Cross-Media Ownership and the "Public Interest" Test.

The Productivity Commission's draft report into broadcasting laws canvasses a number of issues concerning the reform of Australia's cross-media ownership rules. The commission has proposed that existing cross-media laws be removed and replaced by regulation through the Australian Competition and Consumer Commission. An invitation was made seeking comments on the criteria contained in a media-specific public interest test, should the Trade Practices Act be amended in such a manner. The Communications Law Centre has endeavoured to provide the Commission with details of the United Kingdom's experience with this test.

As the current British legislation stands, once a limit pertaining to cross-media ownership has been triggered, the regulator is obliged to balance the economic benefits of the proposed merger/acquisition against any expected detriment to the public interest.

Whilst British legislation offers a guide for the implementation of the public interest test, it is by no means comprehensively detailed. Consequently, a substantial degree of discretion is afforded to the regulator. This is the greatest criticism of the public interest test of British media commentators.

This does not necessarily discount the English model as a guide for developing an Australian public interest test. What it does do is demonstrate the need for thorough public consultation and debate so public interest objectives can be identified before the test receives legislative assent.

The rules pertaining to cross-media ownership in the UK are contained in Part IV Schedule II Broadcasting Act 1996 (as substituted for old Act: 1990) The following summary has been extracted from Gibbons (1998b: p492-493).

Television:

- No person with more than 15% share of total audience time may do any of the following:

(a) hold two or more licenses for Channels 3 and 5, domestic satellite, non domestic satellite, licensable program, or digital program services; or
(b) have more than 20% interest in two or more licensees for such services; or
(c) hold one license and have a 20% interest in another such licensee; or
(d) provide a foreign (that is, other than a domestic) satellite service and hold such a license or have a 20% interest in such a license; or
(e) hold a digital program services license providing two or more of those services.

- For these purposes, and to prevent accretion of interest, half the audience time which counts for a service in which a person has 20% interest is attributed to his or her primary audience share.

- For television, audience time is calculated on the basis of total audience time with respect to all television services capable of being received in the British Isles, using figures supplied by the British Audience Research Board but subject to the ITC's discretion to determine their relevance.

- There are absolute limits on the holding of a Channel 3 license (no national license to be held with a Channel 5 license, and no overlapping regional licenses) and multiplex services (no more than three).

- There are also restrictions on overlapping digital and analogue services, and a points system is introduced with respect to digital program services.

Radio:

- The 15% threshold is again adopted but in conjunction with the points system that has already been established for radio audiences.

- This divides services so that 25 points are attributed to national radio or digital sound program services.

- Thereafter, fifteen points are attributed to other services in Category A (which covers a population exceeding 4.5 million), eight points to category B (1 to 4.5 million), three points to category C (400,000 to 1 million) and one point to category D (less than 400, 000).

- An absolute limit is placed on holding overlapping local radio licenses but they are liberalising, in allowing three licenses (being no more than two FM or AM) to be held.

- However, such overlapping interests are subject to a potentially strict public interest test. This is based on the likely reduction in plurality of ownership, the effects of the range of independent radio services available in the local area, the effects on the diversity of the sources of information available generally in the area, and the effects on the diversity of opinion on local radio in this area.

Press:

- Market share is calculated by reference to newspaper circulation, with national and local levels being distinguished.

- A national newspaper proprietor with a market share of 20% or more may not hold a Channel 3 or 5 license or a national or local radio license, and a local newspaper proprietor with a local share of more than 20% may not hold a corresponding regional Channel 3 license.

- There are also restrictions on participating interests of 20%. The effect is to remove many of the previous upper limits on cross-ownership.

- Local cross-holdings are also restricted; a local radio license may not be held by a person with a local market share of 50% or more unless the service is shared and he or she does not hold another such license.

- In any event, the new rules provide for a public interest test to be applied once the cross-holdings have been established.

Mergers:

Fair Trading Act 1973

Newspapers:
General competition law and its aim to reduce monopolistic concentrations of ownership govern the economic activities of newspaper companies.

However special provision is made for newspaper mergers in recognition of the medium's contribution to freedom of speech.

