura/ Sunraysia*	53760	0.305
Remote and Regional WA*	443556	2.48
Remote Central & Eastern Australia*	374632	2.08
Tasmania	455796	2.55
Total	1427877	7.975
Total for all Markets	17865932	99.94

NB: Based on ABA licence area figures which use the 1996 census. Total population 17,879,300
* = includes redistributed population from overlapping licence areas. Redistributed by dividing the total overlap between two markets and subtracting from the total in each market.[9]

9 Department of Communications, Information Technology and the Arts, *Submission 36*, pp. 1-2 (emphasis added)

Cross-media regulation

2.18 Unlike the situation proposed for the UK described above, the Committee notes that the cross-media regime proposed in the Bill remains in relation to commercial radio and commercial television in a licence area, and newspapers associated with the licence area. The Australian Broadcasting Authority (ABA) is given the power to issue exemption certificates.

Content regulation

2.19 The Committee understands that the UK will also retain content regulation to protect the quality, diversity and impartiality of programming. DCITA provided the Committee with the following extract about content regulation from the 'policy narrative' that accompanied the release of the UK Draft Bill:

> The regulatory framework provided by the rest of the Bill will ensure that any increased concentration of ownership does not dilute the quality, diversity or impartiality of broadcast content. Regulators will be able to act in response to the changing market that consolidation will bring.
>
> ITV will still consist of regional licences, with requirements for UK regional production and programming, as well as independent production and original production. OFCOM will have the power to vary these licences whenever they change hands, to maintain their regional character.
>
> Under the new regulatory regime for public service broadcasters, Channel 5 will also have requirements for independent production and original production. There will be provision for OFCOM to vary the terms of the Channel 5 licence to alter the scale of these requirements. The Secretary of State will also be able to alter the public service remit of the service. If the Channel 5 licence changes hands, OFCOM will be able to vary the licence to maintain the existing character of the service.
>
> There will continue to be stipulations on the ownership and provision of TV news services (for ITV stations) to ensure the independence and quality of news that people particularly trust. There will be a power to introduce a nominated news provider system for Channel 5, if it becomes clear that Channel 5 has gained a significant share of the audience for free-to-air news, comparable to ITV's share.
>
> OFCOM will have a new duty to protect and promote the local content of local radio services, and they will now be able to vary the licences for such services on a change of control, to maintain their local character.
>
> OFCOM already have the power to investigate the news/current affairs programming of any local radio service where they have cause to suspect that news is being presented without due accuracy or impartiality, or that undue prominence is given to views or opinions of particular persons or bodies in matters of political or industrial controversy. This power may become more important in the light of the likely consolidation in local radio markets, and OFCOM will need to use it to pay particular attention to matters of impartiality.[10]

10 Department of Communications, Information Technology and the Arts, *Submission 36*, pp. 9-10

2.20 The Committee notes that, in Australia, regional broadcasters in relation to which an active cross-media exemption certificate applies**,** will be required to meet minimum levels of local news and information services, or to maintain existing levels where they are higher.

2.21 The Committee considered the evidence concerning similarities and differences between Australia and Great Britain regarding media ownership regulation. It also noted recent commentary by independent lawyers Gilbert and Tobin comparing the Bill with the UK Draft Bill. They highlighted the assumptions underlying both Bills that it was time to acknowledge the converging communications environment and that, in the emerging digital world, the safeguards retained to secure 'a plurality of voice and a diversity of services' 'could be set at lower thresholds than in the past'.[11]

Canada

Foreign ownership

2.22 The Committee understands that the new (one year old) Canadian laws are similar to those proposed for Australia and that:

- broadcasting licences may not be issued to non-Canadians who are defined as 'any broadcaster whose foreign ownership exceeds one third of the voting shares at the holding company level'; and
- foreign ownership of the company that has responsibility for programming is limited to 20% of the voting interest at the licence level and 33.3% of the voting interest at the parent or holding company level.

2.23 By comparison the Broadcasting Services Amendment (Media Ownership) Bill 2002 proposes no media-specific provisions. Foreign investment is to be subject to the *Foreign Acquisitions and Takeovers Act 1975* (FATA) and Australia's general foreign investment policy.

2.24 The Committee also understands that the print media in Canada is not subject to media ownership regulation, nor does the Canadian Government consider that the Competition Act applies to newspaper ownership. The Director of the Canadian Competition Bureau is not mandated to look at social issues such as editorial diversity and newspaper quality and considers that competition law is inappropriate to the regulation of monopolies in the newspaper industry because of the difficulty of applying the Competition Act to issues such as editorial control and diversity of opinion

2.25 DCITA provided the Committee with the following comparative information about the Canadian situation and the proposals in the Broadcasting Services Amendment (Media Ownership) Bill 2002.

11 *The Brave New World of Broadcasting Regulation in the UK: An overview of some aspects of the Draft Communications Bill 2002*, Gilbert and Tobin Newsflash: Broadcasting Issues, 23 May 2002

Cross-media ownership

Relevant authority

Canada

2.26 No restrictions on cross-media ownership with respect to broadcasting and newspapers. In the case of radio, cable, television and Canadian satellite programming services, ownership is examined on a case-by-case basis by the Canadian Radio-television Telecommunications Commission (CRTC).

Australia

2.27 The cross-media regime remains in relation to commercial radio and commercial television in a licence area, and newspapers associated with the licence area. The Australian Broadcasting Authority (ABA) is given the power to issue exemption certificates.

Licence conditions

Canada

2.28 The CRTC has authority to deny, or impose conditions on, the acquisition of interests in broadcasting and telecommunications licences if it considers that the proposed concentration of ownership or common ownership in media would impact negatively on editorial independence or the diversity of media voices.

2.29 In reaching its decisions, the CRTC considers such factors as ownership composition, control of other media, and audience reach. The CRTC's approval is given subject to a 'significant benefits test' for which applicants must demonstrate that significant (and quantifiable) benefits will accrue to the public and/or the Canadian programmed production sector as a result of the proposed acquisition, generally representing a financial contribution of 10% of the value of the transaction.

2.30 CRTC has ability to prescribe, on a case by case basis, licence conditions which are imposed on jointly-owned organisations. Conditions imposed on past mergers have included separate management and location of newsrooms, that newsrooms shall not be linked electronically, by computer, or by any other technology, and monitoring by an independent committee.

Australia

2.31 Conditions for issuing an exemption certificate are consistent, non-prescriptive and apply in all cases.

2.32 Before issuing an exemption certificate, the ABA must be satisfied that the conditions proposed in the application are sufficiently specific and detailed, and that they will be adequate for the applicant to continuously meet 'the objective of editorial separation' for the set of media operations concerned within a time period specified by the ABA. That period must be no longer than 60 days after the certificate becomes active.

2.33 The 'objective of editorial separation' defined in the Bill is that separate editorial decision-making responsibilities must be maintained in relation to each of the media operations covered by an exemption certificate. Three mandatory tests are prescribed for the objective of editorial separation to be met. They are the existence of:

- separate and publicly available editorial policies; and
- separate and publicly available organisational charts in relation to editorial decision-making; and
- separate editorial news management, news compilation processes and news gathering and interpretation capabilities for each of the media operations.

Editorial separation

Canada

2.34 Requirements for editorial separation will not prevent the sharing of resources or other forms of cooperation between jointly-controlled media operations, provided that the requirements above continue to be fulfilled.

2.35 Conditions on mergers have included the establishment of independent committees within the organisations to investigate complaints. The CRTC has broad general power to conduct hearings in relation to complaints.

Australia

2.36 Complaints are to be investigated by the regulator. The ABA has specific power to investigate complaints about non-compliance with licence conditions.

Local news and information

Canada

2.37 While there are quotas for local content, there are no specific quotas for local news either in general or in relation to cross-media holdings. Applicants for local television station licences, in their application, must demonstrate how they will meet the demands and reflect the particular concerns of their local audiences, whether through local news or other local programming.

Australia

2.38 Regional broadcasters in relation to which an active cross-media exemption certificate applies will be required to meet minimum levels of local news and information services, or to maintain existing levels where they are higher.

Restrictions on licence holdings - Television

Canada

2.39 A single entity is not allowed to own more than one television station offering a service with the same official language in the same market.

Australia

2.40 Restrictions on ownership - no more than one commercial television licence in the same licence area; no ownership of television licences which together reach more than 75% of the population.

Restrictions on licence holdings - Radio

Canada

2.41 In markets with less than eight commercial stations in a given language, common ownership of up to three stations in that language is permitted, with a maximum of two stations in any one frequency band (AM or FM). In markets with eight or more commercial stations in a given language, common ownership of up to four (two AM and two FM) is permitted.

Australia

2.42 Ownership of no more than two commercial radio licences in the same licence area.[12]

2.43 It must be noted that the Bill preserves the provisions of the BSA relating to limitations on ownership and audience reach ('the concentration rules'). The relevant sections of the BSA are:

- Section 53(1) prevents control of commercial television broadcasting licences whose combined licence area populations exceed 75% of the population of Australia;

- Section 53(2) prevents control of more than one commercial television broadcasting licence in the same licence area. Exceptions to this provision are made by sections 73 and 73A, which essentially provide that additional licences issued in small single and two-service markets under sections 38A and 38B do not result in breaches of ownership limits.

- Section 54 prevents control of more than two commercial radio broadcasting licences in the same area.

2.44 These provisions will act as a significant inhibitor to undue concentration of ownership. In the larger markets, and also in most regional markets, it will be impossible for one company to control all of the forms of media in that market. As the DCITA submission makes clear, around 90% of the Australian population resides in a licence area where there are three commercial television services. The Department's submission states that:

> Section 53(2) [of the Broadcasting Services Act] provides that the number of separately controlled commercial television services in these markets could not reduce through acquisition or mergers should the Bill be passed, irrespective of other radio or newspaper interests. National broadcasting services would also continue to operate.[13]

Summary

2.45 The Committee has carefully considered the views of commentators that tight regulatory controls can impede the development of competition by reducing the responsiveness of industries to changing demand and supply opportunities. It notes the view that in environments of rapid technological change, regulatory approaches should be neutral

12 Department of Communications, Information Technology and the Arts, *Submission 36,* pp. 4-6

13 Department of Communications, Information Technology and the Arts, *Submission 36,* p. 2

in their effect on both delivery systems and services so as not to distort incentive structures, economic efficiency and development.[14] The Productivity Commission *Broadcasting* Inquiry Report 2000 considered that 'regulation must be flexible enough to deal with uncertainty and change. It should not advantage some technologies or media producers at the expense of others.'[15] The Committee accepts that the present restrictions on ownership have limited opportunities to exploit economies of scale and scope and have encouraged the creation of new financial instruments and other arrangements to avoid the regulations.

2.46 The Committee agrees with the principle that outdated regulation of media ownership should be modified. It agrees with the views expressed in the Explanatory Memorandum that the existing regulations are complex, inflexible and tightly focussed and do not provide scope to reflect the changing influence of technology, and the evolution of the communications market over time.[16]

14 Albon, R and Papandrea F, *Media Regulation in Australia and the Public Interest*, Institute of Public Affairs, November 1998, pp. 69, 80, 84

15 Productivity Commission *Broadcasting* Inquiry Report, Report No. 11, 3 March 2000, p. 6

16 Explanatory Memorandum, p. 7

CHAPTER 3

FOREIGN OWNERSHIP AND CONTROL

3.1 This chapter considers Schedule 1, Foreign control of television, of the Broadcasting Services Amendment (Media Ownership) Bill 2002 (the Bill).

3.2 The Committee's inquiry elicited widespread support for the proposals in Schedule 1 to remove foreign ownership and control restrictions from the BSA and discontinue newspaper specific provisions under general foreign investment policy so that the media is subject to general foreign investment rules, just like other industries. The main arguments related to the incentives for enhanced competitiveness of Australian companies, not only through providing opportunities for greater access to capital and expertise, but also through better promotion of Australian expertise internationally.

3.3 UBS Warburg submitted that relaxation of the foreign ownership restrictions would assist Australian companies to increase in scale and become more competitive while remaining based in Australia:

> Australia represents less than 2% of global equity markets. Increasingly, the success of Australia's larger companies will require access to global capital markets. In addition, as investors move to patterns of investment driven by global sectors, the competition for investment increasingly favours those companies with larger market capitalisations.
>
> …. an ongoing challenge for Australia will be to develop a large, highly liquid stock exchange. A handful of giants (News Corp, BHP Billiton, Telstra) will be insufficient to maintain and grow the participation of global investors over time. Companies must be encouraged to maintain an Australian domicile, whilst accessing global capital to achieve scale. Australian media companies could help Australia to face this challenge in a deregulated environment.[1]

3.4 Publishing and Broadcasting Limited (PBL) also argued that foreign investment would enable the sector to grow and benefit the economy, as well as providing opportunities for the quality and quantity of Australian content:

> Without access to foreign capital, local content producers are at a competitive disadvantage with international producers in the larger markets.
>
> With increasing foreign participation in the media and entertainment industry, removal of the rules will enable Australian broadcasters to create alliances with foreign entities assisting in maintaining a competitive and efficient Australian broadcasting industry.[2]

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1 UBS Warburg, *Submission 30*, p. 4

2 Publishing and Broadcasting Limited, *Submission 12*, p. 8

3.5 The Productivity Commission *Broadcasting* Inquiry Report 2000 called for change to a policy framework that was 'inward looking, anti-competitive and restrictive.' The Inquiry found that the foreign investment rules for broadcasting were obsolete and recommended that 'foreign investment in broadcasting be handled in the normal way under Australia's foreign investment policy and that restrictions on foreign investment, ownership and control in the BSA be repealed.'[3]

3.6 Many submitters supported the Productivity Commission's recommendation to repeal the restrictions on the grounds that regulation of foreign investment in the media industry should be consistent with that of all other industries, that is, under the *Foreign Acquisitions and Takeovers Act 1975* (FATA) and Australia's general foreign investment policy.

3.7 PBL argued that the existing rules were not needed to ensure that Australian media is 'Australian' because it claimed that only products that were considered 'Australian' would meet the needs of their audience and be able to compete successfully. It also cited the Act and the Australian Content Standard as substantial safety nets.[4]

3.8 Others pointed out that the existing regulations applied inconsistently across the media industry and were therefore inequitable. For example, Macquarie Radio Network submitted that:

> Treatment of foreign ownership within the BSA involves different approaches to each of commercial television, subscription television (pay TV) and commercial radio. Both types of television service currently have restrictions on levels of foreign ownership and control, however these restrictions are not consistent between the two forms of television service. Commercial television licences are subject to a limitation of any individual ownership to 15%, and a maximum of 20% by all foreign interests. For pay TV licences, the foreign ownership restrictions are 20% for individual holdings and 35% in total. These restrictions generally apply also to company directors, and consideration of foreign ownership is subject to detailed effective control tests.[5]

Australian content

3.9 The Productivity Commission found that concerns that 'foreign proprietors may be less sympathetic than Australians to Australian cultural or political values or to local content' were not well-founded, supporting PBL's contention that media proprietors needed to provide programmes that appealed to Australian audiences. It considered that cultural policy objectives such as concerns about local content were better addressed directly and that these were not a reason to retain the existing restrictions on foreign ownership and control.[6]

3.10 The Australian Press Council supported repeal of the restrictions in favour of regulation under FATA but considered that the issue of Australian content should be carefully considered by those administering the Act:

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3 Productivity Commission *Broadcasting* Inquiry Report, Report No. 11, 3 March 2000, p. 6

4 Publishing and Broadcasting Limited, *Submission 12*, pp. 5-6, 8

5 Macquarie Radio Network, *Submission 20*, p. 4

6 Productivity Commission *Broadcasting* Inquiry Report, Report No. 11, 3 March 2000, p. 23

> Foreign takeovers and acquisitions in the media should be subject to the *Foreign Acquisitions and Takeovers Act* as all other such acquisitions are, with the proviso that those administering the Act have regard for Australian content in the media as an issue of key importance in any such takeover or acquisition.[7]

3.11 The Screen Producers Association of Australia emphasised the importance of the Australian Content Standard and expressed its concern about the increasing tendency for 'in-house' production and networking. It argued that public opinion was shaped by more than news and current affairs programmes and that diversity across all genres was vital. While not opposed to foreign investment per se, it was concerned about the terms on which this might occur in relation to intellectual property rights, and argued for an effective division between broadcasters and the production of content. It opposed removal of the restrictions unless there was a commitment to an Australian independent production quota. In its view, without this safeguard, syndicated 'in house' programming across the distribution chain of a large vertically integrated media organisation would be likely to increase, to the detriment of the audience and the industry.

3.12 The Australian Association of National Advertisers supported removal of the restrictions on the grounds that less restrictive measures were needed to allow advertising to fully play its part in driving more vigorous competition and valuable innovation and diversity in media in the digital era:

> The AANA has long advocated for more vigorous competition and program and service innovation in media, supporting the needs of advertisers who seek to employ to the maximum extent the potential richness and variety of both single medium and cross-media strategies to generate demand.[8]

3.13 The Committee notes that the Australian Content Rules are unaffected by the Bill. They can be summarised as follows:

- Under the co-regulatory framework established by the *Broadcasting Services Act 1992* (BSA) the Australian Content Standard (ACS) imposes an overall quota on commercial TV licensees of 55 per cent of Australian programming between 6 a.m. and midnight, with subquotas for specific types of programming:
  - at least 20 hours of first-release Australian documentary programs
  - at least 32 hours of first-release, and eight hours of repeat, Australian children's drama
  - a minimum score of at least 775 points per three years (and 225 points per year) for first-release Australian drama programs, consisting of
    - : 1 point per hour of serial drama
    - : 2 points per hour of series drama
    - : 3.2 points per hour of mini-series, telemovies and films.
- The Australian Content in Advertising Standard requires 80% of TV advertising broadcast between 6am and midnight each year to be Australian produced.

