CONVERGENCE AND MEDIA OWNERSHIP

THE MERITS OF REPEALING THE '2 OUT OF 3 RULE' AND ADOPTING A NATIONAL PUBLIC INTEREST TEST

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The convergence of media and communications technologies has radically altered the nature of content-related competition in the media sector and undermined the effectiveness of the present regulatory framework. One of the issues identified for consideration in the *Convergence Review - Emerging Issues Paper* of July 2011 was whether cross-media ownership rules are still necessary in a multi-platform environment. The purpose of the present paper is to examine the continuing relevance of the '2 out of 3' rule in the *Broadcasting Services Act* 1992 (Cth) in the context of the recommendations outlined in the *Convergence Review - Final Report* of April 2012. The article seeks to evaluate the extent to which the recommended reforms would serve to enhance regulatory parity and support media diversity within an increasingly converged media landscape.

INTRODUCTION

The radical evolution of media and communications technologies has served to dissolve the traditional boundaries between different categories of media service and altered the nature of content-related competition in the media sector. In such an environment of converging media technologies, markets and services, an issue of significance is the continuing relevance of the '2 out of 3' rule in s 61AEA of the *Broadcasting Services Act* 1992 (Cth) ('BSA'). This rule applies to the licensing of commercial radio and television services and operates to prohibit the acquisition of more than 2 out of 3 types of media operations (i.e. commercial radio, commercial television or an associated newspaper) in a specified radio licence area. The *Convergence Review - Final Report* (CRC 2012) recommends the repeal of this rule and the application of a public interest test to assess proposed changes in the control of content service enterprises of national significance. It is envisaged that the review, to be conducted by a new communications regulator, would complement the existing framework for mergers review under the *Competition and Consumer Act* 2010 (Cth) ('CCA'). It is widely accepted that regulatory parity and media diversity are two critical objectives of communications law. The objective of this article is to evaluate the extent to which the above recommendations for reform would serve to enhance regulatory parity and strengthen media diversity within an increasingly converged media landscape.

The release of the April 2012 *Final Report* marks the end of a year of deliberation by the Convergence Review Committee. In April 2011, the *Convergence Review –Framing Paper* (CRC 2011a) introduced the topics to be addressed and sought feedback from stakeholders as to the principles that should underpin the new policy framework. In July 2011, following the consideration of 65 submissions, the *Convergence Review - Emerging Issues Paper* (CRC 2011b) stated that the object of the review was the formulation of 'a new policy framework' for federal communications law that addressed the convergence of media on older technologies, such as television, with the Internet.

For purposes of the present analysis, of particular interest are the five content-related competitions questions posed in the *Emerging Issues Paper*:

> (a) In a multi-platform environment, are cross-media ownership rules still necessary to ensure a diverse media sector?
>
> (b) Should cross-media provisions extend to cover new media services, such as IPTV and Internet-based media enterprises?
>
> (c) To what extent do the current diversity rules impact on innovation in media and content services?
>
> (d) Should cross-ownership rules be relaxed or removed in favour of a public interest test?
>
> (e) Are the current merger provisions of the CCA sufficient to ensure media diversity in Australia? (CRC 2011b)

The objective of the present article is to apply the scholarly literature on regulatory parity and media diversity to examine the effectiveness of the recommended repeal of the '2 out of 3' rule and the adoption of a national public interest test. In order to do so, the article will examine the merits of the existing provisions in the BSA and CCA, as well as the convergence law review discourse culminating in the April 2012 *Final Report*. The *Final Report* considers the nature of regulatory intervention in a variety of areas, including media ownership, media content standards, and Australian and local content.

The discussion in the present paper is confined to the recommendations relating to media ownership. The article begins in Part 1 by introducing the notion of convergence. Part 2 considers the existing laws, and Part 3 outlines the proposed reforms. In order to examine the merits of the recommendation it is necessary to consider the indicia for judging effective communications laws. Hence, Part 4 examines the theoretical framework and policy basis for laws in this area. Parts 5, 6 and 7 examine the amendments proposed by the Convergence Review Committee, and consider the extent to which the proposed reforms are likely to enhance regulatory parity and media diversity. Finally, Part 8 briefly considers the regulatory framework for electronic communications introduced in the European Union in 2003 and subsequently implemented in the United Kingdom. The EU and UK laws are widely regarded 'best-practice' in this area, and provide useful insights for reform and refinement of Australian communications laws (ACMA 2011: 6).

1 THE NATURE OF CONVERGENCE

Convergence has been described as the coming together of one or more of the following: information technology (computing hardware and software used in conjunction with public communications networks), telecommunications (voice and data), broadcasting and other networked audio-visual services.[1] The word was initially used to describe the dissolving of the clear boundaries between the telecommunications and information technology sectors (Larouche 2003). It was subsequently used to describe the erasure of the clear boundaries between the telecommunications and broadcasting or electronic media sectors (Walden 2003). Bar and Sandvig note that the Internet offers 'a range of applications that once existed in different domains, governed by different policies,' and presents new applications that 'defy traditional classification' (Bar and Sandvig, 2000: 590). Similarly, Werbach notes that '[h]ermetically-sealed categories' are foreign to the Internet (Werbach 2002: 39-40).

In the *Convergence Review – Emerging Issues Paper*, it is noted that as nearly all platforms and devices in the convergent era are digital, they are able to converge to a common network that operates over a variety of infrastructure types such as mobile wireless, copper phone lines, satellite and optical fibre-based infrastructure (CRC 2011b: 11). This allows users to access the Internet on their television or mobile phone, or watch television or listen to the radio on a personal computer. The Review noted that it is no longer 'useful' to look at broadcasting, radiocommunications and telecommunications as 'separate and distinct industries with unique policy frameworks,' and that a 'more useful approach' would be to

recognise market structures as consisting of a series of layers created by convergence (CRC 2011b:12).