Newspaper transfers and mergers are governed by the Fair Trading Act 1973. Under s58, consent is required of the Secretary of State for Trade and Industry for acquisitions that will result in the ownership of newspapers with a cumulative circulation of over 500,000.

Before the Secretary can grant consent, the Newspaper Panel of the Monopolies and Mergers Commission must consider whether the transfer may be expected to operate against the public interest, taking into account all relevant interests and in particular, the need for accurate presentation of news and free expression of opinion.

Therefore, thresholds no longer act as maximum limits but as a trigger for the regulator to decide whether holdings or acquisitions in excess of the relevant threshold are in the public interest.

The Public Interest Test

- Under the terms of Paragraphs 9-13 of Schedule 2 to the Broadcasting Act 1996, the ITC and the Radio Authority are charged with applying a test of public interest when considering the acquisition of commercial broadcasting licences by cross-media corporations already controlling one or more newspapers.

- The matters relevant to determining whether the cross-holding would operate against the public interest are as outlined in paragraph 13(1):

(a) the desirability of promoting -
(i) plurality of ownership in the broadcasting and newspaper industries, and
(ii) diversity in the sources of information available to the public and in the opinions expressed on television or radio or in newspapers,

(b) any economic benefits (such as, for example, technical development or an increase in employment or in the value of goods or services exported) that

might be expected to result from the holding of the license by that body but could not be expected to resulted from the holding of the licence by the body corporate which was not, and was not connected with, the proprietor of a newspaper, and

(c) the effect of the holding of a licence by that body on the proper operation of the market within the broadcasting and the newspaper industries or any section of them.

The tension arising from these competing public interest claims becomes obvious upon first glance. The regulators are forced to balance potential economic benefits of proposed mergers and acquisitions against the values of plurality and diversity and the effects on competition. As observed by Feintuck (1998: para 3.2):

> *"This leaves the regulators with an unenviable task, akin to comparing apples with oranges, and, in the British context, we cannot be sure that any such decision will be taken via a transparent process, or even that adequate reasons will be given or required to enable us to check the rationality of such decision-making."*

This alleged lack of transparency is echoed by Gibbons who, after observing the Scottish Television acquisitions in 1996 and the MAI merger in 1997 argues:

> *"One difficulty with these determinations is that they provide little detail about the criteria used for deciding the public interest, and no indication of the weight given to them. The ITC did publish guidance on the test, but it amounted to little more than a repetition of the statutory language and a procedure for applying information… The RA on the other hand, have been far more open in their reasoning."* (1998b: p497)

<u>The Radio Authority’s Public Interest Determinations:</u>

Available at the Radio Authority’s web site **<www.radioauthority.org.uk>** is a brief overview of issues relevant to their public interest determinations. It goes some way in providing guidance for parties considering making a submission to the authority for consideration.

The following has been extracted from the Radio Authority’s web site:

- In assessing the effects or potential effects of any arrangements the Authority does not adopt a rigid or mechanistic approach… there is no presumption that any set of arrangements does not operate, or could or could not be expected to operate, against the public interest. Each and every transaction or proposed transaction will be judged on its individual merits.

- <u>Plurality and diversity:</u> Information should be provided on *inter alia* the type and extent of any interests held by the parties (or those connected with them) in the radio, television and newspaper industries. The parties may wish to compare their interests with those held by others in these industries. Information should also be provided on the sources of information and opinion available in the area concerned and the sources of international, national and local news used by the radio services and newspapers in question. It should be explained how this position may change or has changed under the arrangements.

- Economic benefits and market effects: Information should be provided to explain their affect on competition for advertising in the broadcasting and newspaper industries, or any section of them, for national and local advertisers. Barriers to entry into the broadcasting and newspaper industries should also be considered.

- Public Consultation: In addition to issuing a press release, the Authority would normally expect to invite public comment through advertisement in one or more local newspaper(s) in the area concerned. The Authority would generally expect a public consultation exercise to be conducted over 20 working days.

- Undertakings: In certain circumstances the Authority may be able to determine that the arrangements under consideration do not operate, or could not be expected to operate, against the public interest, notwithstanding that they have raised material adverse public interest concerns. Such concerns may be addressed by specific assurances or undertakings given by the parties. Any such undertakings or assurances must be aimed at remedying or preventing the material adverse effects identified.

