

1. INTRODUCTION

This is a submission from the Australian Press Council to the Productivity Commission responding to that part of its March 1999 Issues Paper, *Broadcasting*, that is concerned with cross media ownership rules.

2. EXECUTIVE SUMMARY

The Council makes the following recommendations:

A. Certain principles should form the basis for the future regulation of media ownership. These principles should include:

- the promotion of the plurality of media ownership and of media outlets, and the diversity of content and opinion in a competitive media market;
- flexibility, so that the law does not become outdated with every new development and convergence between technologies is not hindered;
- neutrality between different technologies, so that the media is normally treated as one single market or markets geographically defined;
- transparency, so that their application should be clearly seen as being removed from the exercise of political patronage;
- justiciability, that is so that at least the fairness of the process if not the decisions themselves can be reviewed by a court;
- awareness of the benefits which can flow from globalisation;
- emphasis that the purpose of the application of the law is to promote freedom of speech and of the press (including the electronic media); and
- reliance on a case by case approach determining whether a merger substantially lessens competition. It is recommended that research indicating consumer choice and use, particularly the time consumers allocate to using different media, constitute the principal tool in measuring the level of concentration in the market. (paragraph 6.14)

B. The Council recommends that the *Trade Practices Act* constitute the only law governing competition in the media market, in particular in determining whether a merger would have the effect, or be likely to have the effect, of substantially lessening competition in a media market. To achieve this the Council recommends that the *Trade Practices Act* be amended to provide that:

- the principles in recommendation ‘A’ are incorporated as paramount considerations to guide the regulatory authorities;
- the market include the broad media market;
- for the purpose of determining the level of concentration in the media market, consumer choice be the principal tool in measuring market shares;
- consumer choice in the broad media market principally means the amount of time the consumer allocates to the use of the relevant media; and
- the principal purpose of applying competition law to a media market (or sub-market) is to promote freedom of speech and of the press. (paragraph 6.15)

C. The Council also recommends that the *Trade Practices Act* be amended to provide that, where the acquisition of a newspaper, magazine or other media outlet would have the effect or be likely to have the effect of substantially lessening competition, and

- (a) there is no persuasive evidence before the Australian Competition and Consumer Commission of an alternative proposal to acquire the newspaper, magazine or other media outlet on similar or better terms; and
- (b) the vendor indicates that if the acquisition does not proceed the newspaper or magazine or other media outlet will be closed,

the acquisition shall be deemed to be likely to result in such a benefit to the public that the acquisition should be allowed to take place. (paragraph 6.16)

D. The Press Council sees no cogent reason why foreign investment in new media outlets should not be allowed. Legislation relating to foreign investment should:

- affirm the application of the *Trade Practices Act* to the media market, including foreign investment therein;
- establish a threshold in the broad media market and in geographically defined markets below which no approval for foreign investment is required;

- provide that applications for foreign investment above the threshold be determined by the regulator;
- provide that the test to be applied by the regulator in deciding on a foreign investment proposal be whether the proposal would be likely to result in such a benefit to the public that it should be allowed to proceed;
- provide that there be a common regulator under the *Trade Practices Act* and the *Foreign Acquisition and Takeovers Act* in relation to the media market (the Press Council recommends the Australian Competition and Consumer Commission play this role); and
- provide that decisions by the regulator be subject to review, and that at least the fairness of the process be also subject to review by the courts. (paragraph 7.4)

3. THE AUSTRALIAN PRESS COUNCIL

The Australian Press Council is a voluntary association of organisations and persons established on 22 July 1976. The membership of the Council is set out in Addendum A. Its objects are:

- (i) To maintain the character of the Australian press in accordance with the highest journalistic standards and to preserve its established freedom.
- (ii) To consider, investigate, and deal with complaints about the conduct of the press and the conduct of persons and organisations towards the press.
- (iii) To keep under review developments likely to restrict the supply by and to the press of information of public interest and importance.
- (iv) To report publicly on developments in press ownership and control and to publish statistical information about them.
- (v) To make representations concerning the freedom of the press on appropriate occasions to governments, public inquiries, and other organisations in Australia and abroad.
- (vi) To publish reports recording the Council's work, to review from time to time developments in the press and factors affecting them; and to exchange information with other similar bodies.