The Australian Media and Communications Authority ('ACMA'), in its July 2011 *Occasional Paper* entitled *Converged Legislative Frameworks – International Approaches,* introduces the concept of 'legislative convergence' as the coming together of communications and media legislation, under a single converged legislative framework. ACMA notes that legislative convergence has often been viewed as a best practice response to issues raised by convergence. (ACMA 2011:1).

2 THE EXISTING LAW

The control and ownership of media in Australia is regulated by three distinct regulatory frameworks: the BSA, the CCA and the *Foreign Acquisitions and Takeovers Act* 1975 (Cth).[2]

THE PRESENT OPERATION OF '2 OUT OF 3' RULE IN THE BSA

The BSA regulates media control and ownership through a combination of statutory control rules and media diversity rules. The control and ownership laws are largely implemented through the commercial television and radio services via the licensing process.

The '2 out of 3' rule provides that a party cannot control more than two out of three specified media platforms of commercial television, commercial radio, or a newspaper that service a particular radio licence area. Fifty per cent of the geographic area of the radio licence must fall within the television licence area for this prohibition to apply, as per s 59 of the BSA. Section 61AEA provides that an unacceptable 3-way control situation exists in relation to the licence area of a commercial radio broadcasting licence (the first radio licence area) if a person is in a position to exercise control of: (a) a commercial television broadcasting licence, where more than 50% of the licence area population of the first radio licence area is attributable to the licence area of the commercial television broadcasting licence; and (b) a commercial radio broadcasting licence, where the licence area of the commercial radio broadcasting licence is, or is the same as, the first radio licence area; and (c) a newspaper that is associated with the first radio licence area. Section 6 provides that 'control' includes control as a result of, or by means of, trusts, agreements, arrangements, understandings and practices, whether or not having legal or equitable force and whether or not based on legal or equitable rights.

THE PRESENT OPERATION OF S 50 IN THE CCA

A second and distinct tier of regulation of media control and ownership is provided by s 50 of the *Competition and Consumer Act.* Section 50 regulates mergers that would have the likely effect of substantially lessening competition. In contrast to the BSA media ownership provisions, s 50 of the CCA applies to all markets and is not confined to media market transactions. Section 50(1) provides that a corporation is prohibited from directly or indirectly acquiring shares in the capital of a body corporate or acquiring any assets of a person if the acquisition would have the effect, or be likely to have the effect, of substantially lessen competition in a market. Section 50(2) provides a prohibition for such acquisitions by persons. Section 50(3) outlines a non-exclusive list of the matters that may be taken into account for the purposes of s 50(1) and (2) in determining whether the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market.

A corporation or person will not, however, be prevented from making the proposed acquisition if it is in the public benefit and the corporation or person is granted a clearance by the Australian Competition and Consumer Commission ('the ACCC') under s 95AC(2) or the acquisition is authorised by the Australian Competition Tribunal pursuant to 95AT(2). The *Merger Review Guidelines* of 2006 and *Formal Merger Review Process Guidelines* (ACCC

2006), together with the *Formal Merger Review Process Guidelines* (ACCC 2008), serve to outline the ACCC's approach to the assessment of the public benefit of mergers.

The relevant factors for purposes of assessing the 'effect on competition' under s 50 include:

(a) the actual and potential level of import competition in the market;

(b) the height of barriers to entry to the market;

(c) the level of concentration in the market;

(d) the degree of countervailing power in the market;

(e) the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins;

(f) the extent to which substitutes are available in the market or are likely to be available in the market;

(g) the dynamic characteristics of the market, including growth, innovation and product differentiation;

(h) the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor;

(i) the nature and extent of vertical integration in the market.

Extensive judicial consideration has been given to the concept of 'substantially lessening competition'. In *AGL v ACCC* (2003) 137 FCR 317, the court held that if the lessening of competition is 'real' or 'of substance', it will be a breach of s 50 and that the likely future state of affairs is relevant to such an assessment. The dynamic character of the market, including the nature and extent of innovation and product differentiation is also relevant for a s 50 inquiry. In *Coca-Cola Amatil/Berri Coca-Cola Amatil/Berri,* ACCC Competition Assessment, 8 October 2003, the ACCC took into consideration the dynamic character of the market when making an assessment. In its *Media Mergers, Executive Summary*, the ACCC indicated that in assessing the likely competitive effects of a merger it will make a determination of the likely state of the market within a two to three year time frame based on actual evidence rather than hypothetical conjecture (ACCC 2006).

Graham Samuel has provided helpful insights into the assessment of competition in the media market (Samuel 2007). In determining whether a cross-media merger should proceed, a critical element will be whether the merging outlets are significant competitors for advertisers, consumer and/or content owners despite being different types of media. Hence, a television company could potentially be a competitor of a radio company if both broadcast in the same region. Samuel notes that whilst the effect of future technological evolution is relevant, the effect of future technological advances which are in the realm of speculation and conjecture cannot be considered for the purpose of s 50. 'Media mergers that, based on the best available evidence, are unlikely to substantially lessen competition should not be hindered on the basis of speculation of what technology might bring in the future.' On the issue of bundling, Samuel interestingly states that even if the relevant media outlets do not significantly compete for advertisers and consumers, competition concerns may be created if the media merger would facilitate tying and bundling of products. Whilst in some circumstances bundling may in fact increase efficiency by reducing production and distribution costs, it may be anti-competitive if it enables a firm with market power to extend that power by raising barrier to entry and harm potential competitors.

3 RELEVANT PROVISIONS OF THE PROPOSED REFORMS

The *Final Report* notes that in a converged environment there is a risk that content will be a new competition bottleneck for which regulatory intervention will be required. The *Final Report* affirms that competition is a key driver of innovation and investment and forms the foundation of positive consumer outcome. Accordingly, the *Final Report* recommends that

significant media enterprises, defined as 'content service enterprises,' be subject to a variety of regulatory measures relating to ownership and content.