The Monopolies and Mergers Commission's Public Interest Determinations:

The Monopolies and Mergers Commission goes further by providing summaries of their public interest determinations on their web site **<www.mmc.gov.uk>**. The following reports give a clearer insight into how the regulators apply the highly discretionary public interest test.

Report on proposed merger of:

Portsmouth & Sunderland Newspapers PLC and Johnstone Press PLC/Newsquest (Investments) Ltd/News Communications and Media PLC

Available at: **<www.mmc.gov.uk/psn.htm>**

In 1999, the MMC was asked to investigate and report on whether any of the proposed transfers of the newspaper titles and related assets of Portsmouth and Sunderland Newspapers plc (PSN) to Johnston Press PLC (Johnston), Newsquest (Investments) Ltd, a subsidiary of Newsquest plc, and News Communications and Media plc (Newscom) may be expected to operate against the public interest.

PSN publishes 35 local newspapers in the South and the North East of England. PSN assured the Commission that none of the bidders had expressed an interest in its retailing division, which operates a chain of approximately 220 convenience stores.

On the 30 April 1999, PSN announced that it had conditionally agreed to sell this business to another retail group. Johnston publishes 155 newspapers in Scotland and England, Newsquest publishes 179 newspapers in England and Newscom publishes 107 newspapers in England and Wales.

On 22 January 1999 Johnston acquired 14.99 per cent of PSN's issued share capital and announced its intention to tender for up to a further 10 per cent. The PSN board advised share holders not to accept the tender offer but made it clear that they would examine any bid that they considered reflected the true value of the company. On 1 February Johnston announced that the tender offer had failed and was therefore void. On 13 April 1999 Johnston announced that it had acquired further shares in PSN, taking its holding to17.35 per cent. Following Johnston's announcement on 22 January, both Newsquest and Newscom approached PSN. All three companies have sought the Secretary of State's consent to acquire the PSN newspapers and related assets.

When considering whether the proposed transfers would be operating against the public interest, the MMC considered the need for accurate presentation of news and free expression of opinion. Particular attention was paid to the independence provided to the editors of individual newspapers owned by each bidder.

Given the commercial logic of local/regional publications, in order to retain their local readers, it appeared unlikely to the MMC that editorial content would be standardised by the publisher. Evidence was not presented to suggest that a merger would produce a reduced standard of accuracy in reporting or a lack of commitment to editorial freedom.

On a national level, if any of the bidders were to acquire PSN, its share of total circulation and distribution of regional and local papers would increase by just fewer than 3% (falling well below the 25% threshold of the Fair Trading Act 1973). This minimal increase would not be expected to adversely affect national advertisers or cover prices. Thus on a national level, it was not expected to operate against the public interest.

None of the transfers were to involve the overlap of regional newspapers.

At a local level, the MMC examined areas of overlap where at least one newspaper of a bidder and PSN had household penetration rates of 10% or more. The proposed transfers were found to enhance the positions of the bidders in the areas of overlap in varying degrees. However in considering that as most of the areas of overlap were not within the core areas of the newspapers' distribution, little impact would be made on editorial policy, advertising rates or cover prices.

Where the overlap *did* occur in core areas of circulation, the MMC found that the competition offered by other advertising publications would prevent the successful bidder from raising advertising rates and/or cover prices. In the most significant case of overlap for regional and local newspapers by a bidder, it was found that they were so different in terms of their editorial content and advertising base that no significant problems would arise if the bidder were to succeed.

Thus at a local level, the proposed transfers were not expected to operate against the public interest.

If any of the bidders were to acquire PSN there would have been a removal of PSN head office functions; enhanced purchasing of newsprint and other materials; and savings through better use of printing resources. Despite the unemployment of staff at PSN's head office, the transfers were not expected to operate against the public interest on the grounds of efficiency and employment on either a national, local or regional level.

A Report on the Proposed Transfer of a Controlling Interest as defined in section 57(4) of the Fair Trading Act 1973

Summary of Mr David Sullivan and The Bristol Evening Post PLC:

Available at: **<www.gov.uk/mgn.htm>**

On 5 March 1990, the Secretary of State for Trade and Industry asked us to investigate and report on the proposed transfer to Mr David Sullivan of a controlling interest in The Bristol Evening Post PLC (BEP).

