

Australian and US Approaches to Media Ownership Regulation

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Introduction

Media regulation advances important public policy objectives in both Australia and the United States. This paper compares the two countries' approaches to media ownership regulation, one of three major categories of media regulation. In addition to ownership regulation, also referred to as structural regulation, the other two categories are behavioral regulation (*i.e.*, content regulation) and technical regulation (regulation of transmission standards, power levels, antenna heights, interference, etc.).

This paper suggests that structural regulation is an instrument for achieving other goals, such as influencing content and promoting competition among media outlets, without the intrusiveness that is a necessary concomitant of direct behavioral regulation. It concludes that the US relies far more heavily on structural regulation than does Australia and notes that pending Australian legislation would package some content regulation in with the structural media ownership rules. A corollary is that the US analysis of media ownership rules pays more explicit attention than the Australian to the link between structure and behavior.

The paper begins by describing the policy goals and actual media ownership regulations of the two countries. Pending legislation in Australia, the Broadcasting Services Amendment (Media Ownership) Bill 2002 ("BSA Bill 2002")¹, would effect significant changes in the Australian regulations, specifically regarding foreign ownership, cross-media ownership, and local content. The US Federal Communications Commission (FCC), pursuant to Congressional mandate, completed a biennial review of broadcast ownership regulations in June 2003.² Changes in cross-media ownership regulations were a centerpiece of that effort. The FCC's decision was stayed by a Federal appeals court and then remanded for "additional justification or modification."³ The stay remains in effect pending court review of the FCC's action on remand. Moreover, the FCC decision is subject to petitions for reconsideration filed with the Commission, and Congress has intervened to change one of the agency's decisions. So the situation in both the US and Australia is currently somewhat unsettled.

Because the cross-media changes are the heart of the Australian proposals and because the FCC's cross-media decision is based on a new and interesting

¹ See Parliament of the Commonwealth of Australia, HOUSE OF REPRESENTATIVES: "Broadcasting Services Amendment (Media Ownership) Bill 2002; No. , 2003; A Bill for an Act to amend the *Broadcasting Services Act 1992*, and for other purposes" and "Broadcasting Services amendment (Media Ownership) Bill 2002, Explanatory Memorandum.

² Report and Order and Notice of Proposed Rulemaking in the Matter of 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996. 18 FCC Rcd. 13620 (2003) ("Biennial Review Order").

³ *Prometheus Radio Project v. Federal Communications Commission* (US Court of Appeals for the Third Circuit: June 24, 2004) ("Remand").

strain of analysis, the discussion in this paper will emphasize cross-media rules most heavily. The US discussion emphasizes the relationship between ownership and diversity of viewpoint and discusses a summary measure of structure in the “marketplace of ideas.” The US cross-media limits narrative includes a comparison of US and Australian media usage for news gathering, based on survey data from the two countries. The next section contains a comparison of the results of all of the US and Australian rules, and the paper ends with a brief conclusions section.

Australian Goals and Regulations

In both the US and Australia, media regulation goals stem from important social values (e.g., the guarantee of free speech and freedom of the press embodied in the First Amendment to the US Constitution), but the specific details are laid out in federal law and agency regulations. The Australian media policy goals are found in the Broadcasting Services Act 1992 (“BSA 1992”), section 3. US goals are laid out in general terms in the Communications Act of 1934, as amended and in the Children’s Television Act of 1990. However, in the US case, a lot more of the actual development and definition of goals has occurred in FCC proceedings.

Goals

Section 3 contains 18 separate objectives. For the purposes of this paper the following are the most important:

to promote the availability to audiences throughout Australia of a diverse range of radio and television services offering entertainment, education and information

to provide a regulatory environment that will facilitate the development of a broadcasting industry in Australia that is efficient, competitive and responsive to audience needs

to encourage diversity in control of the more influential broadcasting services

to ensure that Australians have effective control of the more influential broadcasting services

to promote the role of broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity

to promote the provision of high quality and innovative content by providers of broadcasting services

to encourage providers of commercial and community broadcasting services to be responsive to the need for a fair and accurate coverage of matters of public interest and for an appropriate coverage of matters of local significance

to encourage providers of broadcasting services to respect community standards in the provision of program material

to ensure that providers of broadcasting services place a high priority on the protection of children from exposure to program material which may be harmful to them

Various other sections of the BSA 1992 have provisions to implement these goals. Section 122 directs the Australian Broadcasting Authority (ABA) to determine standards for Australian content and children's programming. The standards are applicable to commercial television broadcasters. In essence, the section 122 provisions direct the ABA to regulate broadcaster behavior in order to meet the education goal and the goal of developing a sense of Australian identity. Other content goals are addressed by the sections of the Act that mandate broadcasters to develop industry codes of practice, registered with the ABA and that set out a complaint procedure in the event of violations.