In order to be classified as a 'content service enterprise', the enterprise needs to meet a threshold relating to revenue and users. The *Final Report* states that the thresholds for revenue and users would be set at a high level so that only the most substantial and influential entities are within the category of a content service enterprise (CRC 2012: xviiii). The threshold for users and revenue would be set at a high level so as to exclude small and emerging content providers. The *Final Report* further notes that the proposed framework is only concerned with professional content. For example it would include 'television-like' services and newspaper content but exclude social media and other user-generated content. As a guide, modelling conducted for the Review indicates that currently around 15 media operators would be classified as content service enterprises. This modelling suggests that currently only existing broadcasters and the larger newspaper publishers would qualify as content service enterprises.

In relation to media ownership and competition, it is stated that media ownership and control rules should promote a diverse range of owners at a national and local level. A new communications regulator would examine changes in control of content service enterprises of 'national significance.' The new communications regulator would be empowered to instigate and conduct market investigations where potential content-related competition issues are identified. It would have the power to block a proposed transaction if it is satisfied that the proposal is not in the public interest (CRC 2012: 2). It is recommended that the new communications regulator should have 'flexible rule-making powers that can be exercised to promote fair and effective competition in content markets' (CRC 2012: 28). The objective of the test is to maintain diversity of content services at a national level. It is envisaged that these powers would complement rather than duplicate the powers of the ACCC. The *Final Report* recommends the repeal of the '2 out of 3' rule as well as the '75 per cent audience reach' rule, the 'two-to-a-market' rule and the 'one-to-a-market' rule.

In contrast, the ownership of 'local media' would continue to be regulated through a 'minimum number of owners' rule. The existing '4/5' rule should be updated to take into account all entities that provide a news and commentary service and have a significant influence in a local market. The new communications regulator should be able to provide an exemption from the rule in exceptional circumstances, if it is satisfied that a transaction will provide a public benefit in a specific local market.

4 A THEORETICAL FRAMEWORK FOR EVALUATING THE RECOMMENDATIONS

In order to evaluate the merits of the proposed reforms, it is necessary to consider the criteria by which effectiveness of laws in this area can be judged. Two veins of legal scholarship are of particular relevance to evaluating the merits of the reform: the scholarship on the need to maintain media diversity and the scholarship on the benefits of regulatory parity, that is, the need for similar services to attract a similar incidence of regulation. It is useful to consider both these areas of scholarship to determine how they may inform the design of effective laws in this area.

MEDIA DIVERSITY

The relationship between media concentration and media diversity has been the subject of intense scrutiny. 'Media concentration' is a term used to indicate a scenario where one or a few companies dominate the media sector with substantial barriers to the entry of new players, resulting in limited concentration in the media sector (Doyle 2002). Concentration can be vertical, involving ownership of multiple production activities in a single supply chain, horizontal, involving cross-ownership within the same industry sector or diagonal, involving combined ownership of activities in several different areas of the media (Breuer 2011). It is

widely accepted that media concentration has the potential to lead to oligopolistic pricing and restrictive trade practices, and that when it occurs in the media sector, it has the added threat to transform a country's values, ideas and politics, perhaps even the national character ((Breuer 2011, citing Miller 2003).

The corollary to the above is that media competition generates media diversity. Media competition leading to media diversity is commonly held to be important as it leads to 'fairness and balance' and 'greater responsiveness to the interest of citizens' (Entman 2002). Doyle defines 'media diversity' as comprising both of 'a diversity of media supply' and 'a diversity of media' available to the public (Doyle 2002). Perusko presents seven elements of media diversity. The elements consist of a plurality of suppliers, free and affordable access, the service of the public interest through diverse and high quality content, the presence of diverse news sources, the existence of independent editorial news practices, diverse and transparent ownership structures, and the presence of social and cultural diversity (Perusko 2010).

The social responsibility of the media, taken as a whole, is to provide socially desirable content with a greater substance of cultural/social and political varieties, that is, heterogeneous content. Heterogeneous content is provided when the media provides a range of choices in both content and format, and provides a diversity of political orientations and cultural traditions. The media also has a responsibility to avoid the duplication of content that only targets mainstream audiences and serves popular demands, that is, homogeneous content. McCann notes the media should encourage independent thought and expression, innovative content even if it is unpopular and participation through diverse information (McCann 2007).

It is argued that whilst the media has a social responsibility, because most media organisations function on a profit-seeking mechanism, they will not automatically pursue or even gravitate towards providing diversity. The economic approach favoured by Brown and Van Culenburg essentially views the media as being motivated by supplying services (in this context, ideas) that satisfy audience demand (Brown 1996; Van Culenburg 2003). In such a context, self-regulation will not necessarily satisfy proper societal standards of media diversity. McCann describes this as the inherently 'amoral' character of the media (McCann 2007: 4).

It is therefore concluded the State has a critical role to play in protecting public interest through the design and implementation of regulation to achieve media diversity. However, as Breuer notes, whilst it is widely accepted that media concentration poses a threat to democratic values, the conflicting political and economic values make it difficult to formulate widely accepted media policy that satisfies the varied interests of media sector stakeholders (Breuer 2011). This is because, as Hitchens states, the media itself serves multiple, and at times conflicting, public functions that encompass both the economic and the non-economic (Hitchens 2006). Breuer, Abramson, and Blevins further suggest that there is a tension between the protection of competition and the protection of media diversity. This is because competition policy focuses on the economic effects of media concentration, such as the low output and higher prices resulting in a reduction in social welfare, whilst social policy focuses on the threat that media concentration poses to media diversity which has the potential to homogenise content and restrict cultural choice. The challenges for lawmakers in this area is hence not only to design laws that prevent undue media concentration and support diversity but also to formulate a test that provides an effective mechanism for achieving the appropriate level of media diversity.