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7 Australian Press Council, *Submission 3*, p. 1

8 Australian Association of National Advertisers, *Submission 7*, p. 2

- Pay TV licensees that provide a drama service are required under the BSA to spend at least 10 % of program expenditure on Australian programs.
- Commercial and community radio licensees are required by their industry codes of practice to broadcast minimum levels of Australian music, including new music, based on the predominant format of the service.[9]

3.14 In relation to concerns that the relaxation of foreign ownership provisions might mean a reduction in Australian content, the Committee points out that, while the Australian Broadcasting Authority (ABA) is reviewing the ACS and released an Issues Paper on 12 November 2001, no proposal to abolish them is contemplated. The ABA believes that: 'In broad terms, the Australian content standard appears to be working well.'[10] Indeed, the standards have been exceeded: 'The hours of Australian programs on commercial television have increased over the years, exceeding the standard's requirements.'[11]

3.15 Furthermore, it should be acknowledged that for broadcasters there is a commercial imperative to maximise their audience share and that to do this they must have quality programming that people want to watch and which audiences find relevant. Australian audiences have shown a strong preference for Australian content programs. The ABA has confirmed the popularity of Australian productions: 'Audience ratings reflect the popularity of Australian programs over the range of program types.'[12] Thus there is a commercial necessity for broadcasters to include such content. The submission of PBL is instructive in this regard, where it states that:

> To create a successful product, commercial reality requires quality and diversity of views and styles. Media products like television and newspapers as mass market products, must aim to appeal to as large a number of customers as possible in order to be successful. Therefore they must cater for the differing tastes and opinions of their varying consumers.[13]

3.16 Network Ten pointed to the range of investment opportunities available globally and argued that removal of the restrictions will enhance Australian companies' competitiveness and attractiveness as an investment. It argued that the restrictions have acted as an incentive to the development of complicated and unnecessary investment structures and have inhibited the attractiveness of Australian media investments:

> The 15% individual foreign company interest limit has also prevented foreign investors from obtaining a major ownership interest in commercial television. At present, a major foreign investment must be in the form of a "passive" loan interest. This situation has led to Australian television networks seeking foreign equity through unnecessarily complex contractual arrangements…
>
> Complicated contractual arrangements add significantly to the cost and risk of investment in the Australian media, making investment in Australian media unattractive for many foreign investors. With the removal of the current foreign

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9 The Committee has attached as Appendix 4 the Australian Content Standard for Television.

10 *Executive Summary* of *Issues Paper, Review of the Australian content standard 2001*, p. 2 [www.aba.gov.au]

11 ibid

12 ibid

13 Publishing and Broadcasting Ltd, *Submission 12*, p. 3

> ownership restrictions, complex non-equity interests will no longer be required to attract foreign investment.[14]

3.17 It also argued that the present regime limited the possibility for involvement of Australian media companies in joint ventures. This affected both their access to resources and expertise including for specialist niche markets, and their ability to contribute Australian expertise internationally, thereby reducing their potential for growth and diversification. It claimed that joint ventures would provide opportunities for the creation of new programming, upgrading of technical infrastructure and efficient use of the natural synergies between media companies around the world.

Foreign owner influence

3.18 Macquarie Radio Network argued that the outcome of the involvement of foreign interests in commercial radio since deregulation in 1992 had been responsible and balanced reporting. It claimed that the interests of foreign owners or other foreign influences had not been advanced in the approach to the provision of news and information by foreign owned stations and that there was no evidence of editorial interference:

> In our experience it is not a position that is sought, or having been secured then operated, as part of a strategy to promote points of view that either advance specific positions held by the acquiring company or any other foreign entity. We see no real evidence that the programming of existing foreign services in Australia is anything other than a matter for the management of those services. Providing that program decisions and content are consistent with the overall administrative policies of the licensed company (and with all relevant laws), and achieve the commercial objectives set for the operation, corporate owners and Boards do not interfere in day-to-day management.[15]

3.19 Further, Macquarie Radio Network advised the Committee that the beneficiary of deregulation had been listeners since the market had been characterised by vigorous competition which had delivered an increase in the number and diversity of services available, in addition to more owners. Other submitters agreed with this view. RG Capital Radio Ltd claimed that deregulation had led to improvement in the management and operations of commercial radio:

> The experience in radio is that there are some overseas operators now operating in the industry and the industry is probably better for it. It is just one more restriction we do not need to have. There are more things in the world these days that we have in common than separate us, so that global community is a good one for picking up the best business practices and the best ideas. I think radio has been a beneficiary of that. The radio industry, generally speaking, is quantumly better run today than it ever has been in its history.[16]

3.20 Network Ten also referred to the benefits for commercial radio from deregulation, arguing that similar advantages in terms of increased diversity and ownership would flow to other media operations if the restrictions were lifted:

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14 Network Ten, *Submission 8*, p. 3

15 Macquarie Radio Network, Submission 20, p. 6

16 Proof Committee *Hansard*, 21 May, p. 23 (hereinafter referred to as *Evidence)*

> Past experience indicates that removal of foreign ownership restrictions is likely to increase diversity in the Australian media, both in the type of services offered and the companies that offer those services. Removal of foreign ownership restrictions for commercial radio licensees in 1992 has benefited the Australian economy and competition in the radio market, as well as increasing the diversity of services offered. Examples include the entry of the Daily Mail Group into the Australian market place (100% foreign owned) and its establishment of the innovative Sydney radio station Nova 96.9FM. In addition, the Australian Radio Network was formed through a joint venture of Clear Communications and Australian Provincial News (the former is 100% foreign and the latter has approximately 45% foreign ownership). The Australian Radio Network operates one of Australia's leading radio networks, which most recently has joint ventured with the Daily Mail Group to provide an innovative new service in Brisbane.[17]

3.21 The Communications Law Centre (the CLC) signalled that there were a number of concerns in relation to the repeal of the foreign ownership restrictions which need to be resolved if the perceived benefits of foreign investment are to be realised. These were:

- mechanisms for encouraging foreign investors to add to the range of operations in the Australian media, rather than act as a substitute for existing interests;
- mechanisms for ensuring that overseas bureaux of Australian media operations will not be closed or merged with those of a foreign parent or subsidiary company;
- resolution of local broadcasting issues (re local news and the Australian Content Standard);
- commitments to strengthen the position of the national broadcasters in a climate of digital broadcasting and increased foreign investment in the commercial sector, such as additional funding for multi-channelling initiatives; and
- improvements in the processes for approving foreign investment, namely transparency of assessments by the Foreign Investment Review Board (FIRB) and accountability for national interest decisions made by the Treasurer.[18]

3.22 The Australian Consumers' Association (the ACA) supported the CLC's view on the importance of using foreign investment to build new assets, rather than stripping profits from Australian operations:

> …we certainly think that there is an opportunity to build a consensus about bringing foreign ownership into the media market in Australia. We are a comparatively small capital base. Our view is that there should be significant encouragement of building new media assets, not just joining a bidding frenzy.
>
> Just declaring a foreign ownership free-for-all on current assets would not contribute one iota, but bringing foreign capital in to build new media assets would be very productive.[19]

3.23 The Media, Entertainment and Arts Alliance also warned against the danger of local companies becoming 'mere branch offices':

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17 Network Ten, *Submission 8*, p. 4

18 Communications Law Centre, *Submission 15*, p. 4-5

19 *Evidence*, 21 May, p. 29

> Rather than being used as a springboard for growth in Australia and the region, the risk is the products are milked for their cash flow and foreign ownership should only be allowed once commitments are given to ensure continued investment and development of the products under the management of local executives.[20]

3.24 On balance, the Committee believes that in relation to foreign owner influence, it is reasonable to assume that foreign owners will be motivated to maximise profits, rather than influence public opinion. Accordingly, it is to be expected that they would provide content with the aim of maximising consumer demand and therefore advertising revenues. In this context, it is noted that Australian audiences have shown a marked preference for locally produced programs. As the Productivity Commission states in its *Broadcasting* Inquiry Report 2000:

> Foreign media proprietors must meet the needs of their host audiences, providing programming that will appeal to Australians. In a competitive industry they may find it costly to compromise commercial objectives for the pursuit of some other goal.[21]

There is, therefore, a commercial imperative for broadcasters to include Australian content. Furthermore, it is crucial to note that this Bill will in no way alter the existing Australian content rules. The Committee therefore considers that concerns about a diminution of locally produced programming should this Bill proceed are unfounded.

International comparisons

3.25 The Committee is aware that a number of countries have removed restrictions on foreign ownership and control (for example, New Zealand) and that others are considering the repeal of existing restrictions. The UK Draft Communications Bill proposes abolition of all rules on foreign ownership with media mergers and acquisitions to be judged by rules that will prevent undue concentration of power but which are indifferent to the nationality of the companies in question.

Summary and conclusion

3.26 The Committee considered all the evidence put to it regarding Schedule 1 of the Bill. It noted that the Productivity Commission had recommended removal of restrictions on foreign ownership in its *Broadcasting* Inquiry Report 2000.

3.27 Regarding Australian cultural policy, the Committee notes that the Australian Content Standards will remain, and that the '[f]oreign ownership of commercial television and subscription television interests continues to be regulated by the *Foreign Acquisitions and Takeovers Act 1975* in the same manner as for commercial radio and newspapers. The *Trade Practices Act 1974* will also continue to apply.'[22] These provisions provide a floor both to the amount that foreign-sourced product could be used in the Australian media and the extent of foreign penetration of the Australian market.

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20 Media, Entertainment and Arts Alliance, *Submission 11*, p. 9

21 Productivity Commission, *Broadcasting Report*, p. 335

22 Explanatory Memorandum, p. 1

3.28 The Committee also notes that, to ensure the maintenance of pluralism and diversity of information and opinions to all Australians, there will always be a requirement for media organisations to provide minimum standards of local news and information to regional and rural Australia. Therefore, irrespective of ownership, coverage of news and information of relevance to Australians and, in particular, to regional and rural Australians, including opportunities for local input and community service announcements, will be guaranteed.

3.29 In light of this and the evidence put to it, the Committee is persuaded of the benefits that would result from lifting restrictions on foreign ownership for media companies, advertisers and consumers, bearing in mind that foreign investment in the media will be regulated under the *Foreign Acquisitions and Takeovers Act 1975* and Australia's general foreign investment policy. It considers that the repeal of restrictions would provide opportunities for access to global capital, resources and expertise for Australian companies, as well as possibilities for Australian expertise to be promoted and advanced internationally. It considered that this increase in competition would lead to greater diversity in services and products for Australian consumers.

Chapter 4

CROSS MEDIA OWNERSHIP REGULATION

4.1 This chapter considers Schedule 2, Cross-media Rules, of the Broadcasting Services Amendment (Media Ownership) Bill 2002.

Diversity and ownership concentration

4.2 The Committee heard conflicting argument about the effects of the proposed changes to the cross-media rules on ownership concentration and diversity of information and opinions. The Australian Press Council argued that no single newspaper or news agency could report the views of the many different individuals and interest groups in society. It considered it was essential that 'sufficient and sufficiently diverse sources of news and comment [were available] to ensure that members of the public [were] always promptly and well enough informed to make their own judgments about governance, regulation, sport, entertainment or other matters'. It considered the key issue for media ownership policy was:

> Access by all Australians to full, truthful, unbiased information about world and domestic events and to a pluralist range of opinions and commentary about those matters from an Australian perspective.[1]

4.3 Some submitters held a view that the Australian media industry was already heavily concentrated and that any further diminution would seriously weaken the possibilities for dissemination of alternative views and information:

> Ownership in the current Australian media marketplace is already highly concentrated. The current cross-media rules can be seen as legitimising Australia's current state of media concentration as much as providing any appreciable diversity guarantee. Further concentration is perilously close and the rules are the single thing standing against this. They serve as an important if flawed benchmark below which Australia cannot be allowed to dip, simply to serve the short term commercial interests of the current set of owners. We are not persuaded that Australia can safely rely on the provisions of this Bill to guarantee current levels of choice and diversity in broadcast media for consumers, let alone set the stage for any improvement.[2]

4.4 However, A.T. Kearney's analysis of the possible impact of relaxing the cross-media rules found that both content quality and diversity would increase under the proposed changes:

> Our analysis demonstrates that current media ownership restrictions are neither relevant nor necessary to ensure diversity of views and quality local content. In fact, there is a strong argument to say that both these elements will increase if Australian media companies are allowed to expand their operations….In particular,

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1 Australian Press Council, *Submission 3*, p. 2

2 Australian Consumers' Association, *Submission 26*, p. 7

> competitive market forces and other existing safeguards (like the ACCC, FIRB and the ABA) and government provided services (ABC and SBS) will ensure that concerns about lack of diversity in opinion and coverage do not occur. [3]

4.5 Further, A.T.Kearney found that, even in the extreme case of consolidation of ownership into a single company of the dominant newspaper, television and radio groups currently owned by News Limited, Publishing and Broadcasting Limited (PBL) and Austereo, the estimated relative influence of such a company, as measured by the market share of national metropolitan consumption of daily news would, when averaged, be relatively unchanged. Moreover, such a scenario would also see the maintenance of at least three other major media groups, in addition to the national broadcasters, and the percentage reach likely to be achieved by the consolidated company would still be significantly less than the total of that achieved by all other companies. Appendix 5 illustrates this comparison.

Discussion of general issues

4.6 The Committee heard conflicting views on the issue of quality versus quantity. Grant Broadcasters considered that, while it seemed clear that the Bill would result in mergers in order to gain synergy benefits, there would likely be loss of quality in product with 'only assertions as to benefits for the public in the form of diversity and improved quality.'[4]

4.7 On the other hand, Mr Fred Hilmer, Chief Executive Officer of John Fairfax Holdings Ltd, argued persuasively that the proposed reforms would benefit consumers by providing the opportunity for media organisations to gain the critical mass necessary to develop high quality products covering a diverse range of views and content. He argued that diversity was not the sole criterion of good policy, but that the correct criteria were quality and diversity:

> Diversity without quality is meaningless. Without quality players and players able to provide content of depth, to investigate and to follow up, and the strength to weather what are often quite difficult cyclical times in our industry, our ability to discharge our responsibilities is compromised…..it is the web site with the resources and the scale that have continued and are now making a qualitative difference and can contribute to meaningful diversity.[5]

4.8 PBL also argued that the Bill would provide opportunities for Australian companies to access the capital and expertise needed to allow the development of a wide range of quality products:

> ….the hidden cost of the cross-media rules has perpetuated systemic disadvantages of scale and scope vis a vis international competitors. Theoretically a media company can gain financial scale by diversification into non-media/entertainment businesses. However, domestic and global capital markets tend to discourage diversification into non-related industries…

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3 A.T. Kearney, Executive Summary *Media Ownership Restrictions in Australia: The Case for Change*, May 2002, p. 3

4 ibid

5 *Evidence*, 22 May 2002, p. 93

> On the other hand foreign players who enter the Australian media market do so from a base of success in their country of origin, bringing with them scale and scope advantages. Both USA and EU companies have the advantage of huge audiences they are able to tap into at home to build their revenue base. In contrast, with Australia's relatively small population, the potential audience and hence revenue base is limited.[6]

4.9 PBL further referred to the legislation of broadcasting licensing and a strong tradition of journalistic independence as drivers of quality and diversity:

> …in Australia the quality and fairness of media including news and information programming is assured through the impact of consumer demand on media company revenues, the regulation of broadcasters and in the case of both licensed and unlicensed media, the need to attract the best creators of content who demand creative independence.
>
> The overriding impact of these three forces on the behaviour of media companies is sometimes confused by industry observers, either by the conduct of not-for profit media organisations or the tradition of the Editorial Column, which reflects the views of the proprietor or management on a particular subject, in unlicensed media such as newspapers and magazines. Views and opinions would be at least as varied and diverse as they are now.[7]

4.10 The Committee considered whether there might be limits to diversity. Mr Hilmer questioned the notion that quantity in terms of diversity meant quality. He argued that Australia's demographic profile could not support as many media organisations as other more populous countries. But he also considered that, while the Bill might lead to some consolidation within the industry, the outcome would be a competitive market comprising at least three or four commercial owners and the national broadcasters. He noted that, in classical economic theory, three or more operators constituted a competitive market:

> Four major companies are probably all we can afford in my judgment. I think the experience we have had in the last year or so with Ansett and the experience we are going through with telecommunications shows that, in a country our size, there is a limit to what you can afford in terms of sustainable competition. We are going to have four major players and a number of regional players and niche players. These are going to be stronger companies, better able to fulfil their charter in terms of quality and diversity.[8]

4.11 The Seven Network took a position in support of the repeal of the cross-media rules in favour of regulation under general competition law because of the inflexibility of the rules and their impact on the potential for development of new high quality services:

> In Seven's view, competition law provides the most appropriate vehicle to address the changing nature of the media landscape and to deliver diversity of ownership and opinion. This approach would address the phenomenon of convergence and strategic behaviour across traditional market sectors, deliver a healthy competitive environment in the wider media market and obviate the need to retain the cross-media rules contained in the *Broadcasting Services Act*.[9]

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6 Publishing and Broadcasting Limited, *Submission 12*, p. 7

7 Publishing and Broadcasting Limited, *Submission 12*, p. 6

8 *Evidence*, 22 May 2002, p. 94

9 Seven Network, *Submission 14*, p. 5

4.12 Network Ten also supported repeal of the rules on the grounds that they impede efficiency and competition in business:

> Network Ten supports the proposed changes to cross-media ownership rules as they will increase efficiency within the Australian media. The Australian media is one of the few remaining industry sectors within Australia with a high degree of structural regulation. This impedes the aggregation of capital and non-editorial management skills across different sectors of the media.
>
> At present each media organisation operates separately from other organisations serving the same area. The Bill, if enacted, offers the opportunity to reduce this duplication, while maintaining editorial independence….This may occur through cross-media acquisitions, but could also arise through joint ventures, strategic partnerships and other arrangements.[10]

4.13 Network Ten also argued that Australia's leadership in the media sector will not be maintained in the present converging environment unless Australian companies are able to take advantage of economies of scale and scope to allow them to compete globally:

> Australia is regarded as a leader in the media sector, due to its technological development, the high quality of its content and outstanding production, technical and management skills. However, it will be increasingly difficult for Australian media to keep abreast of global developments, unless its media companies can aggregate skills across a range of media sectors.
>
> A relaxation of cross-media rules will assist Australian media organisations to compete in an increasingly global environment. Global media organisations operate in far larger markets and are much greater in scale, than their Australian counterparts (noting in this context that News Corporation is a foreign entity for the purposes of the *Broadcasting Services Act*). Many of these organisations are developing multiple capabilities to take advantage of technological change and emerging audience demand. Australian media companies need to develop similar strategies to ensure their relevance in the future. These strategies will depend on the aggregation of a range of skills drawn from across all media. In addition, Australian companies need to be of sufficient size to fund the investment required to implement these strategies.[11]

4.14 The Committee heard argument about the possible development of synergies between different media operations from a range of submitters.

