



Regulating cross-media ownership: A comparative study between Australia and Italy

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Regulating media ownership is not a simple task. The media represents a field where public interest collides with technological and economic interests. The law is challenged to strike a balance between all three dimensions. This article attempts to deconstruct cross media ownership regulation amidst this field. It establishes the theoretical viewpoints that influence the development of cross-media ownership laws, which puts forward the relevant principles and viewpoints that support the social/political, economic and technological dimensions. It then demonstrates the interaction of these dimensions in practice by presenting a comparative case study of cross-media ownership laws in Australia and Italy. In doing so, this article finds that cross-media ownership regulation requires the careful balancing of competing influences. Sound understanding of competing spheres of influence that interact in the realm of media ownership policy allows legislators to best formulate the directions of Australian law.

Introduction

Ownership of the media matters. It matters because the media has long been regarded as ‘the fourth estate’, a public institution responsible for informing the public, facilitating public debate and keeping those in power accountable for their actions.¹ Questions of how to structure cross-media ownership legislation is therefore never an easy task; acknowledgment must be made of the complexity of competing interests, and the implications that cross media ownership regulation can have for the wider public, corporate entities and democratic society.

The controversy of cross-media ownership has been well debated throughout the world. To date, much of the topical and empirical research has centred on three predominant theoretical considerations; namely, economic, information technology and public/political interest theories.² State regulation of cross-media ownership varies from country to country, however most states

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1 J Schultz, ‘The Press’ in S Cunningham and G Turner (Eds), *The Media and Communications in Australia*, Allen & Unwin, NSW, 2002.

2 There has been much literature focusing on these three theoretical considerations. See, eg, International Institute of Communications, *Media Ownership and Control in the Age of Convergence*, International Institute of Communications, London, 1996, p 282; G Doyle, *Understanding Media Economics*, Sage, London, 2002; K C Creech, *Electronic Media Law and Regulation*, 5th ed, Focal Press, 2007, pp 406–12; Schultz, above n 1; and J Keane, *The Media and Democracy*, Blackwell Publishers, Cambridge, 1991, pp 1–50.

set their policies based on one or two of these three considerations, which has ultimately resulted in the development of biased regulatory policies. When such bias culminates in law, media ownership regulation can have a detrimental effect on a broad range of stakeholders.³

Ideally, if policy makers could balance all three competing aspects, cross-media ownership regulation could foster an innovative approach that is neither too liberal, nor too strong, but strike a harmonious balance between opportunism and protectionism.⁴

Against this background, this article aims to provide a literature review of the three theoretical considerations outlined, as well as a comparative study of cross-media ownership regulation between Australia and Italy. This article departs from the premise that although Australia and Italy are both recognised as having legislation conducive to concentrated media ownership, the policy directions which have informed legislative development in the two countries have been vastly different. Broadly speaking, this article finds that the parallel between the situation in Italy and Australia is clear — Italy provides a compelling example of political influences affecting media policy, while Australian legislative directions appear to favour technological and economic development. Further, this article surmises that neither jurisdiction presents an ideal model for cross-media ownership regulation. By drawing on the strengths and weaknesses of the approaches taken in each nation, it is clear that there is room for improvement in both.

A literature review of the media ownership regulation

The Social/Political theory promotes media diversity as a predicate to pluralism and democracy.⁵ Media ownership in Australia and internationally has historically been recognised as a distinguished sector, worthy of specific regulatory attention to safeguard the public's interest in media diversity.⁶ Departing from the predicate that the press plays a fundamental role in equipping the public with information upon which decisions affecting democratic governance are made, there are typical arguments which underpin freedom of speech. These arguments have one common foundation; pluralism demands that individuals have open access to varied, unhindered viewpoints. Many theorists, including Julliane Schultz⁷ and Jeremy Bentham,⁸ have put forward arguments outlining the fundamental role of freedom of speech in promoting democracy. In addition, an alternate basis upon which the 'public interest' foundation of the media can be founded is that set out in theorist John

3 International Institute of Communications, above n 2, p 21; and D McQuail, 'Media Policy — Premature Obsequies?' in H Tumber (Ed), *Media Power, Professionals and Policies*, Routledge, London, 2000, pp 20–4.

4 McQuail, above n 3.

5 Schultz, above n 1; Keane, above n 2.

6 G Doyle, 'From "Pluralism" to "Ownership": Europe's emergent policy on media concentrations navigates the doldrums' [1997] 3 *Jnl of Information, Law and Technology*.

7 Schultz, above n 1.

8 D Kingsford-Smith and D Oliver, *Economical With the Truth: The Law and Media in a Democratic Society*, Oxford University Press, Oxford, 1990, p 96.

Stuart Mill's *On Liberty* (1859).⁹ Ultimately, social and political influences on legislative policies must be considered amidst a broader context. Academics recognise that:

The conceptualization of the mass media as being either 'the fourth estate' or 'agencies of social control' is an oversimplification. The role of the mass media at any time is shaped by factors particular to the period under consideration as well as the medium under study.¹⁰

As the social and political dimension presents a long-standing influence on regulatory policy, it is essential that it is given adequate authority and not downplayed to advance other competing interests.