REGULATORY PARITY

As well as supporting media diversity, an established objective of communications regulation is the achievement of parity. In the communications sector, technological neutrality is critical to the achievement of regulatory parity. 'Technological neutrality' is the idea that government policies should not treat services differently purely on the basis of the technology used to deliver them. The *Convergence Review - Emerging Issues Paper* notes that 'regulatory parity and technological neutrality' would be enhanced by a transition to a horizontal layered model

of regulation (CRC 2011b: 13). The paper recommends the need to shift from a vertical industry 'silos' approach to a horizontal market structure based on 'layers' approach. It is suggested that such a shift would enable the policy framework to focus on the services offered by each layer, rather than each industry (CRC 2011b: 12). Hence, instead of regulating on the basis of vertical silos such that one set of laws governs radio and another set of laws applies to television, it is necessary to look at the industry as a whole, and make decisions based on the substantive features of the area to be regulated rather than on the basis of predetermined categories.

Leading legal scholarship on the nature of regulatory parity is provided by Ishmail (Ismail 2003). In his seminal article on regulatory parity, Ismail notes that in order to achieve regulatory parity in communications policy, if all other factors are equal, regulators should treat similar services the same. The central justification for regulatory parity is economic efficiency. It is argued that unless all suppliers of similar services are treated equally, it will be regulation, rather than the ability to satisfy consumer demands efficiently, that will determine which suppliers will prevail in the communications market place (Ismail 2003, citing Entman 2000). If decisions as to supply are largely determined by regulation, it is argued that this is likely to result in 'lower quality, less innovation and investment, and higher costs and prices.' Regulatory parity is also justified on the basis of equity or the need to provide suppliers with 'a level playing field' (Ismail 2003: 485).

Hence in the present context, the objective of regulatory parity will be satisfied if like services are regulated on like terms. Thorne states that '[a]ll important legal issues in the new telecommunications operators cut across technology and traditional categories of service, and that modern telecommunications operators encompass television, cable and telephone. 'It spans wireline and wireless. It is underground, in the air, and in the geosynchronous orbit. It doesn't move voice, video or data; it moves bits' (Thorne 1995: 178).

Therefore, in a converging media landscape, the challenge is to design laws that satisfy *both* the objective of the maintenance of diversity and the achievement of regulatory parity. This challenge will be the subject of the remainder of the article.

5 THE LIKELY EFFECT OF THE REPEAL OF THE '2 OUT OF 3' RULE ON REGULATORY PARITY

The operation of the present s 61AEA is not technologically neutral as it uses the mode of transmission of a service as a basis for the nature and level of regulation. The scope of s 61AEA is expressly delineated by technology as it is limited to mergers occurring within the 'television', 'radio' and 'newspaper' sectors. The technological non-neutrality of the provision is further accentuated by the fact that s 61AEA does not apply to commercial radio services that do not use the broadcasting services bands or commercial television services that are provided by satellite.

The *Emerging Issues Paper* states that 'regulatory parity'' is founded on ideas of fair competition which, at their broadest, suggest treating all content equally and is an important objective in designing the new regulatory framework (CRC 2011b: 13). The *Emerging Issues Paper* acknowledges that Australia's media diversity and control rules do not apply to a variety of media which have grown more influential in recent years, including subscription television and online media, and that the penetration of subscription television has increased and as have the range and number of available news and information channels. Some of these commentators were of the opinion that the Internet has significantly increased diversity and provided greater choice and avenues of accessing information and entertainment. Other commentators did, however, point out that the greater volume of views expressed through the Internet was not tantamount to meaningful diversity of voice.

Applying Ismail's theoretical framework, the option presented by the *Final Report* is preferable to the alternative of retaining the substance of the '2 out of 3' rule and merely widening the categories of service included in the rule to encompass new media. As Ismail notes, maintaining categories of service and achieving regulatory parity is not easy, as it is

difficult to accurately identify what constitute 'similar services' that warrant similar regulatory treatment (Ismail 2003: 449). On the basis of Ismail's framework it would have been unhelpful to replace one set of rigid categorisation that unhelpfully distinguished between television, radio and newspaper with another set of rigid categorisation relating to what constitutes similar services. Hence, it is argued that on this level, the repeal of the '2 out of 3' rule would support regulatory parity.

However, the recommendations in the *Final Report* compromise regulatory parity in one critical respect. The *Final Report* expressly does not seek to regulate Internet media. The recommended threshold for 'content service enterprises' is such that no Internet company is within the definition. Keane notes that whilst Google is comfortably outside the definition, Telstra and Apple 'come close' (Keane 2012: 2). The 15 potential content service providers identified by the *Final Report* are all broadcasting or newspaper providers such as Foxtel, Nine Entertainment, Seven West Media and News Ltd. The present threshold setting for content service enterprises hence seriously undermines the regulatory parity rhetoric of the report. The only consolation is that the formulation of content service enterprise through the use of thresholds leaves open the door for online media to be regulated in the future (Keane 2012: 3).

6 THE LIKELY EFFECT OF THE REPEAL OF THE '2 OUT OF 3' RULE ON MEDIA DIVERSITY

The '2 out of 3' rule was originally intended to support media diversity. Greater regulation of radio, television and print was traditionally considered necessary as these mediums exerted significant influence on society. The *Emerging Issues Paper* acknowledges the historical significance of the rule and the fact that '[t]he existing regulatory arrangements reflect in large part the 'audience influence' principle—the idea that the level of regulation attached to a sector is in proportion to its level of influence in shaping community views. Media ownership rules apply to commercial television, commercial radio and newspapers within the same licence area as they have traditionally been considered the most influential services in the community.' The *Interim Report* on Media Diversity echoes this sentiment and opens by acknowledging that 'ownership and control rules are still necessary to promote a diverse and pluralistic media environment.'

However, as the *Emerging Issues Paper* correctly notes, the existing media diversity and control rules do not apply to a range of 'new media' which have become popular in the last few years such as online media and subscription television services. It is also significant that the penetration of subscription television has increased and that a variety of news and information channels are now provided. Similarly, online services are increasingly becoming 'more influential' sources of news and entertainment. Ironically, it is noted that people are increasingly using the online discussion pages to express their thoughts on the nature of diversity within Australia's traditional media.

During the course of the 2006 amendment to the BSA, strong concerns were raised as to the likely negative effect of changes to media ownership rules such as the '2 out of 3' rule on media diversity. Proposed amendments to the BSA were met with strong opposition in 2005 from certain sections of the media, especially trade union and professional associations of media workers who adopted the slogan 'Fewer voices. Fewer choices.'