Regulations

The ownership regulations are also specified in the statute. Section 53 limits ownership of commercial television licenses in two ways. First, no person may control commercial television licenses the license area populations of which exceed 75 percent of the population of Australia.⁴ Second, no person may control more than one commercial television license in any license area. Section 54 provides that no person can control more than two commercial radio broadcasting licenses in the same license area.

Section 57 specifies that a "foreign person" may not control a commercial television broadcasting license and further provides that no foreigner may own more than 15 percent of a license and that, taken together, foreign interests may not exceed 20 percent. Foreign ownership of commercial radio licenses is permitted. Section 60 prohibits common ownership of a commercial radio and a commercial television broadcasting license in the same license area. It also prohibits common ownership of a commercial radio or television license and a newspaper that is "associated" with the license area.⁵

⁴ The term "control" is defined in detail in Schedule 1 of the BSA 1992.

⁵ Section 59 defines an associated newspaper as one that has at least 50 percent of its circulation within the license area of the relevant broadcast station and "is in the English language and is published on at least 4 days in each week, but does not include a publication if less than 50% of its circulation is by way of sale."

As noted above, legislation is pending to revise the Australian rules. The BSA Bill 2002 would eliminate the foreign ownership restriction and provide for a system of cross-media exemptions. It is also worth noting that Australian competition law, in particular the Trade Practices Act, applies to media combinations.

Proposed Changes in Australian Cross-Media Regulations

The BSA Bill 2002 contains provisions that would relax the cross-media limits in Australia. Currently Australian law prohibits cross-media ownership in a single market. Section 60 of the BSA prohibits common ownership of a commercial radio and a commercial television station in the same license area, defined geographically. Section 60 also prohibits newspaper-broadcast common ownership, with the rule coming into play if more than 50 percent of the newspaper's circulation is within the license area of the relevant television or radio station. The BSA Bill 2002 would permit cross-media ownership in a single market of two of the three major media—television, radio, and newspapers—under certain conditions. When those conditions are met, the combined entity would receive a “cross media exemption certificate.”

The conditions are as follows. In “metropolitan” markets (the five major capital cities—Sydney, Melbourne, Brisbane, Adelaide, and Perth), there must be at least five independent commercial media groups in the market post-combination. In the “regional” markets, there must be four independent commercial media groups post-combination. Editorial separation among commonly-owned outlets is also required. Editorial separation means that each “media operation” (*i.e.*, television station, radio station, or newspaper in a single market) must have separate editorial decision-making responsibility. To do so would require a separate editorial policy and an organizational chart that is consistent with the existence of separate editorial decision-making responsibilities for each media operation and also separate editorial news management, separate news compilation processes, and separate news gathering and news interpretation capabilities for each media operation. The legislative explanatory memorandum indicates an expectation that other forms of cooperation and resource sharing will be possible for entities operating under a cross media exemption certificate.

In addition, a minimum standard for local news and information would come into play for radio stations operating under a cross media exemption certificate in regional markets. The proposed minimum standard, embodied in Subdivision C of the BSA Bill 2002, has three parts. First, the licensee must provide at least five local news and weather bulletins, broadcast on different days during the week and during the prime-time period. If each bulletin “adequately reflects matters of local significance,” then there is no further requirement. If each bulletin does not “adequately reflect matters of local significance,” then the licensee must provide at least one more bulletin, which does not have to be on a

separate day nor during prime-time, such that the licensees six or (more) bulletins “when considered together, adequately reflect matters of local significance.”

The second requirement is to transmit one or more local community service announcements per week. The third requirement is for the station to broadcast certain emergency service warnings at the request of emergency service agencies. The legislation empowers the ABA to, by written instrument, determine the definition of “local” for the purpose of this subsection.

These minimum standards come into play in the event that a commercial radio broadcast licensee in a regional area is covered by a cross-media exemption certificate. In that event, the licensee is required to meet the minimum standard or maintain its existing level of local news and information provision, whichever is higher. The existing level is determined based on the licensee’s performance during a “benchmark year.” That year is the 52-week period immediately prior to the day on which application was made for a cross-media exemption certificate.⁶

Although the minimum standards do not specify the number of minutes per week of local news and information needed, the requirement to maintain existing levels is couched in terms of minutes. Licensees may not decrease the number of local news and weather bulletins broadcast, compared to the benchmark year. They are also prohibited from reducing the total number of minutes of local news and weather bulletins broadcast during prime-time and outside prime-time, again compared to the benchmark year.

The cross-media exemption is not the only area in which the government of Australia proposes to impose explicit local content requirements. Proposed new Sections 43A and 43B would direct the ABA to ensure that commercial television licensees in metropolitan and in regional aggregated license areas broadcast “at least a minimum level of material of local significance.” The legislation would also require the ABA to define the terms local area” and “material of local interest.”

