

**FOREIGN OWNERSHIP OF MEDIA AND TELECOMMUNICATIONS:**

**AN AUSTRALIAN STORY**

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ABSTRACT

[253] This article explains the range of laws currently affecting foreign participation in Australian broadcasting and other media and communications sectors. It outlines current ownership and control patterns in different sectors of the Australian media and communications industries. It also explores foreign ownership laws' impact and origins, and assesses arguments for and against changes to them.

On 21 March 2002, legislation was introduced into Australia's federal Parliament which, among other things, would repeal the foreign ownership rules in the *Broadcasting Services Act 1992*.<sup>2</sup> Although media has often been seen as perhaps the most sensitive of industries over which 'outsiders' might exercise control, this plan to liberalise foreign ownership restrictions came less than a year after the rejection of a proposal for foreign control of Australia's largest developed energy resource on the North West Shelf, and a few months before the rejection of a proposal for higher foreign shareholding in QANTAS.

This article explains the range of laws currently affecting foreign participation in Australian broadcasting and other media and communications sectors. It also explores their impact and origins, and assesses arguments for and against changes to them.

**The legal rules**

*Overview*

The general law and policy about foreign participation in the Australian economy is set out in the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (FATA). More detail about the implementation of the law and policy, including specific rules about foreign investment in newspapers, is set in the 'Summary [254] of Australia's Foreign

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<sup>2</sup> Broadcasting Services Amendment (Media Ownership) Bill 2002.

Given, 'Foreign Ownership of Media and Telecommunications: An Australian Story'

Investment Policy' issued to explain that legislation.<sup>3</sup> In addition, there are separate laws limiting foreign ownership and control in the television broadcasting and telecommunications sectors. These do not displace the Treasurer's power under the general law to block the acquisition or establishment of media and communications businesses, even where they do not infringe the sector specific limits.<sup>4</sup> Broadly, the laws:

- limit foreign *shareholdings* in mass circulation newspapers, commercial and pay TV operations and the majority government owned telecommunications company Telstra;
- limit the proportion of foreign *directors* on the boards of commercial TV companies and require Telstra's Chairperson and a majority of its directors to be Australian citizens;
- prohibit foreign *control* of commercial TV stations; and
- require Telstra's head office, *base of operations* and place of incorporation to remain in Australia.

Although the laws provide strong powers to restrict foreign investment, the government's general attitude across the whole economy is to welcome it. It believes foreign investment 'provides scope for higher rates of economic activity and employment than could be achieved from domestic levels of savings' and that 'foreign direct investment provides access to new technology, management skills and overseas markets'. One of the aims of foreign investment policy is to balance community concerns about foreign investment policy, particularly in sensitive sectors like developed residential real estate and media, against its economic benefits.<sup>5</sup>

The Australian Government's policy-making flexibility in this area is potentially affected by international trade agreements to which it is a party. It has made a commitment in the World Trade Organisation to avoid sector specific restrictions on foreign investment in telecommunications.<sup>6</sup> However, it has made no similar

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<sup>3</sup> The Treasury (Foreign Investment Policy Division) 'Summary of Australia's Foreign Investment Policy', May 2000 <[http://www.firb.gov.au/policy\\_pubs/policysummary1.htm#General](http://www.firb.gov.au/policy_pubs/policysummary1.htm#General)> (20 September 2002)

<sup>4</sup> Ibid [33].

<sup>5</sup> Ibid [2].

<sup>6</sup> See below n 21.

commitments for newspapers or television, and under the bilateral Closer Economic Relations Agreement with New Zealand, has expressly preserved its ability to maintain limits on foreign ownership and control of broadcasters.<sup>7</sup>

### ***General***

The FATA and regulations made under it require proposals by foreign persons or corporations to acquire Australian assets valued at more than \$50 million (or corporations controlling them) to be notified in advance to the Treasurer. The Treasurer can 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. 'National interest' is an elastic concept. The 'Summary of Australia's Foreign Investment Policy' under the legislation states: 'The Government determines what is 'contrary to the national interest' by having regard to the widely held community concerns of Australians.'<sup>8</sup>

For media, the 'Summary of Australia's Foreign Investment Policy' indicates that all direct ('non-portfolio') proposals by foreign interests to invest in the media sector irrespective of size are subject to prior approval. Proposals involving portfolio shareholdings of 5 per cent or more must also be submitted for examination.<sup>9</sup>

### **[255] *Newspapers***

The 'Summary of Australia's Foreign Investment Policy' sets more restrictive thresholds for mass circulation national, metropolitan, suburban and provincial newspapers. Under the policy:

All proposals by foreign interests to acquire an interest of 5 per cent or more in an existing newspaper or to establish a new newspaper in Australia are subject to case-by-case examination. The maximum permitted foreign interest (non-portfolio) investment/involvement in national and metropolitan is 30 per cent with any single

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<sup>7</sup> Protocol on Trade in Services to the Australia New Zealand Closer Economic Relations Trade Agreement, Australian Treaty Series 1988 No 20, Canberra, 18 August 1988 (entry into force: 1 January 1989) <<http://www.austlii.edu.au/au/other/dfat/treaties/1988/20.html>>.

<sup>8</sup> 'Summary of Australia's Foreign Investment Policy', above n 3, [6].

<sup>9</sup> *Ibid* [32].

Given, 'Foreign Ownership of Media and Telecommunications: An Australian Story'

foreign shareholder limited to a maximum interest of 25 per cent (and in that instance unrelated foreign interests would be to have aggregate (non-portfolio) shareholdings of a further five per cent). Aggregate foreign interest direct involvement in provincial and suburban newspapers is limited to less than 50 per cent for non-portfolio shareholdings.<sup>10</sup>

The 25 and 30 per cent thresholds were set in 1993, allowing Canadian Conrad Black to increase his shareholding in the John Fairfax newspaper group.<sup>11</sup> A House of Representatives Select Committee on the Print Media had recommended the previous year that individual foreign investors be allowed to exceed 20 per cent only where the proposal was in the national interest or where special arguments (such as a failing company) applied.<sup>12</sup>

### ***Free-to-air TV***

Under the *Broadcasting Services Act*:

- a foreign person must not be in a position to exercise control of a commercial TV licence — a person is deemed to be in a position to exercise control if they have company interests exceeding 15 per cent in a company holding a commercial TV licence;
- two or more foreign persons must not have company interests exceeding 20 per cent in a commercial TV broadcasting licensee;
- not more than 20 per cent of the directors of companies holding commercial TV broadcasting licences can be foreign persons.<sup>13</sup>

'Company interests' encompass shareholdings, votes, dividends or winding up interests.<sup>14</sup>

### ***Pay TV***

Under the *Broadcasting Services Act*:

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<sup>10</sup> Ibid [35].

<sup>11</sup> See Senate Select Committee on Certain Aspects of Foreign Ownership Decisions in relation to the Print Media, *Percentage Players: The 1991 and 1993 Fairfax Ownership Decisions* (June 1994).

<sup>12</sup> House of Representatives Select Committee on the Print Media, *News and Fair Facts: The Australian Print Media Industry* (March 1992) 332–4.

<sup>13</sup> *Broadcasting Services Act 1992* Div 4 of Pt 5 and Sch 1.

<sup>14</sup> Ibid s 6.

- a foreign person must not hold company interests exceeding 20 per cent in a company holding a subscription television broadcasting licence;
- two or more foreign persons must not have company interests exceeding 35 per cent in a company holding a subscription television broadcasting licence.<sup>15</sup>
- there are no limits on foreign control of subscription television broadcasting licences or directorships equivalent to those applying to commercial TV licences. There are also no limits on foreign holdings of company interests in subscription television narrowcasting licences, open narrowcasting or datacasting licences.