The media diversity provisions in Part 5 of the BSA were designed in part to address this concern (Warren 2007 and McGill 2007). Hence, the media ownership section of the *Final Report* begins by expressly making the point that the present media landscape is vastly different to that of 2006 when the media ownership and control rules in the BSA were last amended. In 2006, social media was in its infancy and broadband penetration and speeds in Australia was relatively low, and that subsequently convergence has allowed people to have 'instant access to information and services across platforms' (CRC 2012: 19-20). It is argued

that new media has served to substantially *increase* the diversity of voices in the Australian market. This is a valid point and the *Final Report* recommendation of removing the '2 out of 3' rule will not compromise media diversity if an effective alternative mechanism is adopted to ensure the appropriate level of media diversity is maintained. The question then becomes how effective is the proposed national public interest test? This will be the subject of the next section of the paper.

Further, the repeal of the 2 out of 3 rule has also been supported on economic grounds. The Productivity Commission ('PC') in its *Broadcasting Report* of 2000 argues that any value cross-media rules have in relation to media diversity is mitigated by their economic effect (PC: 369). The PC argue that by preventing mergers across the boundaries of radio, television and newspapers, the cross-media rules potentially have an efficiency cost. The PC also notes that the law was designed when the Internet was in its fledgling stages and prior to subscription or digital television (PC: 344).

7 THE MERITS OF ADOPTING A NATIONAL PUBLIC INTEREST TEST

PRESENT LIMITATIONS OF THE CCA

In its present form, there is a critical limitation to the use of s 50 of the CCA to regulate media ownership and control. The ACCC's consideration of the effect on diversity is limited to economic considerations relevant to the assessment of the level of competition in the sector (ACCC 2008: 28). As the primary objective of s 50 is to protect consumers, the relevant factors to be considered under s 50(3) are essentially all economic in nature. Whilst the ACCC can consider the impact of a merger on media diversity, it is bound to do so within the relatively narrow and constraining context of the impact of such a merger on levels of competition in the media sector (Veljanovski 2000). This serves to limit the effectiveness of s 50 of the CCA in regulating media control and ownership. A proper assessment of media diversity may however require a wider range of issues that relate to the broader public interest.

Papandrea compellingly articulates the distinction between the objectives of competition and consumer protection laws and media diversity law (Papandrea 2006: 307). In an 'economic market,' such as those regulated by the ACCC, 'competition is promoted by substitutability between differentiated products.' Accordingly, the less differentiated the products, the greater scope for substitutability and hence the greater the competition between them. In marked contrast, in the media sector, which Papandrea terms 'the ideas market,' the efficiency of outcome is supported by greater differentiation between competing ideas (Papandrea 2006: 307). Butler similarly interprets the Explanatory Memorandum to the *Broadcasting Services Amendment (Media Ownership) Bill 2006* (Cth) as suggesting that the ACCC is not authorised to consider the impact of the merger on the diversity of opinion of media sector transactions (Butler 2006: 903).

Significantly, Samuel notes that whilst the key purpose of the *Trade Practices Act* 1974 (Cth) (now the CCA) is to protect competition and the primary protection for media diversity is provided by the BSA, the ACCC will consider whether a merged media business could exercise its market power to reduce the quality of content, which could include reducing 'diversity' of such content (Samuel, 2007). In its *Media Mergers Executive Summary*, the ACCC expressly states that it will consider whether a merged media business could exercise market power by reducing the quality of content it provides consumers, which could include reducing the diversity of the content it provides. Whilst this approach would serve to mitigate some of the concerns raised by Papandrea and others, it does not alter the fact that the primary focus of the s 50 CCA test is economic.

As a result of the perceived limitation to the use of s 50 of the CCA to comprehensively regulate media mergers, there has long been a call for a media-specific public interest test that would enable the ACCC to properly consider the full social, political and cultural effects of a merger. As early as 2000, the sceptre of a media-specific public interest was raised by the PC.

The PC considered the adoption of media-specific public interest test that could be incorporated into either the BSA or the *Trade Practices Act* 1974 (Cth) (now the CCA) (PC: 359).

MERITS OF THE PROPOSED TEST

The ambit of the public interest test proposed in the *Final Report* is wider than the present BSA media control and ownership provisions as the new test would extend into sectors not covered by the present media. The media would not be applied by the ACCC but by a new communications regulator. The reforms essentially reject radio licence areas as a basis for imposing regulation and adopt a public interest test for assessing the impact of proposed media mergers. As discussed, the proposal can be supported on the basis of furthering regulatory parity and it can be argued that extending media control laws is justifiable to the extent that those media operations have substantial influence.

However, there are certain limitations and areas of concern. Firstly, the *Final Report* neither provides a clear definition of 'public interest' nor provides clear guidance as to the considerations relevant to the assessment of public interest. In this regard, the approach is similar to the framework adopted by the CCA which also does not have a definition of the 'public interest.' The *Final Report* provides some broad guidance on the factors that should be taken into account. These include whether: the outcome of the transaction would diminish the diversity of unique owners providing general content; services as well as news and commentary at a national level; the outcome of the transaction would diminish the range of content services at a national level; the person(s) taking control of a content service enterprise would represent a significant risk that the content service enterprise would not comply with its obligations.

In the absence of a statutory definition of public interest in the CCA, the ACCC has in the past speculated on what such a definition would look like. In its *Broadcasting Report,* the PC refers to the ACCC's discussion of a media-specific public interest test in *Merger Guidelines: A Guide to the Commission's Administration of the Merger Provisions (s 50, s 50A) of the Trade Practices Act* (ACCC 1996). The ACCC noted that delineation of the public interest may involve the consideration of such criteria as 'the likely impact of an acquisition on editorial independence, the free expression of opinions, and the fair and accurate presentation of news' (ACCC 1996: 17 discussed by PC: 359). In comparison to the ACCC and PC deliberations, the considerations in the *Final Report* are broad-brush, and it would perhaps have been useful to provide more finely honed criteria to add certainty and transparency to the application of the test. The *Final Report* also notes that where the regulator decides that a transaction requires a public interest assessment, it should conduct a public consultation process to seek industry and community views. This would serve to add further uncertainty to the application of the public interest test.