4. THE CROSS MEDIA RULES

4.1 The present Australian Cross Media Rules (CMR) provide that a person must not control in the same license area a commercial television license and a commercial radio license; a commercial television license and a newspaper; or a commercial radio license and a newspaper. [*Broadcasting Services Act 1992 (BSA)*.] Thus newspaper ownership is indirectly regulated by the BSA.

Foreign investment in the media is partially regulated under the CMR but proposals for foreign investment in a newspaper require the approval of the Treasurer under the *Foreign Acquisitions and Takeovers Act, 1975 (FTA)*. Accordingly references to the CMR in this submission will, where appropriate, include references to the FTA.

4.2 The BSA states that one of the objects of the CMR is to “encourage diversity in control of the more influential Broadcasting Services”. Further, as a former Prime Minister said, proprietors were to choose between being a “Queen of the Screen or a Prince of Print”. If this were once a viable proposition, it has little relevance to today’s media. Now, rather than being principally concerned about the form of delivery, media companies are finding that “content is king”. Past programs, archival material etc have become more valuable than ever before. To maximise the value of these assets, to develop Australian companies to their full potential, to allow journalists, artists and other media workers to flourish both in Australia and internationally, a media corporation must now be able to choose which form of delivery, and which mix of the forms of delivery, most suits its needs.

5. COMPETITION IN THE MEDIA MARKET

5.1 Most economic activity in Australia is now subject to competition law. The aim of this is not to achieve perfect competition, but what is sometimes termed “reasonable competition”. In part this requires those in a dominant position to behave competitively; it rarely involves the prospect of divestiture. Based broadly on US competition law (the *Sherman Act 1890* and the *Clayton Act 1907*) - as in competition law in most Western countries - our competition law depends on three principal rules:

- a rule against collusion between competitors - *Trade Practices Act, 1975 (TPA)* s.45
- a rule against the abuse of market power (or “monopolisation”) - TPA s.46
- for our purposes, most importantly, a rule against mergers and takeovers likely to have the effect of substantially lessening competition- TPA s.50

(The latter rule was not in such a stringent form when the CMR were introduced. Mergers likely to have the effect of substantially lessening competition may still be authorised by the Australian Competition and Consumer Commission (ACCC) if they would be likely to result in such a benefit to the public that the acquisition should be allowed to take place.)

5.2 As competition law applies equally to the media as to other sectors of the economy, it is appropriate to ask whether there is the need for another layer of regulation through the CMR?

5.3 The principal reason usually advanced in the past for broadcasting regulation was the scarcity of positions on the broadcasting spectrum. It is sometimes claimed that this assessment of scarcity was exaggerated. In any event, new technological developments - digitalisation and compression, as well as cable and satellite - mean that spectrum scarcity is no longer such a major consideration. An increasing number of highly specialised channels can now broadcast simultaneously. These can be interactive, and allow the exercise of personal choice not only between programs but, for example, between an array of films in vast banks of recorded material.

5.4 A second reason for regulating the electronic media, and for the CMR, flows from the generally accepted perception of the media's special role in society. It is argued that because of its influence in the democratic process, and indeed in all aspects of life, regulations need to be put in place to ensure that proprietors cannot exercise undue influence over the right of the people to be informed.

5.5 The media certainly play a central role in a democratic society. The press is one of the essential checks and balances on the state, particularly on the executive government. It is the source of information on government and all aspects of public life. Politicians reach the people through the media. Without the media, the people would have little of the information they need to exercise their rights and duties in a democratic society.

5.6 Unlike the United States, and most Western democracies, this special role of the media is not protected under our Constitution, save to the extent that it is incorporated in the guarantee of freedom of political communication found by the High Court in 1992 to be implied in the Constitution. The Court has since refined that implied freedom in rulings on its impact on defamation law. This implied freedom gives only moderate protection compared to the US. As noted in paragraph 8, the Council believes that the media's special role in a democratic society needs to be more explicitly protected.

6 CONCENTRATION OF OWNERSHIP

6.1 The question remains as to what measures a society should take to ensure that media ownership is not concentrated in too few hands. Can Australian competition law achieve this result? The rule against mergers and takeovers which substantially lessen competition applies to a “market”. A market is defined according to the “product” concerned as well as geographically. The first step then is to determine what constitutes the “product” in relation to the media.

