# Media Ownership in Australia

# The Laws
# The Players

**Jock Given**

Senior Research Fellow
Institute for Social Research
Swinburne University of Technology
Melbourne, Australia

jgiven@swin.edu.au

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# 1 Overview

This paper was commissioned to describe and assess Australia’s media ownership laws and the state of media ownership in Australia. The following sections set out:

- Australia’s current media ownership laws: ownership, licensing, media content;
- a brief history of those laws;
- the major players in the Australian media; and
- recent policy developments in this area.

Jock Given is a Senior Research Fellow at the Institute for Social Research (ISR) at Swinburne University in Melbourne, Australia. He is currently completing a second edition of *The Death of Broadcasting? Media’s Digital Future* (UNSW Press, Sydney, 1998), about the introduction of digital broadcasting into Australia. He is also working on a book about the World Trade Organisation, globalisation and audiovisual policy. From 1995-2000, he was the Director of the Communications Law Centre at UNSW and Victoria University of Technology. Before that, he was Policy Advisor at the Australian Film Commission and Director, Legislation and Industry Economics at the federal Department of Transport and Communications. Jock has written widely about broadcasting, telecommunications and media law and policy and taught subjects in these areas in the LLB and LLM at UNSW.

The ISR undertakes research, teaching and training in three areas: New Communications Culture, Citizenship and Social Policy, and Cities and Housing.

This paper has been written in association with the Communications Law Centre (http://www.comslaw.org.au), an independent research, teaching and public education organisation specialising in media and communications law and policy. Since the early 1990s, the Centre has published an annual update of media ownership in Australia in its quarterly magazine *Communications Update*.

# 2 Australia's Current Media Ownership Rules

## 2.1 Ownership

The ownership of Australia's major communications media is regulated under four pieces of legislation:

- The Broadcasting Services Act 1992 regulates the ownership and control of licensed commercial, community and subscription broadcasting and narrowcasting services. The Act is administered primarily by the Australian Broadcasting Authority (http://www.aba.gov.au).
- The Foreign Acquisitions and Takeovers Act 1975 regulates the acquisition of Australian land and businesses foreign persons. The Act is administered by the Treasurer, with assistance from the Foreign Investment Review Board.
- The Trade Practices Act 1974 regulates the activities of Australian corporations to prevent anti-competitive and to ensure that the interests and welfare of consumers are adequately protected. The Act is administered by the Australian Competition and Consumer Commission (http://www.accc.gov.au).
- The Radiocommunications Act 1992 regulates the use of the radiofrequency spectrum. It is administered by the Australian Communications Authority (http://www.aca.gov.au).

There are three kinds of limits placed on media ownership:

- limits on ownership within a local area;
- national limits; and
- foreign ownership limits.

### 2.1.1 Limits on ownership within a local area

The Trade Practices Act applies to all corporations, including those holding media assets. Its most relevant provisions, for the purposes of media ownership and control, prohibit mergers likely to have the effect of substantially lessening competition in a market, and the misuse of market power. A critical issue in considering these provisions is the definition of the relevant market(s). The ACCC may “authorise”

mergers which would otherwise have the effect of substantially lessening competition, where it believes there is sufficient public benefit in doing so.

As a result of the Federal Court decision in *Austereo Ltd v. Trade Practices Commission, (1993) 41 FCR 1,* these general provisions may apply to restrict the common ownership and control of media assets even where that ownership would seem to fall within the specific limits on TV, radio and cross-media ownership imposed under the Broadcasting Services Act.

*TV broadcasting and datacasting*

The Broadcasting Services Act imposes a "one-to-a-market" rule: a person must not be in a position to exercise control over more than one commercial TV broadcasting licence in the same licence area (eg. Melbourne, Geraldton, regional Queensland).

It also imposes Cross Media rules: a person must not be in a position to exercise control over more than one of the following in the same area: a commercial TV broadcasting licence and a commercial radio licence or a major newspaper. In addition, a person must not be in a position to exercise control of a commercial TV broadcasting licence and a "datacasting" transmitter licence (licences to provide "non-television" services using broadcasting services bands frequencies).