In considering the likely application of the public interest test, Australia can take some guidance from the United Kingdom which has adopted a liberalised approach to cross-media regulation and incorporated a media-specific public interest test. The test is applicable in situations where the holder of a specified radio or television licence wishes to form an association with the owner of a newspaper. In such a situation the test outlines the matters that must be considered by the regulator. Relevant matters include the desirability of promoting plurality of ownership in broadcasting and newspaper industries, the desirability of promoting diversity in the sources available to the public and in the opinions expressed on television or radio in the newspapers and the economic benefits that may be expected to result from the holding of the licence by the applying body as against a nether body which was not connected with the proprietor of the newspaper. The PC notes with approval the references to plurality of ownership and diversity of information and opinion and the possibility of benefits accrued through economies of scale and concluded that the Australian test might likewise include some of these criteria (PC: 359).

Secondly, it is relevant to note that the present '2 out of 3' rule in the BSA is numerically based. It hence provides certainty and a reasonably predictable and stable basis for business

decision making. In marked contrast, the proposed test involves a high level of subjectivity and discretion. This is compounded by the above lack of detailed guidelines as to the criteria to be employed when applying the public interest test. When a media-specific public interest test was formerly raised, there was industry opposition on the basis that the test would serve to undermine the business certainty and confidence necessary to support investment, especially significant in an industry that already experiences significant ongoing technological and regulatory uncertainty. Indeed, when launching the present laws, the government defended them on the basis that they would support growth and investment in the industry, and would encourage new entrants to enter the market, providing new sources of information and entertainment (Coonan 2006). In its *Broadcasting Report*, the PC also acknowledges industry concerns that the test may be overly complex, uncertain and involve substantial compliance costs (PC: 360). In light of these concerns, it would also have been useful for the *Final Report* to have provided firmer guidance on the considerations relevant to the application of the public interest test.

Thirdly, the ambit of operation of the new public interest test is constrained by the restrictive definition of 'content service enterprise'. In its 2000 report, the PC notes that the media-specific public test should potentially cover Internet service providers, telecommunications firms and subscription television operators. The PC recommends that a list should be enacted through regulation rather than legislation as it would enable coverage to be more responsive to technological change and convergence. As discussed, due to the delineation of thresholds for content service enterprises, Internet companies are presently excluded from the application of the test, making the test narrower in ambit than that recommended by the PC.

Finally, it is relevant to note that the test proposed in the *Final Report* does not involve a reversal of the burden of proof. At present, the onus lies with the ACCC to challenge a merger or acquisition on the grounds that it substantially lessens competition (ACCC 2008: 361). The proposed test similarly requires that the onus is on the regulator to demonstrate that the outcome of the proposed transaction is not in the public interest.

In 2000, the PC concluded that the implementation of a media-specific public interest test is both achievable and desirable. 'Such is the speed with which convergence is occurring in the ownership of media and communications businesses that the test be implemented as soon as possible, and apply more widely than the current rules' (PC: 363). Twelve years has passed since that exhortation, and the effects of convergence, and the consequent case for the adoption of a media-specific test, have strengthened with the passing of time. Therefore, as discussed above, whilst certain matters still need to further clarified and developed, they do not detract from the central value of a communications regulator applying a national public interest test to assess the effect of a proposed transaction.

8 THE EUROPEAN UNION AND UNITED KINGDOM EXPERIENCE

In the context of the complexity and the variance of opinion on the issue, it is useful to briefly examine a jurisdiction that has already adopted a new regulatory framework in the communications sector to address the effects of convergence. In its 2011 report on convergence, ACMA notes that the European Union's converged legislative framework enacted in 2003 to govern 'electronic communications'[3] is 'often considered a best practice model' (ACMA 2011: 8). ACMA notes that Selvadurai (Selvadurai 2007) has called for the application of the EU model in Australia and that Frieden (Frieden 2003: 209) has called for the use of this model in the United States.

The ACMA notes that the trend in the United Kingdom towards reliance on competition law has been extended to broadcasting regulation (ACMA 2011: 40). The United Kingdom government in its *Communications White Paper* has described its approach as 'competition plus' (RAND et al. 2003: 11). The term describes an approach that utilises general competition law as a basis for structural regulation with the additional retention of sector-specific media regulation in circumstances deemed necessary by government. ACMA consider whether the UK legislative enactments in the area have led to greater regulatory

parity by surveying the empirical findings in the field (ACMA 2011: 23). De Steel argues that it is unclear whether the goal of proportionality has been achieved and that the rhetoric on this topic is greater than the actual outcome (De Steel, 2008). A report by Orangjee, prepared by RAND for the Netherland's telecommunications regulator OPTA, was inconclusive as to the success of laws designed to more effectively regulate communications sector in the context of convergence (RAND et al. 2003: 92). Overall, whilst the UK was found to have the most coherent and well-developed regulatory framework, the precise extent to which its laws addressed the effects of convergence was unclear. It was also evident that the regulation still experienced difficulty responding to change and uncertainty. Despite these acknowledged limitations, the framework for the governance of electronic communications remains the most comprehensive and ambitious regulatory response to the effect of convergence on the media sector.

CONCLUSION

As the Internet has served to dissolve technology based distinctions between media services, such categories no longer form relevant as a basis for imposing different forms of communications and content-related competition regulation on radio, television and print. Australia is by no means alone in grappling with the complex and vexed issue of designing effective communications laws to address the reality of convergence. Nations around the world are also battling with the tangled issue of how to amend their communications laws so as to enhance regulatory parity and technological neutrality whilst continuing to protect media diversity. Malaysia was one of the first nations to address this issue, passing the *Communications and Multimedia Act* in 1998. After the watershed of the EU enactment of the electronic communications law in 2003, a variety of nations passed similar laws. South Africa in enacted the new *Electronic Communications Act* in 2005, and Korea and Japan both enacted reforms to their existing regulatory frameworks to address the effects of convergence (Nasseri 2008; Kennedy 2010; Hayashi and Marumo 2011:101). Taiwan has also announced an intention to enact converge laws by 2014.

