# Publishing and Broadcasting Limited

## Submission to
## the Review of Broadcasting Regulation
## by the Productivity Commission

**May 1999**

# EXECUTIVE SUMMARY

## *The value of free television*

*Consumer benefits of free television should be preserved*

Free television has a unique and valued place in the lives of Australians.

Australia's system of free television, which has developed over the last 40 years, is founded on a commitment from government and broadcasters to quality, diversity, responsiveness to audience needs and importantly, to Australian programs. Australians have become accustomed to these high standards, and there is a public expectation that this service will continue.

Broadcasting legislation to date has recognised the important value given to free television by consumers, by limiting the number of available licences so that broadcasters can deliver the types of services consumers demand, including high levels of Australian content.

Free-to-air broadcasting faces serious challenges in the next decade. As it prepares for the expensive digital transition, it is also confronting a challenging and changing industry providing an expanded array of consumer services, such as pay television and on-line services, and proposed datacasting services. While these new services offer many benefits to those who have access to them, many Australians cannot afford new media. And most Australians would like to ensure that their free service is not compromised in any way.

The Commission should, in PBL's view, endorse those aspects of broadcasting regulation which preserve the current high quality, comprehensive, free television service with its benefits for Australian culture. In particular the policy which limits the number of licences to three in any licence area should be recognised as providing extraordinary public benefit, in terms of culture, quality and diversity.

In a small economy like Australia, advertising revenue is limited. There is fierce competition between free-to-air broadcasters for advertising revenue. The television industry is mature so any new licensee would fragment revenue, causing serious loss for all networks. If profit margins decreased, broadcasters would have no choice but to cut costs dramatically. Expensive programming such as drama, sport, current affairs and Australian content would be the first to be affected.

Although free-to-air broadcasters are reviewing operations to take into account the new industry landscape, programming costs continue to rise, and broadcasters are constrained by high regulatory costs in the form of supertax licence fees and quota costs (while pay television and on-line services are not subject to those burdens). Local drama can cost ten times the cost of its foreign equivalent. Both major political parties recently recognised these pressures, and underlined their commitment to quality and local culture, when they legislated for a moratorium on new free-to-air broadcasting licences until 2007. This moratorium, and its effective enforcement (through appropriate limitations on proposed new datacasting services) is essential for Australian broadcasters to be able to maintain current high standards.

*Digital television will provide Australians with the highest quality free television service*

Free-to-air broadcasters are committed to introducing digital television, including high definition television, to Australian consumers. Preparations are underway for the transition, which will commence on 1 January 2001. Digital television will provide unsurpassed quality, and has the potential for many innovative new features. The legislation, including the moratorium on new licences, brings enormous public benefit, and is of central importance to the future of free television in Australia.

Free-to-air broadcasters should be encouraged to provide innovative features such as enhanced programming and high definition television, without regulatory limitations, so as to promote the speedy and smooth take-up of digital television. Pay television has been protected by way of restrictions on provision of multi-channelling and subscription services by free-to-air broadcasters, unlike the USA where free-to-air broadcasters have complete flexibility. The transition from analogue to digital, with the added feature of high definition television, will be the most dramatic change for viewers since colour television, and will lay the foundation for free-to-air television for the next 50 years.

Datacasting services must be appropriately confined so that they do not amount to quasi free-to-air broadcasters, in conflict with the moratorium on new broadcasting licenses. New broadcasting competition would divert audiences and revenue from free-to-air broadcasters, with adverse impact on Australian culture and quality.

*Achieving the broadcasting objectives*

Australia has the best broadcasting system in the world, with its balance of three commercial networks and two public broadcasters, all with national reach and commitment to Australian culture and quality. The services provided by free-to-air broadcasters are supplemented and complemented for viewers by scores of pay channels. The rules which limit the number of free-to-air broadcasters in each area, and some other policies, such as the anti-siphoning rules, which have ensured that consumers have the benefit of major sport on free television, are directed at preservation of the integrity and quality of this system in the public interest.

Some other broadcasting policies though require urgent re-evaluation as they have an adverse effect on consumer interest. These are licence fee obligations imposed on free-to-air broadcasters, the “standard” system of Australian content regulation, and pay television regulation.

These issues are dealt with in more detail in the FACTS commercial television industry submission to the Commission. PBL fully endorses that submission, and through the Nine Network, is a member of FACTS.

## *Cross media and foreign ownership rules*

In recognition of a media landscape which has changed beyond description in the last few years, it is time for the cross media rules to be repealed, and along with them, the foreign ownership rules.

*Diversity and plurality - assured by a combination of factors - democratic principles, consumer demand, new technologies and services and global participation*

The cross-media rules are usually sought to be justified on the basis that the community needs access to a diverse range of information and viewpoints.

The Australian consumer has a rich array of entertainment and information available to him or her, with more services around the corner. The current range of media services providing news and information include commercial, public and community radio, national, regional and local newspapers, magazines, pay-television, on-line services, data and information services and the five free-to-air television broadcasters. As is fitting for the democracy that Australia is, there is also a wide and vigorous range of views, opinions and ideas expressed in the media.

Common ownership of different media forms, such as newspapers and television, would not affect this dynamic. Each media business would retain its own style, presentation and content, and views and opinions would be at least as varied and diverse as they are now. Commercial imperatives would guarantee this - consumers now have such a wide range of choices open to them, that they would exercise that choice negatively if there was a perception of media bias or blandness. Free-to-air broadcasters, in particular, rely exclusively on quality differentiation, such as quality Australian content programs, and accuracy and fairness in news, rather than price, for audience loyalty.

No matter what the extent of cross-ownership between broadcasting and newspapers might be, each media business will remain completely focussed on maximising the returns to that business. The requirements of a newspaper audience, for example, are entirely different to the requirements of broadcast viewers.

Furthermore, independence of the media is a concept central to Australian democracy, and valued by journalists and producers of Australia's major media. Regulation, such as codes of practice reflect high standards in broadcasting.

The advantages of cross-ownership do not lie in homogenising various media products, but in providing administrative and operational efficiencies, and enabling both higher risk assumption and new investment and growth.

*The global, convergent media industry*

The convergence of the media, computing and communications industries around the world has seen the emergence of new technologies and new media forms, and of huge transnational companies who have become active participants in globalised media businesses. These companies, such as AT & T, AOL, MCI Worldcom and Yahoo! , have enormous capital bases, some with market capitalisation substantially in excess of $100 billion. These companies are continuing to grow bigger and reach deeper into converged media and communications businesses, such as the recent merger of the communications and cable networks and media businesses of AT & T and TCI in the USA.

Within Australia, there is a similar pattern of convergence. Telstra and C & W Optus are owners of and active participants in television, Internet services and communications businesses. Foreign transnational corporations have become substantially involved in Australian media businesses, for example, pay television (e.g. News Corp, UIH, Time Warner, Sony, Disney), and Internet services (e.g. AOL, Yahoo!, MCI Worldcom).

In this global information and entertainment landscape, and within Australia, Australian media companies are relatively tiny participants. The cross media rules are impeding the opportunity for Australian media companies to achieve the scale and capital base necessary to participate effectively in this global environment.

*Foreign ownership laws ineffective*

In the past, PBL has supported foreign ownership laws, but in 1999, it is clear that these laws are not achieving their purpose, and that foreign participation in Australia is a reality.

Foreign companies own substantial portions of the radio and newspaper industries, and one free-to-air broadcasting network, and hold substantial investments in, or own outright, many of the operators in the pay television, on-line, and other media sectors. The justification of foreign ownership limitations based on levels of influence (as was intended to be the measuring stick) has become meaningless.

*Repeal of cross media rules, along with the foreign ownership rules would have benefits for the economy*

Repeal of these rules would encourage efficiency by enabling local broadcasting companies scope to compete with “convergent” global media companies, both locally and on the world stage.

Local companies could build a stronger capital base for investment, and with it, the leverage required for growth. Australian companies could trade their expertise and skills, and benefit from international relationships. Locally, infrastructure would improve, as would opportunities for development of content. There would also be increased export opportunities. The flow-on benefits for the economy of a competitive, efficient industry – creation of jobs, export opportunities, earnings - would be substantial.

Stronger media companies would have more capacity to meet public interest broadcasting objectives – high quality and innovative programming, diversity and Australian content.

Community demand for services, competition in the provision of those services and competition regulation will ensure that Australians continue to receive media products of high quality, range and diversity.

However, the foreign ownership and control rules should not be repealed unless the cross-media rules are also simultaneously repealed.

PBL is prepared to compete with foreign companies within the changing Australian media sector, but it does not believe that it can do so on a genuinely competitive basis unless the cross-media rules are repealed and PBL is enabled to grow its capital base.