Economic considerations recognise that regulation must facilitate open access to the media market, while ensuring that media corporations are able to sustain efficient economic practices. Any analysis of influences on media ownership must consider the correlation between the media industry and conglomerate market structures.¹¹ Gillian Doyle has focused much of her research on analysing the relevance of economic impacts on media ownership.¹² She believes that '[e]conomics provides a theoretical framework for analysing markets based on the clearly defined structures of perfect competition, monopolistic competition, oligopoly and monopoly'.¹³ Media ownership poses a predisposition towards monopolistic and oligopolistic market structures.¹⁴ By analogy, Doyle has connected conglomerate market structures to a lack of marketplace diversity¹⁵ and, building upon Doyle's argument, Robert Hassan recognises that economic markets can operate to preclude competition.¹⁶ John Buckley further cements this view, noting that unused economies of scale often result in monopolistic supply networks which create 'a frequent market entry barrier'.¹⁷

Proponents of economic interests and structures in the media industry often argue that competition law is sufficient to regulate and maintain diversity in the media industry. This argument is overtaken when the interaction between fields is accounted for, and other fields influencing policy are considered. It is clear that while economic interests are a major contributing field, if legislative policy was based solely on economic considerations, then discussions about

9 J Stuart Mill, *On Liberty*, 1968, p 65.

10 J Eldridge, J Kitzinger and K Williams, *The Mass Media and Power in Modern Britain*, Oxford University Press, Oxford, 1997, p 13.

11 Doyle, above n 2.

12 Ibid, p 19.

13 Ibid.

14 'A monopoly exists where a single supplier has levels of technology and production that allow it to supply a whole or significant sector of the market. According to economic theory, where one supplier can supply the whole market, then 'at the current level of demand the market will allow no more than one supplier to produce at the minimum point on the cost curve': J Buckley, *Telecommunications Regulation*, IET Books, 2003, p 11. This situation is then classified as a natural monopoly, as gaining entrance to the market is particularly difficult for small enterprises who do not have the capital and skills to take on a large, already established organisation to compete for profits.

15 Doyle, above n 2, p 163.

16 R Hassan and J Thomas, *The New Media Theory Reader*, Open University Press, 2006, p 101.

17 Buckley, above n 14, p 11.

media diversity and probing into technological directions of the media would be largely irrelevant.

The technological dimension argues that by deregulating the market, the public's interest in media diversity will be met as new digital technology facilitates multi-channelling,¹⁸ and opens up the market to new media players who have traditionally been unable to compete.¹⁹ This school of thought had been accepted by many scholars.²⁰ Proponents for technological development believe that as the public are accessing media via new modes, laws limiting ownership of traditional media sectors are no longer relevant. This argument is supported by the growth of broadband internet access, and will be further facilitated by the move to digital broadcasting, allowing for multi-channels and innovative content delivery.²¹ The technological dimension has also created a new influence upon media regulatory policies. This field is constantly developing and changing and it is therefore interesting to note that there are conflicting arguments even within this field of knowledge.²² This field is likely to take a leading role in directing media ownership regulation into the future. The challenge is for regulators to foster technological development without hindering social/political and economic interests.

In practice, while each of these dimensions generates different aims for cross-media ownership regulation, there are also many overlapping objectives.²³ This article argues that only by coming to a balance of all three objectives will any one ever be truly satisfied. To demonstrate this argument, the following provides a comparative study of the cross-media ownership regulations between Australia and Italy, and reveals that the regulation in these two jurisdictions are founded on diverse theoretical dimensions, with weaknesses and room for improvement in the approach of both nations.

Media ownership regulation in Australia

The Australian geographic landscape and population distribution are relevant considerations in determining the possible impacts on changes in diverse

18 The meaning of multi-channelled broadcasting service has been given by cl 5A of Sch 4 of the Broadcasting Services Act 1992.

19 International Telecommunications Union, *Trends in Communication Reform 2006: Regulating in the Broadband World*, 2006, p 1.

20 G Doyle, *Media Ownership*, Sage, 2002, p 151. Also see S Lacy, A Broadrick Sohn, G Sylvie and J LeBlanc Wicks, *Media Management: A Casebook Approach*, 2nd ed, Lawrence Erlbaum Associates, Inc, Mahwah, NJ, 1999, p 384.

21 Commonwealth of Australia, 'Ready, Get Set, Go Digital — A Digital Action Plan for Australia' (2006) *Digital Action Plan*, at <http://www.dcita.gov.au/_data/assets/file/53556/Digital_Action_Plan_web.rtf>.

22 Media, Entertainment and Arts Alliance, 'Official Spin: Censorship and Control of the Australian Press 2007' (2007) *MEAA 2007 Australian Press Freedom Report*, p 15.

23 For example, while technological influences lend towards the deregulation of the media market to take advantage of new opportunities, this is also aligned with economic interests. By reducing limitations on cross-media ownership, media corporations are able to move into new areas of the market, thereby satisfying 'economies of scale'. Another example of objectives overlapping is evident when social/political interests in media diversity are aligned with the economic interests in promoting market competition. While the economic sphere realises that competition should be encouraged in all economic markets, this also works to satisfy the social/political value that is placed in media diversity as a requisite to public access to a wide range of voices, and democracy.

media markets. Due to the existence of lowly populated regional areas, any increase in the concentration of media corporations and 'control' threatens to have a negative impact on pluralism in areas where there is limited access to communication and information mediums.²⁴ This situation is prevalent in the Australian context, and must be considered throughout legislative proposals.

