

FOREIGN OWNERSHIP: MEETING THE CHALLENGES OF GLOBALISATION

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I INTRODUCTION

While considerable attention has been given to the cross-media ownership amendments contained in the recent reforms to the *Broadcasting Services Act* 1992 ('*BSA*'), a significant change receiving less attention is the lifting of restrictions on the foreign control of commercial and subscription television licenses, and limitations on foreign shareholdings in newspaper and television proprietor companies. The almost unanimous industry support for these amendments, as introduced in the *Broadcasting Services Amendment (Media Ownership) Act* 2006 ('*OA Act*'), demonstrates a notable shift in Australian policy which has occurred in a short period of time and reflects, among other things, the significant pace of technological change over the last decade.

The removal of foreign ownership and control restrictions by the *OA Act* does raise the question of the rationality and validity of the policy arguments for their inclusion in the first place. Were the foreign ownership and control restrictions ever necessary to ensure that our key mass media outlets acted in a manner consistent with the national interests and provide relevant content to Australian audiences? In an age of unchecked globalisation, why do the same concerns not arise in relation to emerging technologies which for many Australians is a primary source of information.

II THE WAY THINGS WERE

Pursuant to s 3(b) of the *BSA*, a key objective of the *BSA* was to 'provide a regulatory environment that would facilitate the development of a broadcasting industry ... that is efficient, competitive and responsive to audience needs'.

It was no doubt a consequence of, among other things, this obligation to ensure responsiveness to the needs of an Australian audience that the drafters of the *BSA* included both foreign ownership and control restrictions to ensure that Australians would have effective control of the more influential information providers, being free-to-air and subscription television broadcasting, along with

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newspapers. These restrictions provided an additional safeguard to other content regulation tools such as license conditions.

The orthodox argument in this regard is neatly expressed in a submission by the Media, Entertainment and Arts Alliance's response to the Government's discussion paper on media reform options:¹

One of the key objects of the Broadcasting Services Act is 'to ensure that Australians have effective control of the more influential broadcasting services'. It does so for a very good reason. Removing the foreign ownership restrictions will lead inevitably to greater global concentration of media ownership. New Zealand is a good example. The absence of foreign investment media rules has meant the majority of programming is foreign, with increasing reliance on foreign news sources. Some countries have greater inbuilt protection from foreign programming by virtue of language barriers. But particularly in English language countries, media organisations are more vulnerable to take over by media organisations from larger countries. For New Zealand it was Australia. For Australia it has been Canada [a reference to CanWest's investment in the Ten Network] and will more likely be the United States or the United Kingdom.

Any measures that lead to greater concentration of ownership and control rather than to greater diversity of voice are not in the national interest.²

Curiously, in 1992 (at a time when the internet and mobile telephone companies were still in their infancy in Australia) the legislature did not consider it necessary to impose specific foreign ownership or control rules on radio, which at the time (and still today) arguably served as a medium of first resort for many when information on unfolding events is required, creating the all important first impression. Also missing from the scope of the former provisions was the regulation of subscription narrowcasting. One would have thought that this was risky given the subjective judgment required to determine what constitutes subscription broadcasting and what constitutes subscription narrowcasting.

The three key sections of the *BSA* which imposed foreign ownership control on free-to-air and subscription television are succinctly described in the *Revised Explanatory Memorandum* to the *OA Act* ('Explanatory Memorandum') as follows:

- Section 57 (Division 4, Part 5) of the *BSA* states that a foreign person must not be in a position to exercise control of a commercial television broadcasting licence (normally, company interest greater than 15 per cent) and two or more foreign persons must not have company interests greater than 20 per cent in such a licence;
- Section 48 (Division 4, Part 5) of the *BSA* states that unless approved by the Australian Communications and Media Authority ('ACMA'), under special circumstances, not more than 20 per cent of directors of each commercial television broadcasting licensee may be foreign persons;

1 Australian Government, *Meeting the Digital Age, Reforming Australia's Media in the Digital Age*, Discussion Paper on Media Reforms (2006) ('Discussion Paper').

2 Media, Entertainment & Arts Alliance, *Submission to Department of Communications, Information Technology and the Arts regarding Meeting the Digital Challenge – Reforming Australia's Media in the Digital Age* (April 2006) [2.3.1.].

- Section 109 (Division 3, Part 7) of the *BSA* states that a foreign person must not have company interests greater than 20 per cent in a subscription television broadcasting licence and that these interests when added to the company interests in that licence held by other foreign persons, should not represent greater than 35 per cent foreign interest.³

Interestingly, the provisions applying to subscription television do not refer to 'control'. This allows greater scope for foreign owned businesses to enter into contractual, if not shareholding, relations with Australian owned licensees to assume a level of effective control.