Repeal of the foreign ownership and control rules without contemporaneous repeal of the cross-media rules would produce the absurd result that foreign companies would be free to make further inroads into major Australian media sectors while Australian media companies would be free only to look on.

## *Audience reach rules*

*Outdated, ineffective law should be repealed*

The audience reach rule in the BSA is another outdated rule of no practical application that should be repealed.

The rule was part of the package of 1987 legislation ostensibly designed to protect diversity of information outlets in the Australian community.

It has never had any practical effect, other than to create a second tier of commercial television broadcasting companies beneath the major networks.

But networking arrangements between major networks and their affiliates, pursuant to which most Australians receive all three network services, have long rendered the rule moribund.

## TABLE OF CONTENTS


1. INTRODUCTION – about Publishing and Broadcasting Limited .......... 1

2. THE VALUE OF FREE TELEVISION .......... 2

2.1 Consumer benefits of free television should be preserved .......... 2

2.2 Digital television will provide Australians with the highest quality free television service .......... 3

2.3 Achieving the broadcasting objectives .......... 4

3. CROSS MEDIA OWNERSHIP .......... 5

3.1 Diversity and plurality are assured by a combination of factors - democratic principles, consumer demand, new technologies and services and global participation .......... 5

3.2 Setting the scene – Australian media companies in a global, convergent media marketplace. .......... 13

3.3 New Technology New Competition .......... 15

3.4 Global Convergent Companies in Australia .......... 16

3.5 Inefficiencies in the industry – difficulty of competing in this global, convergent environment .......... 19

3.6 The cost for the industry, and ultimately consumers, is high .......... 20

3.7 Applying Competition Law to Broadcasting Services .......... 21

3.8 PBL Recommendation .......... 23

4. FOREIGN OWNERSHIP AND CONTROL .......... 24

4.1 Foreign ownership and control policy – inconsistent and ineffective .......... 24

4.2 Concept of “influence” seems to have become redundant .......... 25

4.3 The issue of earnings in Australia .......... 26

4.4 Australian voice .......... 26

4.5 PBL Recommendation .......... 26

5. AUDIENCE REACH .......... 28

Appendix “A” .......... i

## 1. INTRODUCTION – about Publishing and Broadcasting Limited

Publishing & Broadcasting Limited ("PBL") is one of Australia's leading media companies with interests in magazines, free television, pay television and on-line services.

The Australian television interests of PBL are held through Nine Network Australia which owns and operates TCN9 Sydney, GTV9 Melbourne, QTQ9 Brisbane and NTD 8 Darwin. Nine Network programming is also broadcast on affiliate stations in Adelaide, Perth and regional areas throughout Australia. The Nine Network is the most popular Australian television network.

Programming includes: news and current affairs (National Nine News, Nightline, Sunday, Today, 60 Minutes and A Current Affair); Australian drama (Water Rats, Murder Call, Halifax fp.); lifestyle and entertainment (Getaway, Burke's Backyard, Money, Our House, Good Medicine and Sale of the Century); sport (International Cricket, Australian Grand Prix, Commonwealth Games, Rugby League), and childrens' drama (Hi 5 and Spellbinder). Local programs account for 60% to 65% of Nine Network's schedule.

Nine Network is preparing for the introduction of digital television in 19 months time. Considerable investment and resources are being allocated to the transition, the most important development for Australian television viewers since the change from black and white to colour.

PBL's magazine interests are held through Australian Consolidated Press Limited ("ACP"). Magazines published by ACP comprise over 70 titles including Woman's Weekly, Woman's Day, The New Weekly, Cleo, Cosmopolitan, She, Dolly, Elle, Mode, The Bulletin and HQ.

PBL through its subsidiary, ecorp, has a 50% interest with Microsoft Corporation in the "ninemsn" joint venture. ninemsn's objective is to deliver world-class information services and entertainment to on-line audiences in Australia. ninemsn has become one of the most visited network of Internet sites in Australia. ecorp has also recently announced a joint venture with US person-to-person on-line auction site eBay, and has acquired internet broker Online Broker Holdings Limited.

Other investments of PBL include:

- A 20.5% interest in the New Regency, a company controlled by Hollywood producer, Arnon Milchan.
- A 32% interest in EasyCall Asia.
- A 25% interest in Foxtel.
- An 18% interest in OneTel.

## 2. THE VALUE OF FREE TELEVISION

### 2.1 Consumer benefits of free television should be preserved

Free television has a unique and valued place in the lives of Australians. We have become accustomed to a diverse, high quality, and comprehensive service – one which brings our favourite sporting matches, regular fair and accurate new bulletins, weather reports, information and lifestyle programs, daily current affairs, overseas hits and local dramas that are relevant to our everyday experiences. Television is not regarded as a luxury – television is in nearly every home across the nation, and television is something we relate to every day.

Australia's system of free television, which has developed over the last 40 years, is founded on a commitment from government and broadcasters to quality, diversity, responsiveness to audience needs and importantly, to Australian programs. Australians have become accustomed to these high standards, and there is a public expectation that this service will continue.

Broadcasting legislation to date has recognised the important value given to free television by consumers, by limiting the number of available licences so that broadcasters can deliver the types of services consumers demand, including high levels of Australian content.

Free-to-air broadcasting faces serious challenges in the next decade. As it prepares for the expensive digital transition, it is also confronting a challenging and changing industry providing an expanded array of consumer services, such as pay television and on-line services, data and information services, and proposed new datacasting services. While these new services offer many benefits to those who have access to them, many Australians cannot afford new media. And most Australians would like to ensure that their free service is not compromised in any way.

The Commission should, in PBL's view, endorse those aspects of broadcasting regulation which preserve the current high quality, comprehensive, free television service with its benefits for Australian culture. In particular the policy which limits the number of licences to three in any licence area should be recognised as providing extraordinary public benefit, in terms of culture, quality and diversity.

Advertising revenue is limited in a small economy like Australia. There is fierce competition between existing licensees. The advertising pool would not increase with the emergence of a new network. The television market is mature and its aggregate audience is stable. The minutes of advertising per hour are limited by regulation, so the aggregate supply of advertising audience minutes is also stable. A new network would simply fragment the available revenue. This would cause serious loss of revenue for all networks. If profit margins decreased, broadcasters would have no choice but to cut costs dramatically. As licence fees are fixed as a proportion of revenue, and overheads are already reasonably low, programming would be the first to suffer. The most expensive programming would be the first to be affected – local content, quality drama, quality news and current affairs, and major sports.

Although free-to-air broadcasters are reviewing operations to take into account the new industry landscape, programming costs continue to rise, and broadcasters are constrained by high regulatory costs in the form or supertax licence fees and quota costs (while pay television and on-line services are not subject to those burdens). Local drama can cost ten times the cost of its foreign equivalent. (Overseas programs are cheaper because the cost has been amortised in large overseas markets, whereas most, if not all of the cost of an Australian program is recouped within Australia.) Both major political parties recently recognised these pressures, and underlined their commitment to quality and local culture, when they legislated for a moratorium on new free-to-air broadcasting licences until 2007. This moratorium, and its effective enforcement (through appropriate limitations on proposed new datacasting services) is essential for Australian broadcasters to be able to maintain current high standards.

### 2.2 Digital television will provide Australians with the highest quality free television service

Free-to-air broadcasters are committed to introducing digital television, including high definition television, to Australian consumers. Preparations are underway for the transition, which will commence on 1 January 2001. Digital television will provide unsurpassed quality, and has the potential for many innovative new features. The legislation, including the moratorium on new licences, brings enormous public benefit, and is of central importance to the future of free television in Australia.

Datacasting services need to be confined in scope so that they do not become quasi free-to-air broadcasters, in conflict with the moratorium on new commercial television licences. New broadcasting competition would divert audiences and revenue, as set out above, and lead to deterrioration in quality and Australian culture.

Free-to-air broadcasters should be encouraged to provide innovative features such as enhanced programming and high definition television, without regulatory limitations, so as to promote the speedy and smooth take-up of digital television. Pay television is already protected by means of prohibitions on provision of multi-channelling and subscription services by free-to-air operators, unlike the USA where free-to-air broadcasters have complete flexibility. The transition from analogue to digital, with the added feature of high definition television, will be the most dramatic change for viewers since colour television, and will lay the foundation for free-to-air television for the next 50 years. The industry is investing millions of dollars over the next few years, relying on a decision of government in July last year to loan spectrum to free-to-air broadcasters to facilitate the transition. Retrospective legislation which altered this decision would severely penalise broadcasters and the community.