Recent history

Media ownership regulation was put on the national agenda in 1985 following a study of the ownership and control of commercial television.²⁵ Consequently, the Broadcasting (Ownership and Control) Act 1987 (the 1987 Act) amended the Australian Broadcasting Act 1942, resulting in stricter controls on cross-media ownership.²⁶ This legislation was the first of its kind in Australia. It was aimed at imposing clear cut restrictions on media ownership, based on audience reach in order to limit any single owner from having control over diverse media forms.²⁷ Although the 1987 Act only applied to television and newspapers, the scope of the Act was extended to incorporate radio ownership through the Broadcasting (Ownership and Control) Act 1988.²⁸ The 1987 Act was further amended by the Broadcasting Amendment Act (No 2) 1990, which exempted affiliated television licensees and lending institutions from breaching the definition of control and audience scope regulations. Subsequently, the Broadcasting Act 1992 overhauled cross-media ownership regulation and has remained in operation until 2006, when it was amended by the Broadcasting Services Amendment (Media Ownership) Act. While the Broadcasting Services Act 1992 carried over many existing cross-media ownership restrictions, there was one fundamental difference: the Act altered the limits on cross-media ownership for a newspaper proprietor from 5% of a television licence to 15% by virtue of the definition of 'control',²⁹ as set out in Sch 1 s 6.³⁰ Section 60 required that there

24 Media, Entertainment and Arts Alliance, above n 22, p 15.

25 'Ownership and Control of Commercial Television: Future policy directions', August 1986. Recommendations from this report instructed the policy directions of the Broadcasting (Ownership and Control) Act 1987.

26 The parliamentary E-brief summarised the amendments stating:

The proposals involved the replacement of the existing 'two station rule' with an audience reach rule, which limited any person to controlling interests in licences serving a maximum of 75% of the population. In addition, cross-media restrictions were to be imposed which were designed to prevent a person from controlling both a television licence and a newspaper published 4 times per week and having more than 50 per cent of its circulation in the same area served by the television licence.

J Gardiner-Garden and J Chowns, 'Media Ownership Regulation in Australia' (2006) *Parliament of Australia E-Brief*, at <http://www.aph.gov.au/library/INTGUIDE/SP/Media_Regulation.htm>, p 17.

27 Ibid.

28 'The owner of a radio licence could not own more than 15 per cent of a television licence serving substantially the same market and 15 per cent of a newspaper published 4 days per week and with more than 50 per cent of its circulation in the same area serviced by the radio licence. Similarly, the owner of a television licence was restricted to owning 15 per cent of a radio licence serving substantially the same market, while a newspaper proprietor could own up to 15 per cent of a radio licence': *ibid*.

29 Ibid.

30 The definition of control was set out in Sch 1 s 6 of the Broadcasting Services Act and

was no common ownership of a television and radio, television and newspaper, or radio and newspaper broadcasting licence in the same licence area.³¹ The Broadcasting Services Act 1992 also contained 'statutory control rules', placing caps on conglomerate media broadcasting ownership and licences within certain sectors of the media market.³²

Current status

Media ownership is currently regulated by two overlapping legislative frameworks — the Broadcasting Services Amendment (Media Ownership) Act 2006 (Media Ownership Act), which sets standards and restrictions on media mergers and acquisitions, and competition law, as set out in the Trade Practices Act 1974 (Cth).

The Media Ownership Act formed part of a broader media reform initiative in 2006,³³ and brought two significant changes. First, it allows media enterprises to take control of a greater share of the market, subject to the provision that there is a 'minimum number of separately controlled commercial media groups' operating in the licence area. Second, the Act facilitates the removal of restrictions and barriers on foreign ownership of the media. By deregulating the market, the Act aims to promote technological development and create a market that is positioned to take advantage of the 'digital revolution'.³⁴

The Broadcasting Legislation Amendment (Digital Television) Act 2006 incorporated regulations that require the advancement of stipulated broadcasting procedures and technologies. In due course, this legislation will facilitate a changeover from analog to digital television, as well as regulate broadcasting licences. The move towards digital television creates opportunities for increased media diversity and, accordingly, should be considered as an influential technological development that affects directions

stipulated that where a person holds company interests that exceed 15%, without any proof disputing the assumption, that person is held to have a controlling interest in the company. There were several limitations upon the scope of this power including: the 15% rule is not applicable where there is a 50% shareholder, as long as that shareholder is not affiliated to another person with an interest in the company; a person may be deemed to be in control of a company where they held a holding of less than 15% if there is no other person with a similar share holding; this rule is extended to cover successions of company groups: see *ibid*.

31 Section 60 of the Broadcasting Services Act stipulates that a person must not control:

A commercial television broadcasting licence and a commercial radio broadcasting licence have the same licence area; a commercial television broadcasting licence and a newspaper associated with that licence area; or a commercial radio broadcasting licence and newspaper associated with that licence area.

Commonwealth of Australia, 'Broadcasting Services Amendment (Media Ownership) Bill 2006, and discussion paper by the Minister for Communications, 'Information Technology and the Arts on the two channels of spectrum for new digital services', 2006, *Parliament of Australia Senate Report*, at <http://www.aph.gov.au/senate/committee/eca_ctte/cross_media/report/c02.htm>, para 2.6.