6.2 Is there a broad “media market”? Are there separate product markets for newspapers, magazines, television, radio etc? While there are sub-markets for, say, newspapers, there is also a single market for all types of media. How else could we explain the decline of the evening newspaper, and the simultaneous rise of the television evening newscast? Clearly consumers have, in this case, substituted television for print as their primary source of information in the afternoon and evening.

Consumers obtain their news, information and entertainment from a spectrum of sources. There is thus one product - the media.

6.3 This media market is diverse and it is expanding. Technology has not only given us new sources of information, it has made significant changes to existing sources. The synergies between ownership of different media can permit significant increases in the range of services offered to advertisers. This convergence between technologies can allow significant cost savings and can enhance the quality of services offered. Already readers with an Internet connection can access the very latest editions of many Australian and overseas newspapers, usually free of additional charges. As the Internet versions of newspapers are no longer constrained by the limitations of paper cost and distribution costs, more material and a greater diversity of views can be published.

This convergence is reinforcing the trend towards a single media market. However, sub-markets will continue, and presumably competition laws will apply simultaneously both to the broader media market and to media sub-markets.

In the meantime digitalisation and compression will allow the licensing of new television and radio stations, allowing a wider degree of choice. Evidence from most countries suggests that fragmentation, or an increase in the number of television channels, does not lead to any significant long-term increase in total viewing. It is therefore reasonable to assume that these and further technological developments could mean substantial increases in competition and also in plurality and diversity.

6.4 Markets are not only defined according to the product, but also geographically: there are national, state, regional and local markets, with potential for spillover. While *The Australian* is a national newspaper, a newspaper buyer in Brisbane might decide to buy either *The Australian* or *The Courier-Mail*. Competition rules thus apply separately to each geographical media market.

6.5 Having first determined the relevant market, according to these principles, it is then possible to determine the level of concentration in that market.

6.6 In the view of the Press Council, the CMR are not suitable tools for the determination of concentration in each media market. First, they do not encompass all aspects of our integrated broad media market. Significant parts of the media market are ignored, for example, videotapes, satellite television, the Internet, magazines and the non-Anglophone media. Second, the CMR cannot, without frequent legislative amendment, accommodate technological change. Third, they lack the desirable attributes of media ownership regulation - particularly flexibility, transparency and neutrality. Fourth, and above all, they are also arbitrary. They are too blunt to be capable of application on a “case by case” approach with a proper consideration of the various factors which affect competition in a particular market (see 6.10 below).

6.7 Another, and fifth, criticism of the CMR is that they measure ownership only. They assume that the more concentrated the ownership, the less diverse the media. Experience indicates that this conclusion does not necessarily follow. The editor in a “one newspaper city” typically leans over backwards to ensure diverse views appear in the paper. Newspapers normally will contain widely diverse views and opinions. There is competition between newspapers owned by the same company and between different programs on radio and television. Nor does diversity necessarily flow from a highly competitive market. And a concentrated market does not necessarily indicate lack of diversity or high barriers to entry. For example, while the US market appears less concentrated than the United Kingdom, British television seems to offer a wider choice to viewers.

6.8 We need more sophisticated tools to measure concentration, that is the share of each of the principal providers.

A measure of the consumers’ actual use of the various media would be a better guide for the application of competition law.

Any regulator given supervision of the media market would have to develop sophisticated measuring of such usage and apply it to determine if any proposal is likely to have the effect of substantially lessening competition in the media market. In 1996 the Council proposed a

“share of voice” concept, based on formula that combines the circulation/ratings of an outlet with the percentage of that outlet owned by any particular owner, as one method by which various parties’ interests in the media market might be assessed.

But there are other possible measures in which consumer choice is stressed. One could be how much consumers spend on the media. Another measure could be the time the consumer allocates to media consumption: reading newspapers, watching free to air television and so on. Obviously the intensity of reading, listening and viewing can vary. If the best way to assess the impact of different media in the market were by measuring the time or money consumers spend reading, listening and watching, guidelines could be enacted to assist the regulator in applying competition law.