The ABA already has independent authority to condition broadcast licenses on the provision of some level of local content.⁷ Indeed, in April 2003, the ABA imposed a condition on all commercial television licensees in four regional aggregated commercial television license areas.⁸ The condition requires those licensees to provide “material of local significance” to various “local areas” within

⁶ If the station is party to more than one cross-media exemption certificate, then the benchmark year is the 52-week period prior to the filing of the first application. Specifically, the benchmark year ends on the Saturday before the earliest day on which an application was made.

⁷ As noted above, one of the general objectives of the Broadcasting Services Act is “To encourage providers of commercial and community broadcasting services to be responsive to the need for...an appropriate coverage of matters of local significance.”

⁸ Northern New South Wales, Southern New South Wales, Regional Queensland, and Regional Victoria.

the license area.⁹ The condition specifies the local areas and defines “material of local significance” as material that relates directly to the local area or the licensee’s license area. Advertising matter is only considered of local significance if it is a public service announcement (advertisements announcing later transmission of material of local significance are not themselves considered material of local significance).

Licensee performance of this obligation is measured by a point system. Only material broadcast between 6:30 A.M. and midnight on weekdays or 8:00 A.M. on weekends is eligible. News relating directly to the local area accumulates two points per minute and news relating to the larger license area accumulates one point per minute. Other material relating directly to the local area accumulates one point per minute, as does other material that relates directly to the license area. To meet the standard, a station must accumulate 90 points per week and 720 points per six-week timing period.¹⁰ One configuration that would meet the standard is one hour of local news per week.

US Goals and Regulations

The US goals for media regulation are described in federal law. However, in most cases, the description is quite general, leaving it to FCC decisions to articulate the goals in more detail. And the actual rules are, in most cases, embodied in FCC regulations rather than in the statute.

Goals

The Communications Act of 1934, as amended, gives the FCC the authority to issue licenses, including broadcast licenses, provided that the grant serves the public interest, convenience, and necessity (Section 307(a)). Section 308(b) gives the FCC the right to set certain eligibility requirements for licensees and section 309(k) addresses renewals, directing the FCC to renew broadcast licenses if it would serve the public interest and the licensee has no significant violations of the Communications Act or Commission regulations. Section 309 also prescribes that all new commercial broadcast licenses be assigned by competitive bidding. Section 307(b) provides for equitable apportionment of broadcast licenses across the states. Section 310(b) limits foreign ownership of a broadcast license, television or radio to a total of 20 percent direct ownership or 25 percent indirect ownership (i.e., through a holding company).

Federal law imposes very limited content regulation on broadcasters. Section 312 requires broadcasters to sell a reasonable amount of time, at the lowest unit

⁹ The license condition goes into some detail on the subject of what constitutes material of local significance (Schedule 3 Explanatory Comments).

¹⁰ There are additional provisions, e.g., no more than 10 percent of points can come from community service announcements and no more than 50 percent from material relating directly to the license area (as opposed to the local area).

rate, to all legally qualified candidates for Federal office. The section also contains an "equal time" provision, which requires candidates for the same federal office to be treated equally. This provision also provides that, if a station sells time to one candidate in a state or local election campaign, it must sell on the same terms to all other candidates for the same office. The Children's Television Act of 1990 requires television broadcasters to provide some programming that meets the educational needs of children, and the FCC has implemented this with a quantitative guideline. This Act also limits the minutes of advertising during children's programming, educational or otherwise. Additionally, using its general authority to regulate in the public interest, the Commission has limited broadcast of so-called "indecent" programming to hours when children are less likely to be in the audience (i.e., from 10:00 PM to 6:00 AM). With the exception of the foreign ownership, political advertising, and children's advertising limits, all US broadcast media regulation is in the regulations of the FCC.

The three major goals of FCC media regulation are competition, diversity, and localism. Competition is economic competition. Initially this goal was defined primarily in terms of the market for advertising, since free-to-air television and radio licensees provide their content to viewers/listeners without a fee. More recently, the FCC has emphasized competition among licensees to provide programming that is of value to their audiences. Of course, the motivation of commercial broadcasters (profit maximization, i.e., maximizing the difference between advertising revenues and programming and other costs) leads them to compete in the provision of valuable programming. The increasing usage of pay television in the US, with its dual revenue streams of subscription fees and advertising means that it is no longer appropriate to focus on advertising market structure as the sole indicator of competition. For this reason, the Commission's local television ownership rule employs overall video audience shares as one criterion for deciding if a merger is permitted.¹¹ It is also worth recalling that, just as in the Australian case, US competition law, enforced by the Department of Justice and the Federal Trade Commission, applies to media combinations.