4.15 Mr Hilmer claimed that a range of synergies would be possible under cross-media ownership and that these would lead to more competitive and better quality products:

> There are a number of operating synergies; some of these are backroom, but they are important.….There are a number of synergies in terms of content….And there are also a number of potential synergies with respect to branding…And all of those become possible with the right kind of mergers….when you have the ability to get onto more platforms and the ability to have more competition for getting onto those platforms, you get better quality.[12]

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10 Network Ten, *Submission 8*, p. 4

11 ibid, p. 5

12 *Evidence*, 22 May 2002, p. 95

4.16 On the other hand, the Media, Entertainment and Arts Alliance (MEAA) claimed that international experience suggested few synergies existed between the three traditional media and that their news cultures were not compatible other than for cross promotion.[13]

4.17 This highlights that editorial separation tends to occur naturally because of the different nature of television, radio and the press. As PBL stressed in its submission:

> For example, the process of producing a daily newspaper and a television news service are quite different. A newspaper will contain dozens of articles of varying depth covering a vast array of issues and a television news service is a half hour (or an hour) mainly visual service highlighting the headline issues of the day in less detail. These different forms of media require different expertise and skills to create successfully.[14]

4.18 Similarly, Fairfax submitted that:

> In any diversified media company, there already exists a degree of editorial separation among their publications or television or radio programs. The commercial imperatives of a successful business require that each publication be geared to a specific audience, which in turn requires a separate and specific editorial focus for that audience and market. This is doubly true for any proposal to merge companies in different media, such as a newspaper and television company. There are profound differences - time of day, size of audience, demographic of audience, print versus media - between the lead item on the 6:00 PM television bulletin and the page 1 scoop in the next morning's *Sydney Morning Herald*. The differences are similarly stark in any merger of a newspaper group and radio chain.[15]

4.19 The difficulties and risks associated with developing regulatory initiatives for the future was also an issue in a range of evidence. Mr Foster of the Australian Association of Independent Regional Radio Broadcasters (IRB) referred to both the volatile nature of radio in terms of technology, and the volatility of the media industry in terms of ownership:

> ..broadcasting is a very volatile industry where ownership changes can occur very quickly and on a large scale. A good example of that is the genesis of the DMG network. It is a very substantial network. It came into being almost overnight by a single purchase from Rural Press—50-odd stations in one hit.[16]

4.20 Mr Hilmer considered that the future in terms of delivery platforms could not be predicted but that to allow 'more content in more places and more ways in the future', media companies needed to be strong enough financially to invest and take risks.[17]

4.21 A number of smaller media operators also supported the changes to the cross-media rules. While opposed to the localism requirements of the Bill as being unsustainable in regional markets, Southern Cross Broadcasting considered that relaxation of the rules could

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13 Media Entertainment and Arts Alliance, *Submission 11*, pp. 4-5

14 PBL, *Submission 12*, p. 5

15 Fairfax, *Submission 18*, p. 6

16 *Evidence*, 22 May 2002, p. 86

17 *Evidence*, 22 May 2002, p. 102

assist the viability of services in 'lean markets' in addition to providing the possibility of opportunities for expansion:

> Operators face quite different cost and revenue problems in those markets. They will approach cross-media expansion not so much in terms of technological convergence or as a step towards international expansion, but simply as a way of improving the viability of their services.
>
> Cross-media expansion can be expected to produce economic benefits, but the potential benefits should not be exaggerated. An operator may be able to reduce some operational costs, market itself more effectively, and achieve an improved revenue share, but this will not transform the difficult economics of small regional markets. [18]

4.22 Mr Peter Harvie, Executive Chairman of Austereo Group Limited, referred to the possibility that only the best example of a particular type of service, for example, a news service, might survive in a particular market. At the same time, he considered that there would be demand for a broad range of services, both popular and quality, resulting from both technology and advertiser-driven demands:

> Obviously in the end it is like programming: excellence of product will win. If the news package is done well and excellently, regardless of whether it is online or SMS or whether it is newspaper, radio or whatever, there will be a devolution to the best presented services.[19]

Competition regulation and the provision of a broad based public interest test

4.23 Improving competition in the media sector is a key objective of the amendments proposed in the Bill.

4.24 Much of the evidence put to the Committee concerned the critical importance of increasing, or at least maintaining at present levels, Australian content and diversity in information and opinions available through the media. This was considered fundamental to a well-functioning democracy because of the special nature of the media industry and its ability to influence public opinion:

> Almost all governments, regulators, community representatives and industry participants recognise that the media is different from other industries and markets. There is widespread recognition that a well-functioning democracy depends on the availability of a range of independent sources of information, views and opinions – that is, diversity is desirable.[20]

4.25 Dr Julian Thomas from Swinburne University of Technology noted that different countries recognised the importance of media diversity in different ways in their communications law and policy:

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18 Southern Cross Broadcasting, *Submission 25*, p. 4

19 *Evidence*, 22 May 2002, pp. 120

20 Communications Law Centre, *Submission 15*, p. 6

> In the United States, the key term is 'the market place for ideas', encapsulated in the jurist Oliver Wendell Holmes' 1919 dictum that 'the ultimate good is better reached by free trade in ideas'. The term diversity in the US policy context often refers to the representation of different demographic groups in media production and content. In Europe, the notion of pluralism is a touchstone, embracing not only access to a variety of points of view but also diversity in content, and the representation of different geographical regions.[21]

4.26 Many submitters considered that this could only be achieved through plurality of ownership but others, including John Fairfax Holdings Ltd, considered that plurality of ownership by itself was not enough to ensure diversity.

> These responsibilities are often expressed in terms of the provision of a diversity of views. However, sheer numbers of providers of marginal or indifferent quality will not fulfil the role media can and should play.
>
> Media deregulation therefore must serve the interest of real diversity: enhancement in the quality of media services and content.[22]

4.27 The Explanatory Memorandum acknowledged the findings of the Productivity Commission's *Broadcasting* Inquiry Report 2000 that 'the current provisions of the *Trade Practices Act 1974* (TPA) were not adequate to address the public interest considerations associated with media mergers because trade practices law does not provide for a single market nor could it readily address the issue of diversity of sources of news and opinion.'[23]

4.28 The Explanatory Memorandum pointed to the difficulties of measuring diversity and plurality related parameters and the potential for subjective regulatory judgement, industry uncertainty and lack of public confidence in the 'objectivity and efficacy' of such a scheme. It proposed instead the granting of exemption certificates on the basis of specific conditions relating to editorial decision-making and levels of local news and current affairs, as more objective because of its basis in relatively straightforward criteria and clear guidelines for compliance[24].

4.29 Many submitters referred to this aspect of the Bill, opposing the proposed exemption certificate process to be administered by the ABA, in favour of regulation under the TPA by the competition regulator, the ACCC.

4.30 Several submitters questioned the effectiveness of the ABA in being able to administer the rules, due to both difficulties in interpreting the Bill's requirements and possible resourcing issues. The IRB argued that the 'tortuous' nature of the exemption certificate process clearly indicated the inherent risks in relaxing the cross-media rules:

> The exemption-based "solution" offered by the Bill is a tacit acknowledgment that there are inherent risks in relaxing cross-media ownership restrictions….The

21 Dr Julian Thomas, *Submission 34*, p. 2

22 John Fairfax Holdings Limited, *Submission 18*, p. 2

23 Explanatory Memorandum, p. 16

24 Explanatory Memorandum, p. 17

> likelihood is that the process will fail and that proprietorial influence will result in a reduction of diversity where media are under common ownership.[25]

4.31 Professor David Flint, Chairman of the ABA, advised the Committee that the ABA would consider applications for exemption certificates on the basis of the facts provided.

> The duties which the bill gives are essentially questions of fact: whether, for example, there is a sufficient degree of editorial separation as set out in the legislation; whether, for example, there is the maintenance of local news to the degree required. These are questions of fact and this is a matter which would have to be established by the authority.[26]

4.32 In response to questions concerning the practicality of determining whether breaches of conditions had occurred, Professor Flint's view was that the Bill provided enough detail to be workable. He considered, for example, that editorial direction by a proprietor, if proven, would constitute a breach of the editorial separation provisions.

> As I understand it, there must be a separation which requires—which implies, certainly—that the actual selection is in the hands of professionals who would determine what is to be compiled, what interpretation is to be put on it and what selection is to be made. That, I would think, would negate the idea of having these separate processes, and I am sure one would hear from those people if an attempt was made to do that.[27]

4.33 Regarding compliance and enforcement, Professor Flint advised the Committee that the ABA had a range of options available to it for investigating complaints, and that the Board would consider any matter in relation to ownership and control as 'serious'.

> If there were a complaint which we upheld we would give a notice of a breach and a notice to comply with the breach. If the broadcaster were recalcitrant in that regard we would follow the processes in the act—we would inform the DPP, for example, if there were a continuing breach of the condition. We could, for example, suspend or remove the licence. This would be a serious matter. The board has taken the view that matters relating to ownership and control are, in the intention of parliament, serious matters, even in relation to the temporary breaches which we permit under section 67, and that the board should pursue those—notwithstanding our personal opinions about the law—and take whatever remedies are necessary to ensure that the law, as it stands now, is enforced.[28]

4.34 However, Network Ten considered that, in practice, the threat of a breach of the proposed conditions was low and that the ABA was an appropriate body to administer them.

> Network Ten submits that the proposed Bill offers appropriate safeguards to ensure editorial integrity between cross-media holdings. Regulation of editorial integrity will be a more targeted means of ensuring a diverse range of opinions in the Australian media than the existing cross-media ownership provisions.

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25 Australian Association of Independent Regional Radio Broadcasters, *Submission 2*, p. 3

26 *Evidence*, 22 May 2002, p. 130

27 *Evidence*, 22 May 2002, p. 131

28 *Evidence*, 22 May 2002, p. 133

> The specific regime for regulation of the level of news and current affairs produced by cross-media entities in regional markets is appropriate, given that these markets lack the scale, diversity and degree of media competition found in the larger metropolitan markets.
>
> The Australian Broadcasting Authority has an appropriate role, of receiving and monitoring cross-media undertakings. It has wide investigative and enforcement powers, which are available if necessary. In practice, the prospect of any breach of a cross-media undertaking is low, given the level of public interest in and scrutiny of the media. A breach of an undertaking giving rise to a lack of diversity of news and current affairs reporting will be obvious. Further, commercial broadcasting licences are valuable assets which are unlikely to be put at risk by their owners. There is a strong record of compliance by the broadcasting industry with content-related licence conditions.[29]

4.35 The Communications Law Centre (the CLC) also questioned the transparency of the exemption process and argued that the public interest should come before commercial interests. It noted that subsection 61N(5) allowed for non-public disclosure of particulars of active cross-media exemption certificates, including undertakings regarding editorial separation, on the grounds that the information provided was 'commercial in confidence'.

> Effectively, whether or not such materials are to be made available for public inspection hinges on whether the 'commercial interests' of a person could reasonably be expected to be prejudiced, and that this prejudice outweighs the public interest in publishing that material. Thus, despite several references to the vital role of the media in maintaining Australia's cultural, creative, and democratic welfare, the emphasis of the Bill is clearly tipped towards the commercial interests of owners.
>
> These provisions for information to kept commercial in confidence are of particular concern given the lack of opportunities for public input into major decisions on media mergers.[30]

4.36 PBL, however, supported the provision.

> The conditions to which a cross-media exemption certificate will be subject may need to detail commercial–in–confidence information (going to the heart of how the relevant media organisations operate), and therefore it is appropriate that the ABA be given the right to withhold certain material from public inspection in certain circumstances. It is noted that this kind of provision is consistent with paragraph 179(3)(a) of the Act, which provides that the ABA is not required to publish or disclose a report of investigation, where such publication or disclosure would disclose matter of a confidential character.[31]

4.37 On this point, Mr Giles Tanner, ABA General Manager, advised the Committee about the process for publicising the ABA's findings in relation to complaints. He also noted that the findings that would be susceptible to challenge under the Administrative Decisions (Judicial Review) Act.

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29 Network Ten, *Submission 8*, p. 5

30 Communications Law Centre, *Submission 15*, p. 19

31 Publishing and Broadcasting Limited, *Submission 12*, p. 17

> The bill would amend section 149 of the legislation, and the ABA would have to make the results of the investigation available for inspection on the Internet. So I would expect some type of report on the ABA's findings and conclusions. There is a qualification then in a new proposed subsection (5) to section 149 if:
>
> (a) publication of the results could reasonably be expected to prejudice substantially the commercial interests of a person; and
>
> (b) the prejudice outweighs the public interest in the publication of the results.
>
> So there is a fairly high test there, and clearly there is a very strong emphasis on transparency.[32]

4.38 Several submitters argued that the exemption certificate process was not a true public interest test and that the media industry should be treated in the same way as other areas of the economy, that is, regulated under competition law by the ACCC. There was agreement that this would require amendment to the TPA for the reasons noted by the Productivity Commission. The Australian Press Council submitted that:

> the proper ownership regulator should be the Australian Competition and Consumer Commission (ACCC) using existing legislation supplemented by a media-specific public interest test, developed in consultation with relevant stakeholders, and by changes that ensure the media is regarded as a single market for the purposes of mergers and acquisitions.
>
> Thus, it is the Council's view that judgments on substantial lessening of competition should be made on the basis of impact, circulation and penetration, considering the media as a single market.[33]

4.39 The CLC considered that editorial separation was only one component of a media-specific public interest test and opposed removal of the cross-media rules until a 'genuine workable media-specific public interest test' were developed:

> Editorial separation represents only one optional element in a media-specific public interest test; alone it is not adequate or sufficient to serve as a public interest test that would replace the cross-media rules.
>
> The scheme for editorial separation does nothing to address the question of influence of ownership on editorial matters *within* any given organisation; it is an inadequate means of addressing the spread of corporate culture *across* media holdings.
>
> The mechanisms for achieving editorial separation set out in this Bill are flawed and would in effect serve as a de facto means of achieving the repeal of the cross-media rules without any real substitute to safeguard the public interest.
>
> Until such time as there is a genuine exploration of the components and scope of an effective media-specific public interest test, diversity of ownership achieved via the

32 *Evidence*, 22 May 2002, p. 133

33 The Australian Press Council, *Submission 3*, p. 1

> cross-media rules is the best available mechanism for preserving the public interest.[34]

The ACCC's view

4.40 The submission from the ACCC noted the suitability of the TPA to industries such as the media industry:

> The TPA seems to be a particularly suitable piece of legislation to apply to this sector of the economy. It is based on very sound and enduring principles, is general in character and capable of adaptation to changing circumstances. As convergence occurs between industries, the TPA provides a set of principles that can respond to the fast evolution of the industries, and that are capable of adapting to changing market boundaries, new technology and globalisation.[35]

4.41 However, the submission also made it clear that there were difficulties associated with reliance on the TPA alone, since, at present, the ACCC regarded the three traditional media as operating in separate markets:

> However, there may be problems with relying entirely on the provisions of the TPA to ensure that government's social as well as economic objectives are achieved. In the absence of cross-media ownership laws, the merger and acquisition provisions of the TPA may not prevent the consolidation of different media interests which fall within separate markets. In applying the TPA to competition in the media generally, it has been the Commission's approach in the past that print and electronic media operate in separate markets following the application of market definition principles. For example, while cross-media ownership rules may prevent a television operator from acquiring certain newspaper interests, it would appear *prima facie* that the TPA would be unlikely to prevent such an acquisition.[36]

4.42 Elaborating on this in evidence to the Committee, Professor Allan Fels, ACCC Chairman, emphasised that the ACCC considered all applications at the time at which they were received, and that changed circumstances had sometimes led to changed views of what constituted a market. However, he pointed to similar views internationally regarding separate markets for the traditional media businesses and that this was likely to remain the view of the ACCC for some time:

> That view, incidentally, is one which has been shared by competition regulators around the world. I cannot think of any who have taken a different view and I know of quite a number who have taken the same view…. We would not want them to think that, if you applied the Trade Practices Act alone to mergers in the media sector, it would be highly likely that the act could be used to block major mergers between major players in different forms of media….There is a fair bit of evidence from industry, if it is pushed and if questions are put to it fairly sharply, that it sees them as separate markets.[37]

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34 Communications Law Centre, *Submission 15*, pp. 2-3