6.9 Such an approach, in the Press Council’s view, offers some advantages over the current CMR. It is not as arbitrary. However, it does not allow for convergence between the different media. It would need to be amended from time to time to take into account new and emerging media. This would include forms of the media which are yet unknown, and which cannot be predicted.

6.10 Apart from the level of concentration in the market, the TPA already provides for a number of other matters which must be taken into account in determining whether a merger would have the effect or be likely to have the effect of substantially lessening competition. These are a useful and, with the level of concentration, mandatory guide in assessing whether a market is competitive. They are:

- the actual and potential level of import competition in the market;
- the height of barriers to entry to the market;
- the degree of countervailing power in the market;
- the likelihood that the acquisition would result in the acquirer being able significantly and sustainably to increase prices or profit margins;
- the extent to which substitutes are available in the market or are likely to be available in the market;
- the dynamic characteristics of the market, including growth, innovation and product differentiation;
- the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor;

- the nature and extent of vertical integration in the market.

6.11 It should be particularly noted that since the introduction of the CMR, the TPA has been amended so that the rule against mergers now uses a lower threshold. The previous “dominant position” test caught fewer mergers. The result is that the TPA now provides in s.50 a sharper tool for assessing the anti-competitive effect of mergers than was previously available, particularly when the CMR were introduced.

6.12 As determinants of a broad media market in which market share is measured in accordance with consumer choice, our competition laws are now superior to measures such as the CMR in achieving a competitive media market.

In the Council’s view, broad media markets exist alongside the relevant sub-markets. A legislative endorsement of this could emphasise the proposition that the Parliament would expect that the broad media market should be competitive. Similarly, it would be useful if Parliament were to indicate that consumer choice be the measure, or the principal measure, in assessing the level of concentration in a media market or sub-market.

6.13 There remains one other matter. The Council is concerned that a number of newspapers have ceased production in recent years. An example was the *Daily News*, the only afternoon newspaper in Perth. In 1990, the owners of the *West Australian* proposed to take over the *Daily News*. The Trade Practices Commission refused to authorise this under the public benefit test. The *Daily News* was closed. The same thing occurred in the case of the *Adelaide News*. The Council believes that it is of overwhelming benefit to the public that existing titles be maintained. The Council proposes that in similar circumstances a merger be authorised.

6.14 Recommendation A

The Press Council proposes that certain principles should form the basis for the future regulation of media ownership. These principles should include:

- **the promotion of the plurality of media ownership and of media outlets, and the diversity of content and opinion in a competitive media market;**
- **flexibility, so that the law does not become outdated with every new development and convergence between technologies is not hindered;**
- **neutrality between different technologies, so that the media is normally treated as one single market or markets geographically defined;**
- **transparency, so that their application should be clearly seen as being removed from the exercise of political patronage;**
- **justiciability, that is so that at least the fairness of the process if not the decisions themselves can be reviewed by a court;**
- **awareness of the benefits which can flow from globalisation;**
- **emphasis that the purpose of the application of the law is to promote freedom of speech and of the press (including the electronic media); and**
- **reliance on a case by case approach determining whether a merger substantially lessens competition. It is recommended that research indicating consumer choice and use, particularly the time consumers allocate to using different media, constitute the principal tool in measuring the level of concentration in the market.**

6.15 Recommendation B

The Council recommends that the *Trade Practices Act* constitute the only law governing competition in the media market, in particular in determining whether a merger or takeover would have the effect, or be likely to have the effect, of substantially lessening competition in a media market. To achieve this the Council recommends that the Trade Practices Act be amended to provide that:

- the principles in recommendation ‘A’ are incorporated as paramount considerations to guide the regulatory authorities;
- the market include the broad media market;
- for the purpose of determining the level of concentration in the media market, consumer choice be the principal tool in measuring market shares;
- consumer choice in the broad media market principally means the amount of time the consumer allocates to the use of the relevant media; and
- the principal purpose of applying competition law to a media market (or sub-market) is to promote freedom of speech and of the press.