The concept of diversity has also been refined over time by the Commission. The Biennial Review Order lists five concepts of diversity: viewpoint, program, outlet, source, and minority and female ownership. By analogy with economic competition, viewpoint diversity may be thought of as competition in the marketplace of ideas. In the recent Biennial Review, the Commission reaffirmed that viewpoint diversity is an important goal. The Commission determined that media ownership rules were necessary to ensure viewpoint diversity in local media markets. It found that there is a multitude of available sources of national and international news and information and hence that no ownership regulation is needed to ensure viewpoint diversity at those levels. The Commission further determined that the "marketplace of ideas" spans multiple media. For this

¹¹ The Commission determined that television programming and radio programming were in different economic product markets. See Biennial Review Order at paras. 142, 245.

reason, as explained below, the cross media limits are targeted to promoting viewpoint diversity.

The Commission also affirmed the importance of program diversity, the availability of a wide range of programming choices and genres, including programming catering to the tastes of ethnic and other minorities. It found that the goal of program diversity is best promoted by ownership limits within media. A change in a television station's programming has little effect on the programming of radio stations, even in the same market, and vice versa.

With respect to outlet diversity, the Commission found, particularly in the case of radio, that outlet diversity can promote innovation. It also found a value in outlet diversity from the point of view of public safety, with multiple owners increasing the likelihood that emergency information will be widely disseminated.

The Commission concluded that source diversity is not a relevant policy goal and affirmed that diversity of female and minority ownership is a valid policy goal. The Commission has established an Advisory Committee on Diversity to explore ways of advancing the latter goal consistent with current law.

Localism is also a concept that is being refined. In the Biennial Review Order, the Commission stated that it would rely on two measures of localism: "the selection of programming responsive to local needs and interests, and local news quantity and quality."

Regulations

The Biennial Review Order examined six broadcast ownership rules, two of national scope and four dealing with local markets. The Order raised the national television ownership cap from 35 percent to 45 percent, but Congress recently passed a law setting the limit at 39 percent. The Commission found that network-owned stations perform particularly well in terms of providing local news, but that a cap is necessary in order to preserve the bargaining power of local affiliates in negotiating collectively with the networks on network programming decisions. In other words, this rule primarily addresses the localism goal.

The other national rule is the dual network rule, which prohibits mergers among the top four US commercial television broadcast networks. (There is no Australian counterpart to this rule, although the Australian local television station ownership limit of one station effectively prevents commercial networks from merging.) This rule is justified on localism grounds in terms of preserving affiliate bargaining power and also on competition grounds, in particular to preserve competition in the national advertising and program acquisition markets.

As explained above, the local rules are under remand, so it is necessary to describe both the "Biennial Review Order rules" and the existing rules. At the

local level, the US has limits on television station and radio station ownership and also cross media ownership limits. The Biennial Review Order local television rule would prohibit mergers within a market among the top four stations in ratings.¹² Subject to this condition, in markets with five or more television stations a company may own two and in markets with 18 or more television stations, a company may own three stations. Only a handful of markets fall into the latter category. In counting stations both commercial and non-commercial licensees are counted. The local television station rule is justified primarily on competition grounds, but the Commission also noted that the ban on mergers among the top four stations will also promote viewpoint diversity. The existing rule prohibits mergers among the top four stations in ratings but allowed ownership of two television stations in a market, provided that eight independent broadcast television voices remained post-merger.

There is a sliding scale, based on market size, for local radio station ownership limits. The levels were originally set by Congress and reaffirmed in the Biennial Review Order, so both sets of rules share the same numerical limits. The limits are eight stations in markets with 45 or more stations, seven stations in markets with 30-44 stations, six stations in markets with 15-29 stations, and five in markets with 14 or fewer stations (but in no event may one company own more than half of the stations in the market). There are limits within each category on the number of stations in a particular service (AM or FM). The Biennial Review Order includes an important change in the way the geographic market in which the limits apply is defined. It uses fixed geographic markets based on economic considerations instead of the signal contour overlap method utilized in the existing rules. The contour overlap method results in different market definitions for each transaction, even those involving stations in the same area.¹³ The rule is justified on the grounds of promoting competition and also viewpoint diversity.

The existing rules include two cross-media ownership limits. One flatly prohibits common ownership of a daily newspaper and a broadcast station (television or radio) in the same market.¹⁴ The other limits, on a sliding scale, common ownership of radio and television stations in the same market.¹⁵ The Biennial Review Order rules replace them with a set of cross-media limits designed to promote viewpoint diversity and also localism. The idea is to ensure a market structure with sufficient independent media outlets to promote viewpoint diversity, while allowing combinations that, through realization of economies of scale and scope, can improve the quality and quantity of local news available to the public.

¹² In markets with 11 or fewer stations, two top-four stations wishing to merge can apply for a waiver of the rule. Waiver applications are examined on a case-by-case basis.

¹³ The Australian rules use a geographic market area definition.

¹⁴ The rule comes into play when a certain broadcast station signal strength contour encompasses the community within which the newspaper is published. See 47 CFR 73.3555(d).

¹⁵ The rule comes into play when a certain signal strength contour of a television or radio station encompasses the community of license of a potentially-commonly owned radio or television station. See 47 CFR 73.3555(c).