32 Gardiner-Garden and Chowns, above n 26, pp 6–10.

33 The 2006 amendments to the regulatory framework incorporate the Broadcasting Legislation Amendment (Digital Television) Bill 2006; Television License Fees Amendment Bill 2006; and the Communications Legislation Amendment (Enforcement Powers) Bill 2006

34 Commonwealth of Australia, above n 21.

of media ownership regulation and the argument that ownership of the media matters.

As part of media law reforms, the government allocates two licences for channels that will provide digital services.³⁵ Each channel comprises different digital capabilities, incorporating data-casting, narrowcasting and mobile television services. These channels are an important part of the move to digital, as their allocation is subject to competition law and will open up opportunities for new players to get on board.

Finally, the Communications Legislation Amendment (Enforcement Powers) Act 2006 provides increased enforcement powers for the Australian Communications and Media Authority (ACMA). The ACMA plays an important role in ensuring that media players comply with regulatory standards. This legislation places greater responsibility on the ACMA to ensure that 'media ownership and content are protected under changes to the regulation of media ownership'.³⁶

Having established the broad context of media reform legislation, it is possible to focus on the likelihood of the amendments resulting in the liberalisation of cross media ownership. The Media Ownership Act introduced a 5/4 rule aimed at limiting convergence of media markets beyond an acceptable level, while simultaneously opening up the market and increasing competition.³⁷ The 5/4 rule 'provides for a minimum of five separate traditional media "voices" in metropolitan radio licence areas and four in regional licence areas'.³⁸ In practice, the 5/4 rule is not dissimilar to its predecessor (s 60 of the Broadcasting Services Act), to the extent that it requires that broadcasting licences do not surpass an acceptable level of diversity in ownership within a licensing area.

The regulatory powers of checks and enforcement do vary considerably. The Media Ownership Act refers to the notion of an 'unacceptable media diversity situation', which arises if a media merger or acquisition occurs without satisfying the 5/4 rule.³⁹ Under the new Act, the ACMA has been given an increasingly prominent role in regulating the media landscape, by determining whether 'an unacceptable media diversity situation' has resulted from a media merger.⁴⁰ Most notably, the effects of the 5/4 rule will be explored. A table set out in the parliament of Australia's 'Media Ownership Regulation in Australia' E- Brief⁴¹ predicts that out of 86% of the radio market population, which also has a daily newspaper covering the same area, the introduction of the 5/4 rule will lead to a reduction in the minimum number of possible owners.

The effects of the legislation in reducing media diversity are clearest when

35 ACMA, 'Media Reform — Guidelines for narrowcasting television services fact sheet', 2008, at <http://www.acma.gov.au/WEB/STANDARD/pc=PC_310119>.

36 Commonwealth of Australia, above n 31, para 1.27.

37 Ibid.

38 Ibid, para 2.8.

39 Ibid, para 2.9.

40 ACCC, 'ACCC and ACMA seeking to share confidential media merger information', Press Release, 2007, at <<http://www.accc.gov.au/content/index.phtml/itemId/781932/fromItemId/2332>>, para 6.

41 Gardiner-Garden and Chowns, above n 26, p 66.

considered in the context of Australia's two largest and most influential licence areas — Sydney⁴² and Melbourne.⁴³ In both of these licence areas, the Media Ownership Act permits the eradication of six existing media owners. Accordingly, the diversity of corporations with cross-media interests can be more than halved for 36.88% of the Australian population.⁴⁴

The way in which media diversity is defined greatly affects legislative structure. Legislators and policy makers are faced with differing views on what the aims of media diversity are and how such aims should be protected through legislation. The Media Ownership Act has defined the scope of 'diversity' to include the promotion of access to diverse media services (including radio, television, newspapers, data-casting⁴⁵ and other services offering 'entertainment, education and information'),⁴⁶ as well as 'diversity in control of the more control of the more influential broadcasting services'.⁴⁷

It is important to note that the ACCC continues to hold an important role under the Trade Practices Act. The ACCC operates within competition framework to assess the competitive impacts of cross-media ownership transactions.

Future directions and evaluations

Following the enactment of the Media Ownership Act, the future directions of Australian media ownership policy remain to be seen.

Commenting on the opportunities brought about through the introduction of the law, the former Communications Minister, Helen Coonan said:

Existing players can make the most of emerging digital media technologies and make the most of flexibility to become globally competitive media companies . . . I believe that Australia's media sector is stronger, more consumer-driven and more competitive than ever before and is now well-placed to take advantage of the digital age.⁴⁸

While this statement draws attention to the opportunity created under the 2006 law, it fails to recognise that the practical application of the law is yet to be proven. Senator Coonan advocated that by furthering technological and economic interests, media diversity and the social and political interests of the public would ultimately be protected.⁴⁹ With the media market in a state of flux after the inception of the new law, the situation is still unclear.

Analysis of the media market shows clear evidence of takeovers and merger activity. Even before the Media Ownership Act was promulgated, there was

42 The Sydney licence area accounts for an 18.97% share of the Australian population (ibid).

43 The Melbourne licence area accounts for a 17.91% share of the Australian population (ibid).

44 Ibid.

45 Media Ownership Act s 3(aa).

46 Ibid, s 3(a).

47 Ibid, s 3(c).

48 Senator Helen Coonan, '2007 — Reaping the benefits of the media reforms', Paper presented at the ABN AMRO Communications Conference, 2007, pp 107–10.