6.16 Recommendation C

The Council also recommends that the *Trade Practices Act* be amended to provide that, where the acquisition of a newspaper, magazine or other media outlet would have the effect or be likely to have the effect of substantially lessening competition, and

- (a) there is no persuasive evidence before the Australian Competition and Consumer Commission of an alternative proposal to acquire the newspaper, magazine or other media outlet on similar or better terms; and
- (b) the vendor indicates that if the acquisition does not proceed the newspaper or magazine or other media outlet will be closed,

the acquisition shall be deemed to be likely to result in such a benefit to the public that the acquisition should be allowed to take place.

7. FOREIGN INVESTMENT

7.1 The present system of the regulation of foreign investment in the media is unsatisfactory.

First, the promotion of plurality, diversity and competition in the media requires a significant degree of foreign investment.

Second, to have investment proposals determined by a Minister without the potential for review comes dangerously close to a partial licensing of newspaper ownership.

Third, the principal objection to foreign investment is a frequently expressed concern that it will reduce Australian content and influence in the media. There is however no evidence that this result follows. Where the majority of the directors of a media corporation remains Australian and, more importantly, a majority of the editors and journalists is also Australian, the result is that the publication or broadcaster has a very clear and obvious Australian orientation. Both Australian and foreign television broadcasters rely substantially on foreign-made television programs - their degree of reliance does not seem to be affected by their ownership but by economic decisions, including consumer tastes and, to an extent, content rules. (Broadcasters frequently go above minimum Australian content requirements.)

Fourth, it is desirable that some Australian media companies continue to be significant in the international media and that others attain this status. An important result can be increased Australian involvement in program making, writing and increased access to technology. And it is doubtful whether other countries will continue to permit our media companies to play this role if some degree of reciprocity is not offered. This is a matter which will no doubt be resolved in international negotiations.

7.2 The Press Council recognises that foreign investment in establishing new media outlets is clearly likely to help promote plurality, diversity and competition. It sees no cogent reason why foreign investment in these should not be allowed.

7.3 However, if it is wished to maintain limitation on foreign investment, a threshold of the total foreign investment in the media market, or a geographically defined media market, should be established below which no approval is necessary. Where approval is necessary, this should be considered by the regulator of the media market. Under the merger rules (TPA s.50) a merger or takeover which puts a corporation in a dominant position or improves that position may still proceed if it satisfies a public benefit test. Under the present foreign investment guidelines, the Treasurer may refuse approval of a proposal if it is found to be against the national interest. There would be, in the Council's view, advantages in applying the same public benefit test to both mergers and foreign investment proposals. And there would be advantages in these being determined by the same regulator. In the event of a

refusal of a foreign investment proposal, a review of the decision should be similarly available, as there is in relation to a refusal to authorise a merger under the TPA.

7.4 Recommendation D

The Press Council sees no cogent reason why foreign investment in new media outlets should not be allowed. Legislation relating to foreign investment should:

- **affirm the application of the *Trade Practices Act* to the media market, including foreign investment therein;**
- **establish a threshold in the broad media market and in geographically defined markets below which no approval for foreign investment is required;**
- **provide that applications for foreign investment above the threshold be determined by the regulator;**
- **provide that the test to be applied by the regulator in deciding on a foreign investment proposal be whether the proposal would be likely to result in such a benefit to the public that it should be allowed to proceed;**
- **provide that there be a common regulator under the *Trade Practices Act* and the *Foreign Acquisition and Takeovers Act* in relation to the media market (the Press Council recommends the Australian Competition and Consumer Commission play this role); and**
- **provide that decisions by the regulator be subject to review, and that at least the fairness of the process be also subject to review by the courts.**

8. CONCLUSION

8.1 While recognising that it is not within the scope of the Commission's inquiry, the Council observes that rather than relying on the CMR, the Parliament could best give effect to its concern about protecting the role of the press by specially guaranteeing the freedom of speech, and of the press. This would ensure that these freedoms could be protected from interference. It is believed the federal Parliament would have the power to legislate in this way under the external affairs power, as Australia has already entered into international treaty commitments promising to provide such guarantees. Subsequently, a referendum could be put proposing that these freedoms be entrenched in the Constitution.

8.2 Accordingly the Council believes that government policy on the media should be based on these objectives:

- the maintenance and enhancement of freedom of the press and of the media; and
- the promotion of plurality of media outlets, diversity of content and media ownership and competition between them in the media market.

THE AUSTRALIAN PRESS COUNCIL

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