The analysis leading to the Biennial Review Order cross-media limits will be described in some detail below. In that decision, the FCC decided to foster regulatory certainty by crafting “bright-line” rules rather than creating a procedure for case-by-case analysis of cross-media limits. The Biennial Review Order cross-media limits are as follows. In markets with three or fewer television stations, no cross-media combinations are permitted. In markets with nine or more television stations, there are no cross-media limits applied, although the individual radio and television limits apply. In markets with between four and eight television stations, combinations are limited to one of the following three possibilities: (1) a daily newspaper, one television station, and up to one-half of the radio station limit for the market; (2) a daily newspaper and up to the radio station limit for the market (but no television station); or (3) two television stations (if the local television ownership rule permits it) and up to the radio station (but no daily newspapers).

A Closer Look at the Biennial Review Order Cross-Media Limits

The Biennial Review Order cross-media limits are designed to foster diversity of viewpoint with respect to local issues, the Commission having determined that a wide range of sources on national and international issues are available. The underlying purpose is to ensure that citizens have the information they need to discharge the obligations of citizenship in a democracy. In the 1945 *Associated Press* case, the Supreme Court described the relevant mechanism in the following well-known passage: “it has long been a basic tenet of national communications policy that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.” The Biennial Review Order and a series of earlier FCC decisions explicitly discuss the relationship between the structure of the marketplace of ideas and the performance of media outlets in fostering viewpoint diversity.

Since owners of media outlets have the power to select the content transmitted, they may choose not to transmit viewpoints with which they disagree. If ownership concentration is excessive, some viewpoints may simply not be transmitted. On the other hand, it is likely that media outlets, in competing for viewer/listener patronage, will present more than one viewpoint on many issues. Indeed, because for many issues there will be more viewpoints than there are outlets, we must rely on this mechanism to ensure wide dissemination of conflicting views.

In earlier years, Commission rules restricted owners to one radio or television station per market, with limited exceptions (most notably to allow ownership of an “AM-FM combination”). At that time the Commission espoused the belief that even the 61st independent media voice in market could bring an important perspective that the first 60 voices had ignored. So one could argue that, to

ensure viewpoint diversity, one should maximize ownership diversity, perhaps allowing combinations only if the second outlet could not survive alone.¹⁶ Over the years, as media market became more competitive economically, it became clear that, by taking advantage of economies of scale and scope, media combinations could actually provide a greater quantity and quality of service, including news and public affairs. The current Commission position reflects recognition of a tradeoff between maximum ownership fragmentation and the quantity and quality of viewpoint diversity. It is interesting to note that a similar argument is made in a submission to an Australian Parliamentary Committee by John Fairfax Chief Executive Fred Hilmer. As summarized by the Committee in its Report, Hilmer argues that cross-media reform would “benefit consumers by providing the opportunity for media organizations to gain the critical mass necessary to develop high quality products covering a diverse range of views and content.” Hilmer further asserted that diversity alone is not the appropriate goal, rather that diversity and quality should be sought together.¹⁷

If one accepts the premise that there is a policy tradeoff between ownership fragmentation and actual realized viewpoint diversity, the question becomes where to draw the line. In order to do so, it is necessary to have some characterization of the “concentration” of the relevant marketplace of ideas, in this case the marketplace for local viewpoint diversity.

There are various ways to characterize the structure of the diversity market. The simplest is a “voice test,” i.e., the number of independent media groups or “voices” in the market. The Commission used a voice test (actually three different voice tests) in its earlier cross-media and local television ownership rules, and, as noted above, a voice test is a part of the proposed Australian cross-media regime. A second metric is a “concentration ratio,” the sum of the market shares of the largest n groups in the market. The “four-firm concentration ratio” was commonly used in antitrust analysis up to about 30 years ago. One weakness of this measure is that it cannot reflect the entire market structure, since the sum of all shares in any market is one hundred percent. Modern antitrust analysis utilizes the Herfindahl-Hirschmann Index (“HHI”). This is the sum of squared market shares of all market participants. The HHI has particularly desirable properties for an analysis of economic market power but can also be used to characterize the structure of other markets.

The Commission used an HHI framework to create a “diversity index” as part of its analysis of cross-media ownership limits. The process involved calculating the diversity index for a large sample of US markets, calculating the change in the index caused by several hypothetical mergers (involving cross-media combinations of various kinds), and then crafting “bright-line” rules based in part on how large a change in the index the merger caused. In general, combinations

¹⁶ Part of the rationale for allowing AM-FM combinations was to encourage investment in the then-new FM service.

¹⁷ Reference to Fairfax Submission.

that caused smaller changes in the index are more likely to be classified as permitted. In order to understand the Commission's decision process properly, it is crucial to know that the Commission used the index "as a tool to inform our judgments about the need for ownership limits." The numerical calculations are part of the process, but so is the Commission's "expert judgment and analysis of the local viewpoint diversity marketplace." The index "informs but does not replace, our judgment in establishing rules of general applicability that determine where we should draw lines between diverse and concentrated markets."¹⁸

With the role of the index in the Commission's decision process clarified, it is instructive to examine the calculation methodology for the diversity index because it helps in understanding the underlying questions about media usage that need to be answered to assess properly the extent of "competition" in the marketplace of ideas.