## 2.3 Achieving the broadcasting objectives

Australia has the best broadcasting system in the world, with its balance of three commercial networks and two public broadcasters, all with national reach and commitment to Australian culture and quality. The services provided by free-to-air broadcasters are supplemented and complemented for viewers by scores of pay channels.

The rules which limit the number of free-to-air broadcasters in each area, and some other policies, such as the anti-siphoning rules, which have ensured that consumers have the benefit of watching major sport on free television, are directed at preservation of the integrity and quality of this system, in the public interest. Without the anti-siphoning rules, there is no doubt that major sports would have migrated to pay television. Pay television has always been prepared to pay exorbitant prices to use sport as a subscription driver. The rules have ensured that sport which has traditionally been shown on free-to-air television has continued to be shown on free television. For those viewers able to afford to do so, there has been the added benefit of complementary and expanded coverage on pay television.

Some other broadcasting policies, though, require urgent re-evaluation as they have an adverse effect on consumer interest. The first of these are licence fee obligations. The cost imposition is huge, nearly $200 million across the industry, or roughly $50 million annually for the Nine Network. This cost diverts from programming costs, and is an unjustified burden on the industry, paid in addition to normal taxes. No other media sector pays this kind of fee.

The "standard" system of Australian content regulation also involves heavy impositions for the industry. Now that it is quite clear that Australian content will be an essential part of the schedule of a commercial television broadcaster because of audience demand, there should not be prescriptive rules as to the form or placement of that content. The Nine Network's schedule comprises 60 to 65% Australian content, and Nine is the highest rating network. Audience demand drives a high level of Australian content. However their tastes change from time to time, and there are many interpretations of what constitutes Australian culture. The "subquota" rules and a prescriptive test for Australianness, set artificial criteria for recognition of Australian culture, character and identity on television. A more flexible system would enable higher quality local productions and more opportunities for export.

Finally, there are disparities in regulation between free television and pay television, which are no longer justified as pay television has become an established industry.

These issues are dealt with in more detail in the FACTS commercial television industry submission to the Commission. PBL fully endorses that submission, and through the Nine Network, is a member of FACTS.

## 3. CROSS MEDIA OWNERSHIP

### 3.1 Diversity and plurality are assured by a combination of factors - democratic principles, consumer demand, new technologies and services and global participation

*This review is investigating whether the public benefits of regulation outweigh costs to the industry. In this section we submit that cross media regulation does not have a public benefit. The public interest objective of diversity and plurality of viewpoints is achieved in Australia, as a result of media proliferation, and traditions of democracy and independence. Consumers have a wide range of choices. It is these choices which will assure diversity continues. There is no link between common ownership and reduction in diversity.*

#### (a) Diversity and plurality - the realities

The Australian consumer has a rich array of entertainment and information available to him or her. This content is sourced from all over the world, as well as locally. The consumer is empowered as to how and when he or she will receive that information, and in what detail. The choices are endless. Not only are there diverse types of information available, but a wide range of views are expressed.

A consumer who wishes to hear about a particular news item can listen to the news and opinions on early morning talk back radio, followed by a local newspaper over breakfast, and another, a foreign newspaper perhaps, on-line. He or she can then surf to ABC Online providing news 12 times a day, plus commentary from a number of experts. Then, he or she may watch Sky News or CNN on pay television, read a political magazine for further commentary, before watching five early evening news services on free-to-air television, followed by current affairs. Then perhaps, a book in bed.

As is fitting for the democracy that Australia is, there is a wide and vigorous range of views, opinions and ideas expressed in the media.

Since 1992 the array of information and opinion provided by media outlets has grown substantially. In 1992 there were far fewer media outlets, both in type and volume, and legislators may have believed that diversity in ownership was necessary for diversity in viewpoints. However, that conclusion needs to be rethought in light of media proliferation.

It bears noting that when the BSA was enacted in 1992, none of the various Government and Senate reports of the time contain any analysis of the Internet as an information and communications medium. Its enormous growth in only seven years underscores the need to review the assumptions which gave rise to the cross media rules.

The following tables compare the position in radio and television at the time of passage of the BSA and the present time, (without considering new media).

**Services made Available since October 1992[1]:**

| **Service Category** | **Services 1992[2]** | **New Services** | **Services as at February 1999[3]** |
|---|---|---|---|
| Television | | | |
| Commercial Licences (5 Capital Cities) | 15 | Nil | 15 |
| Commercial Licences (Regional) | 29 | 4 | 33 |
| National – ABC (Locations) | 512 | 65 | 577 |
| National – SBS (Locations) | 55 | 160 | 215 |
| Community Licences (Regional) | Nil | 12 | 12 |
| Community/Open Narrowcast (Metro) | Nil | 8 | 8 |
| Open Narrowcast Services – (Regional) | Nil | 2 | 2 |
| Subscription Broadcast Licences<br>(Australian Cable, Satellite & MMDS) | Nil | Foxtel 70<br>Optus 198<br>Others 1,367 | 1,635 |
| Radio | | | |
| Commercial Licences (7 Capital Cities) | 39 | Nil | 39 |
| Commercial Licences (Regional incl ACT) | 112 | 68 | 180 |
| National - ABC Metropolitan (Locations) | 9 | Nil | 9 |
| National - ABC Regional (Locations) | 180 | 76 | 256 |
| National - ABC Radio National (Locations) | 157 | 87 | 244 |
| National - ABC JJJ (Locations) | 9 | 39 | 48 |
| National - ABC Classic FM (Locations) | 49 | 19 | 68 |
| National - ABC News & Parliament (Locations) | 8 | Nil | 8 |
| National – SBS (Locations) | 4 | 7 | 11 |
| Community Licences | 107 | 32 | 139 |
| Temporary Community Licences | Nil | 361 | 357 |
| Open Narrowcast (High Power) Services | Nil | 208 | 115 |

[1] ABC & SBS – include ABA Self-help Broadcasting Reception Scheme licences
[2] Report on Activities 4 October 1992 - Australian Broadcasting Tribunal and the Department of Transport Annual Report 1991-92, ABC web site, Radio and Television Stations 1992 – Department of Transport and Communications
[3] Summary of New (free to air) Licences made available as at 4 February 1999 and Section 96 licences allocated at 11 March 1999 – Australian Broadcasting Authority; Radio & Television Broadcasting Stations 1998 – Australian Broadcasting Authority; ABC web site.

### (b) Diversity and plurality in years to come

There will be enormous growth in pay television subscriptions and online connections in the next decade, and communications companies will expand their current range of data and information services.

As well as the services that have been rolled out throughout Australia since 1992, the BSA now provides scope for more new services as well. Datacasting services have been recognised by the BSA, which potentially will provide a range of new information-based services.

Depending on the outcome of the relevant Ministerial review, national television broadcasters will receive legislative authorisation to broadcast in multi-channel mode from the commencement of digital simulcasting on 1 January 2001. The ABC plans to offer news services on one of its new channels and perhaps children's programs and a regional service on others.

The Australian Bureau of Statistics, in the latest in a series of periodical reports on the Household Use of Information Technology[4], reported in November 1998 in the following terms:

1. There were 2.8 million Australian households with a home computer;

2. 13.5% of all Australian households had home Internet access;

3. Nearly 32% of all households with a computer had home Internet access;

4. 17% of households reported an intention to purchase or upgrade a computer in the next twelve months. Nearly 37% of these households did not already have computer facilities;

5. 26% of households with computers and no Internet access indicated an intention to connect to the Internet in the next 12 months.

Pay television is now in 800,000 of Australia's 6.2 million homes giving a penetration rate of 13%. The penetration rate is expected to grow to 30% within 5 years. Such a figure would attract a 35% to 45% viewing share in subscriber homes, translating to a 10% to 15% share when averaged across the total population.[5]

---

[4] The results in this publication are based on a combined set of observations collected in the February and May 1998 surveys of Household Use of Information Technology.
[5] Advertising Investors Newsletter of AIS July 1997

Communication companies have begun to introduce data and information services delivered, for example, by mobile phone, and other means, and are set to expand their range of services with the deployment of new technologies.

**(c) Role of the public broadcasters**

The ABC will remain a comprehensive national broadcaster for the foreseeable future, and enjoys a special place in Australian broadcasting, as does the SBS.

Both national broadcasters provide programming that complements that of the commercial broadcast sector.

The ABC, with its strong focus on Australian political life, its promotion of niche-appeal drama, and its reach to virtually all Australians, will continue to play an important part in providing diverse television programming to the Australian community.

The SBS, which has made foreign language programs accessible in recent years to the English-speaking community, is also much in demand throughout Australia as a broadcaster with niche-appeal programming. Its importance to the NESB communities within Australia cannot be over-estimated.

**(d) Influence**

Different media sectors exert different types of influence. It is impossible to quantify and measure the degree of influence of any particular medium. The influence of each sector has been massively diluted because of the abundance of sources of information.

