

Media Ownership in Australia

Overview

Media and communications ownership in Australia is regulated by general competition and foreign investment laws applying across the whole economy and by specific laws covering broadcasting and telecommunications. Big changes to the media ownership laws were passed by the Parliament in late 2006 and took effect in April 2007. Several large and small transactions have already been completed or announced, and more are likely. The government also sold most of its majority shareholding in the former state-owned telecommunications monopoly, Telstra, in late 2006. This constitutes a major restructuring of media ownership in the country.

The rules

The ownership and control of Australia's major communications enterprises is regulated by four kinds of law:

- Competition law: set out in the Trade Practices Act, which regulates anti-competitive conduct across the whole economy and is administered by the Australian Competition and Consumer Commission.
- Foreign ownership law: set out in the Foreign Acquisitions and Takeovers Act, which regulates foreign investment across the whole economy and is administered by the Treasurer, with assistance from the Foreign Investment Review Board.
- Broadcasting and spectrum management law: set out in the Broadcasting Services Act, which includes ownership and control limits applying only to certain media enterprises, and the Radiocommunications Act, which regulates the use of radiofrequency spectrum. Both these Acts are administered by the Australian Communications and Media Authority, formed in 2005 by amalgamating the separate broadcasting and spectrum regulators.
- Telecommunications law: ownership of shares in the privatized former government monopoly telecommunications company Telstra is limited under the Telstra Corporation Act. These limits can be enforced by court orders on application of Minister or Telstra itself.

There are three kinds of limits placed on media ownership:

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

Limits on ownership within a local area

Caps on TV and radio stations in a market

Broadcasting law prevents more than one commercial television stations or more than two commercial radio stations in a single market being commonly owned.

Cross-media restrictions

Broadcasting law prevents more than two of the three major media forms in an area being commonly owned or controlled—a commercial television station, a commercial radio station and a newspaper published at least four days a week.

It also prevents cross-media mergers which would result in less than five media groups controlling the commercial television licences, commercial radio licences and newspaper(s) in a metropolitan area, or four groups in a non-metropolitan area ('five/four media groups rule').

“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 it.

Other restrictions on spectrum allocation

Spectrum management law gives the media and communications regulator the power to impose restrictions on the acquisition through “price-based allocations” (auctions) of licences to use radiofrequency spectrum, following a written direction from the Minister. These restrictions may limit the bandwidth acquired by one party, the area(s) or population reach to be served, or the number of transmitters.

Specific restrictions apply to two new licences to be allocated in 2007 for new national digital television services. One, which will be used for datacast or narrowcast services delivered to fixed, in-home receivers, cannot be allocated to an incumbent free-to-air TV broadcaster. The other, which will be used for a wider range of services including mobile TV, can be allocated to an incumbent free-to-air TV broadcaster, but only if they use it for non-television services.

Competition restrictions

The Trade Practices Act applies to all corporations, including those holding media assets. It prohibits mergers likely to have the effect of substantially lessening competition in a market and the misuse of market power. The competition regulator can authorise mergers which would otherwise substantially lessen competition where it believes there is sufficient public benefit in doing so. It can also impose conditions, allowing mergers to proceed provided the parties enter into binding undertakings to do certain things, such as dispose of particular assets. These undertakings can be enforced by the courts.

These competition restrictions may apply to prevent the common ownership of media assets even where that ownership would seem to fall within the specific caps on TV and radio stations in a market and cross-media restrictions set out in broadcasting law.

The assets to which competition restrictions apply include licences to use radiofrequency spectrum.

National limits

Broadcasting law prohibits a person being 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, Brisbane, Perth, Adelaide and some regional centres. This population reach cap replaced the numerical two-station limit that applied from the earliest days of television until the mid-1980s.

There is no similar limit for radio. Numerical caps were abolished in 1992.

Foreign ownership limits

Media

Foreign investors proposing to acquire large or sensitive Australian enterprises or assets are required to seek prior approval from the Treasurer. The media and telecommunications sectors are designated as sensitive. Generally, investment in businesses valued at more than A\$100 million [SC?] requires prior approval. In the media sector, portfolio investments of 5 per cent or more and all non-portfolio investments irrespective of size require prior approval. Different thresholds have applied to United States investors since the beginning of 2005 as a result of a bilateral free trade agreement. The general threshold for prior approval of proposals from US investors is \$871 million in 2006 and \$100 million in sensitive sectors.