The cross-media limits in the Biennial Review Order were designed to replace two existing FCC local ownership rules.¹⁹ These rules are the flat prohibition on common ownership of a broadcast station (television or radio) and a daily newspaper of general circulation in the same market and the radio-television cross-ownership limit. The existing radio-television rule permits ownership of two television stations and up to six radio stations or one television station and up to seven radio stations in markets with at least 20 independently-owned media voices remaining post-merger. In markets with at least ten independently-owned media voices post-merger, a company could own two television stations and up to four radio stations. In each case these combinations were permitted only provided they do not violate the separate local television and local radio ownership rules. In any market, a company could own one radio and one television station regardless of the number of post-merger media voices. Total media voices in a market included local television, radio, daily newspapers, and cable.²⁰

The Biennial Review Order cross-media limits prohibit common ownership of radio and television stations and of broadcast stations and newspapers in markets with three or fewer television stations. In markets with nine or more television stations, there are no cross-media limits, but the separate local radio and local television limits apply. In markets with between four and eight television stations, a company is limited to one of the following three combinations: a daily newspaper, one television station, and up to half the radio station limit for the market; a daily newspaper and up to the radio station limit for the market (but no television stations); or two television stations (provided the

¹⁸ Biennial Review Order at paragraph 391. See the Order for a more detailed description of the Commission's decision process.

¹⁹ The cross-media limits and related analysis are discussed in Biennial Review Order at paras. 327-481.

²⁰ For the specifics, see 47 C.F.R. 73.3555§(c)(3).

local television station rule permits this) and up to the radio station limit for the market (but no daily newspaper).

The stated goal of the cross-media limits is “to check the acquisition by any single entity of a dominant position in local media markets—not in economic terms, but in the sense of being able to dominate public debate—through a combination of cross-media properties.”²¹ An important tool in the Commission’s analysis is the so-called “diversity index” (“DI”), a summary measure of “the availability of outlets that contribute to viewpoint diversity in local media markets.”²² The Commission defined “viewpoint diversity” as “availability of a wide range of information and political perspectives on important issues.”²³

The Commission constructed the DI based on an analogy with the HHI. It concluded that citizens utilize multiple media to acquire information on local public affairs issues, based on a survey of consumer media usage conducted by Nielsen.²⁴ Survey respondents were asked about their usage of television, radio, newspapers, magazines, and the Internet to acquire information about news and current affairs. Some questions asked about local news and current affairs, some about national news and current affairs, and some about news and current affairs in general. The DI calculation assumes that the market share is the same for each outlet within a medium.²⁵ This is roughly equivalent to measuring market share based on the availability of media outlets rather than usage (actual viewing or listening).²⁶

The Commission’s analysis of the data led to the conclusion that magazines and cable television were currently not significant sources of local news and current affairs. It constructed the DI based on broadcast television, radio, newspaper, and Internet usage. The Commission concluded that “various media are substitutes in providing viewpoint diversity, but we have no reason to believe that all media are of equal importance” and used the relative usage statistics from the

²¹ Biennial Review Order at para. 432. The Order notes that the local television and radio rules, adopted based on an analysis of economic competition, also have a positive impact on local viewpoint diversity by ensuring minimum numbers of independently-owned radio and television outlets. *Id.* at paras. 436-40.

²² Biennial Review Order at para. 391; see generally, *Id.* at paras 391-431.

²³ *Id.* at para. 393.

²⁴ Federal Communications Commission Media Ownership Working Group Study #8; “Consumer Survey on Media Usage.” Nielsen Media Research (September 2002).

²⁵ See Biennial Review Order at paras. 420-427 for a rationale for this assumption, one that was also employed in the Biennial Review’s competitive analysis of the local television and local radio markets.

²⁶ The Department of Justice Merger Guidelines, in their “General Approach” section, state that market shares will normally be calculated “based on the total sales or *capacity* currently devoted to the relevant market together with that which likely would be devoted to the relevant market in response to a ‘small but significant and nontransitory price increase.’” Horizontal Merger Guidelines” (revised April 8, 1997). Section 1.41 (emphasis added). U.S. Department of Justice and the Federal Trade Commission. www.usdoj.gov/atr/public/guidelines/horiz_book/hmg1.html (visited August 8, 2004).

Nielsen survey to construct weights for broadcast television (33.8%) radio (24.9%), newspapers (28.8%), and the Internet (12.5%).²⁷ Under the equal market shares assumption mentioned above, in a market with ten television stations, each one would be assigned a market share of 3.38 percent.