Similar limits are imposed on multiple directorships.

"Control" is defined very broadly and requires the regulator to examine all the circumstances surrounding any allegation of its exercise. Shareholdings of 15% or more in a company are deemed to place the holder in a position to exercise control of that company.

*Radio*

The Broadcasting Services Act imposes a "two-to-a-market" rule: a person must not be in a position to exercise control over more than two commercial radio broadcasting licences in the same licence area (eg. Adelaide, Wollongong, Central Zone).

It also imposes Cross Media rules: a person must not be in a position to exercise control over a commercial radio broadcasting licence and a commercial TV licence or a major newspaper in the same area.

Similar limits are imposed on multiple directorships.

*Newspapers*

The ownership and control of newspapers within an area is regulated directly only under the Trade Practices Act. However, the cross media restrictions in the Broadcasting Services Act indirectly regulate the activities of people in control of major newspapers.

*Radiofrequency spectrum*

The Radiocommunications Act gives the Australian Communications Authority the power, following a written direction from the Minister, to impose restrictions on the acquisition through "price-based allocations" (auctions) of licences to use radiofrequency spectrum. These restrictions may limit the bandwidth acquired by one party, the area(s) or population reach to be served, or the number of transmitters. These powers have been exercised to prevent the largest two telecommunications companies in the country participating in one auction, to restrict the total bandwidth which could be acquired by any one bidder in another auction and to impose a "one-to-a-market" limit on datacasting transmitter licences.

### 2.1.2 National limits

A person must not be in a position to exercise control of commercial TV licences whose combined licence area population exceeds 75% of the Australian population. In practice, this means a person can control commercial TV licences for the major cities Sydney, Melbourne, Adelaide, Perth, Brisbane and some regional centres.

National limits on the number of commercial radio licences which could be controlled were removed with the passage of the Broadcasting Services Act in 1992.

### 2.1.3 Foreign ownership limits

The Foreign Acquisitions and Takeovers Act empowers the Treasurer to examine proposals by foreign persons:

- to acquire urban land regardless of value; and
- to take over Australian businesses having total assets valued at $5 million or more ($3 million or more in the case of rural properties).

For media assets, this means proposed takeovers of assets valued at more than $5 million must be notified to the Treasurer in advance by the commercial parties involved. The Treasurer may prohibit proposed transactions which he believes are contrary to the national interest. The Treasurer may also order divestiture where acquisitions implemented without prior notification are subsequently found to be contrary to the national interest.

This general law applies in addition to the specific laws about foreign ownership and control of television broadcasting assets described below.

*Newspapers*

In administering the Foreign Acquisitions and Takeovers Act, successive governments have established more detailed policies for takeovers in the print media.

In its September 1992 *Guide to Australian Foreign Investment Policy*, the Government stated:

Foreign investment in mass circulation newspapers is restricted. All proposals by foreign interests to establish a newspaper or acquire an interest in an existing newspaper business in Australia are subject to case-by-case examination irrespective of the size of the proposed investment.

In 1993, the government announced that a single foreign shareholder would be able to hold up to 25% of the shares in a mass circulation newspaper, with a maximum of 30%

for all foreign interests. Despite these stated limits, American citizen Rupert Murdoch's News Corporation controls around two-thirds of Australia's major daily newspaper circulation.

The 1992 *Guide to Australian Foreign Investment Policy* also states that “Approval is not normally given to proposals by foreign interests to establish ethnic newspapers in Australia, unless there is substantial involvement by the local ethnic community and effective local control of editorial policy”.

*TV*

Under the Broadcasting Services Act, a foreign person must not be in a position to exercise control of a commercial TV licence. Two or more foreign persons must not have company interests exceeding 20% in a company holding a commercial TV broadcasting licence. Not more than 20% of the directors of a company controlling a commercial TV broadcasting licence can be foreign persons.

*Pay TV*

Under the Broadcasting Services Act, a foreign person must not have company interests of more than 20% in a subscription TV broadcasting licence. Two or more foreign persons must not have company interests of more than 35% in a subscription TV broadcasting licence. There is no restriction on foreign control of a subscription TV broadcasting licence.