In any event, the arguments about influence are largely irrelevant. There is an abundance of media, both entertainment and information, available, and it portrays and reflects different viewpoints and ideas both within each medium, and across the media sectors. Indeed, even with each media product, eg each newspaper, each radio service, each television service, there is a range of information, viewpoints and opinions.

**(e) Diversity and plurality in broadcasting – tenets of Australian media, but with no causal connection to cross media rules**

The cross-media rules are usually sought to be justified on the basis that to allow common ownership of commercial radio and television licences and newspapers reduces the diversity of information to, and, by extension, the diversity of opinions within, the population. So reducing that diversity of opinion is thought to be a concomitant of media ownership concentration.

The Australian consumer can choose from a wide range of media, and within that range, an array of views and opinions. Common ownership of different media units, such as newspapers and television, would not affect this dynamic. Each media unit would retain its own style, presentation and content, and views and opinions would be as varied and diverse as they are now.

New media are also influencing the volume and content of news and information.

Australia is an extraordinarily stable, democratic country. It has been so since Federation. It offers its citizens a quality of freedom, including freedom of expression and assembly, and freedom of the press, that few other countries in the world can offer. Australians are accustomed to notions of media independence. Public scrutiny easily identifies any lack of independence.

Market economics protect diversity. Australians are sophisticated consumers, empowered by the wide array of media choices they have, and by a culture which emphasises independent and questioning thought. Independence and diversity are already important criteria invoked by members of the public when they allocate their preferences for media products. Biased, narrow or bland reporting by major media companies would simply lead to a smaller audience base.

There is much economic incentive to accommodate diverse preferences, viewpoints and subject matter. The highly competitive nature of media industries ensures that this occurs. There is a high level of competition between the small number of players in each commercial free-to-air licence area. Stations need to provide a diversity of programming for audience appeal and advertiser interest. They must also have fair and accurate news, and represent views fairly, as this is taken as an indicator of quality. Broadcasters cannot compete on price to consumers – they must continually and exclusively rely on quality differentiation, such as a quality news service, and quality Australian programs to generate and maintain audience interest.

In short, through the distribution of content, mainstream media such as free television, free radio and newspapers attract audiences and readerships which are made available for advertising. Attractive content, of which objective news reporting and a diversity of news and political commentaries is a key aspect, is central to competition between media.

Further, independence of the media is a concept valued by quality journalists and producers. In order to attract and keep quality personnel, media companies need to be committed to these principles. It is an indicator of this diversity that Australia has so many high profile, independent media commentators. The media compete for their voices because of the very fact that they are strong, independent voices.

**(f) Common ownership will not affect uniqueness of different media units**

The notion that broadcasting and newspaper ownership, if in the same hands, will result in some form of homogenisation by each of the other, or by one of the other, thereby reducing the level of diversity of opinion in the community, ignores the realities of both the broadcasting and newspaper businesses.

Each medium – broadcasting and newspapers – sells different products to different audiences

Each medium satisfies different needs. The news coverage on television and radio is limited to a small number of items in each bulletin. Furthermore, the bulletins are available only at specific times and do not allow the consumer to select only the items of interest. Newspapers, on the other hand, provide a much larger range of more detailed stories and allow readers to select the time, range and extent of their reading. Similarly with respect to entertainment.[6]

Audiences tend to use the various entertainment and information media differently and for different purposes. For example, anyone seeking information on employment opportunities or availability of used cars of a particular model would use newspapers or on-line services. Listening to radio is possible in conjunction with the performance of other activities (eg, driving a car) while other media such as television or newspapers require a much higher level of attention. The ACCC has recognised that each sector is distinct. There will always be diversity between the different sectors, even with a common owner.

Overall, the unique properties of each medium, and the specific needs that each medium is required to satisfy, differentiate the media forms.[7]

**(g) Regulations ensure community standards are met**

Apart from the laws of market economics, which will deliver all necessary levels of diversity, a number of regulatory safeguards exist, which provide additional reassurance that community attitudes are reflected in programs, including news and current affairs.

*Licence Conditions*

A number of statutory licence conditions and other requirements apply to all categories of broadcasting service providers.

[6] BTCE Working Paper 8 – Broadcasters and Market Behaviour 1993 p11
[7] Ibid p11

One such condition is that commercial television broadcasting licensees must provide a service that, when considered together with other broadcasting services in the same licence area, contribute to the provision of an adequate and comprehensive range of broadcasting services in that licence area.

The BSA provides very heavy monetary penalties (up to 20,000 penalty units) for (daily) breaches of licence conditions.

*Codes of Practice*

The BSA also provides a framework that is designed to ensure that broadcasters develop codes of practice. Such codes are to be developed in consultation with the ABA and taking account of any relevant research conducted by the ABA.

Codes of practice for the commercial television broadcasting that may bear on the promotion of diversity of information and ideas include codes relating to:

- Promoting accuracy and fairness in news and current affairs programs
- Captioning of programs for the hearing impaired
- Other matters relating to program content as are of concern to the community

In developing codes such as these, industry groups are required to take a number of community attitudes into account, including:

- the portrayal of physical and psychological violence, sexual conduct and nudity,
- the use of drugs, including alcohol and tobacco,
- matter that is likely to incite or perpetuate hatred or vilification based on ethnicity, nationality, race gender, sexual preference, age, religion or physical or mental disability, and
- any other matters relating to the content of programs as are of concern to the community.

In addition, the film classification system applied by the Office of Film and Literature Classification must be used for classifying films shown on commercial television. In addition, special provisions apply to the broadcast of programs given special classifications. These provisions restrict viewing times for programs classified as ‘M’, ‘MA’ and ‘AV’. ‘AV’ is a new classification introduced by the commercial television industry after a recent code review and public consultation.

Codes of practice must satisfy the ABA that:

- They provide appropriate community safeguards
- They are endorsed by a majority of service providers in the relevant industry group
- Members of the public have been given an adequate opportunity to comment on the code

before the codes can be registered with the ABA and come into effect.

Section 4 of the Code is intended to ensure that news and current affairs programs are presented fairly, and that news is presented impartially.

In broadcasting *news and current affairs programs*, licensees:

> *Must present factual material accurately and represent viewpoints fairly(*4.3.1)
>
> *Must make reasonable efforts to correct significant errors of fact at the earliest opportunity* (4.3.11).

In broadcasting *news programs*, licensees :

> *Must present news fairly and impartially* (4.4.1)
>
> *Must clearly distinguish the reporting of factual material from commentary and analysis* (4.4.2)

The ABA may determine program standards where codes of practice fail or are not developed. It also investigates complaints about breaches of licence conditions and codes.

*Election Matter*

The BSA imposes special licence conditions on broadcasters relating to election matter. For instance, broadcasters must give reasonable opportunities for the broadcasting of election matter during election periods to all political parties contesting the election.

*Regulatory policy*

The BSA provides a regulatory policy of general application to broadcasting services, in section 4 of the Act. It is intended as a general guide to both the ABA and the broadcasting industry.

PBL does not recommend any change to these bench-marking provisions. They will continue to provide direction and empowerment to both industry and regulator.

The Productivity Commission will note that the BSA, after providing the necessary general framework for the flexible regulation of broadcasting services, goes on to impose additional inconsistent and rigid special rules that compromise the independent administration of the overall regulatory policy by the ABA.

These inconsistent and rigid rules include cross-media and foreign ownership and control rules.

In PBL's submission the Productivity Commission should recommend that the general regulatory policy of the BSA, along with market forces appropriately regulated for competition, are together quite capable of providing the necessary reassurance about the achievement of the appropriate objects of the Act.

## 3.2 Setting the scene – Australian media companies in a global, convergent media marketplace.

*We have submitted above that the Australian consumer has a diverse range of media to choose from, and that common ownership of television, radio, or newspapers would not affect this dynamic.*

*In this section, we describe the global information and entertainment landscape in which Australian media companies are relatively tiny participants. Giant foreign media companies, with interests in a wide array of media holdings, are dominating international media, and are increasingly influential locally.*

*We go on to submit that the cost of the cross media rules is high, for the industry, and for consumers. The Australian economy is small, the possibilities for diversification limited and there are many powerful, mainly overseas competitors. The cross media rules restrict growth, and in doing so, impede the ability of Australian companies to compete, locally and internationally.*

### (a) A global landscape

Over the past ten years there has been a dramatic change in the production, distribution and delivery of information and entertainment to the world.

The convergence of the media, computing and communications industries around the world has seen the emergence of new technologies and new media forms, and of huge transnational companies who have become active participants in globalised media businesses. These companies such as AT & T, AOL, MCI Worldcom, Time Warner and Yahoo! have enormous capital bases, some with market capitalisation's substantially in excess of $100 billion. These companies are continuing to grow bigger and reach deeper into converged media and communications businesses.