BEP's main activity is in publishing a range of newspapers based in the Bristol area, including the Evening Post, the Western Daily Press (a Bristol-based morning paper) and a number of local weekly paid-for papers and free newspapers in the South - West. Other interests include newspaper printing and distribution, property and a chain of confectionery, tobacco and newspaper shops in the Bristol area. Associated Newspapers Holdings Ltd holds 23.8% of BEP shares and associated pension funds a further 6.1%. Mr Sullivan holds almost 7.5% and the other shares are widely dispersed between institutions and individuals, almost half of whom are in the Bristol area.

Mr David Sullivan holds a 50% interest in Sport Newspapers Ltd, publisher of the Sunday Sport and The Sport. His other interests apart from bloodstock dealing include the publication of a range of magazines, the promotion of films, video recordings and associated products and the operation of telephone entertainment services, most of which are classified as "adult".

Mr Sullivan has requested consent to increase his current holding of BEP shares to the 25% level at which such consent is required under the Fair Trading Act. The MMC has thus examined not only the effects of the acquisition of 25% of BEP shares by Mr Sullivan but the likelihood that such an acquisition may lead to effective management control of BEP by him and the public interest issues that would then arise.

The main public interest issue is the likely effect of the transfer on the character and content of BEP newspapers, particularly the Evening Post and the Western Daily Press. We consider that if the acquisition of shares were allowed Mr Sullivan could be expected to influence editorial policy and the character and content of these papers and this would harm both the accurate presentation of news and the free expression of opinion. We also consider that the acquisition could harm the standing of the papers in their community and that there could be some adverse effects on circulation.

The evidence from Mr Sullivan's previous involvement with the Daily Star suggests that his proposed acquisition would raise no significant competition concerns. Mr Sullivan's own ideas for improving BEP's efficiency and profitability were not provided in sufficient detail for us to conclude that there would be offsetting benefits.

We find that the transfer to Mr Sullivan of a controlling interest in BEP may be expected to operate against the public interest. We are unable to recommend any conditions that might be attached to consent to the transfer to prevent it so operating.

<u>A report on the proposed transfer of seven local newspapers published in Nottingham.</u>

Daily Mail and General Trust PLC and T Bailey Forman Ltd:

Available at: **<www.mmc.gov.uk/dgmt.htm>**

In June 1994, the Secretary of State for Trade and Industry asked the MMC to investigate and report on whether the proposed transfer to DMGT of any of the newspapers published by TBF would be expected to operate against the public interest.

Forman Hardy Holdings Limited, who owns TBF did not feel able to provide the continued investment needed to finance the modernization of TBF's printing presses and maintain its profitability for the long term. If the merger was to proceed, TBF was likely to be absorbed by Northcliffe, a subsidiary company responsible for DMGT's interests in local newspapers. As there was no overlap between the areas of circulation for TBF and Northcliffe publications, the issue at stake was not so much a reduction in competition, but an increase in regional concentration of ownership.

Two main issues were at stake, the first being free expression of opinion and diversity of opinion in the press. Whilst Northcliffe argued that their policy of editorial freedom would preserve the standard the diversity, the MMC found otherwise. Their primary concern was that a standardised opinion would see a uniform approach by all editors in the Northcliffe group. Moreover, there was no guarantee a change of proprietor or of senior executives would not see a change in Northcliffe's policy of editorial freedom.

The MMC did not believe that other local media such as radio and television offered a sufficient level of local comment and opinion to rival the influence of a local daily newspaper.

The second issue was the significant acquisition of market power for Northcliffe, should the transfer go ahead. Northcliffe's market share for sales of local newspapers in the three counties of the East Midlands would increase from 36 to 58 per cent. The MMC believed "that such a dominant market position could result in competing weekly publications being forced to close or reduce their editorial expenditure" reducing diversity even further and possibly raising the cost for advertisers.

The MMC found that despite the immediate benefits that the capital investment would have brought to the readers of TBF's titles, they would have been outweighed by the adverse consequences of a transfer to DMGT.

Thus, the proposed transfers of newspapers were expected to operate against the public interest.