*Radio*

The Broadcasting Services Act places no limits on foreign ownership or control of commercial radio licences beyond those imposed by the general provisions of the Foreign Acquisitions and Takeovers Act. The government has indicated that proposals for foreign investment in radio which fall within the scope of the Foreign Acquisitions and Takeovers Act will be considered on a case-by-case basis.

## 2.2 Licensing

Broadcasting licences are allocated by the Australian Broadcasting Authority. Licences to use radiofrequency spectrum are allocated by the Australian Communications Authority. A broad "suitability" requirement for broadcasting licensees was removed in 1992, after the controller of licences comprising the top-rating Nine Network was found to have acted improperly in settling a defamation action with the Premier of one of the Australian States.

Digital terrestrial television broadcasting began in Australia's major metropolitan centres on 1 January 2001. The five existing terrestrial television networks (three commercial, two public) have been allocated an additional channel to begin simulcast digital transmissions of their existing analogue transmissions. They can introduce some program enhancements (such as an electronic program guide, multiple camera angles and data associated with the primary programs), and are required to introduce HDTV programming over time. They cannot use their new capacity for "datacasting" unless they pay an additional amount to the government.

Two terrestrial frequencies are being allocated by auction in the first half of 2001 in each major metropolitan centre for organisations other than incumbent television broadcasters to use for "datacasting". The definition of datacasting is complex. It includes a wide range of video content but prohibits many program genres most closely associated with popular, mainstream television. This has been widely interpreted as politically-motivated protection of incumbent broadcasters. The Broadcasting Services Act prevents the allocation of further commercial television licences until the end of the 2006.

Shutdown of the analogue spectrum in metropolitan areas is currently planned for 1 January 2009.

There have been no restrictions on entry to telecommunications markets since mid-1997.

### 2.3 Media content

The content of printed media, films, videos and video games is regulated by the Office of Film and Literature Classification. Some forms of material are prohibited, such as child pornography and tobacco advertising.

Broadcast content is subject to similar prohibitions, to some requirements (eg. Australian content in free-to-air and pay television programming) and to self-regulation across a range of areas (sexual and violent content) administered by the Australian Broadcasting Authority. Since 1999, the ABA has also administered a statutory scheme covering on-line content, under which it can, amongst other things, issue “take-down notices” to ISP’s hosting content found to be in breach of relevant federal government censorship and classification guidelines.

The Australian Press Council (http://www.presscouncil.org.au) provides a mechanism for handling complaints about the content of those print media publications (particularly the major daily newspapers) and their associated on-line sites which choose to become members of the Council. It is funded by the industry and has industry and public members.

The journalists’ union, the Media Entertainment and Arts Alliance (http://www.alliance.org.au/) has a Code of Ethics which is expected to be applied by its members. (see ATTACHMENT 1)

# 3 History of the rules

Media ownership rules were first introduced in the 1930s to restrict the numbers of radio stations which a single proprietor could control. From the introduction of television in the 1950s, commercial operators were restricted to a maximum of two television licences. A general law outlawing unfair and anti-competitive conduct was passsed in 1974, but it had little impact on the media and communications sector until the late 1980s.

There were substantial changes to broadcast ownership rules in 1987, with the abolition of the “two-station” television ownership rule and its replacement by a national population reach limit for commercial television (then 60%, now 75%) and the cross-media rules. National and regional limits on the number of radio stations which could be owned or controlled were liberalised and then completely removed in 1992, along with the limit on foreign ownership, and prohibition on foreign control, of commercial radio stations.

Since then, the government has held, then aborted, a review of media ownership rules in 1996-97, and commissioned a review of broadcasting regulation by the Productivity Commission, which, in early 2000, recommended substantial changes to them.