[256] **Radio**

The *Broadcasting Services Act* places no specific limits on foreign ownership or control of commercial radio licences beyond those imposed by the FATA. The radio industry is therefore subject only to the general law as interpreted in the *General Policy Guidelines*.

**Telecommunications**

There are two restrictions on foreign ownership in this sector. One affects the former public monopoly carrier, Telstra, and the second affects other telecommunications carriers.

*Restrictions on Telstra*

The federal government owns 50.1 per cent of the shares in the former public monopoly carrier, Telstra, following two rounds of privatisation in the late 1990s. Foreign shareholding and participation in the activities of the company are restricted in a number of ways.<sup>16</sup>

- Limits are imposed on individual foreign ownership and total foreign ownership. Individual foreign persons are not permitted to hold more than 5 per cent of the publicly-traded shares in the company (that is, a 2.5 per cent stake in the company as a whole) and total foreign persons are not permitted to hold more than 35 per cent (17.5 per cent of the whole company). If either of these situations arise, an ‘unacceptable foreign ownership situation’ is said to exist.

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<sup>15</sup> *Ibid* s 109.

<sup>16</sup> *Telstra Corporation Act 1991* Pt 2A.

Given, 'Foreign Ownership of Media and Telecommunications: An Australian Story'

- Telstra's chair, and a majority of Telstra's directors, must be Australian citizens.
- Telstra's head office, base of operations and place of incorporation are to remain in Australia.<sup>17</sup>

The Government's policy on the privatisation of the rest of Telstra is a matter of some contention within the Government. The Government went to the 2001 election stating 'we will not take any steps to privatise any more of Telstra unless and until we are satisfied services are adequate.'<sup>18</sup> An inquiry to further review services in regional, rural and remote areas was announced in August 2002.<sup>19</sup>

#### *Restrictions on other carriers*

The *Telecommunications Act 1997* gives the Minister the power to impose limits on foreign ownership of licensed telecommunications 'carriers' — the companies which own or control transmission infrastructure (s 65).

The Guidelines to the FATA state:

Prior approval is required for foreign involvement in the establishment of new entrants to the telecommunications sector or investment in existing businesses in the telecommunications sector. Proposals above the notification thresholds will be dealt with on a case-by-case basis and normally be approved unless judged contrary to the national interest.<sup>20</sup>

#### *WTO commitment*

The World Trade Organisation settled an agreement on basic telecommunications under the General Agreement on Trade in Services (GATS) in February 1997. This occurred at the same time as Australia was [257] overhauling its telecommunications laws. Australia committed itself to 'no sector specific foreign equity limits for new carriers' if that was the Parliamentary outcome of the 'Open Competition' reforms

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<sup>17</sup> Specifically, 'Telstra must ensure that the central management and control of Telstra is ordinarily exercised at a place in Australia' (s 8BQ) and, without limiting Telstra's capacity to engage in activities outside Australia, 'Telstra must ensure that it maintains a substantial business and operational presence in Australia' (s 8BR).

<sup>18</sup> Senator Richard Alston (Minister for Communications, IT and the Arts), 'Mr Beazley must immediately clarify Labor's position on Telstra', Media Release, 23 May 2001.

<sup>19</sup> Senator Richard Alston, (Minister for Communications, IT and the Arts), 'Regional Telecommunications Inquiry', Media Release 193/02, 16 August 2002.

<sup>20</sup> 'Summary of Australia's Foreign Investment Policy', above n 3, [37].

being debated at the time. It said, '[t]he Government has introduced legislation aimed at implementing an unlimited number of basic telecommunications carrier licences from 1 July 1997 and Australia binds itself to the outcome of this Parliamentary process in terms of numbers of carrier licences and foreign equity applying to new carrier licences.'<sup>21</sup> The commitment explained the status of Telstra privatisation and the arrangements in place at the time affecting the ownership and control of Optus and Vodafone.<sup>22</sup> It stated, '[m]easures shall be maintained to ensure that these arrangements continue to apply after 30 June 1997'. The actual result of those reforms and subsequent regulatory action means the WTO commitment would probably be interpreted as prohibiting sector specific foreign investment restrictions except for Telstra.

### *Satellite*

There are no provisions relating specifically to satellite services. Carriage services provided by satellite are regulated under the *Telecommunications Act*; content services provided by satellite may be regulated under the *Broadcasting Services Act*.

## **The rules' impact**

### *Print*

#### *Newspapers*

Daily and Sunday newspaper circulation is dominated by Murdoch's News Limited and, to a much lesser extent, John Fairfax. News and related companies publish daily newspapers in all State and territory capital cities except Perth and Canberra, plus the national daily *The Australian*. John Fairfax publishes the daily broadsheets in Sydney and Melbourne and the national financial daily the *Australian Financial Review*.

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<sup>21</sup> World Trade Organisation Group on Basic Telecommunications, 'Communications from Australia — Final Schedule on Basic Telecommunications under the General Agreement on Trade in Services (GATS)', Doc 97-0600, S/GBT/W/1/Add.10/Rev.2, 14 February 1997.

<sup>22</sup> There were no limits on total foreign equity in Optus. However, there were certain limits on individual foreign equity holdings. Also, the Chairman and directors of Optus had to be Australian citizens, other than those directors (who must comprise the minority) appointed by the then two current major foreign investors. There was also a requirement for majority Australian ownership of mobile carrier Vodafone. All these requirements were subsequently removed.

*Owners' shares of newspaper circulation 2001 (per cent)*

Controlling group	Capital city dailies Monday-Friday	Capital city Saturdays	Capital city Sundays	Regional dailies	Capital city suburban
News Corp/ Queensland Press/ Independent Newspapers NZ/Murdoch	68	60	77	25	62
John Fairfax	21	26	22	16	20
West Australian Newspapers	9	12		1	0.5
Rural Press	2	2	1	14	2.5
APN News and Media/O'Reilly	-	-	-	28	-
Other	-	-	-	32	15
<b>Total</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>

Includes titles where the controller indicated is the equal largest shareholder.

*Source: Communications Update Media Ownership Issue, no 164, April 2002, Table 12. Circulation figures for the half-year to December 2001.*

[258] Murdoch's dominance of the daily and Sunday newspaper market arose in 1986, before the articulation of the newspaper ownership limits now set out in the general policy on foreign ownership.<sup>23</sup> When the government announced the introduction of the cross-media laws late that year, Murdoch, who then owned the Ten network stations in Sydney and Melbourne, some radio and some newspapers, launched a takeover bid for the Herald and Weekly Times Group. It ran newspapers comprising nearly 50 per cent of metropolitan daily circulation, plus TV and radio stations. The Acting Treasurer approved the acquisition under the FATA.<sup>24</sup> The then Trade Practices Commission also examined the competitive consequences of the transaction. It approved the acquisition under the *Trade Practices Act*, subject to Murdoch's disposal of four tabloid newspapers, all of which were subsequently closed.<sup>25</sup>

<sup>23</sup> See P Chadwick, *Media Mates: Carving up Australia's Media* (1989).

<sup>24</sup> S Burrell and M Steketee, 'HWT: Govt clears obstacle from Murdoch takeover bid', *Sydney Morning Herald*, 14 January 1987, news and features section, 1.

<sup>25</sup> *News and Fair Facts*, above n 12, 418-24.



Subsequent actions under the FATA included the rejection of Murdoch's attempted purchase of the majority of newswire service, Australian Associated Press in 1987 but approval of his acquisition of AAP's share of Reuter and half of Australian Newsprint Mills; a public signal in April 1988 that the Treasurer would not approve any bid by Robert Maxwell for the Melbourne *Age* newspaper; and the rejection of the acquisition of 49.9 per cent of the Perth *Daily News* by a Malaysian company, MUI Australia.<sup>26</sup> The paper subsequently closed.