<u>A report on the publicising, in the course of supplying a television broadcasting service, of goods supplied by the broadcaster.</u>

Summary of Television Broadcasting Services:

Available at: **<www.mmc.gov.uk/325.htm>**

The MMC were asked to investigate and report on whether a monopoly situation exists in the UK whereby broadcasters publicise, during the course of their transmission, goods which they supply and whether this may be expected to operate against the public interest.

Whilst it was not found that there was any significant promotion of reference goods on commercial television, "detriments to the public interest" were found to exist in the BBC's reference practice in respect to the consumer magazine's market.

Whilst the MMC recognised that it was difficult to clearly demarcate between the provision of information and persuasion, they believed that the BBC's publicity had clear elements of selling. "We conclude that the BBC's use of free airtime to promote its magazines has distorted competition in the food and cookery market sector, with adverse effects on the public interest." The actual "effects" being an increased risk of closure of magazines, discouragement of market entry and a reduction in consumer choice. The MMC therefore recommend the prohibition of moving trails to publicise the BBC's magazines on BBC television.

Considering the potential for abuse by broadcasters in this area, the Commission recommended that broadcasters who intended to promote their publishing activities to have regard to its conclusions. Given the growing complexities associated with cross-media promotion, it is an issue expected to grow in significance.

<u>A Report on the Merger Situations</u>

Summary of Trinity PLC/Mirror Group PLC and Regional Independent Media Holdings Limited/Mirror Group PLC:

Available at **<www.mmc.gov.uk.mgn.htm>**

On 12 March 1999 the Secretary of State referred to us the proposed transfer of newspaper titles and related assets owned by Mirror Group plc (Mirror Group) to Trinity plc (Trinity) and regional and local newspapers. Trinity and RIM are publishers of regional and local newspapers.

The Competition Commission Group sent a letter to the Chief Executives of the above-mentioned newspaper groups, outlining the main issues that would be raised during the inquiry.

The following issues were believed to be relevant:
a) The reasons for the proposed merger and the way it would be financed and managed.
b) The financial position of the merged group.
c) Whether the merger would lead to the closure of any titles or the launch of new ones.
d) The effect of the merger on the concentration of ownership of the press.
e) The effects of the merger on employment (including conditions of employment).
f) The ability of a regional newspaper company to successfully manage national newspapers.
g) The effect of the merger on the accurate presentation of news and free expression of opinion; in particular the implications for editorial independence.
h) Whether any cost cutting arising from the merger would effect standards of journalism.
i) Whether the merger would have any effect on the traditional political stance of the Mirror Group's national titles.
j) The benefit of the merger, including any efficiency gains.

The letter also suggested that if the merger did go ahead, there would be an increase concentration of ownership in the press, both in the UK on a whole and in particular parts of it. The respective media groups were advised to think about the effects of this on readers, advertisers, competition (including printing competition) and the diversity of the press.

During the inquiry, both Trinity and RIM made assurances that that a policy of editorial independence was applied to all of their newspapers. No evidence was presented to contradict this. Both companies stated they wished to continue The Mirror's left-of-centre political stance, and given the commercial logic in doing so, the MMC did not see any reason to doubt this.

The inquiry considered whether the quality, or even survival, of Mirror Group titles would be affected by the fact that neither Trinity nor RIM had experience of managing national newspapers. Consideration was also given to any financial pressure arising from either transfer, particularly the transfer to RIM, in view of its high level of gearing. However the risk was not viewed to be serious in either case, and therefore not viewed to pose a threat to the accurate presentation of news and free expression of opinion.

At the UK level, the proposed transfers were found to give Trinity/Mirror Group a share of the circulation/distribution of all regional and local titles of 24.0% and RIM/Mirror Group 17.2%. However it was decided that these UK concentration figures had little relevance for competition because they added together circulation figures for titles serving different areas. It was decided that diversity of the press would be adequately protected by editorial independence, except in Northern Ireland.

Neither transfer was found to present any significant overlap of regional and local titles in England, Scotland or Wales. Therefore the threats posed to competition were not of any real concern.