The Treasurer can reject any notified proposal which he believes is contrary to the national interest, or order divestiture where interests acquired without prior notification are later found to be contrary to the national interest. The Government says it generally welcomes foreign investment. It believes it 'provides scope for higher rates of economic activity and employment than could be achieved from domestic levels of savings. Foreign direct investment also provides access to new technology, management skills and overseas markets.' However, it also recognises community concerns about foreign ownership and tries to balance them against the economic benefits. It determines what is contrary to the national interest 'by having regard to the widely held community concerns of Australians, particularly in more sensitive sectors like media and developed residential real estate.

Specific limits on foreign ownership of media enterprises were recently removed as discussed below. These were previously set out in broadcasting legislation and the detailed guidance issued under foreign investment law.

Telecommunications

Aggregate foreign ownership of Telstra is restricted to 35% of the privatized equity. Individual foreign investors are limited to shareholdings of 5% of the privatized equity. In addition, Telstra's head office, place of incorporation and base of operations must remain in Australia, and its chair and a majority of its directors must be Australian citizens. In late 2006, about two-thirds of the Government's bare majority stake in Telstra was sold to institutional and individual investors. The remaining approximately 17 per cent of the company was transferred to the 'Future Fund', established by the Government to fund its public service superannuation liabilities. These shares will be held in escrow two years.

Rationale

See 'Debates' below.

Administration of the rules

Competition law offers considerable discretion to the competition regulator through the process of negotiating enforceable undertakings with the parties to a proposed transaction that the regulator believes would otherwise infringe the legislation. The regulator agrees not to commence court action to prevent or unwind a transaction on the grounds that it substantially lessens competition, provided the undertakings are adhered to. This does not prevent another party, perhaps a competitor to the parties to the proposed transaction, from launching such action. Whether or not a transaction would actually have the effect of substantially lessening competition is ultimately for the court, not the regulator, to decide. The process of negotiating enforceable undertakings is much more widely used than the 'authorisation' process under which the regulator is asked to approve a transaction after weighing its public benefits and costs. The practical impact of the two processes is similar, but industry generally prefers the former.

Foreign ownership law also offers considerable discretion to the Treasurer, who can reject foreign acquisitions or investments on the highly subjective grounds of 'national interest'.

The **media-specific ownership and control limits in broadcasting law** do not give the regulator any broad discretion to permit interests to be held in breach of the thresholds

set. They do however allow some flexibility in the timeframes it can set for the disposal of interests which exceed the thresholds. Unlike competition law, which is breached as soon as a party commits an act which has the effect of substantially lessening competition, the ownership and control limits in broadcasting law are not breached until the regulator finds them to have been breached in individual cases. Sanctions only apply once a party fails to remedy the breach within the timeframe set, and possibly extended, by the regulator.

Telecommunications law gives no discretion in the application of the ownership thresholds it sets, although the court has considerable discretion in the kind of orders it can make if it finds they have been breached.

Role of public service media

The federal government funds two national public service broadcasters, the ABC and the SBS. The ABC operates two national television networks (one digital only) and an international television service delivered across the Asia-Pacific; international, several national and one local radio network; and one of the country's most used websites. It carries advertising on its international TV service and on third party websites it manages, but not on its domestic TV or radio or international radio services or its own website. The SBS operates two national television networks (one digital only), national radio networks and its website, and is a partner in a commercial pay TV channel, World Movies.

Recent developments

Changes to laws

Big changes to Australia's media ownership laws were passed by the Parliament in October 2006 and took effect in early April 2007:

Foreign ownership: All remaining media-specific foreign ownership restrictions were removed. These included limits on ownership, control and directorships in commercial TV, limits on ownership in pay TV and ownership of newspaper enterprises. Specific limits in commercial radio were removed in 1992. These changes meant the long-standing anomalies of News Corporation's control of around two-thirds of daily newspaper circulation in the country and CanWest's majority economic interest in the Ten Network, achieved in different ways in the 1980s and early 1990s, are no longer inconsistent with stated policy.

Cross-media ownership: Cross-media limits were loosened, allowing one entity to control two of the three main media in a local area, instead of one ('two-out-of-three rule').

Minimum number of media groups: A new requirement for a minimum number of media groups in each area was introduced. Cross-media mergers will not be permitted if they result in less than five media groups controlling the commercial television licences, commercial radio licences and newspaper(s) in a metropolitan area, or four groups in a non-metropolitan area ('five/four media groups rule').

Disclosure of cross-media relationships: Media companies become part of a cross-media group, they are now required to disclose their relationships with other enterprises in the group when reporting on their business affairs.