Newspaper foreign ownership rules were again closely scrutinised when a number of media companies were recapitalised in the early 1990s. Canadians Conrad Black and Izzy Asper bought into John Fairfax and the Ten Network respectively. As noted above, Black was later allowed by the government to increase his stake to 25 per cent. A Senate Select Committee investigating these actions found that the Australian Prime Minister, Paul Keating, 'attempted to exert pressure at Fairfax for favourable election coverage by making a linkage between 'balance' in election coverage and an increased ownership limit for Mr Black'. It rejected the Prime Minister's assertion that 'he took into account national interest considerations when deciding on the ownership of Fairfax', and argued:

as the nation moves with the rest of the world into new forms of media and greater convergence of technology and ownership the committee has grave concerns about any government which seeks to protect its citizens' interests with nothing more binding than a private conversation.<sup>27</sup>

### *Magazines*

The major magazine publishing company in the country is Publishing and Broadcasting Ltd (PBL), controlled by the Packers. Of the top 30 magazines by circulation for the half-year to December 2001, PBL's magazine arm Australian Consolidated Press published 14 and had a 50 per cent profit share interest in a 15th. Pacific Publications, a joint venture established in 2001 by the Seven Network and PMP Ltd published 6 titles in the top 30. Magazines published in Australia include

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<sup>26</sup> P Chadwick, 'The Press', in 'Forum: Foreign Ownership of Media' (Spring 1990) 10:3 *Communications Law Bulletin* 5-6.

<sup>27</sup> *Percentage Players*, above n 11, 130-7.

Australian versions of overseas titles: *Readers Digest* (no 3) and two titles published by Time Inc (US), *Who Weekly* (13) and *Time* (24).<sup>28</sup>

### *Book publishing*

Book publishing in Australia is dominated by foreign companies. Headed by Pearson (UK), which earned A\$175 million in revenue in 1999 (the latest year for which consolidated figures are available), [259] Thomson (Canada, \$115 million), Reed Elsevier (UK and Netherlands, \$90 million), Harper Collins (US/Australia, \$89 million), and Readers Digest (USA, \$88 million), 15 of top 20 publishers were foreign. The largest Australian publisher was Lonely Planet (\$50 million).<sup>29</sup>

### *Radio*

Foreign involvement has increased sharply since specific restrictions in this sector were abolished a decade ago. The main overseas operators now are DMG (UK) and the partners in the Australian Radio Network, Clear Channel (US) and APN News and Media (controlled by the Ireland based Independent News and Media PLC, which publishes *The Independent* in the UK). ARN also has a one third interest in the market leader in New Zealand, The Radio Network, which operates 55 stations.

### *Major radio controllers' licences and population reach 2001*

<b>Controlling group</b>	<b>No of capital city licences</b>	<b>No of regional centre and country licences</b>	<b>Total pop reach (millions of people)</b>	<b>Total pop reach (per cent of Australian population)</b>
DMG Radio Australia	4 + 1 joint venture	57	11.0	61.3
Austereo Group	10	2 + 2 joint ventures	10.8	60.6
Southern Cross Broadcasting	6	-	9.3	51.9
Australian Radio Network APN News and Media/O'Reilly	7 + 1 joint venture	1 + 2 joint ventures	9.0	50.5

<sup>28</sup> (April 2002) 164 *Communications Update Media Ownership Issue* Table 14.

<sup>29</sup> (February 2000) 162 *Communications Update Media Ownership Issue* 28.

and Clear Channel				
Broadcast Operations	1	29	4.8	27.0

Source: *Communications Update Media Ownership Issue, no 164, April 2002, Table 6.*

### **TV**

Of the five free-to-air networks, the top two are Australian controlled (Nine and Seven) and two of the others are public service broadcasters (the ABC and SBS). Canada's CanWest Global Communications holds a majority economic interest in, but formally does not control, the third rating commercial TV network (Ten). This interest was acquired in rescuing the network from receivership in 1992. The network was bought by a company in which CanWest held one share less than 15 per cent of the ordinary shares. This company issued subordinated debentures and convertible debentures, all of which were held by CanWest. These instruments did not fall within the definition of 'company interests' in the *Broadcasting Services Act*. CanWest was, in law, a lender, not an investor, although it earned a return on the debt which reflected the actual earnings of the company, not a fixed rate of interest.<sup>30</sup> The Australian Broadcasting Authority (ABA) found that later transactions altered this position, so that CanWest was in a position to exercise control of the licences.<sup>31</sup> The position was subsequently rectified and CanWest continues to hold its substantial economic interest.<sup>32</sup>

### [260] *Common carriers*

#### *Telecommunications*

The former government monopoly Telstra, now 50.1 per cent government owned, is still by far the largest player in the market after a decade of facilities based competition. It has the largest market share in all the main consumer markets: fixed line, long distance and international, mobile and Internet access. The next four players are all foreign controlled: Singtel (which acquired Optus in 2001 and is controlled by

<sup>30</sup> Australian Broadcasting Authority, *Investigation into Control: CanWest Global Communications Corporation/The Ten Group Ltd* (November 1995).

<sup>31</sup> Australian Broadcasting Authority, *Investigation into Control: CanWest Global Communications Corporation/The Ten Group Ltd, Second Investigation* (April 1997).

the Singapore government), Telecom NZ (which acquired AAPT), Vodafone (a mobile-only operator) and Hutchison Telecommunications (Australia) Ltd, controlled by the Hong Kong based Hutchison Whampoa Ltd.

### *Pay TV*

The market leader, Foxtel, is controlled by Telstra (50 per cent), PBL (25 per cent) and News Corporation (25 per cent). It serves metropolitan areas by cable and satellite and had more than 50 per cent of the country's 1.4 million pay TV subscribers in mid-2001. The other two operators are both foreign controlled: Austar, which serves country areas mainly by satellite, is controlled by the Denver based UnitedGlobalCom and Optus Television, which serves parts of the three largest cities by cable, is operated by Singtel.<sup>33</sup> There is also extensive foreign involvement in the ownership of companies providing pay TV channels to these operators. US film studios have stakes in movie channels and News/Murdoch companies have stakes in news and sports channels. A number of channels are wholly or primarily based on overseas channels, for example CNN International, CNBC Asia, Fox News, Bloomberg Television, BBC World, National Geographic, ESPN.

### *Satellite*

Since the sale of the publicly owned AUSSAT domestic satellite system to Optus as part of the establishment of the second carrier in the early 1990s, the major private satellite systems with Australian footprints (Optus and PanAmSat's PAS 2 and PAS 8) have been controlled by non-Australians.<sup>34</sup>

### *Other areas*

Foreign media and communications companies are involved in other sectors as well. Major examples include music, cinema exhibition and distribution, and the internet ventures NineMSN (Microsoft and PBL) and AOL 7 (AOL Time Warner and the Seven Network). In film and TV production, the value of foreign features and TV dramas shot in Australia exceeded the value of local production in 2000/01 and

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<sup>32</sup> Australian Broadcasting Authority, *Investigation into Control: CanWest Global Communications Corporation/The Ten Group Ltd, Third Investigation* (October 1998).

<sup>33</sup> Australian Communications Authority, 'Australian Pay TV in 2000/01', Ch 14 in *Telecommunications Performance Report 2000/01* (2001) 215.

<sup>34</sup> Australian Information Economy Advisory Council, *National Bandwidth Inquiry* (2002) 70–1.

foreign investors provided nearly a quarter of the finance for local projects.<sup>35</sup> Fox Studios in Sydney and the Warner Roadshow studios on the Gold Coast are operated by News Corporation and Warner Brothers/Village Roadshow respectively.

### **The history of foreign participation and its control**

Australia has a long history both of foreign participation in its media and communications industries and of legislative limits to that participation, particularly in electronic media.