RIM had no titles in Northern Ireland. Trinity owned the *Belfast Telegraph* (an evening daily), *Sunday Life* and a free weekly series. Mirror Group owned the *News Letter* (a morning daily), the *Derry Journal* (a paid-for bi-weekly) and some free weeklies. The *News Letter* had a more distinctly unionist ethos, whilst The *Belfast Telegraph,* although broadly unionist, takes a more middle-of-the-road political stance.

The basic concern for Northern Ireland was the likely convergence between the *Belfast Telegraph* and the *News Letter* if they were both to come under the ownership of Trinity. Such a convergence was viewed as a real risk for the continued representation of unionist opinion, a result expected to be detrimental to the public interest.

A Trinity/Mirror Group merger would see a 67% share of advertising in regional and local newspapers in Northern Ireland. It was found that such a high concentration would see a reduction in competition for advertising, leading to higher costs for advertising in Northern Ireland.

It was therefore concluded that the transfer to RIM of Mirror Group's titles might not be expected to operate against the public interest. The transfer to Trinity of these titles would not operate against the public interest in England, Scotland or Wales, but may be expected to do so in Northern Ireland.

The Commission recommended to Trinity that they give an undertaking to dispose of the *News Letter*, the *Derry Journal*, the *Belfast News*, the *North Down News*, the *Journal Extra* and their related newspaper assets on terms acceptable to the Secretary of State if the proposed transfer of Mirror Group's titles were to go ahead. A six-month limit was given for the disposal of these titles after the completion of any such transfer to Trinity.

The Public Interest's Legislative Framework

Perhaps one reason why there is limited openness amongst the bodies responsible for the administration of the public interest test is the absence of accountability.

As opposed to their US counterparts, British courts are bound by the limiting principle of "Wednesbury unreasonableness" see ***Associated Provincial Picture Houses Ltd v Wednesbury Corp*** 1948 1 KB 223. This legal doctrine prevents courts from applying rigorous standards on regulators regarding issues of merit. Therefore, as long the process of making public interest determinations may be strictly adhered to, no judicial intervention will be invoked.

The authorities of ***R v ITC ex parte TWS*** (1992) and ***R v ITC ex parte Virgin Television*** [1996] EMLR 318 indicate that British will not intervene to ensure rationality or even transparency in the exercise of the power such as the award of licences to broadcasters.

This is in spite of the suggestion by Gibbons that:

> *"When the Broadcasting Act was being debated in parliament, the possibility of judicial review was regarded as a correlative to the new articulation of competitive tendering rules and a residual solution to ambiguities that could not be solved by ministers"* (1998a: p291).

The original cross-media ownership rules, as they appeared Schedule 2 of the Broadcasting Act 1990 were summarised in the Government's White Paper, <u>Media Ownership: The Government's Proposals</u> (1995) at paragraph 2.6:

- National newspaper owners were limited in their holdings in terrestrial television and radio and in domestic satellite broadcasters. Within each category they held up to 20% of one license and then up to 5% of any others. They were allowed full control of non-domestic satellite broadcasters. The Broadcasting Act allowed newspapers to control non-domestic satellite companies in order to encourage investment in an uncertain and high-risk enterprise.

- Local newspaper owners are less tightly controlled in being allowed to own regional TV or local radio broadcasters, provided there is no significant overlap between the licence area and the paper's circulation area.

- National TV and radio (and regional Channel 3) broadcasters were limited in their cross holdings. They were limited to a 20% stake in national newspapers and non-domestic satellite licences

- Producers could not own more than 15% of a television broadcaster and vice-versa if they are to qualify as independent producers of the 25% UK independent production quota that is required of terrestrial broadcasters.

Originally, the rules against cross ownership were designed to prevent a concentration of ownership. However the modern shape of international media means that there are more products and services available. Therefore audiences for individual titles and channels are fragmenting, without necessarily breaking down into uniformly sized media markets.

In paragraph 4.4 of the White Paper the government offered a number of arguments to support a change in cross-ownership rules. These included:

- Digital technologies are breaking down the barriers between traditionally distinct media sectors.

- The logical basis for ownership restrictions as a means for preserving diversity is outdated. Diversity is now sufficiently guaranteed by the proliferation of media outlets with a further expansion forecast as digital broadcasting is introduced.