49 'Existing players can make the most of emerging digital media technologies and make the most of flexibility to become globally competitive media companies. The package also allows encourages new entrants into the media market. It places consumer's front and centre — new digital services give them the power to tailor their own media experience. This in turn helps to protect diversity': ibid.

movement in the market as media corporations attempted to size up their interests and ensure that they were well positioned to take advantage of changes in the media market. The rationale and trigger for many of these mergers and deals was the incentive of having fluid assets that would allow corporations to best take advantage of the relaxation of Australian media laws.⁵⁰ In a \$4 billion deal, Channel Seven sold a 50% share in its main media assets (including Channel Seven, Pacific Magazines and Yahoo online) to private equity firm Kohlberg Kravis Roberts.⁵¹ In April, the Seven Network raised its stake in West Australian newspapers from 14.9% to just over 15%. While previous media laws would not have allowed the Seven Network to increase its stake, under current media laws the network has capitalised on its ability to obtain a position of 'control'.⁵²

Takeover activity was also pre-emptively undertaken by News Corporation and the Seven Network, acquiring a 7.5% and 5% stake respectively in Fairfax before the promulgation of the new law.⁵³ The \$9 billion⁵⁴ merger of Fairfax Media Ltd and Rural Press Ltd was announced soon after the enactment of the new media laws.⁵⁵ The merger was finalised on 24 May 2007, and signalled a significant opportunity for Fairfax to increase its market share in regional Australia, as well as to capitalise on Rural Press' already established online presence.

In a statement released in anticipation of the merger, Ronald Walker, the Chairman of Fairfax Media Ltd, said 'this is a decisive step forward in our bid to create Australasia's largest integrated metropolitan, regional and rural print, online and digital media business'.⁵⁶ This statement draws attention to the significance of the transaction in facilitating growth and a move into new markets, which were among the primary aims of the legislation. In line with discussion throughout this article, it is clear that this growth may have strategic advantages as corporations are able to maximise economic efficiencies, while also moving into new markets and opening up possibilities for the consumer. At the same time, it is necessary to question whether the expansion of an already dominant media entity is impacting upon the state of media diversity in Australia.

In one of the most notable deals following the enactment of Australia's media ownership laws, Publishing and Broadcasting Ltd (PBL)⁵⁷ sold 50% of

50 L Murray, 'Seven has \$3.2b to play with', *Sydney Morning Herald*, 21 November 2006, at <<http://www.smh.com.au/news/business/seven-has-32b-to-play-with/2006/11/20/1163871339404.html>>.

51 Ibid, paras 1 and 9.

52 N Tabakoff, 'Austar in play as new laws bite', *The Australian*, 5 April 2007, at <<http://www.theaustralian.news.com.au/story/0,20867,21507173-7582,00.html>>, para 4.

53 Ibid, para 2.

54 J Hogan, 'Media shares surge', *The Age*, 4 May 2007, at <<http://www.theage.com.au/articles/2007/05/03/1177788311072.html>>.

55 Rural Press Ltd, 'Schemes effective and Nominees to Fairfax media board', Press Release, 2007, at <[http://www.fxj.com.au/announcements/apr07/Nominees ToFairfaxBoard.pdf](http://www.fxj.com.au/announcements/apr07/Nominees%20ToFairfaxBoard.pdf)>.

56 Fairfax Media, 'Fairfax media welcomes rural press shareholder vote to approve proposed merger', Press Release, 2007, at <<http://www.fxj.com.au/announcements/apr07/FXJ190407.pdf>>, p 2.

57 PBL, 'PBL media incorporates Ninemsn, ACP magazines, and the Nine network among other entities', 2007, at <http://www.pbl.com.au/nine_network.htm>.

its media assets to CVC in October last year, in a \$4.5 billion deal. The joint venture was announced only months after new media laws passed through the senate.

The media market continues to undergo great transformation. On 1 June 2007, PBL released a statement outlining the sale of a further 25% interest in PBL media to CVC. This deal dramatically transforms the state of the Australian market, as 'the latest transaction will take CVC's overall ownership of PBL Media to 75% with PBL retaining a 25% share'.⁵⁸ With the 25% interest sold for \$515 million, the changes that this deal imposes on the Australian media market are significant. Australian media giant PBL has relinquished control of its most significant media interests in less than one year.

In 2006, the media market was in a state of flux with Australia's largest media corporations and players repositioning themselves within the media market. Given the corporate nature of the deals, which are shielded by privacy, it is difficult to comment on the effectiveness of the media laws in accounting for all stakeholders.

While analysis of the media market shows clear evidence of takeover and merger activity, the impact and effect of the takeovers that have been outlined are not yet visible. While changes have occurred in the market, and continue to occur, it is not yet possible to draw conclusions on whether these changes positively or negatively affect the media market. Consequently, policy considerations that were adopted in framing the legislation cannot yet be critiqued. Continual monitoring of the market will be essential in ensuring that corporations do not overstep legislative barriers.

As speculation of media mergers continue to surface and eventuate, it will be continually important to monitor the changing state of the media landscape. The introduction of the ACMA's register of controlled media groups in March 2007 was just one significant step in regulating media ownership.⁵⁹ As the legislation has opened up the market to a state of deregulation, without continued checks and balances, it may be difficult to monitor the effects of mergers on the overall state of media ownership. The ACMA'S role in monitoring the market is therefore important in ensuring that media conglomerates do not materialise.