To start with, there are six global corporations that are battling for the loyalty of the world's six billion people. All six companies have access to the output of at least one Hollywood film studio and all six companies have interests in a number of sources for non-film content and information. Even though these corporations have headquarters in either North America or Japan they are truly global companies with revenue flowing from around the world for mainly US sourced content.

The six multi-tiered giants of the media world are Sony, Time Warner, Disney, Seagram, Viacom and News Corporation. They have interests in different continents in movies, television broadcasting, cable, satellites, music, theme parks and book and newspaper publishing.

These companies have grown after being able to merge complementary businesses. Time Warner has grown with the merger of Time Inc, Warner Communications and more recently Turner Broadcasting. Viacom has expanded after the merger and acquisition of Paramount and Blockbuster; Disney with its merger with Capital Cities/ABC television network and its acquisition of ESPN. News Corporation grew with its acquisition of the Herald and Weekly Times, a variety of English and North American mastheads, 20$^{th}$ Century Fox, the amalgamation of satellite TV competitors in the UK to form BSkyB and the development of the Fox television network.

The size and scope of these companies is reflected in the table set out below.

***The Largest Global Media Companies***

| **Company** | **HQ** | **Market Capitalisation[8] (AUS$)** | **Annual Revenues[9]** | **Convergent Content** |
|---|---|---|---|---|
| Time Warner | USA | $135 billion | $23 billion | Warner Bros, CNN, HBO, cable systems, magazines, books, music |
| Walt Disney | USA | $115 billion | $36.5 billion | Walt Disney Pictures, Touchstone, Miramax, ABC, ESPN, Disney Channel, theme parks, magazines |
| Sony | Japan | $59 billion | $87.2 billion | Columbia Pictures, electronics, games & on-line, music, |
| Viacom | USA | $51 billion | $19.2 billion | Paramount, Spelling, Nickelodeon, MTV, publishing, Blockbuster Video, |
| Seagram | Canada | $37 billion | $26.4 billion | Universal, Polygram, music, theme parks, wine and spirits |
| News Corp | USA | $26 billion | $21.4 billion | Fox, Fox Network, BSkyB, Star TV, newspapers, magazines, books |

Other powerful companies competing globally with multi-media businesses include AT&T (which has recently acquired the largest cable television operator in the world, TCI, and broadband cable service @Home), Pearson (UK book, newspaper and television production company) and Bertelsmann (European publishing and television conglomerate). These companies are fighting battles for distribution beyond North America to Asia, Latin America, Europe and Australasia to deliver content – entertainment and information services, sport, movies and news and to utilise new digital technologies.

## 3.3 New Technology New Competition

As technology leaps forward, these companies leap with it. Telecommunication carriers, software developers and internet service providers have also emerged as powerful media players.

[8] Fortune 500 Market Values at 15 March 1999 for Time Warner, Disney & Viacom. ASX at 30 June 1998 for News Corp. SalomonSmithBarney Australia Securities at 5 May 1999 for Sony & Seagram

Convergence is bringing these businesses closer to the business of television. Four examples illustrate this:

- Computer software giants, Microsoft and Oracle, for example, have both developed products that deliver Internet services such as e-mail and web browsing to the television screen. The ability to enhance a television program with supporting data, provide information or to develop e-commerce opportunities is seen as very promising area of business.

- America Online is the world's largest ISP. Its AOL's mission is "to build a global medium as central to people's lives as the telephone or television and even more valuable"[10].

- In March 1999, Yahoo! announced its intention to acquire Broadcast.com. With the $US5.6 billion acquisition, Yahoo! breaks into audio and video streaming – the equivalent of Internet radio and television.

  "The anticipated deal significantly broadens the character of content from Yahoo, which draws approximately 25 million individual PC users each month as Internet's leading search engine"[11.]

  Broadcast.com current provides streaming content from more than 300 radio stations and 40 television stations on-line.[12]

- In January 1999 AT&T, owner of US cable net access provider @Home, purchased the number two Internet search engine, Excite, for $US6.7billion. The merged companies propose to deliver high-bandwidth streaming media, such as higher-quality audio and video files, to @Home subscribers. Users will also be able to access on-demand content, and view live event Webcasts.

### 3.4 Global Convergent Companies in Australia

The giant transnational players and new technology companies are extending their reach worldwide. The Australian media landscape is becoming an integral part of that map.

Within Australia there is a similar pattern of convergence to the global arena. Telstra and C&W Optus are owners of and active participants in television, Internet services, and communications businesses. Foreign transnational corporations have become substantially involved in Australian media businesses, for example, pay television (eg News Corp, UIH,Time Warner, Sony, Disney) and Internet services (eg AOL,Yahoo!, MCI Worldcom).

A chart of some of the convergent media and communication companies in Australia is set out below.

---

[10] AOL 1998 Annual Report
[11] Broadcast & Cable April 5 1999
[12] Yahoo chief executive Tim Koogle reported by c-net.com 1 April 1999

***Convergent Companies in Australia***

| **Company** | **Market Cap (AUS$)**[13] | **Revenues**[14] | **Convergent Businesses** |
|---|---|---|---|
| America Online | $213.5 billion | $4.9 billion | ISP and Internet portal |
| MCI WorldCom | $160.0 billion | $28.1 billion | Telecommunications, ISP |
| Yahoo | $59.3 billion | $0.3 billion | Internet portal and search guide |
| Cable & Wireless | $50.8 billion | $18.7 billion | Telecommunications, ISP |
| Telstra | $35.4 billion | $17.3 billion | Telecommunications, ISP, television |
| News Corp | $23.5 billion | $21.4 billion | Film, television, books, on-line newspapers, magazines |
| Bertelsmann AG | Not Listed | $19.2 billion | ISP & music, television, book publishing & retail |
| C&W Optus | $13.9 billion | $3.2 billion | Telecommunications, ISP, television |
| Clear Channel | $11.0 billion | $2.4 billion | Radio, television & outdoor |
| Daily Mail & General Property Trust PLC | $7.8 billion | $3.4 billion | Radio, television, newspapers, magazines & books |
| **Publishing & Broadcasting (PBL)** | **$4.6 billion** | **$2.3 billion** | **Television, magazines, on-line** |
| United International Holdings (UIH) | $3.8 billion | $0.2 billion | Telecommunications, television |
| Independent Newspapers PLC | $2.0 billion | $1.3 billion | Newspapers, radio, outdoor, magazines |
| Fairfax | $2.8 billion | $1.2 billion | Newspapers, magazines, on-line |
| Seven Network | $1.7 billion | $0.8 billion | Television |
| WA Newspapers | $1.0 billion | $0.3 billion | Newspapers |
| Ten Network | $0.9 billion | $0.2 billion | Television |
| Rural Press | $0.8 billion | $0.4 billion | Newspapers, radio |
| Village Roadshow | $0.7 billion | $0.6 billion | Radio, cinemas, theme parks, film production & distribution. |

[13] Market Capitalisation: US Companies - Fortune 500 at 15 March 1999; Aust Companies - BRW Top 500 at 31 March 1999; UK Companies - Bloomberg at 23 April 1999; Yahoo & AOL – SalomomSmithBarney 5 May 1999

[14] Revenues reported for each company's past financial year

All of the foreign owned companies listed in the chart, with the exceptions of News Corporation and Independent Newspapers, have acquired media interests in Australia since 1992. All these global companies now have an Australian operational base and each has the ability to expand their interests rapidly if required. With time, other transnational communications and media companies will do the same.

The main reasons for this influx have been:

- Deregulation of telecommunications (entry of MCI and Cable & Wireless)
- Deregulation of commercial radio (entry of Clear Channel, Independent Newspapers and Daily Mail Group)
- Development of the Internet (entry of AOL, Bertelsmann, MCI WorldCom, Microsoft, Yahoo)
- Commencement of Pay television (entry of, Time Warner, Disney, Sony's ESPN, Seagram's Universal, News Corporation, AT&T's TCI Cable & Wireless, UIH)

New areas of business and a comparison of cross media ownership and control rules across the different sectors, are set out in Appendix "A".

### 3.5 Inefficiencies in the industry – difficulty of competing in this global, convergent environment

For Australian broadcasting companies, diversification into holdings which have synergy with their core business is part of a commercial vision and shareholder expectation. Because of the relatively small local economy, opportunities for expansion are limited, and competition from multi-tiered transnational companies is intense.