The first ship-to-shore wireless transmissions were conducted in 1901 by the publicly controlled Post Office, but the first ‘overseas’ wireless transmissions were conducted using equipment supplied by Marconi’s UK based company.<sup>36</sup> Private wireless installations were resumed by the Navy during World [261] War I and when radio broadcasting began in the 1920s, regulations under the *Wireless Telegraphy Act* prevented wireless transmission licences being granted to ‘non-British subjects’ or to anyone whose father was a non-British subject at the time of their birth, or whose father had been at any time a citizen of one of Australia’s WWI enemies.<sup>37</sup>

When broadcasting received its own legislation separate from the regulation of wireless telegraphy in 1942, the policy about foreign or enemy control of licences disappeared, although it remained in the *Wireless Telegraphy Act* for ‘aliens’. In 1951, when a company controlled by two Labour-leaning English newspapers, the *Daily Mirror* and the *Sunday Pictorial*, moved to take control of the Macquarie Network, the Liberal-Country Party controlled Houses of Parliament resolved that it was undesirable for non-*Australians*, and not just non-*British* subjects, to have any substantial measure of direct or indirect ownership or control over Australian commercial broadcasting. Perversely, the parties of free enterprise and the Empire, the Liberals and the Country Party, supported the resolution, denying that it was aimed at the political colour of the particular foreign investors. Labor, which at the time favoured Australian government control of all broadcasting, opposed the resolution —

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<sup>35</sup> Australian Film Commission, *National Survey of Feature Film and TV Drama Production 2000/01* (2001).

<sup>36</sup> Information drawn from the commemorative plaques at the two sites in Queenscliff and Point Lonsdale, Victoria, Australia (visited 12 January 2002).

<sup>37</sup> *Wireless Telegraphy Regulations*, Statutory Rules No 97 of 1923, reg 4(2).

a much more welcoming reception than the one the *Mirror's* later owner, Robert Maxwell, would get from Paul Keating. Prime Minister Menzies argued that the real question in 1951 was:

whether the Government should permit or even encourage a state of affairs in which the most intimate form of propaganda known to modern science that is being conducted in this country, one that is going into every home and is reaching every man, woman and child in this country, should be in the hands of people who do not belong to this country.<sup>38</sup>

The Labor Member for Parkes had 'never known the Liberal Party to be worried about where capital came from'. The only reason the members opposite were 'squealing' was that 'their own racket is being spoiled by the intrusion of newer, and indeed fairer, interests'.<sup>39</sup>

The rhetoric used in the debate was strong, but a subsequent restructuring of the proposed transaction was approved, whereby the maximum shareholding of the UK controlled company in any Australian radio station was 44.7 per cent. This approval was subsequently treated by the broadcasting regulator, the Australian Broadcasting Control Board, as a precedent allowing foreign shareholding in the companies to be granted commercial television licences serving Sydney or Melbourne.<sup>40</sup> It imposed limits of 15 per cent for individual foreign owners and 20 per cent for all foreign owners. These were subsequently incorporated into legislation<sup>41</sup> and have remained in place ever since. The same limits were applied to commercial radio in 1969 but were removed in 1992.<sup>42</sup>

Although the percentage thresholds have not changed, a number of changes have been made to the idea of what Australians and non-Australians are. First, 'Australians' meant Australian residents under the 1956 legislation. In 1981, this was changed to

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<sup>38</sup> Australia, House of Representatives, *Debates* (28 November 1951) 2926.

<sup>39</sup> *Ibid* 2935–6.

<sup>40</sup> See Chapter 7, Department of Communications Forward Development Unit, *Ownership and Control of Commercial Television: Future Policy Directions* (1986).

<sup>41</sup> *Broadcasting and Television Act 1956* s 40 inserting a new s 53B.

<sup>42</sup> *Broadcasting and Television Act (No 2) 1969* inserting a new s 90G; *Broadcasting Services Act 1992*.

Australian citizens,<sup>43</sup> when Rupert Murdoch wanted to move to New York (or acknowledge the move he had actually made some years before) while retaining control of his Australian television stations. Later, Murdoch took out US citizenship as well. Under Australian law, this meant he lost his Australian citizenship and, it was assumed, the ability to control [262] Australian TV stations. However, he reorganised his companies in an attempt to hold on to the Ten Network stations. He was still engaged in legal battles on this issue when changes to the media ownership rules were announced in 1986 and the stations were sold. The longstanding section of the *Australian Citizenship Act 1948* under which Australians lost their Australian citizenship if they acquired the citizenship of another country was repealed in 2002.<sup>44</sup>

Second, in addition to the question of what makes a *person* foreign, a key issue has always been what makes a *corporate shareholder* foreign. Broadcasting law has adopted different measures from those applying under general corporations and foreign investment law. The policy concern has been that the simple application of the general law's assumptions about the relationship between shareholdings and control could be exploited through artificial corporate chains enabling ownership and/or control of broadcasting enterprises without formally breaching the foreign ownership/control rules. However, even the specific rules applying in broadcasting have not operated to limit foreign participation as strictly as the 15/20 per cent numerical limits imply. One commentator argued in 1990 that 'the restrictions on foreign ownership and control have never been as strict as they are popularly presented, and this fact has been well known to the bureaucracy and to government of both persuasions'.<sup>45</sup> The three-pronged mechanism in the current legislation, which limits 'company interests' (including shareholdings) and directorships and prohibits control, still allows substantial foreign financial participation in broadcasting enterprises, as discussed in relation to CanWest and the Ten Network above.

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<sup>43</sup> *Broadcasting and Television Amendment Act 1981*, inserting a new s 90G into the *Broadcasting and Television Act 1942*.

<sup>44</sup> *Australian Citizenship Legislation Amendment Act 2002*. The Minister argued that 'This change will allow the growing number of internationally mobile Australians to take advantage of opportunities overseas, while maintaining their links with Australia and bringing back to the Australian community their valuable expertise and knowledge: Second Reading Speech, House of Representatives *Debates* (13 February 2002) 52.

In telecommunications, the federal government ran a public monopoly from 1901 but there was extensive foreign involvement in wireless and undersea cables. Marconi and Telefunken merged their Australian operations early in 1913 into a new company called the Amalgamated Wireless Company of Australasia Limited (AWA) in which the federal government, in the 1920s, took a bare majority stake. AWA was a major player in early Australian radio broadcasting. Its international wireless facilities were fully nationalised by a Labor government in 1946. The newly created public authority, the Overseas Telecommunications Commission,<sup>46</sup> held a monopoly over Australia's international telecommunications services until it was merged with the domestic monopoly, Telecom, as part of the introduction of facilities based telecommunications competition in the early 1990s.

At the time, the level of foreign ownership in any new telecommunications carrier was a sensitive political issue. It was argued that no Australian company alone had sufficient cash or know-how to build a second telecommunications network, especially a mobile telephone network, and 'the foreign telcos are not about to exchange their technology, expertise and cash we need from them for a role as a minor player in the brave new world of Australian telecommunications'.<sup>47</sup> The Labor Party, with close links to the powerful telecommunications unions, was persuaded to accept a new competitor in the basic network to the former government monopoly, but demanded a strong Australian participant in the second carrier ownership consortium, guaranteeing or leading to majority Australian ownership. The Australian transport company Mayne Nickless and local financial institutions joined Bell South and Cable & Wireless in forming Optus Communications, which won the second carrier licence. However, aspirations for Australian ownership fell away, with C&W buying out Bell South, Mayne Nickless selling [263] out in a float of the company and then Singtel buying out C&W.<sup>48</sup> The initial requirement for Vodafone, which won the

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<sup>45</sup> L. Grey, 'Foreign ownership of broadcasting: will the real limitation please stand up?' (Autumn 1990) 10:1 *Communications Law Bulletin* 3–5.