In addition to the provisions of the old *BSA*, the media sector in Australia was, and importantly remains, subject to two other effective forms of foreign investment regulation, being:

- (a) that exercised by the Foreign Investment Review Board ('FIRB') pursuant to both the Commonwealth Government's Foreign Investment Policy ('FIP') and certain foreign investment regulations under the *Foreign Acquisitions and Takeovers Act 1975* (Cth); and
- (b) pursuant to regulation contained in the Australia and United States Free Trade Agreement ('AUSFTA').

As provided in the former, any proposal by a foreign entity to invest in the Australian media sector (considered a 'sensitive sector' under the FIP) requires the consent of the Treasurer on the advice of FIRB on a case-by-case basis. Not only is direct foreign investment regulated, but all portfolio investment over 5 per cent is also regulated.

It is in the FIP that additional foreign ownership limitations are found in relation to newspapers. The Explanatory Memorandum summarises the arrangement as follows:

The foreign ownership limit stipulated in the FIP for a national or metropolitan daily newspaper is 25 per cent individual and 30 per cent in aggregate. Foreign ownership of suburban and provincial newspapers is limited to less than 50 per cent. Proposals to establish a new newspaper are subject to case by case examination. However, media investment proposals that are below the [*Foreign Acquisitions and Takeovers Act 1975* (Cth) ('*FATA*')] thresholds are subject only to policy disapproval by the Treasurer, although to date no foreign investment has been undertaken in breach of the non-legislative framework.⁴

For the purposes of AUSFTA, the media sector is also considered a sensitive sector. The Explanatory Memorandum summarised this situation as, '[i]n sensitive sectors, the threshold for US investors is \$52 million, indexed annually to the GDP implicit price deflator (compared to an \$831million threshold for US investors in non-sensitive sectors)'.⁵

3 Revised Explanatory Memorandum, Broadcasting Services Amendment (Media Ownership) Bill 2006 (Cth) 11 [2].

4 Ibid 12 [31].

5 Ibid.

III THE ARGUMENTS FOR CHANGE

When considering the *OA Act* the Government had no shortage of information and observations from the public and industry to assist it with its task. In March 2006, the Government released its Discussion Paper. Many of the more than 200 submissions received in response to the Discussion Paper addressed the issue of the foreign ownership and control restrictions. Many of these arguments were also raised in a Productivity Commission Report released in March 2000 which dealt with the foreign ownership and control regime in the broadcasting industry, among other things.

The arguments for change can be broadly summarised as follows:

A Changing Patterns of Media Use

Compared to 1992 when the *BSA* was enacted, Australians now have access to a considerably wider range of media to obtain information. Internet access, DVDs, mobile telephones, SMS, and 3G content were not significant competitors to television and newspapers in 1992.

By 2005, prime time television audiences and newspaper circulations had significantly dropped when compared to 1995 levels.⁶ Over roughly the same period, the Australian Bureau of Statistics reports that the percentage of Australian households with access to a computer at home increased steadily from 44 per cent in 1998 to 67 per cent in 2004-2005, with home internet access increasing more strongly from 16 per cent in 1995 to 56 per cent in 2004-2005.⁷

More recently, the 3G mobile phone platform has expanded greatly across each of the four major mobile carriers in Australia, with the Government's current legislative program supporting the ubiquitous introduction of intellectual property ('IP') television. Text-based information using mobile telephony is now commonplace, but was unheard of in 1992.

In light of these changes, the argument goes, the influence of television and newspapers has greatly diminished, removing the justification for regulation of foreign interests in them. This begs the question of course, why not extend that regulation to the new media rather than abandon regulation altogether?

B Access to Capital and Economies of Scale

Pursuant to this argument, insufficient capital exists in the Australian market to enable the Australian media sector to keep up with the capital intensity required to keep abreast of rapid technological change (including the cost of digitisation) and the need for an ever increasing amount of content.

Watering down foreign ownership and control restrictions will open up the Australian industry to this capital, and, as an additional benefit, enable the new proprietors to access economies of scale across their global networks. A similar

6 Ibid 8 [17]; Neil Shoebridge, 'TV's uncertain future', *Australian Financial Review* (Sydney), 18 April 2005, 61.

7 Ibid 8 [18].

argument is made in relation to access to a management pool for the media sector.

C Expanding abroad

Not only is there an argument for ensuring that Australian media proprietors have access to capital to equip, compete and adapt domestically, a failure to introduce the necessary reforms may also hinder the ability of domestic proprietors to expand their operations internationally or to form strategic international partnerships.