During the late-1990s, the general competition regulator, the ACCC, has become much more involved in the regulation of media and communications ownership and competition issues, for several reasons. First, responsibility for telecommunications competition regulation was transferred to it from the telecommunications industry regulator in 1997, when new telecommunications specific-provisions governing interconnection and access to networks and facilities, and anti-competitive conduct, were inserted into the Trade Practices Act. Second, rationalisation of the media and communications industries have seen a number of high profile mergers considered (the ACCC effectively blocked mergers between the largest two ISP’s, the second and third-ranked telecommunications companies and two of the three pay TV companies). Third, new entities such as major sports broadcast rights have emerged as key strategic assets in the media economy, which are not subject to any specific rules like those which have long applied to the ownership and control of broadcasting interests.

# 4 Other policy mechanisms

Some public funding is provided for “community radio” stations, of which there are now nearly 300 in operation. These are non-profit “general community” and “special interest” (Aboriginal, educational, non-English-speaking, religious, sporting etc) stations established since the 1970s to serve particular communities of interest. These stations also effectively significant subsidy through the free allocation of spectrum (an FM frequency for commercial stations in Sydney and Melbourne have recently been auctioned for A$155 million and A$70 million respectively).

There is a small amount of funding provided through the Literature Fund of the federal government's arts funding agency, the Australia Council, for established literary publications.[1] This does not extend to "newspapers" or general interest magazines.

## 5 The players: who owns what in the Australian media

ATTACHMENT 2 sets out the interests held by the major media and communications players in Australia.

Two unusual points deserve clarification.

***News Corporation's control of around two thirds of the daily metropolitan newspaper circulation, despite the guidelines under the Foreign Acquisitions and Takeovers Act limiting non-Australians to a 25% shareholding.***

When the government announced the introduction of the cross-media laws in 1986, Murdoch (who then owned two Ten network stations, some radio and some newspapers) launched a takeover of the Herald and Weekly Times Group (which his father had been the CEO of, but never controlled). It ran newspapers comprising nearly 50% of metropolitan daily circulation, plus TV and radio. Murdoch had significant legal problems with both the laws as they were, and as the government had said they would be (no legislation had even been introduced into the Parliament, much less passed). The new laws required him to choose whether he wanted to be a "Prince of Print, or Queen of the Screen", as the then Treasurer put it. Murdoch decided on newspapers, but he needed:

- the Treasurer, under the Foreign Acquisitions and Takeovers Act, to let him do it as a non-Australian; and
- the competition regulator (then Trade Practices Commission, now Australian Competition and Consumer Commission) to let him acquire major papers in most capital cities.

[1] See http://www.ozco.gov.au/literature/index.htm)

The Treasurer's approval (he has complete discretion and is not required to give public reasons) was given despite the fact that it was inconsistent with the guidelines on foreign acquisition of major newspapers (the guidelines are made under the legislation, but are not in the legislation itself). It was publicly claimed, but never conceded by the government, that the Treasurer's bureaucratic advisers, the Foreign Investment Review Board, advised against it.

The competition regulator arrived at a generous (to Murdoch) interpretation of the provisions of the Trade Practices Act, as it affected concentration in the newspaper business. The Commission allowed the merger to proceed, subject to the disposal of some assets. It's quite likely the current regulator would decide the same issue differently. The theory was that each newspaper competes in a distinct local market, therefore the fact that Murdoch was acquiring what became (after some closures) the only daily, or the top-selling daily, in 6 of 8 state and territory capital cities, was not a problem.

### *CanWest's substantial economic interest in the Ten Network, despite limits on foreign ownership and a prohibition on foreign control*

In 1992, the Ten Network was in receivership and the regulator "approved" a scheme by which CanWest could take a substantial "economic interest" in the companies controlling the licences without:

- taking more than 15% of the shares or votes; or
- breaching the limits on foreign directors; or
- actually putting itself in a position to exercise control of the licences.

Any of these would breach the law. The refinancing structure involved "performance-linked" securities. CanWest's "investment" in the network is actually a "loan", but interest on the loan is calculated according to the profitability of the company (ie. as if it were an investment/dividend). At one point, after CanWest increased its "economic interest" to about 76% (from about 58%), there were a series of incidents which made the regulator look again at the CanWest/Ten structure - it found that CanWest had crossed the line and put itself in a position to exercise control of the licences. It had to restructure its arrangements again to get itself back within the law.