The introduction of Australia's Digital Action plan⁶⁰ in its entirety will also facilitate a better understanding of legislative impacts. Currently, with some parts of the plan in practice and other fundamental parts still pending introduction, it is difficult to hypothesise on the impact of technological influences in the context of media reform. When digital broadcasting services function at their ultimate capabilities, this may increase the number of voices in the media by providing increased and new platforms for broadcasting.

The stated aims of the Broadcasting Media Ownership Act resonate closely with what this article argues is best practice. The Act aims to implement a

58 PBL, 'PBL sells a 25% interest in PBL Media to CVC and Ticketek to PBL media', Press Release, 2007, at <<http://pbl.com.au/Images/Document/PBL%20SELLS%20A%2025%20PERCENT%20INTEREST%20IN%20PBL%20MEDIA%20TO%20CVC.pdf>>, p 3.

59 ACMA, 'Register of Controlled Media Groups', 2007.

60 Commonwealth of Australia, above n 21.

pre-emptive framework to move towards digital broadcasting, and also considers changing patterns of accessing news and information. In addition, the legislation aims to protect the social and political value of media diversity by setting limits on the lowest levels of acceptable cross-media ownership. Economic aims are also incorporated, as the Act supports a framework where corporations can continue to meet existing efficiencies and, in many cases, even take new opportunities for expansion.

While praised for facilitating digital convergence, and ensuring that the legislation has practicality in the future, the legislature's focus on facilitating a move forward towards digital convergence could be deemed premature. The statistics regarding patterns of how Australians access media cast doubt on the actual number of people who are making use of new modes of access. While the number of people accessing news through the internet is growing, at present new media formats are only being used by a small percentage of the overall population. Therefore, it is arguable that the objectives underlying the Media Ownership Act should be less focused on technological influences and present a more balanced structure to protect the public's interest in media diversity.

While the introduction of a 5/4 rule is seen as establishing a balance between protection of media diversity and deregulation, to account for economic and technological development, it is unclear whether this rule goes too far at the expense of media diversity. In the majority of Australian licence areas, the 5/4 rule mimics the current state of the market and, accordingly, will not result in a significant loss of media diversity. However, as established earlier, in Melbourne and Sydney, which account for 36.88% of the Australian population, the legislation will allow the number of media owners to be reduced from eleven to five. Although it has been argued that five 'voices' are sufficient to maintain media diversity by making further concentration of media interests possible, the legislation is arguably taking a backwards step in protecting media diversity.

The introduction of digital television has also played a significant part in legislative change. The introduction of two new digital channels was believed to be an important part of the framework, as it facilitates additional media diversity by opening up the market to new players.⁶¹ In theory, opening up a digital platform will increase the state of media diversity, however it is unclear whether the Australian market is ready to take advantage of this new technology. The government has already extended the target for the digital switchover⁶² to 2012. Consequently, the digital platform will be unable to fulfil its stated objective of maintaining the level of media diversity until introduction.

Regulators in Australia face difficulties in enacting uniform regulation across regional and city areas. While such difficulties are also evident in other jurisdictions, these challenges are exacerbated in Australia due to vast distance and the recognition that social inequality and a reduction in living standards results where services are not accessible. One of the strengths in the Australian

61 Ibid.

62 The digital switchover refers to the timeline by which all analogue television broadcasting services will be switched off. Following this, broadcasting will only be transmitted digitally.

media regulation structure is the way in which limits on local content and news delivery are stipulated for regional areas.⁶³ It is important to recognise that regulating media access in rural areas has specific challenges. Without legislative guidelines stipulating standards for the maintenance of local news services, conglomerate media owners would have the power to choose how to limit services. It is likely that this power would be exercised based solely on economic and financial considerations, rather than public interest.

In summation, Australian regulation attempts to balance all three competing platforms. There is a particular focus on technological development that may prove premature. By maintaining minimum control levels of ownership across mediums, the legislation does appear to be protecting media diversity by ensuring that it does not fall below a minimum standard. The legislation may prove difficult to enforce if corporations are slow to register and disclose their interests, although the extended powers of the ACMA should assist in ensuring compliance with legislative standards.

The answer to the question of whether the focus on technological convergence will meet its stated objectives remains unsolved three years after the 2006 enactment. As long as digital technology is taken on board, the legislation is likely to be considered successful in balancing all interests. If the digital convergence does not progress as expected, the reduction in media diversity may be considered unjustified. Failure of digital uptake will undermine the aims of the legislation and could give rise to speculation that the legislative policy was biased towards economic and corporate interests at the expense of social/political interests.

Media ownership regulation in Italy

Italian trends in accessing news and information point to television as the primary source. The Organisation for Security and Co-Operation in Europe (OSCE) states:

Television has developed over time to become the main source of information for the Italian public, with fourteen nationwide surface-frequency channels and more than five hundred local and regional channels. There are thousands of radio stations in the country. Newspaper readership on the other hand, at 6 million daily, has remained roughly the same for the past fifty years.⁶⁴

As most Italians turn to television as their primary source of news and information, this increases the possibility of concentrated media ownership having an unfavourable impact upon media pluralism and diversity. While Italy has 14 channels, the distribution of market share and ownership between these channels has resulted in the existence of a duopoly.⁶⁵

OSCE reports reinforce this obligation, drawing attention to the highly concentrated nature of media ownership in Italy:

63 Media Ownership Act: s 43A (material of local significance — regional aggregated commercial television broadcasting licences); s 43B (local presence — regional commercial radio broadcasting licences); and s 43C (local content — regional commercial radio broadcasting licences).