- International media players from the UK will only be created by consolidation within the domestic industry

- The broadcasting sector needs new sources for investment

True to the British Government recognising the diminution of traditional market barriers was the proposed BSKYB/Manchester United merger. Before any public interest issues could be contemplated, it was necessary for the Monopolies and Mergers Commission to ascertain exactly the nature, extent and definition of each party's market. Consumer issues ranged from the disproportionate influence that BSkyB would have over the rules and decisions of Premier League to the impact that such a merger would have on the collective selling of broadcasting rights to the game.

Clearly the demarcation between "soccer team" and "broadcaster" was blurred. A legitimate concern was that BSkyB's position would be so enhanced by the merger that they could limit the supply of football matches to rival broadcasters, and use their considerable finances to dominate the Premier League, thus killing any competition in the game.

Situations such as the BSkyB merger have prompted a critical analysis in the UK of the market, and thus the "market share", that any one media company occupies with the aim of preventing an undue concentration of influence by any one player. For further information, refer to the British government's publication " BSkyB Group and Manchester United PLC ; A Report on the Proposed Meger" CM 4305 (London:HMSO) or 'BSkyB United Takeover Banned' available at <http://www.sunday-times.co.uk/cgi-bin/BackIssue?999>

The Market Share

Arguably, the aim of competition policy is to regulate markets in order to achieve effective competition. In theory this produces not only in the lowest prices but also the highest quality and choice of products and services.

In this sense it appears that the focus on competition via control of ownership is a surrogate for regulation of plurality in output. As acknowledged by Feintuck, it is easier to measure and impose limits on ownership than to determine and define requirements and diversity in output.

However, as pointed out by Collins and Murroni:

> *"[I]n spite of technological change, media and communication markets do not fit the paradigms on which competition law is built".*(1996: p12)

More precisely, they argue that competition policy's emphasis on homogeneity is incompatible with the heterogenous nature of the media. To illustrate this point, the example of product substitution is used. Clearly any attempt to compare the readership of the *Sun* and the *Financial Times* in England is fraught with difficulties.

The standard approach in competition policy is to use revenues as the basic measure of market power, and this approach can reasonably be applied in the case of the media. Yet by virtue of their power and influence, the media cannot simply be treated as another commodity market.

Efforts have thus been made to devise an adequate scheme to measure the media's influence within a market by creating an exchange rate to be applied across all of the media. In the consultation paper, <u>Media Ownership: The Government's Proposals</u>, the concept of the "market share" played a central part.

As observed by Gibbons, the Government's White Paper

> *"…explained the exchange rate, but it said very little about how media markets should be defined. The relationship between the market's and the media's influence were not exposed."* (1998a: p218)

Criticism by Robinson took a similar line:

> *"Although the Government's paper considers in some detail how to measure market share, it does not discuss the relationship between the definition of the objective (pluralism) and the definition of the instrument (ownership thresholds based on market share) used to achieve that objective."* (in Congdon et al, 1996: p51)

Attempts to devise a suitable exchange rate proved too difficult for the legislation and a modified scheme was introduced to quantify the market share.

Independent bodies, including the British Media Interest Group (BMIG) (1995) have created their own share of voice index, purporting to measure the impact of different media on consumers. This is achieved by aggregating the share of consumption, and thus accredited of influence, of different UK media enterprises. It aggregates regional and national newspaper circulation, radio listening and television viewing. It weighs radio differently, notably by discounting its share, and notionally therefore its impact, by 50%.

The accuracy of BMIG's test is not necessarily its central focus; a point recognised by others:

> *"Whether or not the concept of share of voice is meaningful, the index is useful in focusing attention on the unexamined assumption that structure is a satisfactory proxy for behaviour. The assumption is pervasive and possibly well founded, but unproved."* (Collins and Murroni, 1996: 64)

Recognising that the recipients of media products have expectations not only as consumers, but also as citizens, provides some kind logic behind a media-specific public interest determination beyond a basic competition legislative framework.