35 Australian Competition and Consumer Commission, *Submission 33*, p. 2

36 ibid

37 *Evidence*, 22 May 2002, p. 122

and

> Supposing you had a very large number of free-to-air channels or digitised free-to-air and each of them did multichannelling, then pay television would not look terribly different. We would probably say that is one market. So the changing world has the potential to affect the views that we would take. Over the next five or seven years, on most scenarios, my assumption would be we will continue to see newspapers, television and radio continuing to be separate in economic terms.[38]

4.43 While acknowledging that the ACCC's principal role was limited to ensuring competition in a single market, Professor Fels referred to its contribution to ensuring diversity within any one media market. While noting that the ACCC was not required to consider the 'marketplace for ideas', he referred to its role regarding 'authorisations' that required broad judgements in the public interest:

> …our principal focus is competition. I would not want to detract from the force of that point. But there is another point to make the other way: the commission has this other job of so-called adjudication, where we authorise practices. If the dairy farmers come to us and say, 'We want to have a price-fixing agreement,' or something, we say, 'You can't have it under the competition part of the act but you can apply for an authorisation.' Then we have to make a broad judgment: is this in the public interest?
>
> Recently we have been considering some anticompetitive arrangements within industry that would actually help promote greater safety. We have agreed to them in the past. We are very likely to agree to them again. So quite often we do get caught up in making decisions about public interest versus competition. We are not inexpert at the matter, and our decisions can be appealed.[39]

4.44 Professor Fels reiterated the ACCC's view that the media industry should continue to be subject, first and foremost, to general competition policy under the TPA. He emphasised that the very general wording of the Act allowed it to cope with change, and therefore with industries undergoing convergence, very well:

> The commission's main point is really to say that, whatever happens about the cross-media laws, the present provisions of the Trade Practices Act should, in our view, continue to apply in full. If there is to be some additional test about cross-media, then we do not have a particular view on that, other than it should in no way replace any of the tests under the Trade Practices Act…..

and

> The act does have a great deal of flexibility and ability to accommodate change. In some ways it contrasts quite sharply with the cross-media ownership rules. Those rules were set at a certain point in history; certain rules were set about what percentage of ownership people could have in different forms of media and so on, and as time has gone on it is possible that people have found ways around those rigid rules and also that the rigid rules may not remain quite as suitable as

38 *Evidence*, 22 May 2002, p. 124

39 *Evidence*, 22 May 2002, p. 125

> circumstances change.… From the competition point of view, the act is written fairly well to deal with the effects of convergence.[40]

4.45 Professor Fels also put the view that a media-specific public interest test could function under either the ACCC or the BSA. While the ACCC did not consider it appropriate to make a recommendation as to the placement of a public interest test, it considered that a more general test would reside more easily under general competition policy than a more detailed and technical test requiring specialist knowledge. In that case, the ABA or another body with the knowledge and experience of administering technical aspects of the media might be more appropriate as the administrator:

> The reason we have not really taken a stand on it is that we regard these questions about cross-ownership as being basically policy questions that are outside the strict area of competition law. Also, questions about which institution is best fitted to do it probably also require a broader judgment.
>
> As another point, I could venture the suggestion that, if the cross-media laws have very specific and technical aspects to them, they may be more suitable for the ABA. If the rules that are being proposed about editorial independence and separation of the editorial function and so on came into force, we could deal with them in the end, I am sure, but that is more in the ABA's field. The ABA would bring more immediate expertise to it. Likewise, the rules about regional news more naturally fit the ABA. If there started to be questions which were of broader public interest, then, as I have said, you can argue about which of the two agencies should do it—there are arguments for and against on both sides. It depends a bit on the test that is applied.[41]

Conclusion – a broad based public interest test

4.46 In considering the need for a broad based media specific public interest test to be administered by the ACCC, the Committee posed the question of what such a test would, if introduced, seek to achieve. The Committee concluded that such a test would firstly need to maintain diversity of ownership and opinion in the media as well as preserve Australian content at levels acceptable to the community.

4.47 Having established these objectives, consideration was then given to what the situation in the media would be if this Bill becomes law, and whether or not there was any specific threat to the protection of the public interest in terms of these objectives.

4.48 Since, in addition to the editorial separation rules the concentration rules will remain in place, as will those requirements pertaining to the minimum levels of Australian content, the Committee believes that the public interest will be satisfactorily protected in terms of diversity of opinion and ownership under the proposed Bill, as well as by the cultural objectives of the Australian content policy requirements.

4.49 In his evidence about the Canadian situation, Mr Stephen Kimber, Director of the School of Journalism at Canada's University of King's College, stated that various newspapers owned by the Asper family were required to run the same editorial across the country. CanWest clarified this statement in its submission saying that: '[t]he national

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40 *Evidence*, 22 May 2002, pp. 121, 126-127

41 *Evidence*, 22 May 2002, p. 127-128

editorials run an average of once per week.'[42] The recent A.T. Kearney study into media ownership restrictions in Australia found that: 'Media companies promote diversity even within their own channels and products. Large media companies continually demonstrate diversity of opinion both across and within titles'.[43] As an example, the study cited the 2001 Federal election where:

> the Sydney Morning Herald had editorials positive and negative towards the Coalition and positive towards Labor, while The Age (another Fairfax paper) similarly had editorials both positive and negative towards Labor. The same pattern is seen in News Limited publications – The Daily Telegraph published editorials positive and negative towards the Coalition and negative towards Labor.[44]

4.50 The study further states that: 'Analysis of coverage of the 6 elections prior to 2001 also shows that there is no systematic bias across opinion sources with common ownership.'[45]

4.51 Given the views expressed above, the Committee believes that, in general terms, public interest is adequately protected without the involvement of the ACCC in an area which raises broad social concerns, not just competition concerns. In his evidence, Professor Fels stated that:

> Once you get into discussion about cross-media, you are talking about broader issues than economic competition issues; it relates to social sorts of issues, diversity and so on. It might be thought that the commission is too narrow in its focus to deal with that kind of thing.[46]

4.52 Professor Fels acknowledged that the ACCC's principal role was limited to ensuring competition in a single market, and that the ACCC regards the three traditional media as operating in separate markets, rather than a single media market. With convergence, the Committee is of the view that divisions between various forms of media will become increasingly irrelevant.

4.53 The Committee concludes that the public interest is protected by the editorial separation requirements administered by the ABA, the preservation of the concentration rules and the retention of the rules regarding Australian content, and that a broad media-specific public interest test is thus not required.

4.54 The Committee believes that it would further protect the public interest if there were a requirement that commercial interest should be disclosed in the context of any article or editorial comment where co-ownership exists under a cross-media exemption, when one co-owned media outlet made editorial comment about another in the same locality.

Recommendation 1: That where a media company has a cross-media exemption, it be required to disclose its relevant cross-media holding when it reports on issues or matters related to that holding (for example, where there is cross-promotion).

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42 CanWest Global Communications Corp, *Submission 39*, p. 7

43 A.T.Kearney report, Executive Summary, p. 6

44 A.T. Kearney report, Executive Summary, p. 6

45 A.T. Kearney report, Executive Summary, p. 7

46 *Evidence*, 22 May 2002, p. 121

Constitutional Challenge

4.55 The Friends of Fairfax raised the issue of a constitutional challenge to the Bill.

> Television, radio and telecommunications are regulated under the wireless and telegraphy power in the Constitution, and rules which touch on newspapers, such as cross media limits, are valid because they are inextricably linked to this head of power. The current legislation arguably goes much further than the cross media rules, which deal only with cross shareholdings, and attempts to regulate, in detail, the activities of newspapers. It will almost certainly be vulnerable to constitutional challenge, particularly if the ABA attempts to remedy a breach of editorial separation by directing a print organisation to comply with the exemption certificate. The exemption certificate will become a condition of the television or radio licence, but won't affect the newspaper. The High Court has found an implied constitutional right to freedom of expression on matters of political debate. This clearly covers the activities of newspapers and could be used as a further ground for attacking orders by the ABA.[47]

4.56 Ms Gail Hambly, General Counsel for John Fairfax Holdings Ltd, advised the Committee that, while there was a head of power in the constitution for application of section 62F to broadcasting, Fairfax considered that its application to the print media was in question. Fairfax could, therefore, not rule out a challenge to the Bill.

> While we would like to put this in a considered response, it is fair to say that a number of people are already discussing the constitutionality of section 62F particularly and whether or not there is power under the federal Constitution to deal with print media. Obviously, it is dealt with presently in the Broadcasting Services Act, but the Broadcasting Services Act presently touches very lightly on print media and considerable debate is going to develop, if this kind of legislation goes through in its present form, as to whether or not you can extend the light touch on print media necessary for the cross-media rules, through to a discussion on editorial principles and editorial structure in the print media.[48]

4.57 The general counsel for DCITA, Mr Don Markus, advised the Committee that, in the Department's view, the Bill was not open to constitutional challenge. Under the 'Postal, telegraphic, telephonic and other like services' Act, the Commonwealth was able to control the activities of a person in relation to broadcasting, and this could be by reference to matters that were not themselves related to broadcasting:

> we are satisfied that the legislation is within constitutional power….The essential basis of the legislation is the Commonwealth's legislative power with respect to communications. The provision in the Constitution says 'Postal, telegraphic, telephonic and other like services' and that has been held, over the years, to apply to broadcasting as well. So broadcasting is an activity that is directly within that subject matter of Commonwealth constitutional power. It has been held, I think back in the mid-sixties, in the High Court case under the name of Herald and Weekly Times that the Commonwealth's power to regulate the activity of broadcasting allows it to control the participation of a person in the activity of broadcasting and that control of that activity can be exercised by references to

47 Friends of Fairfax, *Submission 27*, p. 6

48 *Evidence*, 22 May 2002, p. 103

> considerations which are not themselves necessarily related to broadcasting. That is essentially the basis of the cross-media rules.

4.58 Mr Marcus further advised the Committee that the Bill was concerned with process rather than content in considering the separateness of editorial arrangements.

> it does in effect impose another requirement: that there be the necessary degree of separateness between the editorial arrangements for the electronic media and for the newspaper. In that sense, it still has a relationship to broadcasting. It is simply saying that the editorial arrangements for that broadcasting cannot be connected—to the extent that the act prohibits—to the newspaper. It is not really concerned with what the newspaper does or what the newspaper actually says. I do not see that there is any implied freedom of communication lost there either. It is just saying that they have to be separate. It is not really saying what the newspaper does or attempting to regulate in any other way the activity of that newspaper. It only operates to the extent that the newspaper's editorial arrangements impinge on the electronic media.[49]

4.59 The editorial separation requirements of the Bill are a response to concerns about diversity of information and opinion and the potential for proprietorial interference in editorial independence. The evidence has not been sufficiently compelling to convince the Committee that these provisions are an inappropriate response to these concerns. Furthermore, it is convinced that the ABA will act both responsibly and appropriately, with due discretion and sensitivity, in administering the editorial separation requirements. The Committee rejects absolutely the view that these requirements will be the 'thin edge of the wedge' in facilitating Government intrusion into the freedom of the media. The Commonwealth, of course, already has the power to regulate newspaper organisations under Corporations Law.

Conclusion – cross –media ownership regulation

4.60 The Committee has considered all the evidence put to it concerning cross-media ownership regulation.

4.61 The Committee has also considered the possible effects of the Bill, taking into account consideration of the existing provisions of the BSA relating to limits on audience reach and holdings of licences.

4.62 The Committee also notes that Australian content requirements and the rules on concentration of control in the media will remain in place.

4.63 In light of this, and considering all the arguments put to it, the Committee concludes that the actual impact of the changes proposed in the Bill to the regulation of cross-media ownership will not be great, given the likelihood that around eighty per cent of Australians will continue to have access to three commercial television channels plus the national broadcasters. There will continue to be a diversity of radio and press.

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49 *Evidence*, 22 May 2002, pp. 134-135

CHAPTER 5

REGIONAL CONSIDERATIONS

5.1 The Committee acknowledges the special difficulties faced by regional media organisations in providing print and broadcasting services to regional and rural Australia due to the small size of markets, the much higher service provision costs and the lower revenue available in regional markets.

Special characteristics of regions

5.2 There was a clear difference of opinion between regional media operators on the merits of the Bill's proposals to amend the cross-media ownership regulations. However, even amongst those who supported the proposals, most opposed the conditions under which exemption certificates could be granted on the basis that they had been developed in the context of metropolitan markets and were inappropriate for regional media markets.

5.3 The Australian Association of Independent Regional Radio Broadcasters (IRB) informed the Committee that there were important differences between regional and metropolitan media markets in terms of the media's role and distribution. It maintained that the Bill should take account of each market separately because of this. It emphasised the very large contribution made by regional media to regional communities in terms of community service, sponsorship and promotion of local affairs and causes. It argued that the media's importance to regional areas was therefore far greater than the simple provision of information and opinions and that its viability was critical to the maintenance of coherent and vibrant regional communities. It feared that the synergies and economies of scale that might flow from the Bill threatened the viability of regional media operations and would work against fostering community empowerment and localism in regional Australia.

5.4 Further, it argued for special consideration of regional markets because of the much more limited choice in terms of the number of media outlets in regional areas, and the far greater potential for a single person or company to control the majority of the mainstream media and therefore influence public opinion in those markets. It also disagreed with the premise that convergence and the continuing increase in new media services would increase opportunities for local content to be provided in regional areas. It argued that the only websites offering local news were those of the existing media and that local news and information was unlikely to be the focus of new media services.

Definition of a region

5.5 The Committee considered that the definition of a region was important to an understanding of the Bill's requirements for the provision of local news and information in non-metropolitan areas. New Section 61B defines a regional licence area as an area 'which is outside the mainland state capitals'. New Subsection 61S(1) provides that the definition of 'local', the area to which minimum service standards for local news and information must be supplied, may be defined by the ABA. The Explanatory Memorandum suggests that, for

aggregated television markets, areas where separate programming (particularly separate advertising) is provided may be a guide to the 'relevant local area.'[1]

5.6 The Seven Network referred to the fact that the Bill did not require the ABA to take the commercial viability of services into account in imposing conditions relating to local news content, although this had been required in granting news licences to regional licence areas prior to aggregation. It argued that there was a need for more flexibility in the definition of 'local' and that the Bill's suggestion regarding aggregated markets was not practical. It also considered that the cost of maintaining regional news services was high and that the requirements for separate news services in regional areas would cause financial hardship, be unsustainable and may negate opportunities for cross-media expansion by regional licensees.

> The cost of establishing and maintaining news services in regional markets is formidable. The mainland aggregated markets each cover thousands of square miles, and cover a number of areas that were previously regulated as separate licence areas prior to aggregation. In many instances, these previously distinct licence areas are serviced by separate advertising content.
>
> Each mainland aggregated market's population is around the level of 1 million, but generates far less revenue than the smallest capital city market. By way of comparison, the metropolitan licence area of Adelaide services around 1.2million people.
>
> Therefore, the economics of providing separate news programming in each area where separate advertising is also provided is questionable. Such a requirement would be analogous to requiring metropolitan licensees to provide between five and seven separate news services in the Adelaide market. Clearly, the revenue per capita would be highly unlikely to justify the expense of providing a separate news service.[2]

5.7 Prime Television referred to the fact that news services in regional areas were 'doubly expensive commodities' because of the requirement for regional operators to pay a percentage of their advertising revenue to the networks. They agreed with the view that the different demographics and economics of regional and metropolitan areas dictated a different approach to the delivery of news and information to broadcasting areas.

> Regional broadcasters face relatively higher operating costs than metropolitan broadcasters (because we transmit over huge geographic areas to sparse populations). At the same time we compete for a much smaller portion of the advertising market. Television advertising in regional Australia is approximately $84 per head compared with $173 per head in the five major cities. (Revenue information sourced from the ABA Report: Broadcasting Financial Results 2000-2001)
>
> Regional broadcasters obtain the bulk of their programming through affiliation agreements with the city networks. These require the regionals to pay a percentage of all their advertising revenue to the networks. These percentage rates have jumped sharply in recent years, with regional stations having little or no bargaining power because there is no alternative source of supply. Affiliation fees even have to be paid on programs that the regional broadcasters produce themselves, so that local news is a doubly expensive commodity.

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1 Explanatory Memorandum, pp. 27, 34-36

2 Seven Network, *Submission 14*, pp. 7-8

> The proposed legislation does not include a requirement that the metropolitan stations be compelled to provide local news in order to qualify for a cross-media exemption. The obvious retort is that "they do so anyway". Prime contends that this is simply a reflection of the different economics. It is one thing to produce a news bulletin for an audience of several millions, but quite another to produce the same product when the audience is measured in thousands. No-one expects the Sydney television stations to produce different news bulletins every night for the eastern suburbs, then the inner-west, then the north shore, etc., even though those areas have populations much higher than in the towns serviced by Prime.[3]

5.8 The Committee heard evidence about the differing size of 'local areas' in terms of television stations, radio stations and local newspapers in the regions from a range of submitters. RG Capital Radio Ltd, WIN Television Network and Rural Press Ltd argued that relatively few aggregated sub-markets could support more than one local TV news service.

Rules for localism inequitable

5.9 Many submitters stated that the rules for 'localism' were inequitable and argued that the rules should apply consistently to all players, not on a case by case basis. Aside from the arguments noted above concerning the economics of producing local news services in regional areas, inequity was also claimed on the following grounds:

- that only holders of active exemption certificates were required to adhere to the requirements (Section 61U); and
- that the amount of local news and information required to be provided varied according to whether:
    - the exemption certificate holders were judged to have met 'minimum levels' for local news and information for the year prior to the application being made (requirement to continue to provide the 'existing' level of service) (Section 61V); or
    - whether exemption certificate holders were judged NOT to have met 'minimum levels' for local news and information for the year prior to the application being made (requirement to provide the 'minimum' level of service) (Section 61W).