64 OSCE, 'Visit to Italy: The Gasparri Law, observations and recommendations', *OSCE Report*, 7 June 2005, at <http://www.osce.org/documents/rfm/2005/06/15459_en.pdf>, p 6.

65 *Ibid*, p 11.

Within the market of these fourteen channels, the public-service broadcaster RAI and the privately owned Mediaset muster a duopoly in audience share with around 45 percent each (both own three channels). This 90% share is split amongst the three channels, but in actual fact only between these two companies. The remaining 10 percent of the audience share is distributed between the remaining eight national TV outlets.⁶⁶

The current media duopoly consists of the Italian public service broadcaster RAI, which comprises three television networks, three radio networks, one digital network and other specialised networks. The other major player is Silvio Berlusconi, who exerts significant influence over the commercial broadcasting sector; owning Canale 5, Italia 1 and Rete Quattro, one newspaper, a book and magazine publishing house (Mondadori), and advertising agency (Publitalia). During his reign as Italian prime minister, Berlusconi was further able to exert influence over the Italian public broadcaster RAI. Referring to Berlusconi's influence over the Italian media, the European Federation of Journalists said: 'In no other settled democracy in the world has such a situation ever existed.'⁶⁷

Analysis of advertising has provided further evidence of Italy's media duopoly. Statistics quoted by the OSCE reveal that in 2004:

- Mediaset received 58.3% of advertising revenues;
- RAI received 28.1% of advertising revenues;
- eight other nationwide commercial channels received 2% or less of advertising revenues each; and
- local/regional television stations received 9% of advertising revenues all inclusive.⁶⁸

Due to the existence of a duopoly market and legislation that is often charged with political motives, Feintuck has argued that that regulation is 'merely symbolic' and largely insignificant in the Italian media market.⁶⁹

The OSCE has summarised many of the issues which affect media ownership policy, stating:

Italy has an ongoing record of control over and interference with public-service television by political parties and governments. As the Prime Minister is also the country's main media entrepreneur, the 'traditional' fears of governmental control of RAI are aggravated by worries of a general governmental control of the nation's most important information source, television.⁷⁰

Recent history

Media regulation in Italy was founded in Article 21 of the Constitution (1947) introduced to ensure political independence of the state broadcaster, RAI.

⁶⁶ Ibid.

⁶⁷ European Federation of Journalists, 'Crisis in Italian Media: how poor politics and flawed legislation put journalism under pressure', *Report of the IFJ/EFJ Mission to Italy*, 6–8 November 2003, at <<http://www.ifj-europe.org/pdfs/Italy%20Mission%20Final.pdf>>, p 4.

⁶⁸ OSCE, above n 64, p 11.

⁶⁹ M Feintuck, *Media Regulation, Public Interest and the Law*, Edinburgh University Press, Edinburgh, 1999, p 174.

⁷⁰ OSCE, above n 64, p 18.

The socio-political rationale behind the introduction of cross-media ownership regulation in Italy has not withstood the dramatic changes in legislative framework that governs the Italian media scope. As early as 20 years after the introduction of television broadcasting in Italy (1954), the government exercised a controlled cartel over broadcasting.⁷¹

The 1975 Broadcasting Act (No 103) split the public broadcaster RAI into two (and later three) networks. This Act introduced the system of a *lottizzazione*, which divided RAI into separate networks that represented diverse political parties.

Prior to the introduction of the Broadcasting Act, Silvio Berlusconi's Fininvest began to take control of the television market.⁷² While the 1975 legislation effecting the *lottizzazione* attempted to remove power from national broadcaster RAI, it resulted in the conglomeration of smaller media companies which formed syndicated groups. Berlusconi used this structural shortcoming to expand his media interests and effectively take control of the market.⁷³

A decision of the Constitutional Court in 1976 (Judgement 202),⁷⁴ found that the monopoly control of public television broadcasting in Italy was unconstitutional. Following this ruling, there was a proliferation of independent local stations, which ultimately gave way to mergers between independent stations and Fininvest (Berlusconi's holding company). Consequently, RAI and Fininvest dominated the Italian market to such an extent that they were deemed to hold a monopoly.⁷⁵ The decision of the constitutional court was seen as revolutionary in breaking up this concentrated ownership structure, signalling 'a new historical phase in Italian broadcasting'.⁷⁶

The revolution was short-lived, as evident in 1984 when Italian Prime Minister Craxi issued a decree allowing Berlusconi's television interests to continue broadcasting despite an administrative decision to prevent it broadcasting due to policy breaches.⁷⁷ This decree was later indoctrinated into legislation, and became known as Craxi's decree.⁷⁸ It was clear that this

71 H Kesson, 'Seeing the back of Berlusconi? The Current situation of the Media in Italy', *FlowTV* article, 28 July 2006, at <<http://flowtv.org/?p=182>>, para 4.