Table 1 provides some data from the Nielsen survey and some roughly comparable data on media usage from various Australian surveys, all but one conducted on behalf of the Australian Broadcasting Authority. Media usage habits in the two countries appear quite similar. Perhaps the best comparison is between the US column labeled “Sources of Local News and Current Affairs, without magazines” and the Australian column labeled “ABA Sources Data (without magazines and pay tv).”²⁸ The US column is the one that the Commission used to weight the different media in the construction of the Diversity Index. The weights for television and newspapers are quite similar across the two countries. The US figures yield a higher weight for Internet and a lower weight for radio than do the Australian figures.

The Court remand criticized the equal market share assumption in this context and also in the context of the local television and radio rules. The Court opined that it was inconsistent to employ usage data to weight the different media while declining to use audience share data to weight outlets within each medium.²⁹ The Court did not accept what it called the “Commission’s predictive judgment” that “compared to consumer preferences for a general media type (which are generally stable), consumers’ preferences for particular media outlets are fluid because they depend on the media outlet’s chosen format or quantity or quality of content, which are easily changed.”³⁰ The Court also criticized the Commission’s analysis of the Nielsen data that led to inclusion of the Internet as a source of local news and current affairs information.³¹

²⁷ Biennial Review Order at paras. 409, 415.

²⁸ These data are from “Sources of News and Current Affairs,” a report by Bond University to the Australian Broadcasting Authority (May 2001). The figures in this column are based on a series of survey questions of the form “Do you utilize ... for news and current affairs?”

²⁹ Remand at 69-72.

³⁰ Remand at 71, citing Biennial Review Order at para. 422.

³¹ Remand at 62-68.

Table 1: Australian and US Survey Data on Use of Media for News and Current Affairs

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US Data From Nielsen Media Research Survey					Australian Data			
	Sources of Local News and Current Affairs	Sources of National News and Current Affairs	Primary Source for Local or National News and Current Affairs	Sources of Local News and Current Affairs, without magazines	AT Kearney Study (Minutes Spent Accessing News, Average Over Metropolitan Areas)	ABA Sources of News and Current Affairs Survey (media used)	ABA Sources Data (without magazines and pay tv)	ABA Radio Survey (media very/extremely important for local news and information)
Television	31.4%	33.9%	57.5%	33.8%	42.7%	31.6%	34.9%	27.7%
Radio	23.2%	20.7%	10.2%	24.9%	19.4%	27.4%	30.3%	39.0%
Newspapers	26.9%	26.3%	25.7%	28.8%	32.0%	27.3%	30.2%	33.3%
Internet	11.7%	11.9%	6.0%	12.5%	5.8%	4.1%	4.6%	
Magazines	6.8%	7.2%	0.6%			6.1%		
Pay TV						3.6%		
Note: In US data, pay tv included in overall television								

As an aid to determining the specific cross-media limits it would impose, the Commission calculated DI scores for a large number of markets, grouped them by the number of television stations in the market, and then calculated average DI scores for each subgroup (i.e., markets with 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 15, and 20 stations). For each subgroup, the Commission then calculated the change in the DI associated with various hypothetical mergers.³²

The Court criticized the Commission's chosen cross-media limits, pointing out some examples of permitted transactions with DI changes "considerably higher" than those of other permitted transactions and some examples where a permitted transaction had a DI change greater than that of a prohibited transaction.

The Court did not object to the Commission's use of the HHI framework as a starting point in its diversity analysis. It remanded the cross-media rules because "the Commission gave too much weight to the Internet as a media outlet, irrationally assigned outlets of the same media type equal market shares, and inconsistently derived the Cross-Media Limits from its Diversity Index Results."³³

Comparison of US and Australian Media Ownership Regulations

National Rules

Australia's national television station ownership limit, at 75 percent of households reached, is less stringent than the Congressionally-imposed 39 percent in the United States. It is also less stringent than the Biennial Review Order's 45 percent level. Australia does not have a dual network rule, but it does have a prohibition on ownership of more than one television station in a market. Each of Australia's three commercial networks own television stations in at least three of the five major markets, so the local television rule in Australia, in effect, acts like a dual network rule. It is also true that, in Australia as in the United States, media mergers are subject to challenge by the antitrust authorities (Department of Justice or Federal Trade Commission in the United States and the Australian Competition and Consumer Commission in Australia).

Local Rules

Australia prohibits common ownership of two television stations in any local market. However the largest markets only have six television stations in them—three commercial, two "national" (public networks with a federal government charter—the ABC and SBS), and one "community." Few markets have a community station, which is roughly equivalent to a US public television station that is not part of the PBS. Thus, under the existing rules that require eight independent television voices post-merger, US and Australian rules are the same

³² See Biennial Review Order, Appendix D (Diversity Index Scenarios by Number of TV Stations in Markets).