The industry is less efficient because Australian broadcasting companies are, because of limitations of scale and scope, unable to compete effectively. Telstra and C&W Optus, are the only companies with anything like the size and multiplicity of business streams to compete in the globalised, convergent environment. The other logical local competitors- Australia’s media companies, are constrained by the cross media rules from building a sufficient capital base, supported by a number of business streams, to compete in this environment.

Furthermore, Australian broadcasters have other high regulatory costs to face, which reduce their spending capacity. The details of these are set out in the FACTS submission, but in brief they include the supertax licence fees, and the costs of ABA imposed standards.

The burden of the cross media rules is more apparent now than ever as Australian broadcasters are facing their most difficult challenge since inception. Broadcasters are confronting new challenges from pay television and on-line services and new data and information services provided by communications companies.

More new services are expected to be introduced in the near future – for example, multi-channelling on the ABC and SBS and datacasting services. Some of the parties interested in providing datacasting services aim to gear the services to look very much like television.

Although broadcasters are constantly reviewing operations with a view of cutting costs, there is little scope for reductions. The heaviest costs are the supertax licence fees (last year nearly $200 million was paid to the Commonwealth) as well as other high regulatory costs, such as the Australian content quota. It is programming itself which has to be cut in difficult times. Nine Network recently made the decision to cut its long running weekend sports programs as they could not be justified in light of the diminished weekend viewing audiences due to the broader sports programming alternatives now available on pay television. Broadcasters are also preparing for the high costs of digital conversion, commencing on 1 January 2001. The costs to the industry are estimated to be around $700 million, with $30 to $50 million each year during the simulcast period.

In short, broadcasting companies like other Australian media companies, need to be able to diversify and grow so as to meet the challenge of this global, ‘convergent’ future.

## 3.6 The cost for the industry, and ultimately consumers, is high

The cross media rules create inefficiencies in the industry, in conflict with the Federal Government’s industry policy, Investing for Growth, which places considerable emphasis on developing a vision for industry sectors and on identifying impediments to higher productivity, growth and innovation. The rules limit the level of actual and potential competition in the industry, locally and internationally, by impeding companies from:

*Diversifying*

Acquiring holdings which are relevant or have synergy with their businesses. (The market imperative and the shareholder expectation is that media business will expand and invest in other complementary or related in other complementary or related businesses).

*Growing and adding value to the economy*

Accumulating capital . This allows companies to withstand downturns, and invest more broadly, thus creating jobs, infrastructure, earnings, and furthering the development of skills and training and export.

*Investing overseas*

Having cashflow to allow international investments, with the flow on benefits for the Australian economy. Currently, Australian media companies are unable to compete effectively in the international arena because of the scope and size of competitors, and the regulatory impediments Australian broadcasters face.

*Operating more efficiently*

Having the ability to operate more efficiently by taking advantage of economies of scale, such as advertising, research, production of on-line material, management, facilities, technology, training etc

Having the ability to save costs and increase revenue through cross-promotion, using brands across different businesses etc.

*Using the digital opportunities overseas*

Having the ability to “springboard” into Asian markets, as those countries follow Australian in adopting digital terrestrial television. Australia will be the first country in the world to introduce an interoperable digital terrestrial system with free-to-air services focusing on High Definition Television and subscription television operators focusing on multi-channel services delivered by satellite and cable.

The Industry Action Agenda prepared by the Government sets out seven opportunities for Australian industry. Three of these opportunities are likely to involve substantial investment by Australian media companies (production studios, program enhancements and datacasting services and enabling software).

*Investing in new products*

The cross media rules are an inflexible brake on the potential for Australian commercial television companies to move quickly in capitalising on opportunities to compete globally. The cross media rules are not only limiting the ability of Australian broadcasting companies to compete in the global forum, but the rules are also restricting the ability of Australian broadcasting media companies ability to participate in convergent businesses, compared to far larger companies in the Australian economy.

*Improving the quality of programming, and other community services.*

Having the ability to spend more on programming (the highest expenditure of broadcasters after licence fees), including more local content, more expensive programming such as news and sport, or more innovative thus risky programming. It would also allow broadcasters more scope to develop and promote digital television, through high definition and enhanced programming, and to provide other community services such as captioning.

*Exporting more product*

Having the ability to develop high end product for export, for example by commissioning expensive Australian drama (with the flow-on benefits for the Australian production industry)

*Improving the capacity* of *broadcasters to meet the broadcasting objectives*

Less financial constraints means more flexibility to produce high quality, diverse and innovative programming, to provide Australian content, to operate self-regulation more efficiently (such as consumer complaints), and to respond better to audience needs.

*Conclusion*

In short, the cost to the public is high. Australians are being deprived of the benefit of a competitive, efficient, energetic industry which would better meet the demand of their audiences, as well as providing all the flow -on advantages to the economy.

### 3.7 Applying Competition Law to Broadcasting Services

In PBL's view the supervision of mergers and acquisitions within the broadcasting industry, and between the broadcasting industry and the newspaper industry, can satisfactorily be regulated by the relevant provisions of the Trade Practices Act 1974 (TPA) as administered by the Australian Competition and Consumer Commission (ACCC).

No additional provisions beyond those presently found in the Trade Practices Act need be introduced.

An additional general public interest test, of the type that has been mooted from time to time, will not be necessary.

The TPA's objective is:

> … to enhance the welfare of Australians through the promotion of competition and fair trading and provision of consumer protection (s.2)

As one of the ACCC's Commissioners has noted:

> Competition is not an objective in itself. There must be ultimate benefits from competition to make it a worthwhile objective to pursue.
>
> What are these benefits? Competition is about increasing efficiency in economies for the ultimate benefit of consumers in terms of lower prices, higher quality and greater diversity of choice.
>
> These benefits are ultimately consumer benefits. Therefore the twin objectives of promoting competition and protecting consumer welfare are, to a large extent, in lock-step.[15]

The efficacy of competition regulation within the broadcasting industry has already been established.

The ACCC has already played a very significant role in the development of pay television services in Australia, and other examples of ACCC regulation include:

- Service bundling notifications have been reviewed by the ACCC for compliance with third line forcing criteria.

- A programming alliance between Australis and Foxtel was reviewed by the ACCC. The ACCC had been concerned whether Australis and Foxtel would continue to compete when they had the same core programming, but ultimately cleared the alliance.

- The ACCC reviewed and permitted a shareholding arrangement that included the Nine Network, the Seven Network, Optus Communications and Continental Cablevision in changing proportions, because it believed competition would be the most likely outcome.

  Implicit in that conclusion, was the ACCC view that pay TV was in a separate and distinct market from free-to-air television, such that the pricing of pay TV services was, or would be, largely unconstrained by the availability of free-to-air services.

- The ACCC opposed the proposed merger of Australis and Foxtel because it considered it would be likely to lead to a substantial lessening of competition in both the pay television and telephony markets.

---

[15] Pay TV, Cables and Service Bundling: Challenges for Regulators, David Lieberman, 1997 Australasian Cable and Satellite Yelevision Conference p1.

- The ACCC decided not to intervene in relation to a satellite infrastructure joint venture between Australis and Optus Vision because the two satellite pay TV providers would compete in terms of pricing, marketing and program content.

The ACCC has also dealt with a number of other broadcasting-related consumer protection matters in recent years, including a number of disputes between the video rental and pay TV industries about competing product claims.

The Productivity Commission will also be aware that the combination of the TPA and the ACCC has proven quite capable of satisfying the testing regulation of the telecommunications industry in Australia. That industry includes many global players and is much more competitive than previously. That industry notably has not required any extension of the ACCC's powers beyond those found in the TPA and the Telecommunications Act.

There are no cross media rules between free-to-air and pay television. The only relevant structural regulation is the TPA. Yet the absence of any cross media rules has not prevented the development of a highly competitive pay television sector. If such a sector has been able to develop with the competition protection of the TPA alone, despite its adjacency to free television, then clearly more remote markets such as radio and newspapers would continue to experience a high degree of competition, if the cross media rules were repealed.

In PBL's view the Productivity Commission will be able to satisfy itself that the TPA and the ACCC will, in the absence of special ownership and control rules, be more than able to administer general competition and consumer law in the broadcasting and newspaper industries.

### 3.8 PBL Recommendation

PBL recommends that the cross-media ownership and control rules be repealed in their entirety, including consequential rules about directorships.