<sup>46</sup> A. Moyal, *Clear Across Australia: a history of telecommunications* (1984) 180–3.

<sup>47</sup> P. Waters, 'Telecommunications', in 'Forum: Foreign Ownership of Media' (1990) 10:3 *Communications Law Bulletin* 6–7.

<sup>48</sup> Singtel's acquisition, approved by the federal Treasurer under foreign investment law, required some deft shifts in rhetoric from a government which had argued strenuously, in part-privatising Telstra, that government control of telecommunications companies was an anachronism.



third mobile licence, to have at least 50 per cent Australian ownership by 2003, was also subsequently relaxed.<sup>49</sup>

Despite this more relaxed view about foreign ownership of new entrants, the government stressed the importance of domestic ownership of the incumbent Telstra when it was part-privatised in two tranches in 1997 and 1999. The Minister chose the same words to explain the tight limits on foreign shareholdings and other requirements about domestic focus in both the 1996 and 1998 legislation:

Telstra has a vital continuing strategic role in the national economy. Australia's long term national interest therefore demands that it not simply be sold off to the highest bidder but that it remains an Australian owned and Australian controlled Corporation.<sup>50</sup>

The rules for pay TV, passed in 1993, were more liberal than those for free-to-air TV. They imposed foreign shareholding limits on licensee companies, but no limits on directorships or foreign control. The result was a much higher level of foreign participation in pay TV than in commercial free-to-air TV.

### **The proposed changes**

The Broadcasting Services Amendment (Media Ownership) Bill 2002 would repeal all the provisions of the *Broadcasting Services Act* restricting foreign participation in commercial TV and subscription TV (ss 57, 58 and 109 and associated machinery provisions). The Second Reading Speech argued that these changes would 'improve access to capital, increase the pool of potential media owners and act as a safeguard in media concentration'.<sup>51</sup> Labor Party Senators on the Senate Committee which held an

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<sup>49</sup> J Given and H Raiche, 'The Policy Context', Chapter 1 in *Australian Telecommunications Regulation: the Communications Law Centre Guide* (2001) 8.

<sup>50</sup> Warwick Smith, Second Reading Speech on the Telstra (Dilution of Public Ownership) Bill 1996, House of Representatives Hansard (2 May 1996) 296; Senator Jocelyn Newman (Minister for Family and Community Services and Minister Assisting the Prime Minister for the Status of Women), Second Reading Speech on the Telstra (Transition to Full Private Ownership) Bill 1998, Senate Hansard (13 May 1998) 2747–8.

<sup>51</sup> P McGauran, (Minister for Science) Second Reading Speech on the Broadcasting Services Amendment (Media Ownership) Bill 2002, House of Representatives Hansard (21 March 2002) 1925.

inquiry into the legislation, reporting on 18 June 2002, supported the repeal of the foreign ownership restrictions. The Democrat representative opposed the change.<sup>52</sup>

### **The debate**

There are three broad ongoing arguments for the removal or liberalisation of foreign media ownership laws.

First, the current rules don't work in an operational sense — to stop restrict foreign ownership/control of the specific media and communications assets to which they are targeted.

Second, the current rules don't work more broadly — to maintain a substantial Australian presence in the media and communications business and the production and distribution of media content to Australians.

[264] Third, the policy goals are no longer relevant, or the achievement of other, more important goals is being undermined by the current rules.

The debate about foreign ownership rules in Australia is closely tied to the debate about cross media ownership rules which currently prevent anyone acquiring a substantial interest in more than one of the major commercial media forms in an area — commercial TV, commercial radio and daily newspapers. These rules would also be repealed by the passage of the *Broadcasting Services Amendment (Media Ownership) Bill 2002*. Principally, the issues are linked by arguing that liberalisation of the foreign ownership rules will enable a wider range of players to compete for the opportunities presented by any liberalisation of the cross media rules. Without liberalisation of the foreign ownership rules, liberalisation of the cross media rules would be likely to lead only to consolidation of ownership among existing Australian media players.

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<sup>52</sup> Senate Environment, Communications, Information Technology and the Arts Legislation Committee, Report on the *Broadcasting Services Amendment (Media Ownership) Bill 2002* (June 2002): <[http://www.aph.gov.au/senate/committee/ecita\\_ctte/media\\_ownership/report/media\\_ownership.pdf](http://www.aph.gov.au/senate/committee/ecita_ctte/media_ownership/report/media_ownership.pdf)>.

These arguments are apparent in the submissions put to the Productivity Commission in 1999 by key overseas media players with Australian interests.<sup>53</sup> CanWest criticised Australia's foreign ownership rules for being more stringent than in comparable countries, and the principle that Australians must have effective control of the more influential broadcasting services as 'outdated and unnecessary'. It cited a range of benefits from foreign investment in media, stating it:

- promotes diversity of ownership;
- provides much-needed capital for a sector where growth is large scale and capital intensive;
- offers new technology and expertise to local industry; and
- brings international opportunities for the local companies involved and for local performers, writers, producers and broadcasters.

It argued that foreign investment did not threaten cultural values:

As a guest in another country, foreign investors pay particular attention to local cultural sensitivities, only too well aware they will be more scrutinized than local investors if there is a concern about content or views expressed. The reality is that foreigners have less reason to interfere in local domestic affairs, because they are less likely to have a substantial range of other investments which could lead to the risk of conflicts of interest. In addition, content is chosen on the basis of audience interest and regulatory requirements, neither of which have anything to do with a foreign investor's own programming interests.<sup>54</sup>

It also argued that the 'significant objectives' of Australian programming were protected through clearly mandated and monitored content requirements, which it supported:

CanWest supports the retention and enforcement of rules governing the production and airing of domestically produced programming on television. In fact, CanWest has an operating philosophy which supports the independent production community rather

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<sup>53</sup> CanWest Pacific Communications (Asia Pacific subsidiary of CanWest Global Communications Corp) submission to Productivity Commission inquiry into broadcasting, 1999: <<http://www.pc.gov.au/inquiry/broadcast/subs/sub043.pdf>>.

<sup>54</sup> *Ibid.*

than its own in-house production facility. The existence of content requirements, combined with the diversity of ownership made possible through increased foreign investment, will ensure achievement of the government's media objectives.<sup>55</sup>

In its submission to the same review, US-controlled pay TV operator Austar argued 'that the foreign ownership restrictions ... increase media concentration at the expense of diversity of voice and are outmoded in the age of global communications. These restrictions should be removed immediately and need not be dependent on any other reforms.' It said the investment by Austar's parent company, United Global Communications, was:

[265] an excellent example of the benefits that the removal of foreign ownership restrictions would bring. United's support of Austar has allowed Austar to have the benefit of foreign experience in the building of its pay TV business. It also allowed Austar to be independent of the existing interests that dominate Australia's media and communications industries. United's support has also allowed Austar to focus on rural and regional Australia, providing multi-channel pay television and broadband internet services to consumers generally neglected by traditional media interests.

The benefits brought about by removing foreign ownership restrictions are not merely financial, although foreign investment and control is crucial to introduce diversity into Australia's concentrated media industry. United has also provided invaluable technical and operational support and experience in establishing a business which was new to Australia, namely satellite, MMDS and cable pay television.<sup>56</sup>

### ***Do the current rules work operationally?***

One of the main criticisms of the existing policy is that, as discussed above, it has failed to prevent substantial foreign involvement even in the sectors it targets. This results particularly from the decisions taken to approve News Limited's acquisition of the Herald and Weekly Times and to accept CanWest's level of involvement in the Ten Network.

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<sup>55</sup> Ibid.

<sup>56</sup> Austar submission to Productivity Commission Inquiry into Broadcasting, 1999: <<http://www.pc.gov.au/inquiry/broadcst/subs/subdr209.pdf>>.