³³ Remand at 58.

in practice (*i.e.*, applying the US rules to an Australian market would give the same result as applying the Australian rules and vice versa). The Biennial Review Order rules would allow duopolies in markets with more than four television stations, but prohibit mergers among the top four commercial stations, so those rules too would effectively block duopolies in Australian markets.

The US radio rules are noticeably less stringent than those of Australia. In Australia, one firm may own two commercial radio licenses per market. Markets are defined geographically. The US rules allow multiple station ownership on a sliding scale. For markets with fewer than 15 stations, one firm is permitted to own up to five, provided that it does not own more than one half of the stations in the market. Under the existing rules, noncommercial stations are not counted. The largest Australian markets (Sydney and Melbourne) have ten commercial radio stations each,³⁴ so the US rules would permit owning five stations where the Australian rules would permit only two. If, as in the Biennial Review Order rules, noncommercial stations are counted, Sydney and Melbourne would each be credited with 16 radio stations (five from ABC and one from SBS).³⁵ The new rules would permit one firm to own six stations in those markets.

The cross-media limits are a bit more difficult to compare. The existing rules in both the US and Australia prohibited newspaper broadcast cross-ownership in the same market. The existing rules in Australia prohibit television-radio cross-ownership in the same market. The existing rules in the US permit television-radio cross-ownership on a sliding scale. In markets with at least 20 independently-owned media voices remaining post-merger, one company could own two television stations and up to six radio stations or one television station and up to seven radio stations. In markets with at least ten independently-owned media voices post-merger, a company could own two television stations and up to four radio stations. Combinations are, of course, also subject to the separate radio and television limits. As noted above, under US rules, no firm could own two television stations in any Australian market.

The “independent voices” calculation for the largest Australian market, Sydney, would be as follows. There are three commercial television stations, two public stations, and one community station. Assuming that the two public stations are counted separately, that makes six television voices. There are 10 commercial radio stations and six public stations (owned by the same organizations—ABC and SBS—that own the public television stations). Cable television is widely available in Sydney. There is one major local newspaper, the Sydney Morning Herald, and a commonly-owned more specialized paper, the Australian Financial Review. It is not clear how the national newspaper, the Australian, would be treated but I suspect it would not be included. The existing rules only include

³⁴ Data on commercial media availability in Australia are from “Media Ownership Update” in Communications Update December 2003 Issue 165. Communications Law Centre, University of New South Wales Sydney Australia.

³⁵ Noncommercial station availability from websites of ABC and SBS. [detail to be added]

newspapers with circulation to at least five percent of households in the market, so there could be additional papers but this is unlikely. Thus it appears that the maximum possible number of independent media voices would probably be 18. Therefore applying the US existing rules to Sydney would lead to a maximum of one television and four radio stations, whereas the Australian rules would permit two radio stations.

Given that Sydney has six television stations, the following provisions of the US Biennial Review Order rules would apply. One firm could own a daily newspaper, one television station, and up to half of the (six) radio stations permitted for markets of the relevant size; i.e., three stations. Alternatively, one firm could own a daily newspaper and the full radio limit (six) for the market; or one firm could own two television stations if otherwise permitted and radio stations up to the limit (six). Since there are only three commercial stations and all are in the top four in audience, the third alternative would not be permitted.

This is clearly much more permissive than the current Australian rules. However the proposals in the BSA Bill 2002 would relax these strictures a bit. These proposals would not permit common ownership of outlets in all three media in the same market, so the first alternative under US rules would not be permitted. Moreover, the separate limit of two on the number of radio licenses per market remains in force. So the proposed rules would permit common ownership of a television station and a daily newspaper or a television station and two radio stations. However the rules have a minimum number of commercial media groups provision as well. In metropolitan markets (the five largest) there must be five independent commercial media groups post-merger. Cable does not count as a media group for this purpose. So one possible market structure would be three combinations of a television station and two radio stations, one combination of a newspaper and two radio stations, and one combination of two radio stations. Alternatively, there could be two combinations of a television station and two radio stations, one combination of a television station and a newspaper, and three combinations of two radio stations.

The US Biennial Review Order rules are stricter than the Australian rules in the smallest markets. The US rules prohibit all cross-media ownership in markets with three or fewer television stations, including public stations. In Australia, "remote areas" are exempted from the minimum number of media groups test.

Conclusions

The above analysis has shown that Australia has more stringent media ownership regulation than the United States with respect to local markets. This will be true even if the BSA Bill 2002 passes and the existing rules of the FCC remain in effect. At the national level, Australia's rules are less stringent than those of the United States. The United States relies more on structural regulation to influence content indirectly, while Australia is much more willing to

regulate content and behavior, even in the context of structural rules. The proposed cross media exemption certificate provisions of the Broadcasting Services Amendment Bill 2002, with their requirements for editorial separation and minimum radio news requirements in some cases, exemplify this. As a consequence of the greater reliance on structural regulation, US media ownership decisions tend to articulate in more detail the link between media market structure and behavior (i.e., the range of content provided.)