5.10 Following the decision by Southern Cross Broadcasting and Prime Television to stop providing local television news in a significant number of regional markets, an ABA investigation into the adequacy of news on television in regional Australia was announced. This investigation is currently underway.

5.11 In recognition of the concerns that have been expressed that the local news and information requirements of the Bill are discriminatory, following the findings of the ABA investigation, it may be appropriate to extend the requirements to non cross-media exemption certificate holders in regional Australia, provided that the financial viability of regional broadcasters is not undermined. This measure would also have the distinction of acknowledging the demand that exists in regional areas for local news and information.

Recommendation 2: Following receipt of the ABA report into local news and information in regional Australia, the Government considers extending its requirement

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3 Prime Television Limited, *Submission 21*, p. 3

for the provision of local news and information to non cross-media exemption certificate holders in regional Australia. This should be done in a way that enables people in regional Australia to receive news and information about their local communities (including community service announcements), whilst ensuring that there is sufficient flexibility so as not to undermine the financial viability of regional broadcasters.

Separate policy levers for localism and regulation of cross-media ownership

5.12 Southern Cross Broadcasting urged the Committee to consider endorsing the Bill for regional areas (excluding the localism requirements) even if it recommended against implementing the Bill in metropolitan areas. It argued that separate legislation for regional markets existed in relation to other policy objectives and that there were 'cogent grounds for allowing sensibly conceived and regulated cross-media expansion in regional markets'.[4]

5.13 The Committee therefore believes that the Bill should be amended to permit co-ownership of only two of the three forms of media (that is, radio, television and newspapers) in a regional market. This would be an appropriate response to the different economics experienced by regional media, and recognises concerns about undue concentration of ownership in regional Australia. It would help to secure the financial viability of regional media, by allowing for enhanced economies of scale and a larger revenue base and therefore greater profitability. Larger scale regional media companies would also have a greater capability to maintain local content.

Recommendation 3: That the Bill be amended so that in regional markets, cross-media exemptions only be allowed in relation to proposals that could result in a media company having cross-ownership in only two of the three generic categories of newspapers, radio and television.

Incentives for localism

5.14 Elaborating on their view that the localism requirements were not a sensible response to concerns about the level of local news, Southern Cross Broadcasting argued instead for targeted incentives such as:

- abolition of 'punitive' licence fees on regional television (and radio); and
- targeted subsidies for localism (where licence fee relief would not provide enough incentive to encourage greater levels of localism).

> Over the past decade, the Government has rebated television licence fees for regional aggregation and for regional digital transmission, in acknowledgment of the burden licence fees impose on regional media. It should now remove regional television and radio licence fees altogether or at least rebate them for all expenditure on localism. [5]

5.15 The combined submission from RG Capital Radio Ltd, Rural Press Ltd and WIN Television Network Pty Ltd also argued for encouragement for the provision of local news

4 Southern Cross Broadcasting, *Submission 25*, p. 5

5 Southern Cross Broadcasting, *Submission 25*, p. 14

services through rebates against license fees and taxes for those who employ local people to provide and present news and information in regional and rural areas.[6]

5.16 WIN Corporation Pty Ltd urged the Committee to examine incentives such as 'television and radio licence fee rebates tied to the amount of local news, and perhaps also to the viewing levels it achieves.'[7]

5.17 The Committee has considered all the evidence put to it concerning the impact of the Bill on regional areas, and its requirements for local news and information services. It believes that the provision of incentives to regional media companies to encourage local content, such as licence fee rebates, would be an appropriate recognition of the higher operating costs and lower revenue base of regional media.

Recommendation 4: That the Government investigate the feasibility of providing appropriate incentives for regional media to provide local content, such as licence fee rebates.

Other issues

5.18 During its inquiry, the Committee received evidence on a range of other issues relating to the media industry. These included:

- digital broadcasting and terrestrial transmission infrastructure;
- datacasting;
- access considerations for new media products and services;
- information and suggestions regarding the appropriate number of broadcasting licences per area;
- ongoing negotiations regarding ownership and control of pay-television; and
- broadcasting rights to certain programs.

5.19 The Committee is aware that consideration is being given to a wide variety of issues including the above through a range of different processes and initiatives. It considered the focus of its inquiry to be that of media ownership and that it was not appropriate for it to comment on these or other issues in this report.

6 RG Capital Ltd, WIN Television Network Pty Ltd, Rural Press Ltd, *Submission 19*, p. 4

7 WIN Corporation Pty Ltd, *Submission 23*, p. 5

BROADCASTING SERVICES AMENDMENT (MEDIA OWNERSHIP) BILL 2002

DISSENTING REPORT BY ALP AND DEMOCRAT SENATORS

Cross-media ownership and convergence almost inevitably result in diminishing credibility and diluting quality, because media owners … see them primarily as ways to save money and extend their brand. Will cross-media ownership result in improved newspaper coverage; will it result in greater diversity of information? I do not believe that it will in either case. In fact, if we allow companies to buy up more and more media outlets, to transform independent newspapers, television stations and web sites into integrated multimedia platforms, and journalists into media content providers, we will ultimately create a situation in which there are so few alternatives that we will not even know when news stories are being distorted and we are being misled by our media.

—Dr Stephen Kimber in evidence to the Inquiry 21/5/02

Introduction

ALP and Democrat Senators believe that diversity of media content is inexorably linked to diversity of media ownership. Democrat and Labor Senators believe that the Australian media is already very concentrated, and that any further concentration of media ownership is not consistent with the plurality of information sources essential in a modern democratic political system.

The submissions and evidence presented to the Inquiry did not convince Labor and Democrat Senators that there is any public interest served by the dismantling of the cross-media ownership restrictions. In fact many submissions suggested there would be a significant increase in the concentration of media ownership in Australia which would not be in the public interest.

Democrat and Labor Senators believe that passage of this Bill would lead to a dramatic further concentration of ownership in the Australian media industry. A plausible outcome of the passage of this Bill is Australia ending up with as few as three main commercial media companies. This would not be in the public interest, as such a small number of commercial media players would not guarantee the plurality of voice and opinion so essential to a modern democracy.

Consequently, Labor and Democrat Senators find that they cannot agree with either the arguments or the recommendations contained in the Chair's Report.

The main beneficiaries of this Bill will be the major media corporations and their shareholders. Submissions to the Inquiry contained almost no support from members of the general public, staff associations or consumer groups. Almost all of the support for the Bill came from media proprietors only.

The cross-media rules provide a safeguard against further concentration of this already crowded environment. They have the considerable advantage of being certain, measurable

and enforceable. Without an alternative mechanism that is able to provide as effective a safeguard, the current rules cannot justifiably be removed. Whilst these laws may need to be reformed at some stage, this Bill represents a repeal of the cross-media laws rather than a reform and so should be opposed outright.

Dr Derek Wilding, Director of the Communications Law Centre (CLC), presented compelling evidence to the inquiry that he regarded the editorial separation provisions of the Bill as representing a de-facto repeal of the cross-media laws. These provisions do not represent a genuine public interest test.

It is of particular note that Recommendation 3 of the Chair's Report seeks to retain a version of the cross-media laws for regional media only. This recommendation seeks to create a new dual system of regulation in Australia for media ownership, and suggests a whole new set of problems that have not been properly considered. This recommendation appears to add enormous complications to the already complicated regulatory regime proposed in the Bill. This recommendation is also a tacit acknowledgement by the Coalition of both the enduring importance of cross-media ownership laws and the fact that the editorial separation test in this Bill will not prevent the likely abuses of overly concentrated media ownership.

This recommendation also acknowledges that there will be a further concentration of media ownership if the Bill is passed. Regional media companies will be the first to be swallowed up by major metropolitan media companies. Under the Bill as it stands, some regional towns could see their major newspaper, radio station and television station fall into the hands of one owner. This cannot be in the interests of regional Australians. Democrat and Labor Senators believe that if regional media warrants protection against media monoliths, so does the rest of Australia.

The Bill also contains provisions that would require some regional broadcasters to provide local news services. While Labor and Democrat Senators recognise these attempts by the Government to maintain local news services in regional Australia, the mechanism by which the Government proposes to achieve this in the Bill is an inconsistent and inequitable instrument that applies only to cross-media owners. Further, it pre-empts the findings of a thorough inquiry into the issue that is currently being conducted by the ABA. Recommendation 2 of the Chair's Report recognises these problems, but proposes an ad hoc solution that further complicates the mechanisms of the Bill. The more reasoned and sensible approach preferred by Democrat and Labor Senators is to recognise that regional news obligations are an entirely separate issue from cross-media ownership that require a separate solution.

Evidence presented to the inquiry overwhelmingly showed that ownership of media organisations is a critical factor in editorial decision-making, and that diversity of ownership is fundamental to delivering diversity, independence and quality in media content. Concentration of media ownership will inexorably lead to further concentration of media content as media companies seek to minimise their production costs by reducing staff and consolidating their news collection and editorial functions.

ALP and Democrat Senators believe that the profit-making imperative within a large media company seeking to maximise cost-effectiveness and other synergies would not be circumvented by the superficial and unworkable "editorial separation" regime that the Bill proposes.

Concentration of ownership

Democrat and Labor Senators agree with the view expressed to the Committee by a number of witnesses that the Australian media industry is already heavily concentrated and that any further diminution will seriously weaken the possibilities for dissemination of alternative views and information. As the Australian Consumers' Association (ACA) argued:

> Ownership in the current Australian media marketplace is already highly concentrated. The current cross-media rules can be seen as legitimising Australia's current state of media concentration as much as providing any appreciable diversity guarantee. Further concentration is perilously close and the rules are the single thing standing against this. They serve as an important if flawed benchmark below which Australia cannot be allowed to dip, simply to serve the short term commercial interests of the current set of owners. We are not persuaded that Australia can safely rely on the provisions of this Bill to guarantee current levels of choice and diversity in broadcast media for consumers, let alone set the stage for any improvement.[1]

Ownership of the Australian media is already highly concentrated. Two companies, News Limited and John Fairfax Holdings, control in excess of 80% of capital city newspapers.[2] Capital city radio markets are dominated by four companies—DMG Radio Australia, the Austereo Group, Southern Cross Broadcasting and the Australian Radio Network—while the majority of regional licence areas are served by only two radio stations, often owned by the same company.[3] There are three major commercial television networks—Seven, Nine and Ten—which dominate the capital city markets and provide content to regional markets via affiliates.[4] The subscription television market is divided between three services—Austar, FOXTEL and Optus Television—although subscribers are at best able to choose between two. FOXTEL and Optus are currently seeking a content-sharing arrangement that will significantly merge the content sides of their pay TV businesses.

The cross-media rules provide a safeguard against further concentration of this already crowded environment. Whilst these laws may need to be reformed at a future time they should not be repealed, which is the effect of this Bill. Cross media ownership laws have the considerable advantage of being certain, measurable and enforceable. Without an alternative mechanism that is able to provide as effective a safeguard, the current rules cannot justifiably be removed.

It is worth noting the claim made by John Fairfax Holdings that removal of the existing rules would not result in an unacceptable level of concentration. Fairfax correctly identify that the smallest possible number of commercial players that could result if the cross-media laws are removed is three—which is the greatest number of television broadcasting licences currently permitted. Combined with the ABC, Fairfax argue this would give Australia "four pillars" of media, each of which would be a large and heavily-resourced media company. Labor and Democrat Senators are not at all convinced by this, as it marks a considerable increase in concentration. This scenario completely ignores the threat to small and independent media companies in regional areas who already struggle to compete against the market power of major media networks.

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1 Australian Consumers' Association, *Submission 26*, p. 7

2 Communications Law Centre. *Communications Update, Issue 164*, April 2002, p.26.

3 Communications Law Centre. *Communications Update, Issue 164*, April 2002, pp.12–20.

4 Communications Law Centre. *Communications Update, Issue 164*, April 2002, pp.10-11.

Further, it is underpinned by the currently untenable assumption that there is a single media market, rather than separate newspaper, radio and television markets. While it is true that some media markets do overlap—the obvious example being free-to-air and subscription television, which share production commonalities and compete for viewers and some program rights—we are still a long way from the convergence of media markets into one.

New technologies

Democrat and Labor Senators reject the argument that new technologies are delivering greater diversity which makes the current cross-media restrictions redundant.

Several witnesses stated that the existence of new technologies as sources of news and current affairs were not yet evidence of greater diversity because of the dominance of existing media companies extends to these technologies. Dr Wilding, for example, argued that:

> [t]he competition that is offered by online services is no competition at all. The news services offered online are replications of the traditional media sources. They are great—the people in this room probably use them all the time—but they do not replace the traditional media sources, particularly when there are still a large number of people who do not have access to the Internet.[5]

ALP and Democrat Senators believe that reliance on arguments about new technology ignores the issue of content. Technology, new or traditional, is irrelevant in ensuring diversity if that content originates from the same one source. The major new technology used for information on news and current affairs is the Internet. However, market analysis shows the most popular websites are those operated by major media organisations such as PBL's ninemsn, Fairfax's F2 and the ABC's abc.net.au.

Dr Derek Wilding gave the following evidence:

> I would like to take a moment to repeat a comment from the Department of Trade and Industry and the Department for Culture, Media and Sport. They released a joint comment when this draft bill was released. I think it is significant for the process of transition that we are seeing in Australia, given that there is a consideration of an approach based upon either regulation on the basis of ownership or regulation on the basis of content. These two departments in the UK, in releasing these proposals, said that:
>
> For the time being legislation must address the present situation, where most people engage with the media in their traditional forms, and media ownership rules remain the best way of doing this. Competition law alone is not sufficient. It can address issues of concentration, efficiency and choice, but it cannot guarantee that a significant number of different media voices will continue to be heard, and it cannot address concerns over editorial freedom or community voice.[6]

Further, in spite of rapid growth, Internet accessibility and use is by no means as great as the traditional media. Accurate, current figures for internet access are notoriously difficult to obtain, but recent estimates suggest that as many as 50-55% of Australians have regular

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5 *Environment, Communications, Information Technology and the Arts Legislation Committee Hansard*, 21 May 2002, p. 6

6 *Environment, Communications, Information Technology and the Arts Legislation Committee Hansard*, 21 May 2002, p. 2

network access, a figure which compares unfavourably to the 99.8% population reach of television. Equally, it means that 45-50% of Australians do not have such access. A significantly greater number of people will have to acquire access to the Internet before it can be accurately described as a genuine competitor for traditional media.

A number of submissions pointed to the figures generated by a recent ABA inquiry into sources of news and current affairs, which reinforce this conclusion. The ABA study found that 87.5% of participants reported using television for news and current affairs, while 75.8% used the radio and 75.5% used newspapers. By comparison, only 22.8% of those participants reporting Internet access also reported using it to obtain news and current affairs. 45.3% of participants with access to pay television used it for news and current affairs.[7] These figures quite clearly indicate that, in spite of the arrival of new media forms such as the Internet, the traditional trio of television, radio and newspapers continue to be our dominant sources of news and information.

Democrat and Labor Senators believe that this evidence indicates clearly that Internet access in Australia is still immature. As such, it is a poor basis for removing the cross-media rules. A similar conclusion may be drawn about subscription television, which is currently used by fewer than 25% of Australian households.

Some commentators argue a case can be made for extending cross-media restrictions to cover additional media. The observation that the cross-media rules do not cover new media forms is no justification for their removal, as the Government believes. Some submissions suggested a response to the realisation that the current rules have insufficient scope might be to extend the rules to other media, such a pay television, magazines and the Internet,[8] rather than abandon them. However, consideration of possible reforms of the cross-media rules are outside of the scope of an inquiry into a Bill that seeks merely to eliminate those rules.

Media Diversity

Labor and Democrat Senators believe that diversity is about many different voices expressing different points of view about what has occurred in our social and political world, and what those events mean. Media diversity is not simply about the technology that delivers that content.

Democrat and Labor Senators believe that this plurality of voices and views is only effectively guaranteed by diversity of media ownership and control. While many owners of organisations with diverse media holdings are comfortable letting individual editors take decisions on the editorial stance of different publications, there are numerous instances of owners who are not. Five newspapers owned by the one company might have five separate editorial positions, or they might have one. Five newspapers with five separate owners will more likely have five separate editorial positions. It is for this reason that is vital to guarantee that Australians have access to a range of media content produced by different organisations.

A compelling example of the phenomenon of proprietorial intervention was described by Mr Stephen Kimber, a former columnist for the *Halifax Daily News*, a newspaper belonging to

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7 ABA. *Sources of News and Current Affairs*. 2001. ABA: Sydney, pp.325-6.

8 See, eg., Australian Consumers' Association. *Submission 26*, p.11.

the vast CanWest media organisation in Canada.[9] There are few, if any, media organisations in Australia that intervene in as extreme a fashion as Mr Kimber described. Nonetheless, proprietorial intervention and self-censorship are both known to occur. It is one of the great strengths of the cross-media rules that they maintain a level of diversity in spite of such behaviour by proprietors.

Numerous submissions and witnesses drew attention to the effectiveness of the cross-media rules in maintaining diversity. The Media, Entertainment and Arts Alliance (MEAA) opposed relaxation of the rules on the grounds that they had been successful to date in encouraging diversity and a greater number of owners. Referring to the trend in the United States for joint ventures and copy sharing, MEAA further disagreed with the view that the development of multimedia products was being impeded by structural separation between print and broadcasting.[10]

Several submissions claimed that the cross-media rules were more relevant now than at the time of their introduction as a safeguard of present levels of diversity of information and opinion. The ACA argued that:

> [t]here are many emerging opportunities for cross platform collaboration. Content lines can be blurred across media. However in our opinion, this simply increases the necessity of rules that mitigate the concentration of media ownership and control into fewer and fewer hands. The potential for concentration of new media in the hands of old media players is enormous. Underlying technologies changes offer additional opportunities for vertical and horizontal integration. In theory, technology lowers barriers to entry, however in practice the capital requirements to achieve critical mass for broad market acceptance remains as high as ever. This favours established players. The potential for market failure is high as content comes to share common digital origins.[11]

Many submissions urged the Committee to reject the Bill on the grounds that it would decrease the number of owners of Australian media organisations, and therefore diversity of information and opinions available to the Australian public. While there were differing views on the possible extent of ownership concentration, some, such as the MEAA, claimed that the existing rules had prevented the emergence of a duopoly in the media industry.