# 6 Policy debate

As in other countries, laws placing specific restrictions on the ownership and control of media enterprises have been increasingly criticised, particularly by media and communications enterprises enthusiastic about the commercial opportunities offered by globalisation and convergence. In Australia, these criticisms have focused on the cross-media and foreign ownership restrictions.

Then newly-elected Liberal/National (Conservative) Government commenced a review of these laws in 1996. Submissions were made by all the major media organisations, with most favouring at least partial liberalisation. However, there was substantial opposition to any changes to the laws. It came from "opinion-leaders" (key journalists in the Canberra press gallery and the Fairfax press, publisher of the daily broadsheets in Sydney and Melbourne), the government's own backbench (members, particularly in rural electorates, concerned about the already high level of media concentration in Australia) and from opposition parties in the Senate (which, together, had a majority in that House, and may have prevented any legislation passing the Parliament). In addition, it appeared the government was unable to come up with a package of changes which accommodated the different emphases of key media interests. The Packer organisation (television and magazines) particularly wanted changes to the cross-media laws to allow it to bid for John Fairfax. The Murdoch organisation (newspapers and pay TV) did not want liberalisation of the cross-media rules (which would allow Packer and Fairfax to expand) without liberalisation also of the foreign ownership rules (which would allow it to expand). The government decided not to proceed with any changes.

In 1999, the Government directed the Productivity Commission to conduct a year-long inquiry into broadcasting regulation as part of the on-going program of reviews of regulation covering all industry sectors. The Commission is the government's "principal review and advisory body on microeconomic policy". It is an independent, federal public sector agency which "conducts public inquiries and research into a broad range of economic and social issues affecting the welfare of Australians". It is the latest incarnation of an agency which has existed in various forms for decades (the Tariff Board, the Industries Assistance Commission, the Industry Commission) to advise government on policies about industry and regulation. It has full-time commissioners (generally economists) and sometimes employs part-time commissioners with particular expertise for individual inquiries.

Although it was interpreted by some as an opportunity to get changes to media ownership laws back on the policy agenda, the Commission took a broad, forward-looking view of broadcasting laws and made criticism of the government's policies on the introduction of digital television into Australia the centrepiece of its report. However, it also supported submissions seeking liberalisation of industry-specific ownership and control rules, so long as the timing of that liberalisation was carefully managed. It said:[2]

> The cross-media rules prevent mergers between companies in the traditional media businesses of newspapers and free-to-air commercial radio and television. While they are simple and certain in their application, their effectiveness in controlling media concentration is diminishing as convergence in technology and company ownership gathers pace. They constrain the growth and development of old media companies, but do nothing about the new.
>
> At the heart of the debate is whether concentration of media assets within and across media boundaries will reduce the diversity of sources of information and opinion. In a concentrated media market, a related issue is the extent to which the non-media business interests of the key media proprietors could compromise the editorial integrity and coverage of their media businesses.
>
> The Commission concludes that diversity of opinion and information is more likely to be encouraged by greater rather than less diversity in the ownership and control of the main media.
>
> The cross-media rules do not apply to some traditional media (such as magazines and cinema) or to new media (such as the Internet and subscription television). Cable and satellite services make it possible to deliver a great deal of diversity in commercial programming to Australian households, and new digital services, including datacasting and multichannelling, could significantly enhance the ability of "over the air" broadcasters to deliver multiple services. Internet broadcasting may provide even more program options. These are all sources of information and ideas.
>
> However, it is not sufficient to have multiple voices if those voices are not accessible, or if they are effectively controlled by main media interests. The traditional media businesses in Australia are concentrated, and could become more so if the cross-media rules are relaxed and no other compensating measures, such as freeing entry, are taken.