Clearly there is more than one method of measuring market shares, and the likelihood of finding one which will adequately capture all facets of influence are unlikely. A combination of the following may be most appropriate:

An assessment of market share measurement units put forward to date:

Measurement unit	Advantages	Disadvantages
Time use	No need for exchange rate	Loose connection between time use and influence
Weighted time use	More closely related to influence than time use alone	Heroic assumptions required to make measurement work
Audience shares	Easily measured	Head count ignores the fact that some audiences are more influential. Doesn't capture relative influence of different sectors
Revenue	No need for an exchange rate Revenue provides the money to make programmes that attract more viewers. Captures fact that more influential audiences generate more revenue	Two-way relationship between revenue and influence both indirect and variable
Revenue-weighted audience share	Uses revenue as an objective weighting system. Combines advantages of revenue and audience measures	Still suffers from unreliable link between revenue and influence
Reach	Potentially the simplest measure, involving no "exchange rate". Relates directly to democratic (ie undifferentiated mass) outcomes	Fails to capture intensity of consumption

Extracted from Robinson in Congdon et al (1996: p69)

Upon reflection of the market share assessment, Robinson concludes:

> *"Some kind of weighting - which will inevitably involve a degree of arbitrariness - will always be required and, with the exception of revenue and reach, so will an "exchange rate". The preferred approach must be simple, avoid arbitrary assumptions, be susceptible to extension to media products and services in addition to television, newspapers and radio, and be forward looking. In practice, it may be impossible to define a measure that can be applied universally (to all media) in every circumstance."* (1996: p67)

Lessons for Australia:

One of the greatest criticisms to emerge from the UK's experience of the "public interest" test is encapsulated by Feintuck as

> *"the identification and articulation of regulatory objectives, [are] often masked by the use of the nebulous "public interest"."* (1998: p4)

He believes that as a concept, the test has been fundamentally undermined by a failure to develop a rational basis for reconciling the competing values pivotal to weighing up the public interest. As a result it is inconsistent in its application. The fact that it hands to regulators substantial and largely unchecked, discretionary power exacerbate this concern.

Arguably the purpose of the public interest test is to deliver what a standard competitive legislative framework cannot.

Justification for its operation can be found in cultural as well as economic ideals of efficiency, diversity and plurality. Within the liberal-democratic ideal of citizen participation and the media as a means to facilitate this effectively, Feintuck views it as simply corollary that

> *"…to place citizenship at the heart of any meaningful concept of the "public interest" would seem to be a logical necessity".*(1988: para 3.2)

Naturally public consultation could provide an Australian perspective to this context.

Once the desired outcomes from the application of a public interest test have been clearly articulated the criteria can be formulated in a more comprehensive manner, and the regulators will have greater rationale for intervention.

Clearly identified goals would also relieve the legislator of drafting overly detailed rules and regulations that are both inflexible and rendered unworkable by technological innovations in the media.

Australia can take a few lessons from the United Kingdom's experience of Broadcasting law reform, as traced by Gibbons:

> *"In terms of regulatory style, the approach in the 1990 legislation was to remove most discretion from the regulators and to set out extremely detailed permutations of prohibited ownership, reaching back through as many corporate layers as could be anticipated in order to expose attempts to disguise the effective control of companies that hold licenses. The problem with this approach is that it does not cater to unpredictable or ingenious ways of discovering loopholes (the schedule was modified many times throughout the passing of the bill)."* (1998b: p494)

To overcome the extremely complicated means of regulating cross-ownership and accumulations, delegated legislation was employed to lend it some flexibility. The three statutory instruments in the five years that it operated did not entirely alleviate this problem.

As a result the legislature provided the regulators with a powerful underpinning for the supervisory powers exercised by them, to investigate issues such as control in media companies. The 1996 Broadcasting legislation has thus resulted in a consequent loss of transparency, with the regulators having a much greater discretion to act on professional judgements of companies' activities.

Whilst such arbitrariness appears to be fundamental to the operation of the public interest test, it also demonstrates the need to formulate exactly what the regulator is aiming to achieve.

Therefore, if plurality and diversity are legitimate goals for the media, then these must be clearly defined. The regulator needs to provide some kind of justification for its role in the marketplace.

If the cross-media laws are intended to prevent barriers for market entry within the general competition framework, then those boundaries must also be identified.

In addition to this, the openness of the application of the public interest test is paramount. Or as succinctly proposed by Feintuck,

> *"A transparent system, open and accountable, with probably a degree of representativeness and free of government powers of appointment, seems to provide a sound basis."* (1998: para 4)

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