## 4. FOREIGN OWNERSHIP AND CONTROL

*In this section we submit that, along with cross media rules, foreign ownership and control laws should be repealed. In the past, PBL has supported the principles of the foreign ownership and control laws. However, it is clear that these laws are not achieving their purpose, and foreign participation is a reality.*

*The rules apply unevenly and capriciously. There is now in Australia extensive foreign participation in radio, pay television, telecommunications, newspapers, the Internet and book publishing as well as the provision of content.*

*The foreign ownership and control rules should not be repealed, however, unless the cross-media rules are also simultaneously repealed.*

### 4.1 Foreign ownership and control policy – inconsistent and ineffective

PBL has argued consistently that the rules are ineffective in achieving the stated goal of ensuring that Australians have effective control of the more influential broadcasting services. Foreign companies own substantial portions of the radio and newspaper industries, and one free-to-air broadcasting network, and hold substantial investments in, or own outright, many of the operators in the pay television, on-line and other media sectors. The justification of foreign ownership limitations based on levels of influence (as was intended to be the measuring stick) has become meaningless.

The concern about foreign "control", (as opposed to ownership), is not one which is effectively carried through into any of the other influential mass media sectors. There is already substantial foreign ownership and control of newspapers and radio.

*Distinction between ownership and control*

The Foreign Investment Review Board reviews all direct proposals by foreign interests to invest in the media sector, and proposals by foreign interests to acquire an interest of 5% or more are subject to case by case examination. The Board's decision making is discretionary, based on a number of principles.

Restrictions in relation to commercial television apply in the form of specific ownership levels, but also control. The control provisions do not apply to newspapers or pay television, and radio has neither ownership nor control provisions.

#### *Newspapers*

The maximum permitted aggregate foreign interest (non-portfolio) investment/involvement in national and metropolitan newspapers is 30% with any single foreign shareholder limited to a maximum interest of 25% and in that instance unrelated foreign interests would be allowed to have aggregate (non-portfolio) shareholdings of a further 5%. Aggregate foreign interest direct involvement in provincial and suburban newspapers is limited to less than 50% for non-portfolio shareholdings.

These restrictions apply to ownership only.

Governments have not expressed concern about foreign control of Australia's major metropolitan newspapers.

During the separate periods when interests associated with the Canadian publisher Mr Conrad Black and the New Zealand company Brierley Investments Ltd were undoubtedly in control of the Fairfax group, no objection was had on that score by FIRB or the Commonwealth Treasurer, although their acquisition of shareholding interests in that group was, of course, restricted.

Mr Rupert Murdoch's News Ltd controls 67% of the total circulation of Australian capital city and national daily newspapers, 75% of total circulation of Australian Sunday newspapers, 46% of total circulation of Australian suburban newspapers and 23% of total circulation of Australian regional daily newspapers[16]. Mr Murdoch is an American citizen and undoubtedly in control of News Ltd.

In other words, Australian foreign ownership policy does not spring from a determination to retain Australian control of major newspaper companies and their potential to influence the shape of community views in Australia.

*Radio*

The Parliament regards neither foreign ownership nor foreign control as issues of importance in relation to commercial radio, despite their wide audience reach. Since 1992 a number of Australian commercial radio services have come to be owned and controlled by foreign persons.

This being the case there appears to be no logical reason why the foreign ownership and control rules in the BSA applying to commercial television broadcasting services should be different to those applying to commercial radio broadcasting services and to newspaper companies.

### 4.2 Concept of "influence" seems to have become redundant

The hierarchy of foreign ownership and control rules suggests a policy belief that commercial television services warrant the strictest protection from foreign influences. But, on any objective analysis, many other influential media services exist in the same market place without foreign restrictions. Some of these, such as radio talk back and newspapers seem more influential on community views and opinions than commercial television.

The usage of the Internet by Australians for information services is high and growing. Communications companies provide data and information services and are set to expand their scope.

Other media sectors which are more or as influential as television are unregulated or regulated less – and foreign participation is extensive.

---

[16] Media ownership update 1999, prepared by the Melbourne and Sydney offices of the Communications Law Centre.

In short, the rules apply unevenly and do not appear to be linked to levels of influence.

### 4.3 The issue of earnings in Australia

Foreign ownership restrictions that do not also include control restrictions must be presumed to be principally designed to ensure that Australians retain entitlements to invest in certain industries and to returns on those investments such that those returns will supplement the domestic level of savings as a source of further investment funds. However this does not accord with the application of the Act to the investment by CanWest Global Communications in the Ten Network.

CanWest is precluded by the BSA from having, in conjunction with other foreigners, more than 20% company interests in the Ten Network. It is also precluded by the control rules from having more than 15% company interests in, or control of, the Ten Network in its own right.

But the term ‘company interests’ does not include all economic interests capable of being held in corporations.

Ever since it led a consortium which purchased the Ten Network in 1992, CanWest has never enjoyed less than a 57% economic interest in the network.

Notwithstanding that this arrangement appears to fly in the face of the broadcasting foreign control rules, no Australian Government has done anything to cause the definitional provisions of the BSA to be reviewed in the years since their true meaning was established.

Accordingly, it must be taken to mean that the broadcasting foreign ownership rules do not have a rationale related to the need to ensure that shareholders’ dividends remain substantially in Australia. CanWest has repatriated very significant levels of dividends to Canada over the past few years without attracting adverse comment for doing so.

It is time to recognise that these artificial structures are not consistent with an efficient and properly functioning media sector.

### 4.4 Australian voice

It has become apparent in the last few years, that, no matter how little local content there may be in other media types, free-to-air viewers expect very high levels of Australian content on free-to-air television. News, in particular requires a regional and local orientation.

Thus, commercially, foreign owners would need to preserve high levels of Australian content for ratings success.

### 4.5 PBL Recommendation

The foreign ownership rules are clearly ineffective, as globalisation and convergence have brought transnational companies into Australia, and newspapers, radio, pay television and the internet have substantial foreign involvement. One free-to-air broadcaster even has majority economic ownership by a foreign company notwithstanding the apparent intent of the current rules. Clearly, the rules have lost their logic and their validity.

With this level of foreign participation in the media industry, broadcasters too should have the opportunity to forge alliances with foreign companies to remain efficient and competitive.

In PBL's submission, along with the cross media rules, the foreign ownership and control rules should be repealed, leaving FIRB and the Treasury to review foreign investment in the commercial and subscription television broadcasting sector on a discretionary basis.

However, the foreign ownership and control rules should not be repealed unless the cross-media rules are also simultaneously repealed.

PBL is prepared to compete with foreign companies within the changing Australian media sector, but it does not believe that it can do so on a genuinely competitive basis unless the cross-media rules are repealed and PBL is enabled to grow its capital base.

Repeal of the foreign ownership and control rules without contemporaneous repeal of the cross-media rules would produce the absurd result that foreign companies would be free to make further inroads into major Australian media sectors while Australian media companies would be free only to look on.

## 5. AUDIENCE REACH

*In this section, we argue that this rule seems no useful purpose and should be repealed.*

The audience reach rule - now found in s.53 of the BSA – was introduced as a concept at the same time as the cross-media rules were introduced (1987). These two sets of rules were designed to replace the then maximum ownership and control limit of two television stations in the national, but not local, market.

The government of the day originally proposed an audience reach rule limiting any person to control of licences serving a maximum of 75% of the Australian population. This was reduced to 60% during Parliamentary debate.

The provision was re-enacted when the BSA was introduced, but the allowable audience reach level was extended to 75%, as had initially been proposed in 1987.

The abolition of the two-licence policy in 1987 and the aggregation of television service areas led to ownership rearrangement of the commercial television industry.

This rearrangement recognised the reality of relationships that then existed between major owners in the capital cities and the owners of regional services.

The capital city owners, focussed principally on the Sydney and Melbourne markets, produced much of the programming seen in other cities and regions around Australia.

This programming was, and is, fed to regional operators for a price. Local programming was, and decreasingly is, sometimes substituted for the network feed.

The 60% rule allowed some network growth, but it wasn't until the BSA amended the rule to 75% audience reach that some networks with a national ownership structure finally emerged. The Productivity Commission might note that PBL owns only three capital city licences (not including Darwin), and relies on relationships with affiliates in other capital cities and regional areas to spread its programming.

The reality of these network relationships is that the programming of the three major networks is seen, by one means or another, throughout virtually the whole of Australia.

Some remote service areas are served by one or two services only because the ABA has judged there to be no compelling case to offer new licences in those markets. In markets with less than three services, the programming of the three national networks is still strongly represented through affiliation or other arrangements.

As the BTCE put it in 1991

Most of the financial incentives which underlie the formation of networks arise from the nature of broadcasting and thus exist with or without common ownership of the network. The restrictions limiting media concentration and preventing the construction of wholly owned national networks do not prevent independently owned broadcast stations from collaborating with each other or affiliating with existing networks to obtain network-type economies.[17]

The audience reach rule was ostensibly introduced to act as a restraint on ownership that took a different form from the ownership cap replaced at the same time.

It was thought that the reach rule would, as it has, restrain television ownership from further concentration than was then thought to be justified.