***Do the current rules work to achieve their broader objects?***

However, the rules have not been completely ineffective. They have worked to prevent further foreign acquisitions of major newspaper titles, to prevent CanWest increasing its level of involvement in the Ten Network and to preserve overwhelmingly local ownership of Telstra. The next question is whether this represents success in achieving some broader policy objects.

There is no single, broad statement of overall policy about foreign ownership of media and communications enterprises. The nearest thing is a provision in the *Broadcasting Services Act*, which states that one of the objects of the legislation is 'to ensure Australians have effective control of the more influential broadcasting services' (s 3(d)). The detailed provisions of the legislation, however, apply only to commercial television broadcasters.

The Packers' PBL, a supporter of foreign ownership rules in the mid-1990s, changed its position in the late 1990s, arguing that the rules 'are not achieving their purpose. They apply unevenly and capriciously and foreign participation in Australian media is a reality'. Not only do foreign companies own substantial enterprises in many sectors, but consumers have easy access to foreign sources of information and entertainment through the Internet and pay TV. 'This means that the ... rules are not effective to prevent foreigners from exercising influence on the Australian populace'.<sup>57</sup>

But 'preventing foreigners from exercising influence on the Australian populace' has never been the stated policy. Magazines, books, music recording and movie production, distribution and exhibition have never been subject to foreign ownership restrictions. Nor has the policy about broadcasting, since the introduction of television at least, been to prevent a substantial level of foreign investment in individual broadcasting enterprises.

If one attempts to construct a statement of existing policy on the basis of its results, one might propose:

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<sup>57</sup> Edited extract of PBL submission to the Productivity Commission Inquiry into Broadcasting Legislation, (1999) 18:2 *Communications Law Bulletin* 10.

Given, 'Foreign Ownership of Media and Telecommunications: An Australian Story'

- to ensure Australian control of the most influential media and communications enterprises and a substantial Australian presence in the other major media and communications sectors,
- while permitting:
  - substantial foreign investment, so as to bring capital, expertise, diversity and competition to the [266] Australian media and communications industry; and
  - foreign control of other media and communications enterprises.

If this is the policy, it is actually working quite well. Australian control of the most powerful media and communications enterprises is ensured through majority government shareholding and limits on foreign private shareholding in Telstra and the prohibition about foreign control of free-to-air TV networks. A substantial Australian presence in the other most influential media and communications sectors — newspapers and radio — is provided, first, through the guidelines on newspaper investment, which has helped to achieve the currently fairly open share register at John Fairfax, publisher of the daily broadsheet newspapers in the two largest cities and the influential financial daily the *Australian Financial Review*. Secondly, the publicly funded ABC operates multiple networks Local Radio, Radio National, News Radio, ABC Classic FM and youth-oriented JJJ, which together have the widest reach of any radio network. The substantial Australian presence in established media is also migrating into emerging media forms, since the most popular media websites are proving to be those established by existing media organisations, either alone (like the ABC) or in partnership (like NineMSN).

This is not simply an empty vision. The next question becomes whether this revised vision an appropriate one.

### ***Are the policy goals still relevant?***

Three central, related arguments have been made for restricting foreign ownership and control of major media and communications assets.

*The 'directed coverage' argument:* foreign owners may be vulnerable to conflicts of loyalties, potentially placing their loyalty to foreign states above any loyalty to the

best interests of countries in which they operate media businesses; or their loyalty to their own financial interests above the 'information' interests of media audiences in other countries in which they operate media businesses;

*The 'media sovereignty' argument:* domestic owners are better than foreign owners at running media enterprises which serve the information, education and entertainment needs of domestic audiences.

*The 'industry and employment' argument:* domestic owners are better than foreign owners at running media enterprises which employ and develop Australians and Australian resources, so maximising their economic and social contribution.

All three have been attacked. In addition, it is argued that, far from compromising Australia's national interests, foreign ownership of media and communications assets actually brings domestic benefits. First, it brings capital, expertise, the possibility of a greater competition and diversity of media players, and media owners with *less* interest in intervening in domestic politics than local moguls. Second, it is argued that the existence of specific foreign ownership restrictions compromises Australia's position in international trade negotiations, where the country generally supports free trade and investment flows. Third, even if the central arguments in favour of foreign ownership restrictions are valid, it is suggested that there are better ways of achieving the policy goals than foreign ownership restrictions. These include public broadcasting, content quotas and subsidies.

#### *Directed coverage*

The 'directed coverage' argument finds its roots in national security concerns about enemy control of wireless installations during World War I, but it has found continuing expressions. Even the US restricts foreign ownership of television and radio broadcast facilities, and has argued, in the context of international trade negotiations (where it generally opposes government measures restricting the free

flow of capital, goods and services in the audiovisual sector), that these restrictions 'may need to be preserved for reasons of national security'.<sup>58</sup>

[267] In 2001, security issues were a significant element in the Australian Treasurer's consideration of the takeover of Australia's second telecommunications carrier Optus Communications by Singtel. Executive Chairman of Australia's Seven Network, Kerry Stokes, made submissions arguing that the particular relationship between Singtel and the Singapore Government meant it would be contrary to Australia's national interest for Singtel to control Optus, and hence the domestic satellite system used extensively for Australia's defence communications. Stokes said he was not opposed to foreign business investment: 'What I am against is foreign power investment'.<sup>59</sup> The Treasurer eventually raised no objections to the acquisition, subject to three conditions designed to protect Australia's security interests and imposed at the request, and with the approval, of the Australian Department of Defence and the Australian Security Intelligence Organisation (ASIO). Singtel and Optus also gave undertakings requested by the US Department of State.<sup>60</sup> The government announced this decision on 22 August 2001, shortly before the September 11 terrorist attacks in the US so dramatically raised the profile of national security issues.

In the country of Rupert Murdoch's birth, it is difficult to sustain a serious argument that media coverage is not influenced by the interests of media owners. Examples include the Murdoch papers' role in the fall of the Whitlam Government in Australia in 1975 and the dropping of the BBC World Service from Star TV's satellite TV service in 1994 in the face of criticism from the Chinese government. Of the latter decision, Murdoch said later: 'The BBC was driving them nuts ... We're not proud of

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<sup>58</sup> 'Audio-Visual Services', paper presented by the United States to the Working Group on Audio-Visual Services, General Agreement on Tariffs and Trade, Meeting held 27–8 August 1990, Geneva.

<sup>59</sup> Some argued that Stokes had a substantial commercial interest at stake in the future ownership of Optus: M Baker (Asia Editor), 'The last refuge of our corporations', *The Australian Financial Review*, 14 August 2001, 13.

<sup>60</sup> Hon Peter Costello MP (Treasurer of Australia) 'Singapore Telecommunications Limited — Application for Foreign Investment Approval to Acquire Cable & Wireless Optus Limited', Media Release No 060 (22 August 2001). The conditions were that Singtel and Optus adhere to the terms of Deeds of Agreement signed with the Commonwealth Department of Defence and with the Commonwealth of Australia and Agencies and that Singtel and its relevant subsidiaries provide confirmation that an export licence by the Office of Defense Trade Controls, US Department of State, is not required for the A3, B1, B3 and C1 satellites, ground support equipment and technical data.



that decision. It was the only way ... The truth is — and we Americans don't like to admit it — that authoritarian countries can work ... The best thing you can do in China is engage the Chinese and wait.'<sup>61</sup> Robert Maxwell tried to calm fears about directed coverage if he acquired the Melbourne *Age* newspaper: 'I, as a foreigner, can't acquire newspapers in Australia and use them as a megaphone to tell Australians what to do. That must be left to the natives to tell them, not to foreigners. I don't interfere editorially anywhere except where I vote'.<sup>62</sup>