D FATA and AUSFTA are Sufficient

It is argued that Australia enjoys a considered foreign investment regime outside of the scope of the *BSA*, much of which is described above. Under that regime, the media is a *sensitive sector* and as a result is subject to particular scrutiny in any event as all foreign investment (and portfolio investment of 5 per cent or more), requires prior approval from the Treasurer on the advice of FIRB.

Even if approval is given, certainly in the case of newspapers and pursuant to AUSFTA, certain limits will apply in any event.

E Compliance Cost

In a related argument, removing what is seen as an unnecessary media industry specific regime regarding foreign investment will assist the industry generally by decreasing its regulatory compliance costs.

F Improving Diversity

An objective of the *BSA* is to ensure diversity of opinion. In this regard, there is a presumption that a diversity of ownership will be conducive to a diversity of content, ideas and opinions presented through the media which would cater to the diverse information needs of Australia.

Not all respondents to the Discussion Paper were convinced, however, that removing the foreign ownership restrictions would have a positive or neutral effect. News Limited in its response to the Discussion Paper largely backs self interest and argues that, when coupled with the cross-media ownership reforms, any change in the foreign ownership and control regime will adversely affect the value of its newspaper assets. News Limited contended:

we believe that the removal of these restrictions within the framework proposed in the [Discussion Paper] will provide even stronger protection for the most protected sector of Australia's media industry, the commercial free-to-air television broadcasters.

For example, the removal of cross and foreign ownership restrictions will allow other media companies as well as foreign entities to buy Australian television broadcasting assets, but from a finite pool. In other words, the value of television assets in Australia will increase because there will be a potentially larger pool of buyers for a finite and unchanged pool of assets.

Conversely, domestic and foreign entities, whether already involved in the media industry or not, will be eligible to buy Australian newspaper assets or start new businesses. In other words, the value of newspaper assets could fall because there will be both a potentially larger pool of buyers and a larger pool of industry participants.

This inequity needs to be addressed as the Government considers its formal legislative agenda. News Limited could not support the proposed changes to cross and foreign ownership unless the discriminatory deregulation proposals are changed. In particular, these changes should not occur until the Government allocates new FTA licences.⁸

News Limited's position does not appear to have resonated with the Government on this occasion.

The option of leaving the *BSA* regulations as they stood, but simply allowing greater levels of foreign investment in Australian media, is dismissed in the Explanatory Memorandum as:

- regulatory complexity would arise in determining when an investment was sufficiently passive to satisfy the requirements in cases where the terms and conditions of securities contracts require individual consideration (for example hybrid or individualised securities);⁹
- while enabling passive investment in commercial television stations might increase capital and address some of the concerns referred to above, certainly the Privacy Commission in its March 2000 report doubted that many foreign investors would accept an entirely passive role.¹⁰

At the other end of the spectrum, there were those who argued that retaining the media's *sensitive sector* status under the FIP is also not warranted. One such protagonist was the Institute of Public Affairs which, in its response to the Discussion Paper submitted:

given that the government considers that there is 'no compelling basis' for singling out newspapers and commercial free-to-air television broadcasters for specific limitations on foreign ownership, this begs the question: why limit foreign ownership in the media sector at all? While relaxations are certainly welcome, it is not necessary to retain the media as a 'sensitive sector' under Australia's Foreign Investment Policy.

Foreign ownership restrictions necessarily limit the pool of potential investors, and constrains media organizations' capacity to utilize international assets and networks. In industries like the media, which often require large capital investment – and, as has become common to innovative new networks and services in the internet era, the capacity to sustain losses for sometimes up to a decade before turning a profit – disallowing foreign investment restrains potential media options for consumers.

8 News Limited, *Submission in Response to the Australian Government Discussion Paper on Media Reform Options* (April 2006) 4.

9 See Media, Entertainment & Arts Alliance, above n 2, 18.

10 *Ibid* 18 [64].

Such decisions should not be left up to a political actor – who, due to electoral pressure has an interest in gaining the confidence of existing or potential media personalities – but instead should be left up to the market to allocate the most efficient owner of media organizations.¹¹

That appeared to be one step too far into a Pollyanna world even for Australia's interventionist moderate Government.

IV WAS REGULATION EVER NECESSARY?

With both the legislature and industry, not to mention the Productivity Commission, so comprehensively willing to abandon the foreign ownership and control provisions contained in the *BSA*, a number of key questions arise.