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[2] See http://www.pc.gov.au/inquiry/broadcst/index.html

> The Trade Practices Act 1974 provides the means to prohibit mergers or acquisitions that would substantially lessen competition. It should be adequate to deal with mergers among radio or television stations within licence areas. [The Commission thus recommended the repeal of the two-to-a-market limit on commercial radio licences and the one-to-a-market rule on commercial television licences.]…However, the Commission considers that the Trade Practices Act is ill-equipped to cope with cross-media mergers.
>
> Australia could try to extend the cross-media rules to other media, but such an approach would become increasingly difficult to implement in a convergent world. The Australian community will be better served by pollicies that encourage contestability and entry. Given that ownership structures are changing rapidly, the Commission recommends that a media-specific public interest test be inserted into the Trade Practices Act immediately.
>
> Eventually, the cross-media rules should be replaced with a more flexible approach suited to the new, emerging media environment. However, removing the cross-media rules while regulatory barriers to entry to television and radio are still in place would be counterproductive. Repealing these regulatory barriers would enhance the prospects for new players to emerge, but only if entrants have access to spectrum.
>
> The relaxation of the foreign investment restrictions applying to television is also an important pre-condition for the removal of the cross-media rules. This will enhance the pool of possible owners with media expertise. Once the new media-specific public interest test is put in place and new entry has established a more competitive atmosphere for Australian media, the cross-media rules should be repealed.
>
> The Commission recommends that the cross-media rules be removed, but only after the following conditions have been met:
>
> · the removal of regulatory barriers to entry in broadcasting, together with the availability of spectrum for new broadcasters; and
>
> · the abolition of [existing industry-specific] restrictions on foreign investment, ownership and control [so that foreign investment in broadcasting is handled "in the normal way under Australia's foreign investment policy"]; and
>
> · the amendment of the Trade Practices Act to provide for a media-specific public interest test to apply to mergers and acquisitions.

The Commission also recommended new charging arrangements for "broadcast" spectrum and increased powers for the ABA to be able to hasten the "clearing" of spectrum, to make it available for alternate uses.

The government has not acted on most of these recommendations, although it commissioned a report on expanded spectrum-clearance powers, which it is understood to support. However, it has proceeded with the core elements of its policy on the introduction of digital TV, which the Commission criticised as anti-competitive, although it has also determined that “streaming” video and audio over the Internet will not be treated as broadcasting, calming the worst fears of the Internet industry that the transmission of such content might be restricted in some way.

The press recently reported that the Cabinet had discussed the government’s overdue response to the Commission’s report.

**ATTACHMENT 1**

# Media Entertainment and Arts Alliance Code of Ethics

MEAA members engaged in journalism commit themselves to:

Honesty
Fairness
Independence
Respect for the rights of others

1. Report and interpret honestly, striving for accuracy, fairness and disclosure of all essential facts. Do not suppress relevant available facts, or give distorting emphasis. Do your utmost to give a fair opportunity for reply.

2. Do not place unnecessary emphasis on personal characteristics, including race, ethnicity, nationality, gender, age, sexual orientation, family relationships, religious belief, or physical or intellectual disability.

3. Aim to attribute information to its source. Where a source seeks anonymity, do not agree without first considering the source's motives and any alternative attributable source. Where confidences are accepted, respect them in all circumstances.

4. Do not allow personal interest, or any belief, commitment, payment, gift or benefit, to undermine your accuracy, fairness or independence.

5. Disclose conflicts of interest that affect, or could be seen to affect, the accuracy, fairness or independence of your journalism. Do not improperly use a journalistic position for personal gain.

6. Do not allow advertising or other commercial considerations to undermine accuracy, fairness or independence.

7. Do your utmost to ensure disclosure of any direct or indirect payment made for interviews, pictures, information or stories.

8. Use fair, responsible and honest means to obtain material. Identify yourself and your employer before obtaining any interview for publication or broadcast. Never exploit a person's vulnerability or ignorance of media practice.

9. Present pictures and sound which are true and accurate. Any manipulation likely to mislead should be disclosed.

10. Do not plagiarise.

11. Respect private grief and personal privacy. Journalists have the right to resist compulsion to intrude.

12. Do your utmost to achieve fair correction of errors.

See http://www.alliance.org.au/