Owners do direct coverage, or omit coverage, or employ people who they are confident will direct or omit coverage in certain ways. The real question is whether the directions foreign owners point their coverage are any more or less likely to coincide with Australia's national interests — whatever they might be on particular issues — than the directions domestic owners head. The answer is especially complicated when owners like Rupert Murdoch transform themselves from domestic to foreign while still, sometimes, calling Australia home. Former academic, now competition regulator, Ross Jones argued in 1990 that Australian TV networks all used news feeds from international networks like CNN, the BBC and the US networks without 'any current concern that such sources are biased'.<sup>63</sup>

In the context of the Singtel/Optus takeover, the *Australian Financial Review's* Asia Editor suggested that directed use of the particular communications facilities under review was inevitable, but that the possibility of such use having any significant detrimental impact on Australia was fanciful. Everyone spies on everyone else for reasons of legitimate self-interest, he said. 'A more arresting story would have been that Singapore was not spying on Australia ... The fact that a foreign government, authoritarian or otherwise, is a large stakeholder ... is irrelevant'. However, he thought 'the broader implication that [268] Singapore represents some kind of strategic threat to Australia is absurd'.<sup>64</sup> One wonders if national security issues

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<sup>61</sup> See Ch 6 in G Munster, *Rupert Murdoch: A Paper Prince* (1985) 95–114; N Chenoweth, *Virtual Murdoch: Reality Wars on the Information Highway* (2001) 280.

<sup>62</sup> *Australian Financial Review*, 20 July 1990, quoted in Chadwick, above n 26.

<sup>63</sup> R Jones, 'Foreign ownership limits on Australia's electronic media' (1991) 11:1 *Communications Law Bulletin* 27.

<sup>64</sup> Baker, above n 59.

Given, 'Foreign Ownership of Media and Telecommunications: An Australian Story'

would be treated quite so dismissively, and the disinterested perspectives of overseas news organisations assumed quite so comfortably, after September 11 2001.

### *Media sovereignty*

The media sovereignty argument was well expressed by Paul Chadwick in 1990:

It is vital to preserve local control of, and accountability for, the news and opinion which provide the basis of Australians' view of themselves, the world around them and their place in it. As Australia increasingly attempts to engage that world, local control of the media becomes still more important. The deregulation of the financial system, of which the increased inflow of foreign capital is one spectacular feature, has made the economy more vulnerable. The need to adapt is obvious, but that imperative must be explained by Australians to Australians to be achieved.<sup>65</sup>

Chadwick felt it was important, and that foreign ownership restrictions helped in ensuring, that Australian TV stations and newspapers didn't become, to an even greater extent than at present, 'merely extra outlets for drama made in Los Angeles' and 'passive carriers of articles researched and written in, say London, for British readers'.

By contrast, Ross Jones argued in 1990 that the claim that 'if foreigners control Australian television they will broadcast foreign programs and put Australia's cultural identity in jeopardy' suggests that 'Australians' sense of their "Australianness" is so weak that it requires continuous reinforcement from jingoistic Australian television programming'. He thought:

The idea that foreign owners of Australian television stations would fill their schedules with cheap foreign entertainment or biased news and current affairs programming is implausible in an industry that is highly responsive to consumer tastes and totally dependent on such tastes for its revenue.<sup>66</sup>

He also argued it was contradictory to ban foreign control of commercial TV stations while also providing government funding to the SBS, a multicultural public

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<sup>65</sup> Chadwick, above n 26.

broadcaster which provides a wide range of foreign programming and shows less Australian programs than other networks.

*Industry and employment*

This argument has tended to be overshadowed by the directed coverage and media sovereignty arguments when considering foreign ownership and control of media and communications enterprises. It was implied, though not articulated in any detail, when the government used as its rationale for ‘Keeping Telstra Australian’ the organisation’s ‘vital continuing strategic role in the national economy’. ‘There can be no doubt that Telstra will remain another “Big Australian”’, said the Minister when introducing the legislation which enabled the first tranche of shares to be sold.<sup>67</sup> The industry and employment argument has probably also been used sparingly because the evidence of the employment practices of Australian and overseas controlled enterprises in Australia is very mixed: foreign firms employ plenty of Australians, and Australian firms hire plenty of overseas talent. For example, like so many other major Australian companies in the 1990s, Telstra chose an overseas CEO, American telco executive Frank Blount, to lead it into its increasingly competitive, privatised environment. By contrast, [269] Optus Communications, with its large foreign shareholders, chose the Australian Bob Mansfield as its founding CEO.

The most significant recent examples of the government using its powers under the FATA to block major foreign investment proposals involved strategic economic and political considerations. In April 2001, the Treasurer rejected Shell’s bid to acquire a substantial shareholding in Woodside Petroleum. Woodside is the operator of the huge North West Shelf mining project, a joint venture in which Shell was already involved. It is Australia’s largest developed energy resource. The proposed transaction would have resulted in a change in control of the project. The government was concerned that the North West Shelf resource might not be fully developed and exports not maximised if the project’s operational and marketing activities were no longer conducted independently of Shell’s other international activities.<sup>68</sup> In August

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<sup>66</sup> Jones, above n 63.

<sup>67</sup> Smith, above n 50.

<sup>68</sup> Hon Peter Costello MP (Treasurer of Australia) ‘Foreign Investment Proposal — Shell Australia Investments Limited’s (Shell) Acquisition Of Woodside Petroleum Limited (Woodside)’, Media Release No 025 (23 April 2001).

2002, the government refused to accede to QANTAS's proposal to allow foreign equity in the airline to exceed 49 per cent.<sup>69</sup>

***Are the goals or policies inconsistent with other more important goals?***

*Benefits of foreign ownership*

Perhaps the most powerful arguments against restricting foreign investment have been those which stress the benefits it can bring to media and communications enterprises and their audiences and customers. As noted above, the ability of foreign companies to bring capital and expertise to new industries, like pay TV, or to undertake major investments in existing industries like telecommunications, was a key reason more liberal rules about foreign investment were set in these sectors in the early 1990s than applied to pay television. It was also, perhaps, the real reason CanWest's controversial investment in the Ten network in the early 1990s was politically acceptable — offshore investment to recapitalise a company then in receivership was seen as a welcome, rather than a threatening, addition to the local media scene.

In the Productivity Commission's broadcasting inquiry in 1999–2000, the Seven Network argued for an explicit trade-off between increased foreign investment in free-to-air television and broadcasters' commitments to local production, as well as more liberal rules about 'passive' foreign investment and investments, such as superannuation, managed by foreign owned funds for Australian investors. It argued:

[I]n a national market subject to increasing monopoly pressures and in a global market that is increasingly inter-linked ... capital formation within markets is becoming a key to survival. One principal driver towards concentration of ownership in smaller markets such as Australia has been lower levels of capital available to make new investments, remain strong and resist takeovers.<sup>70</sup>

It drew on research undertaken by the Communications Law Centre about the relationship between foreign ownership and local production, although that research

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<sup>69</sup> See 'Summary of Australia's Foreign Investment Policy', above n 3, [29] and L Tingle, and J Boyle, 'Cabinet rejects Qantas plea on foreign shares', *Australian Financial Review*, 14 August 2002, 1, 8.

<sup>70</sup> Seven Network, Supplementary Submission to Productivity Commission Inquiry into the Broadcasting Services Act 1992 (August 1999) 17–21; see <<http://www.pc.gov.au/inquiry/broadcast/subs/sub151.pdf>>.

found no clear relationship between the two. Foreign owners were motivated by a mix of commercial, regulatory and political factors. They were ‘sometimes sensitive to local political imperatives, such as the desirability of sustaining reasonable levels of local programming ... but have proved adept at influencing political processes to ensure reasonable commercial terms for investments’. Examples included the liberalisation of foreign ownership laws in [270] New Zealand after the initial collapse of TV3, the reduction of quotas for Canal Plus in France following two years of losses after the service commenced in the 1980s, and the light-handed administration of European program quotas for BSkyB in the UK. The research provided evidence that some media owners have been stronger local programmers in their home territories than in foreign territories.<sup>71</sup>

A second benefit argued to accrue from a more liberal foreign investment regime is the possibility it offers for a greater diversity of media players and an increased level of competition in the local media business. Greater diversity and competition might come either from foreign companies setting up new businesses or buying existing media businesses and thus diversifying the current mix of media players. On this view, restrictions on foreign ownership are part of a wider problem about the inability to establish new businesses in some sectors like broadcasting, where licensing arrangements restrict the allocation of new licences.