The Australian federal government has long acknowledged the need for reform to address the digital revolution, 'the impact of digital technologies means the current regulatory settings, which are largely designed for an analogue world, risk becoming outdated' (DICITA, 2006). The *Broadcasting Services Amendment (Media Ownership) Act* 2006 (Cth) ('BSAMOA') enacted significant amendments to the BSA. The Act repealed the former wide-ranging cross-media ownership laws. The repeal of the broad cross-media ownership laws formed an acknowledgment of the evolution of the media sector and served to increase the currency and relevance of Australian communications law. Indeed, in introducing the amendments, the government expressly stated that the media ownership amendments were 'technology and consumer driven' (Coonan, 2007). However, the BSAMOA also inserted a new set of media control provisions. One of these rules was the technology-specific three-way control rule that prohibits the acquisition of 2 out of 3 types of media platforms in the same licence area. In this context of the 'technology driven' objective of the 2006 amendments, it is difficult to explain reliance on the '2 out of 3' rule. The provision serves to regulate similar services in different ways, undermining a central tenement of communications law, the achievement of regulatory parity. The present convergence review provides a fresh opportunity to extend and build upon the 2006 reforms.

Therefore, the repeal of the technologically discriminatory '2 out of 3' rule, the introduction of a new national public interest test, together with the continuance of s 50 of the CCA, provide an effective framework for the attainment of both media diversity and regulatory parity. As discussed, whilst a variety of matters need to be clarified and developed, greater reliance on content-related competition laws would allow for both the protection of media diversity and the enhancement of regulatory parity in the governance of the communications sector. Placing greater emphasis on flexible notions of content-related competition and national public interest to determine appropriate levels of media diversity, and less reliance on inflexible numerical rules that differentiate between various media platforms, is consistent

with the international trend towards the design of technology neutral communications legislative frameworks.

REFERENCES

REPORTS

ACMA. 2011. Australian Communications and Media Authority, *Converged Legislative Frameworks – International Approaches*, Occasional Paper, July 2011.

ACCC. 1996.Australian Competition and Consumer Commission, *A Guide to the Commission's Administration of the Merger Provisions (s 50, s 50A) of the Trade Practices Act*.

ACCC. 1999. Australian Competition and Consumer Commission, *Merger Guidelines*, June 1999.

ACCC. 2006. Australian Competition and Consumer Commission, *Merger Review Guidelines*.

ACCC. 2008. Australian Competition and Consumer Commission (ACCC), *Formal Merger Review Process Guidelines*, 1 Jan 2007, updated June 2008.

CRC. 2011a. Convergence Review Committee, *Convergence Review – Framing Paper*, April 2011.

CRC. 2011b. Convergence Review Committee , *Convergence Review - Emerging Issues Paper*, July 2011.

CRC. 2011c. Convergence Review Committee , *Convergence Review – Interim Paper*, December 2011.

CRC. 2012. Convergence Review Committee, *Convergence Review - Final Report,* April 2012. Available from: http://www.dbcde.gov.au/digital_economy/convergence_review

PC. 2000. Productivity Commission, *Broadcasting Report,* No. 11, 3 March 2000.

RAND, DTI and Department for Culture, Media and Sport. 2003. 'Responding to Convergence', *Communications White Paper*.

BOOKS

Butler, D.; Rodrick, S. 2011. *Australian Media Law*. Sydney: Thomson Reuters.

Croteau, D.; Hoynes, W. (eds). 2006. *The Business of Media: Corporate Media and the Public Interest*. Thousand Oaks, California: Pine Forge Press.

Doyle, H. 2002. *Media Ownership*. London: Sage.

Hitchens, L. 2006. *Broadcasting pluralism and diversity: A comparative study of policy and regulation*. Oxford: Hart Publishing.

Walden, I.; Angel, J. 2003. *Telecommunications Law*. Vancouver: Blackstone Press.

ARTICLES AND PAPERS

Abramson, B. 2001. 'Media policy after regulation?', *International Journal of Cultural Studies* 4(3): 301-326.

Bar, F.; Sandvig, C. 2000. 'Rules from truth: Post-convergence policy for access', *28th Conference on Communications: Information and Internet Policy*, September 2000.

Breuer, A. 2011. 'Regulating the concentration of media ownership in the era of convergence in Europe for a comprehensive examination of the issue of media concentration', Central European University Department of Public Policy, Budapest Hungary.

Blevins, J. 2002. 'Source diversity after the Telecommunications Act of 1996 – Media Oligarchs begin to colonise cyberspace', *Television New Media* 3 (2): 95-112.

Brown, A, 1996. 'Economics, public service broadcasting and social values', *Journal of Media Economics* 9: 3-15.

Coonan, H. 2006. 'New media frameworks for Australia', *Press Release,* 13 July 2006. Available at http://www.abc.net.au/mediawatch/transcripts/ep23coo.pdf

Coonan, H. 2007. ABC Radio, 'New media laws mean more choice, says Coonan', *The World Today,* 30 March 2007. Available at http://www.abc.net.au.worldtoday/content/2007/s1885807

Copp, R. 1995. 'The economic effects of a decade of merger policy in Australia: Suggestions for reform', *Trade Practices Law Journal* 3: 108-125.

DCITA. 2006. Department of Communications and Information Technology and the Arts, *Meeting the Digital Challenge: Reforming Australia's Media Laws in the Digital Age,* Discussion paper, March 2006.

De Steel, A. 2008. 'Current and future European regulation of electronic communications: A critical assessment', *Telecommunications Policy* 32: 722-734.

Doyle, G. 2002. 'What's 'new' about the future of communications? An evaluation of recent shifts in UK media ownership policy', *Media Culture and Society* 24(5): 715-724.

