

# Comment

## *Old rules and the new economy*

**A**s Judge Thomas Penfield Jackson was uncovering Microsoft's innovative ways of behaving anti-competitively in the new economy, the Productivity Commission was reviewing Australian broadcasting regulation. This involved a close look at the old rules Australia retains to curb undue concentration of control of old media.

The Commission recommended the removal of the rules once barriers to entry into Australian broadcasting were removed and a media-specific "public interest" test was introduced into the Trade Practices Act (see separate story on p 4).

Prime Minister Howard and Communications Minister Alston have made no secret of their desire to change the rules, which include "cross-media" laws, introduced by the Labor Government in 1987, preventing someone controlling more than one major media outlet in an area. The rules mean the controller of a commercial television licence (Channels 7, 9 and 10) can't also control a commercial radio licence (such as 3MMM or 3AW) or a major daily newspaper (such as *The Age* or the *Herald Sun*).

In a recent speech, the Minister returned to the theme. The cross-media rules had been "flawed from the very outset" and convergence is now "making a nonsense" of them. There were several key arguments.

First, the rules haven't worked – Australia's media is heavily concentrated.

True, most of the major newspapers are controlled by two groups (News Limited and Fairfax) and there has been massive rationalisation of commercial radio ownership since the early 1990s. But that's not what the cross-media rules are aimed at. Their goal is to ensure that free-to-air TV, radio and newspapers in an area are run by different people. Since these media continue to take by far the largest share of media usage in Australia, the goal still seems to be very relevant, and the rules have been pretty successful at achieving it in metropolitan areas.

Indeed, without the cross-media rules, it's very likely there'd be a good deal less independent media organisations out there to have a shot at creating an online future for themselves.

Second, we have little to fear from "a monolithic interventionist Citizen-Kane-type proprietor". Media organisations run "campaigns" all the time, the market place disciplines those who might turn their media vehicles into private journals and diversity of ownership doesn't guarantee diversity of viewpoint anyway.

True, but one suspects there are a few marginal government backbenchers who are very thankful that the commercial TV and radio stations in Sydney and Melbourne are not controlled by the same people who've been putting together the savage criticisms of the federal government on the front pages of the *Herald Sun* and *The Daily Telegraph* over recent months.

Third, there has been "an explosion of alternate sources of information", particularly those used by young people. The N-Gen gets its own information and isn't too concerned about who owns major media.

True again, so far as it goes – that's the wonderful part about the Internet and the global social and cultural changes of the past decade. But a sceptic might note that the N-Gen's baby-boomer parents thought they were

creating a media world that had never been seen before either: current affairs in prime-time on commercial television, community radio, cool magazines and *Countdown*.

All good stuff, but a generation on it doesn't seem to have been quite enough to put much of a dent in the cultural and political hegemonies of big media.

Fourth, convergence is blurring the distinctions between traditional media products. You get newspapers over the Net, radio stations through your mobile phone. It's crazy to try to prevent one media owner controlling any other sort of media because they're all becoming the same.

Also true, but market definition – drawing difficult boundaries between the markets for related products – is the very heart of competition law, and no-one's suggesting it's irrelevant. Would we care if Telstra owned the lot? Or News Limited? Or Microsoft? Absolutely. So we need rules, and boundaries and thresholds. It's hard.

Convergence is testing competition regulators as much as it is testing the proponents of media diversity. Both need to get some new tools, not to throw in the towel.

In particular, there are now many forms of media enterprise or assets, besides TV and radio stations and newspapers, which deliver their controllers a real capacity to influence information, entertainment and ideas. These include major content rights (eg. football, movies), critical technologies like the conditional access systems in pay TV systems, key software applications and services like the electronic program guides audiences will use to navigate their way around media screens in the future.

The competition regulator, the Australian Competition and

continued on page 6 ➤

# Cross-media ownership and the "public interest" test

... continued from page 5

media ownership. As a result it has been applied inconsistently. The fact that it hands to regulators substantial, and largely unchecked, discretionary power exacerbates this concern.

Recognising that the recipients of media products have expectations not only as consumers, but also as citizens, provides some kind of logic behind a media-specific public interest test which supplements the framework of general competition law. "To place citizenship at the heart of any meaningful concept of the 'public interest' would seem to be a logical necessity", argues Feintuck.

Further 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 could be formulated in a comprehensive manner, providing regulators with a clearer rationale and greater accountability for intervention.

Clearly identified goals would also help to ensure that the appropriate

balance was struck in drafting the relevant criteria, between overly detailed rules that are both inflexible and rendered unworkable by technological innovations in the media, and impossibly broad statements of principle which turn appeal courts into politicians.

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## Comment

... continued from page 3

Consumer Commission, can already look at mergers and acquisitions and potential anti-competitive conduct in relation to these enterprises and assets. But it does so only through the framework of competition.

Competition in media markets is generally a good thing for the quality of the output. But a market may satisfy the economist's goal of competition without satisfying the tougher threshold of a level of diversity, access and openness sufficient to sustain a democratic and culturally complex society.

As the Productivity Commission recommends, a new regulatory test is going to be needed – to supplement rather than replace existing media ownership rules – and new processes for enforcing it.

It's a good idea to remember the starting point for this debate: a country with one of the most heavily concentrated media sectors around.

The opportunities provided by new delivery systems and lower barriers to entry into some parts of

the media business are real. But they need to be *grasped* by policy-makers, governments and entrepreneurs, not simply *assumed*. They need to be used creatively to generate a much more diversely controlled media industry, not treated as a convenient rationale for getting rid of rules which have underpinned the very limited diversity we've got.

**Jock Given**

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