Versions of this argument have been put with varying degrees of intensity by a wide range of individuals and organisations. As the globalisation of media and communications enterprises and markets proceeded through the 1990s, many argued, like the Productivity Commission in 2000, that limits on foreign investment were ‘restrict[ing] the options open to Australian media businesses’. Such limits were at odds with policies encouraging international competition in other sectors of the economy.<sup>72</sup> In telecommunications, the Treasurer argued, in raising no objections to Singtel’s takeover of Optus, that ‘Singtel’s investment ... means that Australia’s second largest telephone network will be able to provide strong competition to the

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<sup>71</sup> Communications Law Centre, *Foreign Ownership and Local Programs — An Assessment of Some International Broadcasters* (June 1999); see <<http://www.pc.gov.au/inquiry/broadcst/subs/sub151.pdf>>. The author was the Director of the Centre at the time of this research and a co-author of the paper.

<sup>72</sup> Productivity Commission, *Broadcasting*, Report 11 (2000) 332–43.

largest network, owned and operated by Telstra. Consumers will benefit from competition.'<sup>73</sup>

From a different perspective, Chadwick argued in 1990 that appropriate (tougher) restrictions on concentration would make greater levels of foreign investment less of a concern: 'Nobody's megaphone would be too loud.'<sup>74</sup> By the late 1990s, even the union representing Australian journalists, traditionally a supporter of foreign ownership restrictions, had 'reluctantly come to the conclusion that while an Australian owned media is preferable ... the far more pressing problem in Australia is media concentration ... [T]here is room to explore liberalisation of foreign ownership restrictions if, after careful analysis, it is established that these rules limit diversity'.<sup>75</sup> In arriving at this position, the MEAA was particularly influenced by the possible acquisition of John Fairfax by the Packers' PBL, if cross-media rules were relaxed. An experienced overseas newspaper publisher with no existing Australian interests was widely seen as a better suitor than the already locally powerful Packer.

This raised a third potential benefit from greater foreign control of Australian media, but one which directly contradicted one of the central arguments used to support restrictions. Distant, non-Australian owners might be less likely to interfere editorially than Australian owners who turned up at the office when you least wanted them. Some support for this view came from those who'd experienced the absentee landlordism of Conrad Black when he was the largest shareholder at Fairfax for some years in the 1990s.

If the argument that a more liberal foreign ownership regime will provide greater ownership diversity is to be accepted, it is important to identify the mechanisms by which new businesses would actually be established. In particular sectors, this is not always entirely clear. In telecommunications, pay TV and online services, there is effectively no restriction on the establishment of new businesses by Australians [271] or non-Australians already, so there are no special rules to remove.

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<sup>73</sup> Costello, above n 60.

<sup>74</sup> Chadwick, above n 26.

<sup>75</sup> Media Entertainment and Arts Alliance, Submission to Productivity Commission Review of Broadcasting Legislation (June 1999) 13–14; see <<http://www.pc.gov.au/inquiry/broadcast/subs/sub119.pdf>>.

Telecommunications and pay TV seem more likely to experience exits than entries by foreign players in the foreseeable future. In radio, there is no special limit on foreign ownership of new or existing enterprises, but there are only a very few more analogue FM licences to be allocated and the business is increasingly dominated by multi-station networks. It is very unlikely that a new foreign player would try to move into the Australian market without first acquiring substantial existing radio assets as the basis for an expanded business (DMG's strategy). In the print media, the likelihood of new daily newspapers being established in Australia is remote. Only in free-to-air television is there a real likelihood of a foreign player without existing Australian interests being interested in starting up a new business.

### *Trade negotiations*

Some have argued that Australia cannot, on the one hand, argue in international forums for free trade, particularly in agricultural products and many services sectors, while on the other hand maintaining high barriers to foreign investment in media and communications and perhaps other industries.

If we have ambitions to flood the world with Fosters and bully our beef into Asian markets, and if we want to be seen as a fair player in the region, we can hardly complain when others seek to land their planes in our back yard and make a collect call on our privatised phone network.<sup>76</sup>

While some, particularly since the September 11 terrorist attacks, have called for a rethink of the shape of the global trade liberalisation agenda, others argue the reverse: that defiant economic and cultural isolationism 'is counterproductive in a world which now, more than ever, needs all the unity it can get'.<sup>77</sup>

The commercial radio industry provides a different perspective on this issue. Austereo has noted that Australia 'missed an opportunity to seek reciprocal arrangements with other countries' when it removed its special restrictions on foreign ownership in this sector in 1992. Foreign ownership restrictions in other territories continue to restrict

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<sup>76</sup> Baker, above n 59.

<sup>77</sup> T Magarey, 'Cultural parochialism and free trade' (2001) 20:4 *Communications Law Bulletin* 15.

its ability to expand internationally to joint ventures, but Australia has limited leverage to argue for their removal.<sup>78</sup>

***Can the goals be achieved through other means?***

Many commentators have argued that the media sovereignty goal is already addressed by other mechanisms such as public service broadcasting, direct and indirect (through tax concessions) funding of local programming and local content quotas for commercial broadcasters.<sup>79</sup> However, they are not always convinced that these other mechanisms are appropriate either,<sup>80</sup> which makes their reliance on them as a justification for removing foreign ownership rules less persuasive.

**Conclusion**

On balance, the directed coverage, media sovereignty and employment and industry arguments seem insufficient to justify restrictions which completely prohibit foreign participation in the media and communications industry or in any particular sector of it. On the contrary, the problems with the central arguments for restrictions and the likelihood of benefits from foreign involvement suggest that a degree of foreign involvement is desirable.

However, there is already a substantial degree of foreign involvement in Australian media and communications and few obstacles to further participation in most sectors. In addition, the mechanisms [272] by which liberalisation of current laws would lead to a greater diversity of players in the Australian media and communications market are far from clear. The problems with the central arguments do not render them entirely specious.

The most appropriate policy response would seem to be:

- to maximise the use of policy measures other than foreign ownership and control restrictions to pursue those aspects of the policy goals which can be sought by these alternate means;

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<sup>78</sup> Austereo Pty Ltd, Submission to Productivity Commission Inquiry into the Broadcasting Services Act 1992 (May 1999) see <<http://www.pc.gov.au/inquiry/broadcst/subs/sub055.pdf>>.

<sup>79</sup> See, eg, Jones, above n 63.

<sup>80</sup> See R Jones, *Cut! Protection of Australia's Film and Television Industries* (1991).



- to ensure that any restrictions on foreign ownership and control of Australian media and communications enterprises are carefully tailored to balance:
  - the potential benefits of foreign capital, expertise and other inputs and desire for open flow of information, entertainment and ideas; with
  - the benefits accruing from Australian control of a small number of the most influential media and communications enterprises (Telstra and the five free-to-air TV networks) and a substantial Australian presence in the other major media and communications sectors (radio, newspapers, pay TV and emerging online media); and
- to extract maximum leverage in international trade negotiations from any proposed liberalisation of foreign ownership rules.

The goal should not be 'All Australian media'. But, contrary to the claims of those who criticise the alleged xenophobia of longstanding policies about foreign investment in media, it never has been.