A key issue is whether the foreign ownership and control provisions were ever necessary to effectively ensure that our key mass media outlets acted in a manner consistent with the national interest and provide content *responsive* to Australian audience needs. Presumably the view was that content regulation alone was not sufficient, regulating as it does quantities rather than opinion.

Certainly the view of the Privacy Commission in its enquiry referred to above was that media proprietors, whether foreign or domestic, are essentially bound by commercial imperative to determine what is relevant for local audiences. This proposition is also supported in the submission of Publishing and Broadcasting Limited in relation to the Discussion Paper:

The existing rules are not needed to ensure that Australian media is 'Australian'. To operate a successful media operation in a competitive environment competing for ratings, sales and advertising dollars, it is vital to produce a relevant local product. Consumers are interested in a mix of foreign and local content but Australian content is very popular and companies expend considerable resources on their [sic] production. This is particularly the case with news and current affairs. In addition, there is considerable legislation and regulation particularly in relation to free-to-air television to provide a substantial safety net to ensure free-to-air television is 'Australian'. Removal of the foreign ownership rules will not change this.¹²

If by *responsive to Australian audience needs* the policy argument is that Australian proprietors are more likely to act altruistically in determining content that is not only desired by Australian audiences but which is good for them, then there is a considerable naivety in the argument. Indeed, if this were the case then the need for institutions such as the ABC and SBS would be significantly less.¹³ The Privacy Commission observed: 'foreign owners may be less likely to seek to interfere in domestic affairs or to have conflicts of interest in the local market aiding the *BSA*'s objective of encouraging diversity of opinion'.¹⁴

11 Chris Berg, Institute of Public Affairs, *Submission to Department of Communications, Information Technology and the Arts regarding Meeting the Digital Challenge – Reforming Australia's Media in the Digital Age* (April 2006) 6.

12 Publishing and Broadcasting Limited, *Submission to Department of Communications, Information Technology and the Arts regarding Meeting the Digital Challenge – Reforming Australia's Media in the Digital Age* (March 2006) 2.

13 See Media, Entertainment & Arts Alliance, above n 2, 17.

14 *Ibid.*

Likewise, if *responsive to Australian audience needs* refers to ensuring diversity of opinion rather than simply catering to what audiences' desire, the argument for media specific foreign ownership and control provisions has little resonance. Indeed, there are those who argue that attempts to regulate foreign ownership or control may do more harm in this regard than good. An example is found in the submission of John Fairfax Holdings Limited in response to the Discussion Paper:

The media's role in our society is to provide the accurate, timely, high quality, and compelling flow of information and ideas. This is vital to the functioning of our democracy, our society and our market economy. Without an informed public, democracy is compromised. Without full and open access by the markets to business news, markets cannot operate properly and abuses can occur.

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 should play.

Media deregulation therefore must serve the interest of real diversity, including the enhancement in the quality of media services and content.

What is required is the assurance of an adequate number of competitive participants with the resources and commitment to produce and deliver a diverse range of high quality content.

Media policy therefore needs to balance the number of players with sustainable quality of media services over time.

Current regulation, particularly the limits on cross ownership and foreign ownership, bias policy towards a greater number of local players but ignores the real threat to quality.¹⁵

V CONCLUSION

Looking back to 1992 with the benefit of 2007 hindsight, it is easy to simply chalk up the foreign ownership and control provisions, as they existed in the *BSA*, to a pre-globalisation mindset which was indicative of an isolationist approach. However, in the absence of the proliferation of alternative sources of information which has occurred since 1992, it is understandable why regulators were concerned to ensure that information provided to Australians was not at risk of first filtering through a prism of foreign opinion, over the holders of which the regulator had little or no control.

Whilst the internet represents a free market of ideas that are largely not subject to any checks and balances, that nature is understood and recognised by users who anticipate seeing content on particular matters which is subject to the prejudices of the author or the operator of the site. With so many information sources available on the internet, if the user does not like or does not agree with a particular source, the user is free to choose another. However, while there has been a shift in attitude towards content arising from the greater choices available

15 John Fairfax Holdings Limited, *Submission to Department of Communications, Information Technology and the Arts regarding Meeting the Digital Challenge – Reforming Australia's Media in the Digital Age* (April 2006) 6.

to an individual, our expectation remains that traditional media such as free-to-air television and newspapers not only convey reliable information but information that is consistent with the Australian national interest.

The FIRB, the FIP and, to an extent the AUSFTA, continue to operate as an important mechanism to ensure that reliability and consistency, but are arguably now sufficient to address legitimate concerns regarding national interest in relation to content but also in relation to maintaining control of key pieces of communications infrastructure.