Media ownership rules are part of a larger problem

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As emerging technologies shift the boundaries of the media industries, we need to think again about how we can secure diversity in Australian media. Are the restrictions on ownership and control outdated? Are there other or better ways to promote the plurality of opinion and sources of information that we consider important in a democracy?

There is now some urgency about these questions. The Coalition came to power in 1996 with a commitment to remove the cross-media rules, which aim to limit cross-ownership between commercial broadcasting and newspapers. The rules prevent the controller of a commercial television or radio licence from owning a newspaper in the same licence area, while also proscribing cross-ownership between television and radio.

So far the Government has been unable to secure political support for change. In my view, this failure is not the result of Democrat or Labor intransigence in the Senate, but a symptom of the Government’s reluctance to contemplate a broader modernisation of the Australian broadcasting system. Recently, however, the Government has said it wants to try again on cross-media.

The present rules were legislated in 1987 and have shaped Australian media around the separation of print and broadcasting. But they have never been amended to apply to new media forms and distribution platforms, such as subscription television, datacasting, Internet media or telecommunications. The result has been the emergence of a whole new generation of cross-media interests outside the scope of the current rules. Considerable cross-ownership now exists both within new media and between new and old media. One example is Foxtel, which is owned by Telstra, the Packers’ Publishing and Broadcasting Limited (PBL) and the Murdochs’ News Limited. Another is Telstra’s almost-but-not-quite purchase of the Nine Network in 1999, which would have been allowed by the current rules.

The Government’s argument against the cross-media rules is twofold: new media technologies are delivering more diversity, and the rules operate unevenly and partially in a convergent environment anyway. The first point is increasingly questionable: concentration now appears to be the most likely scenario for the industry over the medium term. Old and new media are consolidating as Internet media sites evolve, or in many cases collapse. A recent story in the Age (18 December 2001) on the problems of webzine publishing emphasises the reliance of new media on old. Nick Place, a journalist with online content provider Media Giants, is quoted saying that ‘To make money on the Web now, you’ve really got to be tied to something else, like a newspaper, a television show or a radio program. Otherwise, it’s just too tough.’ His comment signals the closure of what we can now see as the naïve era of Internet publishing. New technologies can no longer be seen as inherent forces for plurality and diversity. The economics of online media have proved no less challenging than offline.

The stronger objection to the cross-media rules is that they do not extend to media forms that have emerged since 1987, such as subscription television, and they do not take account of the convergence of telecommunications, broadcasting and the Internet. This is true, and needs to be addressed through some changes to the existing system. So what should replace the cross-media rules, and when? The virtue of the current regime is its relative simplicity. Widening the scope of regulation might provide greater flexibility, but at the risk of increased complexity and uncertainty.

Much of the current debate has been about the best means to secure media diversity. Extending the current cross-media rules to other media sectors would leave more hostages to technological fortune. Could we rely on general competition law to prevent further concentration? Specific rules do seem necessary for preserving diversity in the media, primarily because the political, social and cultural need for diverse sources of information cannot be correlated with the need for competition in commercial media markets.
From the point of view of competition regulation, the ‘consumers’ of free to air media are not viewers or listeners but advertisers, so the problem concerns the market for advertising, rather than the availability of a range of news and information sources for readers or viewers of the media. In this context the substitutability of different media for advertisers becomes the main issue, and while there is considerable debate around this topic, the general view is that competition law as embodied in the Trade Practices Act (TPA) may well define markets too narrowly to prevent further concentration across media sectors.

But however broadly one defines the market in this way, it may not be sufficient to sustain the broader public interest in media diversity. In its recent inquiry into these matters, the Productivity Commission drew on a line of work suggesting that the social performance of the market in providing diversity of opinion and information is the primary issue.

The Productivity Commission’s suggestion was to introduce a media-specific public interest test in trade practices law. I worked on the staff of the inquiry, and think that its approach to this issue is still the best way forward. The proposed test would prohibit mergers and acquisitions between businesses in prescribed media industry sectors, unless it could be shown that the proposed merger was not contrary to the public interest in diversity. Reversing the usual requirements of the TPA, the onus would be on industry players to prove that a proposed merger was in the public interest. Criteria would probably be based on a number of measures, including audience share and advertising revenue. This test would function in addition to the ‘substantial lessening of competition’ test already applied by the Australian Competition and Consumer Commission (ACCC) to mergers and acquisitions. The test would be administered by the ACCC, which would be advised by the Australian Broadcasting Authority (ABA) on the social, cultural and political dimensions of the public interest.

Critics of the Commission’s position, notably News and PBL, have argued that a media-specific public interest test would be intrusive, complex, uncertain and expensive. The Communications Law Centre, while not sharing these reservations, noted a lack of transparency in the decision-making of the UK’s Independent Television Commission, which administers a public interest test. However, in its final report the Commission emphasised the need for as much openness as possible in the administration of the test, including public consultation and the publication of reasons for decisions.

The Commission’s extended discussion of these questions remains the most useful point of reference for this issue. Further attention needs to be given to the content of the test, the development of ‘safe harbour’ guidelines, the specification of which sectors should be included in the test, the process of administering the test, and the process of appeals against decisions. An important element in all this work is developing a greater understanding of media influence: the ABA’s recent research on the sources of news offers a useful starting point, but there is more work to be done.

One of the most important aspects of the Commission’s recommendations was the proposal that the public interest test sit alongside the cross-media rules, until other reforms make it possible for new players to enter the industry. Ownership rules are a crude way of protecting a degree of plurality in a media system which prohibits new commercial television licences; allowing new entrants into the system would bring real benefits in increasing the sources of information and opinion. Defenders of the present system sometimes point out that free to air television is less concentrated than the newspaper business. But there is no real public interest in preserving the incumbent television oligopoly. The review of datacasting scheduled for 2002 is an early opportunity to abandon the Government’s peculiar restrictions on digital television, and encourage greater diversity and innovation.

A quick fix on cross-media will not guarantee diversity. A wider effort to modernise audiovisual policy is required. The strategic connections need to be made between digital television policy, the inclusion of new players, content regulation, the future role of public broadcasting, and further development of Australia’s indigenous and community media sectors.

The real challenge is a forward-looking overhaul of the policy framework. On this front the Government
appears a little tired and somewhat over-committed to the present system, cross-media rules excepted. Labor and the smaller parties have indicated a willingness to address the issues more comprehensively. They are well placed to make an important contribution.

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