Entman, R. 2002. 'Transition to an IP Environment'. *Aspen Annual Institute Conference on Telecommunications Policy*.

Frieden, R. 2003. 'Adjusting the horizontal and vertical in telecommunications regulation: A comparison of the traditional and a new layered approach'. *Federal Communications Law Journal* 55(2): 207-250.

Gillwald, A. 2001.'Experimenting with institutional arrangements for communications policy and regulation: The case of telecommunications and broadcasting in South Africa'. *The South African Journal of Information and Communications* 2: 34-51.

Hayashi, H.; Marumo, A. 'Japan', *International Comparative Legal Guide to Telecommunications Laws and Regulations 2012*: 92-99. London: Global Legal Group.

Ismail, S, 'Parity rules: Mapping regulatory treatment of similar services,' (2003) 56(3) *Federal Communications Law Journal* 447-488.

Katz, M. 2000. 'Regulation: The next 1000 years', *Six Degrees of Competition: Correlating Regulation with the Telecommunications Marketplace*. Aspen Annual Institute Conference on Telecommunications Policy: 40-64. Available at http://www.aspeninstitute.org/sites/default/files/content/docs/cands/SIXDEGREES_FINAL_.PDF

Keane, B. 2012. 'Regulation Revolution of the Convergence Review', *Crikey.com.au*, 1 May 2012. Available at: http://www.crikey.com.au/2012/05/01/keane-regulation-revolution-of-the-convergence-review/

Kennedy, D.; Lee, W. 2010. 'South Korea (Country Regulation Overview)', *Ovum Report,* 15 June 2010: 11.

Larouche, P. 1998. 'EC Competition Law and the Convergence of the Telecommunications and Broadcasting Sectors', *Telecommunications Policy* 22 (3): 219-242.

Lui, Y. 2011. 'The impact of convergence on the telecommunications laws and broadcasting-related laws: A comparison between Japan and Taiwan', *Keio Communications Review* 33: 8-32.

McCann, K. 2007. 'Communications policy and public interests: Media diversity in public and commercial broadcast television in the US', PhD dissertation, Bowling Green State University, December 2007. Available at http://etd.ohiolink.edu/send-pdf.cgi/McCann%20Kim.pdf?bgsu1189542869

McGill, I. 2007. 'Cross media mergers under the 2006 amendments to the Broadcasting Services Act 1992', *University of New South Wales Law Journal* 13(1): 280-294.

Mandelli, A. 2006. 'Monitoring citizens and network gate-keeping in complex democracies', *International Communication Association Conference*, Dresden International Congress Centre.

Miller, R. 2002. 'The Frankenstein syndrome: The creation of mega-media conglomerates and ethical modeling in journalism', *Journal of Business Ethics* 36(1-2): 105-110.

Nasseri, J. 2008. 'Korea plans new laws to maintain broadcasters edge', *Asia-Pacific Broadcasting Union*, 28 August 2008.

Papandrea, F. 2006. 'Media Diversity and Cross-Media Regulation', *Prometheus* 24(3): 301-322.

Perusko, Z,. 2010. 'The link that matters: Media concentration and diversity of content' in Klimkiewicz, B (ed), *Media Freedom and Pluralism: Media Policy Challenges in the Enlarged Europe*, (2010), Central University Press, Budapest.

Samuel, G. 2007. 'Key competition issues in Australia's media and broadcasting markets', *University of New South Wales Law Journal* 13(1): 1-10.

Selvadurai, N. 2005. 'The creation of the Australian Communications and Media Authority and the next necessary step forward', *Adelaide Law Review* 26(2): 271-299.

Selvadurai, N. 2007. 'Regulating for the future – accommodating the effects of convergence', *Trade Practices Law Journal* 13: 20-37.

Thorne, J.; Huber, P.W.; Kellogg, M.K. 1995. *Federal Broadband Law*, Aspen Publishers.

Van Cuilenburg, J.; McQuail, D. 2003. 'Media Policy Paradigm shifts: Towards a new communications policy paradigm', *European Journal of Communications* 18:181-207.

Veljanovski, C. 1995. 'The Australian Foxtel merger', *Australian Business Law Review* 28: 166-179.

Warren, C. 2007. 'The price of freedom: New media ownership laws and a free Australian press', *University of New South Wales Law Journal* 30(1): 269-279.

Westen, P. 1982. 'Empty idea of equality', *Harvard Law Review* 95(3): 537-596.

Werbach, K. 2002. 'A layered model for Internet policy', *Journal on Telecommunications and High Technology Law* 1:37-68.

ENDNOTES

1. *See further* Dwyer, T, *Media Convergence* (2010); Grant, A, and Wilkinson, J (eds), *Understanding Media Convergence: The State of the Field* (2009); Jenkins, H, *Convergence Culture: When Old and New Media Collide* (2008) (2nd ed.); and Ludes, P, *Convergence and Fragmentation: Media Technology and the Information Society* (2008).

2. A consideration of the *Foreign Acquisitions and Takeovers Act* 1975 (Cth) is outside the ambit of the present article.

3. The regulatory framework consists of four central directives, supported by a series of non-binding guidelines and recommendations European Commission: *Framework Directive* 2002/21 EC, OJ [2002] L108/33; European Commission, *Authorisation Directive* 20002/20 EC, OJ [2002] L108/21; European Commission, *Access and Interconnection Directive* 2002/19, OJ [2002] L108/7; European Commission, *Access and Interconnection Directive* 2002/19, OJ [2002] L108/7; European Commission, *Universal Service Directive* (2002/58/EC); European Commission, *Privacy Directive* 97/66 EC of 15 December 1997, OJ [2002] L201/37; and European Commission, *Recommendation on Relevant Products and Services,* OJ L 114, 11.2.2003; *See* European Commission, *Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors, and the Implications for Regulation, towards and Information Society Approach,* 1997, COM (97) 623 for the law reform discourse prior to the enactment of the new laws.

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