Maintaining local content and presence in non-metropolitan areas: New requirements introduced by the regulator in 2004 were supplemented and given legislative force. These oblige regional television and radio licensees to broadcast minimum numbers of local news and weather bulletins, local community service announcements and, if requested by emergency service agencies, emergency warnings. Where they became part of a cross-media group, they are also required to maintain prior levels of local news, information and 'local presence' (staffing levels and studios and other production facilities).

Debates

Concentration of ownership

The current Liberal/National Coalition (Conservative) Government opposed the introduction of cross-media rules in the mid-1980s, which were the centerpiece of the changes made to media ownership rules by the previous Labor Government. In office from 1996, the Coalition's long-standing criticism was bolstered by changes in the media market. When introducing a bill to remove the rules in 2002, the Minister argued there was 'ongoing tension between the trend towards convergence...and a regulatory framework which is based on sector-specific regulation and an assumption that influential sources of news and opinion are limited to the traditional domestic media outlets'. The government was 'committed to the need for ongoing diversity of opinion and information in the Australian media' but 'does not believe that diversity of ownership is necessary to achieve this'.¹

The Government emphasized the importance of new media services available via the internet, and the two extra TV-like services discussed above which it proposes to licence in 2007. It also argued that falling barriers to entry in the media business as a result of new technology meant the industry should be treated more like other sectors of

¹ Second Reading Speech, Broadcasting Services Amendment (Media Ownership) Bill 2002 (Cth), House of Representatives, 21 March 2002, 1924-5 (Peter McGauran, Minister for Science).

the economy for the purposes of competition regulation. It stressed, however, that it was not abolishing, but merely liberalizing, the cross-media ownership limits, and supplementing them with the new media groups and content requirements outlined above.

Although the Labor Opposition eventually opposed the removal of the cross-media rules in the Parliament in 2002 and 2006, its former communications spokesperson argued in 1999 that such restrictions would 'no longer be important' because 'the media dominance of newspapers and television is soon to end' and barriers to entry into the information industry were 'dropping at a staggering rate'.² Labor eventually argued against the Government's liberalization of cross-media restrictions because it thought the changes would merely result in greater concentration of ownership of the three media which were still the most used sources of information.

Foreign ownership

The Labor Opposition supported the Government's removal of media-specific foreign ownership restrictions, agreeing that further foreign investment could expand the capital and skills available to Australian media enterprises.

Telstra privatization

The Labor Opposition opposed the Government's privatization of Telstra. It has recently proposed a 50/50 Private Public Partnership to build a national Fibre-to-the-Home network to deliver fast broadband to 98% of households in the country.

Important transactions

Almost as soon as the new laws were passed, Australia's two top-rating television networks, Seven and Nine, along with some other media interests, were sold into 50/50 joint ventures between their previous owners and overseas private equity firms, CVC (Nine) and KKR (Seven). Nine's parent later sold a further 25%. Following restructuring of its media and gambling interests into separate companies, it is likely to emerge with only around a 5% stake in the Nine television network and the Australian Consolidated Press magazine business. It retains its 25% stake in the man pay TV operator, Foxtel, whose other shareholders are Telstra (50%) and Rupert Murdoch's News Limited (25%).

The largest investor in the third network, CanWest Global Communications, is looking for a buyer for its stake,³ having already found one, the Australian private equity firm

² Lindsay Tanner, *Open Australia* (1990), 175-6. Tanner led the opposition to the Broadcasting Services Amendment (Media Ownership) Bill 2002. See Commonwealth, *Parliamentary Debates*, House of Representatives, 25 September 2002, 7234-40 (Lindsay Tanner).

³ 'Joint news release by CanWest International Communications Inc. and Ten Network Holdings Limited', 7 Dec 2006. This joint announcement came the day after Ten announced a 'Seriously Different' digital media strategy: Media Release, 6 Dec 2006.

Ironbridge Capital, for its New Zealand commercial TV and radio operation, CanWest MediaWorks.⁴

Some individual television stations not already part of the main networks have been acquired by Nine and its regional affiliate WIN in transactions that were not dependent on the changes to the laws.

The Fairfax newspaper business, the second largest in the country, which publishes the daily broadsheets in Sydney and Melbourne and the national financial daily *The Australian Financial Review*, has merged with Rural Press, a major owner of newspapers and radio stations in country areas. Rupert Murdoch's News Limited acquired but later sold a significant stake in Fairfax, a move widely interpreted as blocking any acquisition of Fairfax by one of the major television operators in the country.

The Seven Network has taken a significant stake in West Australian Newspapers.

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⁴ 'Ironbridge Capital to acquire CanWest's stake in MediaWorks for NZ\$386 million', Media Release, 8 May 2007.