> The rules have ensured the existence of five major commercial forces in the media: three major print groups—plus two substantial regional groups—and three commercial television networks, with Mr Kerry Packer's Publishing and Broadcasting having interests in both print and television.
>
> If the cross media rules had not been introduced, the inevitable move toward networking in television and radio would have resulted in News Limited, which already controls over 60 per cent of the newspaper circulation, and PBL, emerging as the dominant duopoly in the industry, each controlling key broadcasting and newspaper properties across the country.[12]

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9 *Environment, Communications, Information Technology and the Arts Legislation Committee Hansard*, 21 May 2002, pp.40-42.

10 Media, Entertainment and Arts Alliance, *Submission 11*, p. 5

11 Australian Consumers' Association, *Submission 26*, p. 3

12 Media, Entertainment and Arts Alliance, *Submission 11*, p. 2

For regional towns, the prospect of less diversity is even more alarming. The IRB considered that control of the media in a small market was critical because the potential for public opinion to be influenced in a small market where there are relatively few media outlets was far greater than in metropolitan markets.[13]

Labor and Democrat Senators reject the analysis presented by Professor Hilmer which claimed that less diversity of ownership would lead to increased quality of journalism. This argument was based on the claim that there is a need for a critical mass of audience to make the expensive business of employing journalists more cost-effective.

However, Democrat and Labor Senators did not find this hypothesis convincing as they believe that quality journalism is not exclusive to large media companies but can also be found in small independent organisations. Besides which, Fairfax's own newspapers already are of a very high quality. News Corp's Melbourne *Herald Sun* is considered to be one of the world's best tabloid newspapers. Australian free-to-air television is considered amongst the world's best. Cross-media ownership restrictions have not prevented the development of top quality Australian media and journalism—the Fairfax argument that 'diversity without quality is meaningless' is a furphy. Further, Labor and Democrat Senators can see no reason to believe that the removal of the cross-media laws will guarantee an increase in the quality of news and information offerings. Fairfax suggested that the higher quality of journalism that characterises newspaper reporting might carry over into television news services associated with newspapers.[14] It is equally possible that the reverse may occur, with newspaper reporting being "dumbed down" in response to calls for cost cutting by television management.

Does the Bill serve the public interest?

Democrat and Labor Senators found that the only justification apparent for the changes proposed in this Bill were to serve the commercial interests of the major media companies who would have everything to gain under the new rules. Not surprisingly, the major media companies are also the biggest proponents of the Bill. The fact that this Bill serves their commercial interests at the cost of media diversity in Australia was clear from the evidence presented to the Committee.

Mr Kevin Blyton of the Australian Association of Independent Regional Radio Broadcasters (the IRB) claimed that the Bill would benefit large companies only.

> It seems to me that this bill benefits about 12 companies in Australia. It is about allowing them to grow. The only way that they can grow is to either increase their revenue or reduce their costs. The pie is only so big for advertising in Cooma, in Goulburn, in Bega or anywhere else. We work hard. We maximise that pie of advertising dollars. It is not going to increase because of the changes to this bill. The only way to achieve the economies that they want to achieve is to cut costs, and that has to be cutting staff.[15]

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13 Environment, Communications, Information Technology and the Arts Legislation Committee *Hansard*, 22 May 2002, p 86

14 Fairfax. *Submission 18*, p.4.

15 Environment, Communications, Information Technology and the Arts Legislation Committee *Hansard*, 22 May 2002, p. 88

Others opposed to the relaxation of the rules argued that concentration of ownership would confer a wide range of benefits to existing media operators including self-promotion opportunities, decreased competition for advertising and higher share prices.

> As media companies expand their commercial interests, it is increasingly tempting for them to use their media outlets for their commercial benefit. In the lead-up to the Sydney Olympics, News Ltd papers had exclusive access to Olympic news stories because they bought the rights to these stories as part of their Olympic sponsorship deal … Advertisers, readers, and all sections of society would suffer from a further reduction in media ownership and the inevitable further decline that this must bring to independent and competitive journalism in Australia. The only winners would be a handful of shareholders and media company proprietors who would inevitably benefit financially from a one-off share price rise.[16]

A number of independent regional broadcasters suggested that smaller companies would be considerably disadvantaged and under pressure to sell, since they lacked the capital to acquire further assets themselves.

Mr Stephen Everett of the IRB put this view to the Committee.

> Quite simply, a large conglomerate owning the newspaper and the television in our town could drive the advertising rate down to a point where we would go out of business or have to sell out. To them, it would be a tiny drop in the ocean. They could run that market at a loss for however long it takes to get our business to a point where it could not continue to operate. What would that cause us to do in the interim? We would start to cut back. We cannot increase the revenue—we would see a decline—so we would start to cut back to survive. That would be inevitable. I feel very strongly about that. Even now when things get tight, we say, 'The national market is a little tight at the moment,' and we resist cutting back and hang in there, because we know it is a cycle; it will come good again. But it would not be a cycle if a large player got in there; what would happen would be inevitable.[17]

Labor and Democrat Senators do not support allowing small and independent media companies to be made the takeover targets of the major media companies which they believe would be an inevitable result to the passage of this Bill.

Editorial Separation Regime

Democrat and Labor Senators find that the proposed Editorial Separation regime contained in this Bill will be ineffective in delivering its intended outcomes. The editorial separation provisions of the Bill cannot be described properly as representing a public interest test as they effectively only call on cross-media owned companies to provide basic information on editorial policy, processes and structures to the Australian Broadcasting Authority. They effectively represent a de-facto means of repealing the cross media ownership restrictions. Furthermore, they allow for an unwarranted level of Government intrusion into the editorial decision making of media companies.

Interestingly, there were almost no submissions to the inquiry that favoured the Bill's Editorial Separation regime. Even media proprietors otherwise supportive of the broad thrust

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16 Friends of Fairfax, *Submission 27*, p. 2

17 Environment, Communications, Information Technology and the Arts Legislation Committee *Hansard*, 22 May 2002, p. 89

of the legislation, such as News Limited and PBL,[18] found fault with some aspect of these provisions.

The Seven Network opposed the administratively cumbersome nature of the conditions and considered that they would result in obstacles to rather than encouragement of, synergies, with the opposite effect to that intended. In its view, the exemption process represented 'an unwarranted level of regulatory intervention in the media and would be ineffective in achieving plurality and diversity of sources and opinion.'[19] It referred to attempts to impose licence conditions requiring separation of functions in Canada. These actions had been criticised as resulting in an unwarranted level of regulatory intervention, as ineffective in achieving editorial independence and as acting as a fetter on free speech.

> At the board and news management level, conditions have been imposed which prevented directors of the "print" organisation sitting on the board of the "broadcasting" organisation. In addition, directors on the board of the "broadcasting" entity had to be people who had not had any involvement on the "print' board or other related entities.
>
> At the news management level, entities have been required to maintain separate news directors, executive producers, assignment editors, writers and reporters in each respective organisation.
>
> In the case of newsgathering, measures considered acceptable by the CRTC to achieve this aim have included a prohibition on exchange of information between journalists, editors and news managers of the print and broadcast operations, journalists not being permitted to transmit, receive, exchange or discuss any information by phone, fax, internet or other technology, and physical separation of newsrooms. With this approach, many of the economic efficiencies that may have been a key commercial driver for entering into print/broadcasting mergers, would not, of course, be forthcoming.[20]

Many submitters pointed to the impracticality of the conditions and the vagueness concerning its operation and monitoring.

> Seven also notes that there is some uncertainty of the practical effect of the proposed requirements. While exempted licensees are required to have separate news management and news compilation *processes*, the requirement in relation to news gathering and news interpretation is that there be a separate *capability*. It is not clear whether actual separation will be required in these areas or whether it would be sufficient to demonstrate that separation, although not actually implemented, would be a possibility if necessary in any given instance.[21]

The Australian Press Council also considered that there was a strong possibility that the three requirements would be unenforceable and meaningless.

> As a primary objective of any cross-media acquisition will be to reap the benefits of 'synergies', efforts to curtail cost cutting would be futile. There are so many

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18 See, for example, News Limited, Submission 17, pp.2-4; PBL, *Submission 12*, p.10-17.

19 Seven Network, *Submission 14*, p. 2

20 Seven Network, *Submission 14*, p. 6

21 ibid

> ways around the vague requirements of the Bill that in practice it will be inoperable.[22]

It also questioned whether undertakings, once entered into, would be kept.

> Most of all, if it turns out that a cross-media owner, after gaining an exemption certificate, pursues 'rationalisation' and is thought to be paying only lip service to the editorial independence rules, how will the ABA, in the inevitable litigation that would follow suspension or withdrawal of a certificate, prove that the withdrawal was justified?[23]

Many submitters questioned the effectiveness of the ABA in being able to administer the rules, due to both difficulties in interpreting the Bill's requirements and possible resourcing issues. The IRB argued that the 'tortuous' nature of the exemption certificate process clearly indicated the inherent risks in relaxing the cross-media rules:

> The exemption-based "solution" offered by the Bill is a tacit acknowledgment that there are inherent risks in relaxing cross-media ownership restrictions….The likelihood is that the process will fail and that proprietorial influence will result in a reduction of diversity where media are under common ownership.[24]

The CLC also addressed the fact that the requirement is only to demonstrate 'capabilities' in regard of editorial separation, rather than actually ensuring editorial separation:

> In practice, this would appear to operate in such a way that each distinct media operation—say the local paper and the local radio station—must have its own news management staff, its own compilation processes, and its own news gathering and news interpretation capabilities…
>
> In any event, this requirement for separate news gathering and interpretation (as opposed to management structure and compilation) is only a *capability* – it appears that the application of the capability does not need to be demonstrated in any individual case or story. Demonstrating the capability falls short of demonstrating certainty that editorial interests are not compromised by proprietary interests.[25]

Regional media organisations, such as Southern Cross Broadcasting, also objected to the editorial separation conditions on the grounds that they were economically unsustainable and:

> [i]n relation to 61F of the bill, dealing with editorial separation, the requirement for separate editorial news management should satisfy the government's objective. To insist on separate news gathering and compilation processes goes too far. The editorial independence of a news editor should suffice. Our interpretation of the bill suggests that the bill in its present form does not open opportunities for acquisitions in regional markets by broadcasters sharing the same service area.[26]

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22 Australian Press Council, *Submission 3*, p. 5

23 Australian Press Council, *Submission 3*, p. 6

24 Australian Association of Independent Regional Radio Broadcasters, *Submission 2*, p. 3

25 Communications Law Centre, *Submission 15*, pp. 17-18

26 Environment, Communications, Information Technology and the Arts Legislation Committee *Hansard*, 21 May 2002, p. 65

The inquiry also heard evidence from Mr Stephen Kimber regarding the Canadian experience with a similar regime.

> You may be interested to know that our Canadian Radio Television Commission, which is similar to your Australian Broadcasting Authority, has already tried similar measures. In 2001, the CRTC required that Quebecor—a Quebec based publisher of 15 daily newspapers in Canada—keep its newspaper newsrooms separate from a newly acquired TV network. Less than a year later, however, Quebecor's web site boasts that the 'synergies between the Internet, cable television, broadcasting, newspapers, telephony and publishing media are now a reality'. So much for separation… Media companies did establish arms-length monitoring committees to assure us that they were living up to the commitments they made. But, as the chair of one of those committees explained to me recently, they operate on a 'complaints only' basis and, since most of what happens inside newsrooms happens at a level removed from public scrutiny, there had been few complaints for them to investigate.[27]

Concerns about the ability of the ABA to effectively administer this regime were also expressed by the Australian Press Council:

> What is proposed is pretty near unworkable. You could not envisage that the ABA, even if it was entrusted with this responsibility, would be able to handle it in a way consistent with maintaining the diversity of sources and diversity of input that is intended. Especially once the cake is cooked, you could not unscramble it back to flour, eggs and so on.[28]

Constitutional issues

The editorial separation regime raises the prospect of legislative intrusion into the print media by the Federal Government, which is not allowed for in the Constitution.

The Friends of Fairfax raised the issue of a constitutional challenge to the Bill:

> Television, radio and telecommunications are regulated under the wireless and telegraphy power in the Constitution, and rules which touch on newspapers, such as cross media limits, are valid because they are inextricably linked to this head of power. The current legislation arguably goes much further than the cross media rules, which deal only with cross shareholdings, and attempts to regulate, in detail, the activities of newspapers. It will almost certainly be vulnerable to constitutional challenge, particularly if the ABA attempts to remedy a breach of editorial separation by directing a print organisation to comply with the exemption certificate. The exemption certificate will become a condition of the television or radio licence, but won't affect the newspaper. The High Court has found an implied constitutional right to freedom of expression on matters of political debate. This clearly covers the activities of newspapers and could be used as a further ground for attacking orders by the ABA.[29]

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27 *Environment, Communications, Information Technology and the Arts Legislation Committee Hansard*, 21 May 2002, p.41

28 *Environment, Communications, Information Technology and the Arts Legislation Committee Hansard*, 21 May 2002, p.52

29 Friends of Fairfax, *Submission 27*, p. 6

Ms Gail Hambly, General Counsel for John Fairfax Holdings Ltd, advised the Committee that, while there was a head of power in the constitution for application of section 62F to broadcasting, Fairfax considered that its application to the print media was in question. Fairfax could, therefore, not rule out a challenge to the Bill:

> While we would like to put this in a considered response, it is fair to say that a number of people are already discussing the constitutionality of section 62F particularly and whether or not there is power under the federal Constitution to deal with print media. Obviously, it is dealt with presently in the Broadcasting Services Act, but the Broadcasting Services Act presently touches very lightly on print media and considerable debate is going to develop, if this kind of legislation goes through in its present form, as to whether or not you can extend the light touch on print media necessary for the cross-media rules, through to a discussion on editorial principles and editorial structure in the print media.[30]

In their evidence before the Committee, the Department of Communications, Information technology and the Arts presented a conditional response to the broad suggestion that section 61F may be unconstitutional. Mr Donald Markus, General Counsel for the Department, argued that section 61F extends the logic of the existing cross-media rules, in that it details conditions under which a broadcasting licence may be held. As the existing cross-media rules fall within the Commonwealth's power to regulate communications, which include broadcasting, Mr Markus submitted that section 61F would also fall within that power. He stated that the rules relate to the conditions on which a person may hold a broadcast licence and are not intended to dictate how a newspaper is run.[31] Labor and Democrat Senators do not propose to adjudicate on a constitutional debate of this kind. What is worth noting, however, is that there appear to be grounds upon which this section of the Bill might invite legal challenge. In this light, the application and consequences of the Editorial Separation provisions of the Bill appear to be uncertain.

International comparisons

International comparisons were a feature of some evidence presented to the Committee. Whilst it is impossible to directly compare the media regimes of the UK, Canada and Australia, some conclusions were relevant to the current issues considered by the Committee.

United Kingdom

The Minister, Senator Richard Alston, has claimed that the UK is moving along a similar path to the one encapsulated in the Bill and abandoning its cross-media ownership regime. Evidence presented to the Inquiry, however, showed that far from moving along a similar path, the UK is in fact retaining many aspects of its restrictions on cross-media ownership.

Mr Given, for instance, argued that:

> it has been widely reported that the UK is essentially dropping its cross-media rules. As I see it, it is not doing that at all. What it is doing is proposing to drop cross-media laws, particularly in relation to the Channel 5 television franchise. It is

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30 *Environment, Communications, Information Technology and the Arts Legislation Committee Hansard*, 22 May 2002, p.103

31 Environment, Communications, Information Technology and the Arts Legislation Committee *Hansard*, 22 May 2002, p.134.

> very important to understand that Australia does not have an equivalent to the Channel 5 franchise in operation at the moment…
>
> The second point, where I do not think they are dropping cross-media rules, is that they are proposing to keep the restriction in place for newspaper proprietors who have more than 20 per cent of the national market. The two biggest national newspaper players in Australia—News and Fairfax—have more than 20 per cent, so the players that that kind of change would apply to in Australia are not our biggest newspaper players.[32]

The proposed UK laws represent a reform of their cross-media ownership restrictions, the proposed Australian Bill represents an effective repeal of our cross-media ownership restrictions.

Canada

Mr Kimber urged the Committee not to approve the Bill in light of the concentration of ownership in the media that had occurred in Canada since relaxation of cross-media regulation in 1985:

> The Canadian media landscape changed dramatically during the last decade as media companies merged and converged in pursuit of various visions of the future. During my 15 years as a columnist with the *Daily News*, the newspaper changed owners five times; moving, in the process, from a newspaper owned and operated by its journalist-entrepreneur founder to a publication that is now part of Canada's largest media empire, CanWest Global Communications Corporation, a media company that is probably familiar to you because of its role in Australia's Ten Group Ltd. CanWest Global now owns daily newspapers in every major Canadian city except Toronto and Winnipeg. In nine of those cities, including Halifax, CanWest's global television network also owns a local television station.[33]

Mr Kimber stated:

> Ironically, largely because of our recent experiences in Canada with the deleterious impact of increasing media concentration and cross-ownership, many Canadians are beginning to ask whether we need regulations in our country to prevent companies from owning competing media in the same community. It would be unfortunate if Australia chose this moment to abandon a rule that has helped to protect the publication and broadcast of a variety of diverse and competing views on local issues.[34]

Regional News

Democrat and Labor Senators find that the regional news requirements in the Bill pre-empt the current comprehensive inquiry by the Australian Broadcasting Authority into the adequacy of regional news services. This inquiry, which is due to report soon, has undertaken a wide-ranging review of the issue, including evidence taken at public hearings in regional

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32 Environment, Communications, Information Technology and the Arts Legislation Committee *Hansard*, 21 May 2002, p.9

33 Environment, Communications, Information Technology and the Arts Legislation Committee *Hansard*, 21 May 2002, p.40

34 Environment, Communications, Information Technology and the Arts Legislation Committee *Hansard*, 21 May 2002, pp. 42

centres throughout the country. Its conclusions will be based on a much wider body of evidence than was available to the Committee and may suggest a comprehensive solution to regional news coverage problems which would render the regional news provisions of the Bill almost immediately redundant and in need of repeal.