What underpinned this policy was the misplaced assumption that program reach would match ownership reach. But networking arrangements have overtaken the policy's goal and rendered it inapplicable to its original purpose.

All that remains is a policy which provides some artificial restraint over ownership arrangements for no good purpose.

If the rule is abolished, as PBL suggests it should be, there may be – although it is not inevitable - some further mergers between commercial television service owners. The effect of this on the viewing audience will, if of any effect at all, be negligible.

The audience reach rule is a rule that serves no useful purpose. It has only ever inhibited economically-justified ownership arrangements, without ever delivering on its promise of protecting diversity of broadcast information.

**PBL Recommendation**

Along with the cross media and foreign ownership and control laws, PBL recommends that the audience reach laws should be abolished.

[17] Economic Aspects of Broadcasting Regulation, Bureau of Transport and Communications Economics 1991 p83r

## Appendix "A"

### Global convergent companies in Australia – new opportunities for business

*(a) Digital television*

The Digital Broadcasting Industry Action Agenda (which reported earlier this year) has predicted that there will be substantial demand for content development, enhanced programming and information services in Australia.

A number of global companies will be looking to establish businesses in Australia.

With digital datacasting being compatible across terrestrial, cable and satellite, global players likely to have an interest in the Australian industry include: computer companies Microsoft and Oracle, Internet service providers AOL, MCI WorldCom, and Cable & Wireless, and information companies such as News Corporation, and Bertelsmann.

Converging digital television and computer technologies will enable Australian consumers increased access to a world market, not bound by geographic borders. Global companies that previously did not see Australia as cost effective to service directly will increasingly target Australian consumers.

*(b) Telecommunications Carriers*

In Australia, telecommunications companies have no restrictions on participating across the convergent sector not had the same restrictions placed on their business strategies as they have overseas. They have a control over the access systems, and as such are in a powerful position.

For Telstra and Cable & Wireless Optus, television is part of a wider business strategy. Both hope to provide television, high speed Internet access and other multimedia services (including video-on-demand) over their broadband cable networks.

These two telecommunications companies have been able to dominate the pay television landscape in Australia, holding respectively 50% and 100% of the two metropolitan pay television operators.

With the acquisition of a majority interest in Optus Communications by Cable & Wireless, Optus now has the financial backing of a company that is the equivalent in size as Telstra. In terms of capitalisation, both Telstra and Cable and Wireless dwarf the free-to-air sector.

*(c) Deregulation of Radio*

International media companies – Daily Mail and General Trust PLC, Clear Channel Communications Inc and Independent Newspapers PLC - have entered the Australian market since the deregulation of ownership of commercial radio.

The Daily Mail Group owns and controls 54 of Australia's 217 commercial radio stations. The Daily Mail Group is truly a company capitalising on convergence. It is the owner of a range of media interests. Its main business is the publication and printing of newspapers and periodicals, and it is also involved in television, radio, teletext, magazines, exhibitions, conferences, training, computer software, video and book publishing.

PN News & Media Limited and US media group Clear Channel jointly acquired Australia's second most profitable radio network – the Australian Radio Network – with its eight metropolitan and three regional stations. Clear Channel operates, or is affiliated with, 441 radio stations, 18 television stations and approximately 200,000 outdoor advertising displays in 25 countries worldwide.

APN is majority owned by Independent Newspapers, which is an expanding global media and communications group with interests in newspaper and magazine publishing, electronic media and outdoor advertising. Independent Newspapers has interests in Ireland, the United Kingdom, France, Portugal, South Africa, New Zealand and Mexico. APN publishes regional newspapers in Australia.

(d) The Internet Developments

Global companies are vying for a position in Australia, one of the most Internet connected countries in the world. For example, MCI Worldcom has recently acquired the largest ISP in Australia, OzEmail .

North America's largest ISP to homes, America Online, is now operating an AOL Australian service.

Cable and Wireless Optus is currently ramping up its Internet service in Australia. Its strategy is to offer a full convergent service including local, interstate and international telephone, Internet, pay television and interactive television over the next twelve to eighteen months.

Yahoo now provides an Australian search engine and Internet portal with its web site Yahoo.com.au. The site has been heavily promoted in Australia.

The majority of Australian usage of the Internet is to sites outside Australia owned and operated by foreign companies. In part this is because the resources and investment able to be deployed against these foreign investment services is far greater than can be sustained by Australian media companies.

*(e) Pay Television*

The Australian pay television industry is made up of three service providers Foxtel, Optus Vision and AUSTAR.

***Pay television Operators in Australia***[18]

| | **Foxtel** | **Optus Vision** | **Austar** |
|---|---|---|---|
| Ownership | Telstra 50%, News 25%<br>PBL 25% | Cable & Wireless Optus<br>100% | United International Holdings (UIH) Inc<br>100% |
| Area of Operation | Mainland Capital Cities | Sydney, Brisbane Melbourne, | Regional & Rural Australia |
| Delivery | Cable & Satellite | Cable | Cable (Darwin), Satellite & MDS |
| Number of Channels | 32 | 27 | 19 |
| Potential Market | 2.5 million homes passed by cable<br>Satellite for remaining | 2.1 million homes passed by Optus Cable | 2.2 million homes |
| Subscribers | 440 000<br>(390,000 cable, est 40-50,000 satellite) | 200,000 cable | 300,000 satellite and MDS |

Under the exclusive agreements the pay television operators pay mainly global content providers for programs using a mix of licence fees, per subscriber payments and minimum subscriber guarantees.

[18] Adapted from an article in Australian Pay TV News, from figures provided by pay TV operators in October 1998

***Pay Television Content Providers***[19]

| Channel Type | Provider | Content supply |
|---|---|---|
| Movies & General Entertainment | Foxtel/Austar | 20th Century Fox (News Corp), Columbia Tristar (Sony), Universal (Seagram), Paramount (Viacom), UKTV (Pearson) |
| | Optus Vision | Warner Bros (Time Warner), Touchstone (Disney), Miramax (Disney), MGM, Dreamworks, Village Roadshow |
| Children's | Foxtel/Austar | Nickelodeon (Viacom), Fox Kids (News Corp), Cartoon Network (Time Warner) |
| | Optus Vision | Disney Channel, Cartoon Network (Time Warner) |
| Sport | Foxtel/Austar | Fox Sport (News Corp) |
| | Optus Vision | ESPN (Disney), C7 Network (Seven Network) |
| News | Foxtel/Austar | Sky News( News Corp, Seven, Nine)CNN(Time Warner), BBC, Bloomberg, CNBC (NBC Network) |
| | Optus Vision | Sky News, CNN , CNBC |

**Comparison of rules across media sectors**

There has been a disparity in regulation between free-to-air and pay television, in the areas of licence fees, Australian content and classification of material.

Pay television companies have also not been constrained by cross media laws. Cross-media rules have no present application to the pay television sector, or for that matter, to Internet Service Providers.

The controllers of a pay television service, or an Internet Service Provider, are completely free to acquire company interests of any dimension in, or to control, a commercial television service, a commercial radio service or any newspaper in any market in which they operate.

And, of course, a pay television service, an Internet Service Provider, a major newspaper, and a commercial radio service, may each be controlled by foreigners as well.

[19] Various sources including AFC's Get the Picture 5th Edition

**Cross-Media Ownership and Control Sector Comparison**

| Regulation | Commercial Television | Commercial Radio | Newspapers | Pay Television | Internet Service Providers |
|---|---|---|---|---|---|
| **Cross-media Ownership Constraints**<br><br>**(TV, radio, newspapers)** | **Yes**<br><br>A controller of a commercial television licence can not have more than 15% company interests in another media unit[20] | **Yes**<br><br>A controller of a commercial radio licence can not have more than 15% company interests in another media unit | **Yes**<br><br>A controller of a newspaper associated with the licence area of a commercial television or radio service can not have more than 15% company interests in that service | **No**[21] | **No** |
| **Cross-media Control Constraints**<br><br>**(TV, radio, newspapers)** | **Yes**<br><br>A controller of a commercial television licence must not be in a position to control another media unit in the same market | **Yes**<br><br>A controller of a commercial radio licence must not be in a position to control another media unit in the same market | **Yes**<br><br>A controller of a newspaper associated with the licence area of a commercial television or radio service must not be in a position to control those services | **No**<br><br>[But see above] | **No** |

[20] The term 'media unit' in this submission refers to one of a commercial television or radio broadcasting service or a newspaper.

[21] The BSA as enacted contained rules that were designed to ensure the original two satellite licences for subscription television could not be controlled by persons in control of certain newspapers, commercial television services, telecommunications carriers and each other. By operation of a sunset clause, those rules ceased to have effect on 1.7.97.