Regulatory measures to deal with ensuring the viability of local news have no direct or logical connection with the cross and foreign media ownership restrictions, although the issue may be of great concern to regional representatives.

The provisions in the Bill are no more than an ad hoc measure which will not apply as a uniform regulatory regime across regional Australia. As the Bill stands, the requirements for minimum local news are only triggered when a media organisation is subject to a merger subject to a cross media ownership exemption certificate. This measure will therefore apply in an uneven way, and could considerably disadvantage some media organisations, while not applying to others.

Many submissions stated that the rules for 'localism' were inequitable and should apply consistently to all players, rather than on a case by case basis. Regional broadcasters argued that the economics of local news production are highly unfavourable when compared to metropolitan services. Their services cover much wider areas than city services, and may require up to six separate localised bulletins. At the same time, the advertising revenue that is available in the regions is considerably less, with the result local news provision requires them to do a lot more than their metropolitan counterparts with a lot less. Further, inequity was also claimed on the following grounds:

- that only holders of active exemption certificates were required to adhere to the requirements (Section 61U); and
- that the amount of local news and information required to be provided varied according to whether:
    - the exemption certificate holders were judged to have met 'minimum levels' for local news and information for the year prior to the application being made (requirement to continue to provide the 'existing' level of service) (Section 61V); or
    - whether exemption certificate holders were judged NOT to have met 'minimum levels' for local news and information for the year prior to the application being made (requirement to provide the 'minimum' level of service) (Section 61W).

Labor and Democrat Senators support the strengthening of regional news and information requirements, but feel this should be dealt with separately to this Bill, and following a thorough analysis of the ABA regional news inquiry.

Democrat and Labor Senators further acknowledge that the economics of producing regional news broadcasts differ from metropolitan news production, and can see merit in exploring mechanisms such as licence fee rebates should the ABA's findings indicate that regional news cannot be strengthened without financial support from the Commonwealth. However, we cannot accept Recommendation 4 of the Chair's Report, which reflects similar conclusions, as that recommendation pre-supposes that the ABA will indeed find that regional news services require additional funding. As with the regional news provisions of the Bill, it would be more appropriate not to pre-empt the ABS's findings.

Foreign Ownership

Labor and Democrat Senators draw different conclusions from the evidence presented to the Committee about the provisions of Schedule 1 of the Bill, which relates to the removal of foreign ownership on free-to-air and subscription television licences. Nonetheless, there are points of commonality.

Democrat and Labor Senators note the views of the CLC that greater public consultation before introducing change might ensure broader support from a range of interest groups for the proposals. The CLC argued that there remain a range of concerns that should be addressed before the restrictions were repealed. These were:

- mechanisms for encouraging foreign investors to add to the range of operations in the Australian media, rather than act as a substitute for existing interests;
- mechanisms for ensuring that overseas bureaux of Australian media operations will not be closed or merged with those of a foreign parent or subsidiary company;
- resolution of local broadcasting issues (regarding local news and the Australian Content Standard);
- commitments to strengthen the position of the national broadcasters in a climate of digital broadcasting and increased foreign investment in the commercial sector, such as additional funding for multi-channelling initiatives; and
- improvements in the processes for approving foreign investment, namely transparency of assessments by the Foreign Investment Review Board (FIRB) and accountability for national interest decisions made by the Treasurer.[35]

The CLC put the view of several submitters concerning the issue of overseas bureaux. It considered this issue of major importance to the public interest because the continuing provision of Australian views on overseas events potentially directly affected the content and quality of news in Australia. It also considered that, in the context of international trade negotiations, concessions on foreign ownership should be strategic, that is, 'with a view to securing ongoing commitment to domestic policies and programs such as content standards and support to the production industry.'[36]

The ACA supported the CLC's view on the importance of using foreign investment to build new assets, rather than stripping profits from Australian operations:

> …we certainly think that there is an opportunity to build a consensus about bringing foreign ownership into the media market in Australia. We are a comparatively small capital base. Our view is that there should be significant encouragement of building new media assets, not just joining a bidding frenzy.
>
> Just declaring a foreign ownership free-for-all on current assets would not contribute one iota, but bringing foreign capital in to build new media assets would be very productive.[37]

The Media, Entertainment and Arts Alliance also warned against the danger of local companies becoming 'mere branch offices.'

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35 Communications Law Centre, *Submission 15*, p. 4-5

36 Communications Law Centre, *Submission 15*, p. 4-5

37 Environment, Communications, Information Technology and the Arts Legislation Committee *Hansard*, 21 May, p. 29

> Rather than being used as a springboard for growth in Australia and the region, the risk is the products are milked for their cash flow and foreign ownership should only be allowed once commitments are given to ensure continued investment and development of the products under the management of local executives.[38]

Regarding Australian cultural policy, Labor and Democrat Senators note that the Bill does not propose to remove the Australian Content Standards or reduce levels of Australian content.

Labor findings on foreign ownership

Labor Senators considered all the evidence put to them regarding Schedule 1 of the Bill which concerns relaxing foreign ownership restrictions. They noted that the Productivity Commission had recommended removal of restrictions on foreign ownership in its Broadcasting Inquiry Report 2000.

Labor Senators are supportive in principle of provisions in the Bill to ease foreign ownership restrictions provided national interest considerations remain and provisions are made for minor problems associated with foreign ownership such as any threats to reporting from international bureaux by Australian journalists.

In light of this and the evidence put to it, Labor Senators are persuaded that there would be benefits as a result of lifting restrictions on foreign ownership for media companies, advertisers and consumers. They consider that the repeal of restrictions would provide opportunities for access to global capital, resources and expertise for Australian companies, as well as possibilities for Australian expertise to be promoted and advanced internationally.

Labor Senators considered that this increase in competition would lead to greater diversity in services and products for Australian consumers.

Australian Democrat findings on foreign ownership

Democrat Senators remain convinced of the fundamental importance of the control of Australian media remaining in Australian hands. The Australian Democrats do not see foreign participation in the Australian media sector as a bad thing *per se*. However, changes to the foreign media rules must not decrease Australian control of our media or jobs in the Australian media sector. Australian media companies must not become local outlets for global media conglomerates. The Democrats note in the *Explanatory Memorandum* that the Government considered allowing modifications to the foreign ownership rules that would have allowed greater foreign investment without sacrificing Australian control.[39] The Democrats regard this as a more satisfactory solution to the problem of attracting greater levels of foreign funding for Australian media production.

A media-specific public interest test

As a test of the effectiveness of the Bill to deliver media diversity, Labor Senators put an extreme scenario to Professor Alan Fels of the ACCC, describing a media monolith. This scenario was: if this Bill was passed, what regulatory restrictions would be left that could stop a proposed merger between Telstra, Network Nine, John Fairfax, 2UE and Nova FM. Professor Fels replied:

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38 Media, Entertainment and Arts Alliance, *Submission 11*, p. 9

39 *Explanatory Memorandum*, pp.9-11.

> …and this is my view too – that it might well be quite okay under the Trade Practices Act.[40]

Professor Fels' response demonstrates a particular and serious problem with the *Trade Practices Act 1974* (TPA) as it currently stands: that it is simply unable to deal satisfactorily with cross-media mergers and acquisitions. This not-implausible scenario would have massively adverse implications for media diversity and public opinion in Australia. Such a company could exert enormous influence over the democratic process. Under the "normal" operations of the TPA, however, the creation of this media monstrosity would be unlikely to be deemed anti-competitive. "Normal" operations of the TPA would seem to mean no blocks on media concentration.

Clearly, if any repeal of the cross-media laws in line with the Bill was to be seriously considered, a concurrent amendment of the TPA would also be required. The lack of such an amendment in the Bill marks yet another serious flaw in the Government's proposals and underlines their lack of commitment to true media diversity.

The most likely form that the amendment to the TPA would take is the introduction of a media-specific public interest test. This idea was first raised in the Productivity Commission's *Broadcasting* report,[41] and was taken up in a number of submissions.[42] According to the Explanatory Memorandum, the Government themselves considered such a proposal, but rejected it in favour of simply removal the cross-media rules.[43]

The Seven Network takes a slightly different approach, recommending that:

> suitable provisions should be enacted in the *Trade Practices Act 1974* to provide adequate competitive safeguards across the total media environment. These provisions should allow for departure from the current narrow market based approach adopted by the ACCC and encourage a competition analysis that recognises the connections between related industry sectors and that the competitive state of one market may influence the competitive state in neighbouring markets.[44]

Democrat and Labor Senators do not regard the introduction of a media-specific public interest test alone to be a sufficient condition for removal of the cross-media rules. Consequently, there is no need to discuss it in detail in the context of a Bill that removes those rules. By the same token, Labor and Democrat Senators do regard reform of the TPA to account for the specific nature of the media sector as a necessary step in the process of reforming Australian media ownership rules. It is a topic that would repay further examination in a more appropriate forum.

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40 *Environment, Communications, Information Technology and the Arts Legislation Committee Hansard*, 22 May 2002, p.128

41 Productivity Commission. *Broadcasting*. Report No. 11. 2000. Canberra: Ausinfo, pp.359-364.

42 Eg. Australian Press Council. *Submission 3*, pp.3-4; CLC. *Submission 15*, pp.6-8; ACA. *Submission 26*, pp.2-3.

43 *Explanatory Memorandum*, pp.15-19.

44 Seven Network. *Submission 14*, p.5.

Need for an inquiry into the media industry

Democrat and ALP Senators find that as a result of the evidence presented to this Inquiry, there are compelling reasons for a broader inquiry into the media industry.

The issues of cross-media ownership and foreign ownership of media cannot be viewed in isolation from other related policy and regulatory issues. In the coalescing digital communications environment, it is becoming increasingly clear that a piecemeal approach to media regulation is no longer sustainable. A comprehensive policy approach that draws together all sectors of the media industries is required.

This inquiry should seek to identify the appropriate regulatory structures and legislative regime to deliver optimum public benefits to the Australian community for the future. It should have as clear terms of reference the continuation of social and cultural policy objectives and the maximisation of the public interest, as well as ensuring adequate competition and opportunities for growth within the Australian media industry.

Senator Sue Mackay	Senator Kate Lundy	Senator Vicki Bourne
Senator for Tasmania	Senator for the ACT	Senator for NSW

APPENDIX 1

LIST OF SUBMISSIONS

1. Mr Kevin Beck
2. Australian Association of Independent Regional Radio Broadcasters (IRB)
3. Australian Press Council
4. Mr Tom Nilsson
5. Grant Broadcasters Pty Ltd
6. Mr Graeme McConnell
7. Australian Association of National Advertisers
8. Network Ten
9. Rural Press Limited
10. Ms Sue McDonald
11. Media, Entertainment & Arts Alliance
12. Publishing and Broadcasting Ltd
13. Screen Producers Association of Australia
14. Seven Network
15. Communications Law Centre
16. Australian Broadcasting Corporation
17. News Limited
18. John Fairfax Holdings
19. RG Capital Radio Ltd, Rural Press Ltd, WIN Television Network
20. Macquarie Radio Network Pty Ltd
21. Prime Television Limited
22. RG Capital Radio Limited
23. WIN Corporation Pty Ltd
24. DMG Radio Australia
25. Southern Cross Broadcasting (Australia) Limited
26. Australian Consumers' Association
27. Friends of Fairfax
28. Mr Bruce Robinson
29. Clayton Utz
30. UBS Warburg Australia Ltd
31. Mr Jock Given
32. Dr Paul Jones
33. Australian Competition & Consumer Commission
34. Mr Julian Thomas
35. Austereo
36. Department of Communications, Information Technology and the Arts
37. Radio 4GG Gold Coast Pty Ltd
38. Australian Broadcasting Authority
39. CanWest Global Communications Corp.
40. The Age Independence Committee

APPENDIX 2

WITNESSES AT PUBLIC HEARINGS

Tuesday 21 May 2002

Communications Law Centre
Dr Derek Wilding

Mr Jock Given, Senior Research Fellow, Swinburne University

RG Capital Radio Ltd
Mr Rhys Holleran

WIN Television Network
Mr John Rushton

Rural Press
Mr Brian McCarthy

Australian Consumers Association
Mr Charles Britton

Screen Producers Association of Australia
Mr Geoff Brown
Mr Hal McElroy
Ms Adrianne Pecotic

Media, Entertainment and Arts Alliance
Mr Christopher Warren

Friends of Fairfax
Ms Anne Davies
Mr Ward O'Neill
Mr Stephen Kimber

Australian Press Council
Professor Ken McKinnon
Mr Jack Herman

Prime TV
Mrs Shirley Brown
Mr Darryl Guihot

Southern Cross Broadcasting (Australia) Limited
Mr Anthony E Bell

Network Ten
Mr Nick Falloon
Ms Susan Oddie

Wednesday 22 May 2002

Grant Broadcasters Pty Ltd
Mrs Janet Cameron
Mrs Alison O'Neill

Australian Association of Independent Regional Broadcasters
Mr Kevin Blyton
Mr D L Foster
Mr Stephen Everette

John Fairfax Holdings
Mr Fred Hilmer
Mr Bruce Wolpe

Mr Julian Thomas, Swinburne University

Austereo Group Limited
Mr Peter Harvie

Australian Broadcasting Authority
Professor David Flint
Mr Giles Tanner
Ms Jacqueline Gleeson

Department of Communications, Information Technology and the Arts
Ms Susan Page
Mr Don Markus
Mr David Smith
Mr Gordon Neil
Mr Peter Young

Australian Competition and Consumer Commission
Professor Alan Fels
Mr Bryan Cassidy
Mr Michael Cosgrave

APPENDIX 3

EXHIBITS

Canberra, 21 May 2002

Friends of Fairfax tabled the following two documents:

- Chart: Current Media Ownership Landscape
- Chart: Rationalisation scenario after media rules abolished.

APPENDIX 4

AUSTRALIAN CONTENT STANDARD FOR TELEVISION

Content Regulation

- Australian content
- Children's television
- Sport
- Codes of practice
- Advertising
- Political Matter

Analog TV

Digital TV

Datacasting

Licensing

Research

Investigations

Complaints

Forms

Ownership & Control

FAQs

Content regulation

Australian content

Content standard

PART 1 - INTRODUCTION

1. Name of standard

This standard is the *Broadcasting Services (Australian Content) Standard 1999*.

2. Commencement

This standard commences on 1 March 1999.

3. Revocation of previous Australian Content Standard

The Australian Content Standard determined, under paragraph 122(1)(a) of the *Broadcasting Services Act 1992*, by the Australian Broadcasting Authority on
15 December 1995 is revoked.

4. Object of standard

The object of this standard is to promote the role of commercial television in developing and reflecting a sense of Australian identity, character and cultural diversity by supporting the community's continued access to television programs produced under Australian creative control.

5 What this standard does

1. This standard:
    a. sets minimum levels of Australian programming to be broadcast by commercial television licensees; and
    b. requires minimum amounts of first release Australian drama programs, documentary programs and children's programs (including children's drama, but excluding preschool programs) to be broadcast by commercial television licensees;
    c. requires preschool programs broadcast by commercial television licensees to be Australian programs.
2. In order to be consistent with Australia's international co-production obligations, this standard recognises Australian official co-productions equally with Australian programs for the purposes of compliance with this standard.
3. While Australian culture and New Zealand culture are different from each other, in order to consistent with the Protocol on Trade in Services to the Australia New Zealand Closer Economic Relations Trade Agreement, this standard recognises New Zealand programs and Australian/New Zealand programs equally with Australian programs for the purposes of complaince with this standard.

[*Note*: It is a condition of a commercial television broadcasting licence that the licensee will comply with program standards applicable to the licence under Part 9 of the B*roadcasting Services Act 1992* - see Schedule 2, Part 3, paragraph 7(1)(b) of the Broadcasting Services Act.

This standard is a program standard.]

PART 2 - TERMS USED IN THIS STANDARD

6. Definitions

In this standard, unless the contrary intention appears:

'acquired' means acquired by a licensee, or its program supplier, under a legally binding agreement.

'Australian', in relation to a person, means a citizen or permanent resident of Australia.

'Australian children's drama' has the same meaning as in CTS 11.

'Australian drama program':

a. means an Australian program that has a fully scripted screenplay in which the dramatic elements of character, theme and plot are introduced and developed to form a narrative structure; and
b. includes a fully scripted sketch comedy program, animated drama and dramatised documentary; but
c. does not include:
    i. a program, or a segment of a program, that involves the incidental use of actors; or
    ii. an Australian children's drama.

'Australian/New Zealand program' has the meaning given by section 20.

'Australian official co-production' means a program made under an agreement or arrangement between the Government of Australia, or an authority of the Government of Australia, and the Government of another country or an authority of the Government of another country.

'Australian program' has the meaning given by section 7.

'C band' has the same meaning as in CTS 1.

'C program' has the same meaning as in CTS 1.

'CTS' followed by a number (for example, CTS 2), means the standard so numbered in the standards relating to programs for children, determined by the Australian Broadcasting Tribunal under paragraph 16(1)(d) of the *Broadcasting Act 1942* and taken, under subsection 21(2) of the *Broadcasting Services (Transitional Provisions and Consequential Amendments) Act 1992*, to be a standard determined by the ABA under paragraph 122(1)(a) of the *Broadcasting Services Act 1992*, as varied and in force from time to time.

[*Note*: 'ABA' means the Australian Broadcasting Authority - see section 6(1) of the *Broadcasting Services Act 1992*.]

'documentary program' means a program that is a creative treatment of actuality other than a news or current affairs, sports coverage, magazine, infotainment, or light entertainment program .

'drama score' has the meaning given by section 11.

'duration', for a program, includes any time when an advertisement, community service announcement, station promotion or other material is broadcast during the program.

'first release', in relation to a program, has the meaning given by section 8.

'licence' means a commercial television broadcasting licence.

'licensee' means a commercial television broadcasting licensee.

'P program' has the same meaning as in CTS 1.

'prime time' means the period of the day between 5.00 p.m. and 11.00 p.m.

'producer' means the person who has overall creative responsibility for a program.

'sketch comedy program':

a. means a comedy program produced for television comprising sketches that are short, self-contained stories or plots; but
b. does not include a stand-up comedy program or an incidental sketch that is a component in a program of another kind.

'television production fund' means the Australian Commercial Television Production Fund administered by the Australian Film Commission.

'writer' means a person who writes the script for a program (except a person who adapts the screenplay or teleplay of an existing program).

[*Note*: 'Commercial television broadcasting licence' and 'program' are defined in subsection 6 (1) of the *Broadcasting Services Act 1992*. See also the note following section 5.]

PART 3 - AUSTRALIAN PROGRAMS

7. What is an Australian program

1. Subject to subsections (3) and (4), a program is an Australian program if:
    a. it is produced under the creative control of Australians; and
    b. it was made without financial assistance from the television production fund.
2. For paragraph (1)(a), program is produced under the creative control of Australians if:
    a. the producer of the program is, or the producers of the program are, Australian (whether or not the program is produced in conjunction with a co-producer, or an executive producer, who is not an Australian); and
    b. either:
        i. the director of the program is, or the

directors of the program are, Australian; or

ii. the writer of the program is, or the writers of the program are, Australian; and

c. not less than 50% of the leading actors or on-screen presenters appearing in the program are Australians; and

d. in the case of a drama program - not less than 75% of the major supporting cast appearing in the program are Australians; and

e. subject to subsection (5), the program is produced and post-produced in Australia (whether or not it is filmed in Australia); and

f. in the case of an animated program - the program satisfies at least 3 of the following requirements:

i. the production designer is Australian;

ii. the character designer is Australian;

iii. the supervising layout artist is Australian;

iv. the supervising storyboard artist is Australian;

v. the key background artist is Australian.

3. If a program (except a news, current affairs or sports program) includes segments that, if they were individual programs, would not comply with subsection (2), only a segment that, if it were an individual program, would comply with subsection (2) is taken to be an Australian program

Example

A music video program including Australian clips and children's cartoon programs that is presented by an Australian host.

4. A documentary program that complies with subsection (2) is not an Australian program of it is a reversioning of one or more existing documentary programs that are nor Australian programs, Australian official co-productions, New Zealand programs opr Australian/New Zealand programs.

5. For paragraph 2(3), a news, current affairs or sports program that is filmend outside Australian and produced or post-produced outside Australia because it it impractical to produce or post-produce the program in Australia is taken to be produced and post-produced in Australia.

PART 4 - FIRST RELEASE PROGRAMS

8. What is a first release program

1. A program (except a telemovie or feature film) is a 'first release' program when it is first broadcast in the licence area if it has been acquired:

a. before 16 February 1999; or

b. within 2 years of the completion of production of the program.

2. A program that is a telemovie is a 'first release' program when it is first broadcast by a licensee in the licence area (whether or not the program has already been broadcast in the licence area by a subscription television broadcasting service) if it has been acquired:

a. before 16 February 1999; or

b. within 2 years of the completion of production of the program.

3. A program that is a feature film is a 'first release' program when it is first broadcast by a licensee in the licence area (whether or not the program has already been broadcast in the licence area by a subscription television broadcasting service) if it has been acquired:

a. before 16 February 1999; or

b. within 3 years of the completion of production of the program.

[*Note*: 'Licence area', and 'subscription television broadcasting service' are defined in subsection 6 (1) of the *Broadcasting Services Act 1992*. See also the note following section 5.]

PART 5 - TRANSMISSION QUOTA

9. Australian transmission quota

1. This section has effect subject to Part II.
2. Subject to subsection (3), Australian programs must be at least 55% of all programming broadcast in a year by the licensee between 6.00 a.m. and midnight that was made without financial assistance from the television production fund.
3. If an Australian program that is first release sports coverage begins before midnight on a day (the 'first day') and ends on the next day; the part of the program broadcast between midnight and 2.00 a.m. is taken to have been broadcast between 6.00 a.m. and midnight on the first day.

PART 6 - DRAMA

10. Australian drama program requirement

1. Subject to subsections (3), (4) and (5), the drama scores for all first release Australian drama programs broadcast by a licensee in prime time in each succeeding period of 3 years must total at least 775.
2. Subject to subsections (3), (4) and (5), the drama scores for all first release Australian drama programs broadcast in prime time in any year must total at least 225.
3. If a first release Australian drama program that is a feature film

begins to be broadcast before or at 11.00 p.m. on a day, the part of the program broadcast between 11.00 p.m. and midnight on that day is taken to have been broadcast in prime time.

4. A first release Australian drama program broadcast by a licensee between 11.00 p.m. and midnight on a day before 1 March 2000 is taken to be broadcast in prime time if:
    a. the program was acquired before 12 November 1998; or
    b. in any other case - the principal photography for the production of the program had commenced, but had not been completed, before 12 November 1998.
5. Up to 13 hours of a serial or mini-series with a format factor of 2, or a mini-series broadcast by a licensee between 11.00 p.m.and midnight are taken to be broadcast in prime time on the day of broadcast if:
    a. the series, serial or mini-series is comprised of first release Australian drama programs; and
    b. at least the same number of hours of the same serial, series or mini-series was broadcast by the licensee between 5.00 p.m. and 11.00 p.m. in the same or a previous year.
6. In subsection (5)

'format factor' means the format factor mentioned in subsection 11(2).

11. What is the drama score of an Australian drama program

1. The 'drama score' for an Australian drama program is calculated using the following formula:

drama score = format factor x duration

2. For subsection (1), the 'format factor' is:
    a. for an Australian drama program that is a serial or series produced at the rate of more than 1 hour per week - **1**; and
    b. for an Australian drama program that is a serial or series produced at the rate of 1 hour or less per week - **2**; and
    c. for an Australian drama program that is a feature film, a telemovie, a mini-series, or self-contained drama of less than 90 minutes' duration - **3.2**.

[*Note*: 'Duration', for a program, is defined in section 6.]

PART 7 - CHILDREN'S DRAMA

12. Australian children's drama - first release programs

1. A licensee must broadcast each year in the C band at least 32 hours of first release Australian children's drama.
2. For subsection (1), the Australian children's drama must:
    a. have been acquired for a commercial television broadcasting licence fee, in cash or in kind, of at

least
$45 000; or

b. have been acquired before 12 November 1998.

13. Australian children's drama - repeat programs

A licensee must broadcast each year in the C band at least 8 hours of Australian children's drama programs that are not first release programs.

PART 8 - C AND P PROGRAMS

14. C programs (Australian children's programs)

At least 50% of the C programming broadcast by a licensee each year in accordance with CTS 3 must be first release Australian programs.

[Note: At least 260 hours of C programs must be broadcast each year in accordance with CTS 3.]

15. P programs (Australian preschool programs)

All P programs broadcast by a licensee in accordance with CTS 3 must be Australian programs.

[*Note 1*.At least 130 hours of P programs must be broadcast each year in accordance with CTS 3.

Note 2 A P program must not be broadcast more than 3 times in a period of 5 years.]

PART 9 - DOCUMENTARIES

16. Australian documentaries requirement

A licensee must broadcast the following number of hours of first release Australian programs that are documentary programs, of at least 30 minutes each in duration:

a. in the year beginning on 1 January 1999 - 15 hours;
b. in each following year - 20 hours.

PART 10 - PREVIOUS STANDARD

17. Certain programs taken to comply with this standard

1. A program that was an Australian program or documentary program within the meaning given by the previous standard is taken to be an Australian program or documentary program within the meaning of this standard if:
    a. the program was acquired before 12 November 1998; and
    b. the licensee has notified the ABA in writing, by 30 June 1999, of the acquisition of the program.

2. If a licensee broadcasts an Australian program aftrer 31

December 1998 and before 1 March 1999 in compliance with a provision of the previous standard, the broadcast is taken to satisfy the licensee's obligations under the corresponding provision of this standard for the year beginning 1 January 1999.

3. In this section :

'previous standard' means the Australian Content Standard, determined under paragraph 122(1)(a) of the *Broadcasting Services Act 1992*, by the ABA on
15 December 1995, as in force immediately before the commencement of this standard.

PART 11 - AUSTRALIA'S INTERNATIONAL OBLIGATIONS

[Note For information about Australia's international obligations, see the note following section 20.]

18. Programs other than Australian programs recognised by this standard in fulfilment of Australia's international obligations

1. (1) Subject to subsection (2), a licensee's obligations under this standard may be reduced by the extent to which the licensee broadcsats Australian official co-productions, New Zealand programs or Australian/New Zealand programs.
2. To reduce a licensee's obligation under subsection (1), an Australian official co-production, New Zealand program or Australian/New Zealand program must satisfy the same requuirements that an Australian program must satisfy the same requirement that an Australian program must satsify under the relevant section of this standard (except the requirement to be Australian).

19. What is a New Zealand program

1. Subject to subsections (3) and (4), a program is a 'New Zealand program' if it is produced under the creative control of New Zealanders.
2. For subsection (1), a program is produced under the creative control of New Zealanders if:
    a. the producer of the program is a New Zealander, or the producers of the program are New Zealanders (whether or not the program is produced in conjunction with a co-producer, or an executive producer, who is not a New Zealande); and
    b. either:
        i. the director of the program is a New Zealander, or the directors of the program are New Zealanders; or
        ii. the writer of the program is a New Zealander, or the writers of the program are New Zealanders; and
    c. at least 50% of the leading actors, including voice

actors, or on-screen presenters appearing in the program are New Zealanders; and

d. in the case of a drama program - at least 75% of the major supporting cast appearing in the program are New Zealanders; and

e. in the case of an animated program - the program satisfies at least 3 of the following requirements:

i. the production designer is a New Zealander;

ii. the character designer is a New Zealander;

iii. the supervising layout artist is a New Zealander;

iv. the supervising storyboard artist is a New Zealander;

v. the key background artist is a New Zealander.

3. If a program (except a news, current affairs or sports program) includes segments that, if they were individual programs, would not comply with subsection (2), only a segment that, if it were an individual program, would comply with subsection (2) is taken to be a New Zealand program.

Example

A music video program including New Zealand clips and children's cartoon programs that is presented by a New Zealander.

4. A documentatry program that complies with subsection (2) is not a New Zealand program if it is a revisioning of one or more existing documentary programs that are not Australian programs, Australian official co-productions, New Zealand programs or Australian/New Zealand programs.

5. For paragraph (2)(e), a news, current affairs or sports program that is filmed outside New Zealand and produced or post-produced outside New Zealand because it is impractical to produce or post-produce the program in New Zealand is taken to be produced and post-produced in New Zealand.

20. What is an Australian/New Zealand program

A program is an 'Australian/New Zealand' program if:

a. (a) it meets the requirements of section 7 (except that New Zealanders rather than Australians undertake one or more, but not all, of the specified creative roles); or

b. it meets the requirements of section 19 (except that New Zealanders rather than Australians undertake one or more, but not all, of the specified creative roles).

[*Note for Part II* Subsection 160(d) of the *Broadcasting Services Act 1992* requires that the Australian Broadcasting Authority must perform its functions in a manner that is consistent with Australia's obligations under any conventions to which Australia is a party or any agreement

between Australia and a foreign country.

As at 1 January 1999, Australia has relevant international obligations under Official Film Co-production Agreements with the United Kingdom of Great Britain and Northern Irelend, Canada, Italy, Israel and Ireland and the Australlia New Zealand Closer Economic Relations Trade Agreement. In addition to these agreements, Official Film Co-production Memoranda of Understanding exist between the Australian Film Commission and relevant government agencies in New Zealand and France.

In 1983, the Government of Australia and the Government of New Zealand entered into the Australia New Zealand Closer Economic Relations Trade Agreement (the CER). On 18 August 1988, the Government of Australia and the Government of New Zealand entered into a Protocol on Trade in Services to the CER, the scope of which covers the production of programs for television and the broadcasting of programs on television.

For the purpose of meeting Australia's obligations under these agreements, this standard:

a. (a) allows Australian official co-productions the full enjoyment of all benefits accorded to Australian programs; and
b. allows New Zealanders and services provided by New Zealanders access to the Australian market for television programs no less favourable than that allowed to Australian and services provided by Australians; and
c. in like circumstances, treats New Zealanders and services provided by New Zealanders no less favourably than Australians and services provided by Australians.]

[Note:1 Made by the Australian Broadcasting Authority on 26 February 1999, and notified in the *Commonwealth of Australia Gazette* on 26 February 1999.]

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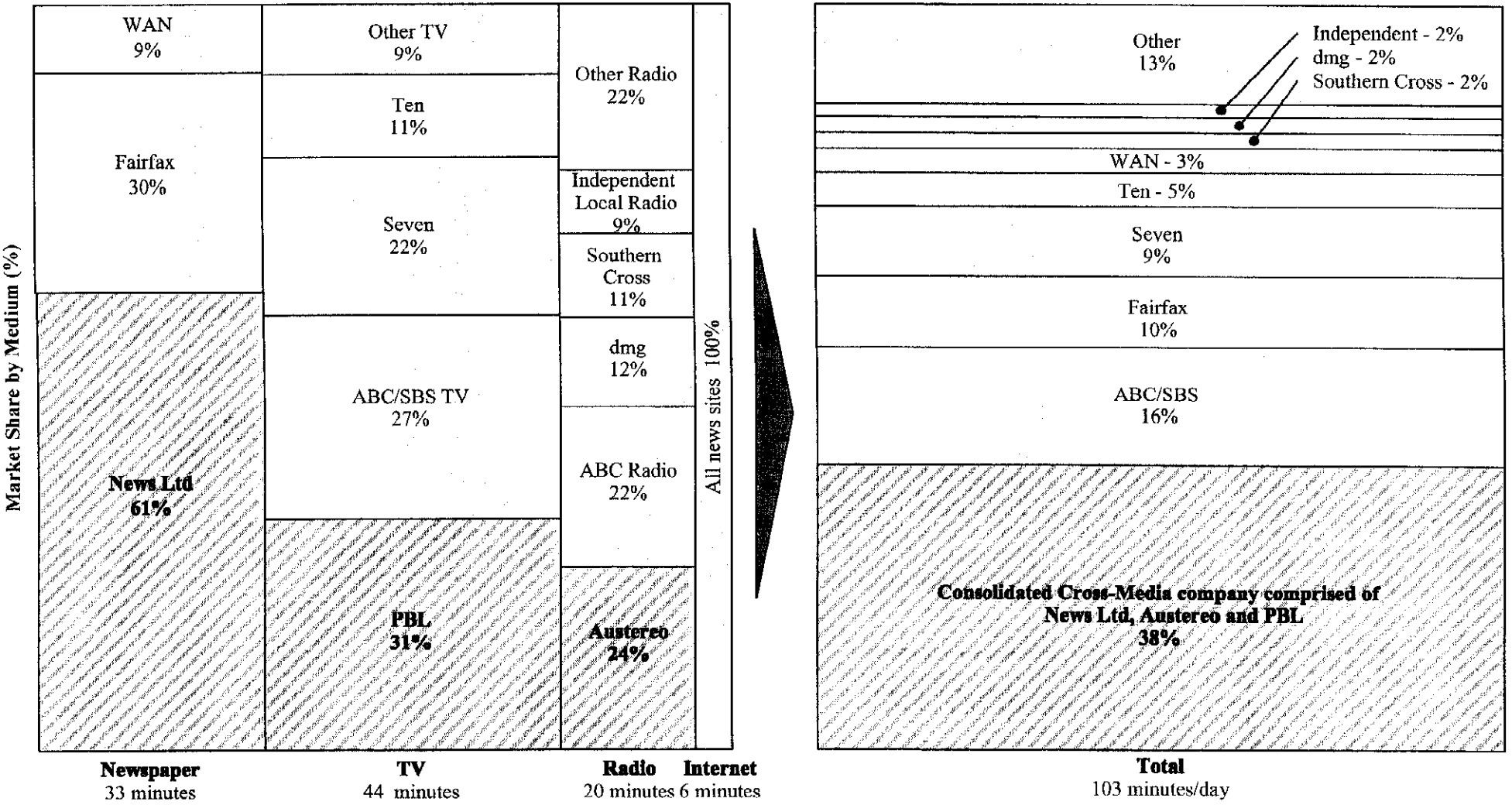
APPENDIX 5

MARKET SHARE ESTIMATES IN MAJOR CROSS-MEDIA CONSOLIDATION SCENARIO

Even in the extreme scenario of single ownership of the largest commercial TV, Newspaper and Radio companies the degree of influence would still be limited

Summary of Daily News Consumption Share – Nationwide Metropolitan[1]



Source: Roy Morgan Readership data, ACNielsen ratings, ABA, ABS, NOIE, Red Sheriff