72 M Hibberd, 'Silvio Berlusconi and the Media in Italy: Conflicts of Interest', Paper presented at the RIPE Public Service Broadcasting Conference, 2006, at <<http://www.yle.fi/ripe/Papers/Hibberd.pdf>>, p 15.

73 Ibid, p 14.

74 Corte Costituzionale della Repubblica italiana, 'Giudizio di Legittimità Costituzionale in Via Incidentale', *Summaries of Judgments and Orders since 1956, 1976*, at <<http://www.cortecostituzionale.it/eng/attivita/corte/pronunceemassime/massime/schedaMS.asp?Comando=LET&NoMS=8513&TrmT=&TrmL=>>>.

75 By the end of the 1980s, Berlusconi had come to dominate 'the private sector of television broadcasting. The three largest private networks were his (Canale 5, Retequattro and Italia 1), and his closest competitor (Telemontecarlo) lagged far behind. The RAI and Fininvest networks all but monopolized the Italian television audience': R Gunther and A Mughan, *Democracy and the Media — A Comparative Perspective*, Cambridge University Press, Cambridge, 2000, p 206.

76 Ortoleva in Hibberd, above n 72, p 8.

77 Hibberd, above n 72, p 15.

78 Ibid.

decree undermined the power of the constitutional court in restricting conglomerate media ownership.⁷⁹

By 1990, Mammi Law (No 223, 6 August 1990) carried on the de-regulated approach to cross-media ownership, ruling that no corporate owner or group could own more than 3/12 licensed networks. This Act was introduced to place limitations on what was known as the “wild west” of all broadcasting systems’.⁸⁰ Rather than regulating with the aim of establishing ideal media ownership structures, the law sanctioned the existence of a duopoly in Italian media holdings.

Current status

Media ownership in Italy is currently governed by The Gasparri Law⁸¹ and the Frattini Law,⁸² which were introduced in response to continued calls for legislation to reduce the concentration of television and media ownership in Italy.

During Berlusconi’s reign as Italian Prime Minister between 2001–2006, both the Gasparri and Frattini laws came to fruition. These laws were implemented in a bid to address major shortcomings in the regulation of cross-media ownership laws.

As discussed above, these shortcomings include:

- the continued existence of a duopoly over national television broadcasting (despite legislative attempts to open up the market to competitors and diversity of ownership);
- a conflict of interest situation, whereby the owner of a large proportion of private broadcasting services was also in control of the public broadcasting sector, by virtue of being the prime minister;⁸³ and
- the lack of any legislation which set limitations upon cross-media ownership, and which could be enforced to ensure that the public’s interest in media diversity was recognised.

At the time of its introduction, the Gasparri Law was believed to be an ‘avant-garde law’⁸⁴ as it was focused on opening up the market to encourage the shift from analog to digital and, in the process, facilitated the convergence

79 Ibid.

80 Ibid, p 13.

81 The ‘Gasparri law’ refers to Law 3 May 2004, No 112: OSCE, above n 64, p 2.

82 The ‘Frattini Law’ refers to Law 20 July 2004, No 215: ‘Norme in materia di risoluzione dei conflitti di interesse’, which can be translated as ‘rules of solving conflicts of interest’: OSCE, above n 64, p 2.

83 After previously serving in a Prime Ministerial position, Berlusconi was re-elected as Prime Minister of Italy in 2001. Berlusconi’s re-election raised a number of questions regarding his conflict of interest in amending media laws to more favourably serve his personal corporate interests, as well as questions regarding pluralism of the media, whereby Berlusconi’s control over private, as well as public sector broadcasting was deemed controversial.

84 OSCE, above n 64, p 29.

of communications systems by introducing the concept of Sistema Integrato della Comunicazioni (SIC), translated as Integrated System of Communications.⁸⁵

The SIC concept has been criticised in an International Federation of Journalists (IFJ) Report, which is critical of the way that the Gasparri Law:

creates a massive new economic sector which brings together all information, communication and media enterprises and then puts a limit of 20 per cent on any individual holding, and which dramatically weakens existing rules, which limit media ownership.⁸⁶

One of the main objectives of the Gasparri Law was the facilitation of the move towards 'Digital terrestrial television service'. The Gasparri Law came into effect in 2004, following approval by the chamber and senate. Article 1 of the legislation outlines the objectives of the law, and a translation reads:

This law identifies the main principles which form the structure of the national, regional and local radio and television system, and upgrades it to the advent of digital technology and the convergence process between radio and television and other personal and mass communication fields such as telecommunications, the press, even electronic and internet in all its applications.⁸⁷

Included in the application framework of this law, it continues, are

broadcasts of television programmes, radio programmes and data programmes even with conditioned access, as well as the supply of associated interactive services and conditioned access services on terrestrial frequencies, via cable and via satellite.⁸⁸

Consequently, by broadcasters operating on a digital network, restrictions are removed as the market is opened up to more players, inevitably encouraging media pluralism. As an OSCE report recognised, '[m]any aspects of the Gasparri Law are unquestionably leading towards the multiplication of broadcasting channels. They create opportunities for diversification and synergies between the channels'.⁸⁹

Despite the influence of technological factors on the formation of Italian media laws, the Gasparri Law falls notably short of its objectives, by failing to initiate change in the broadcasting sector. The Gasparri Law has also failed to balance competing political influences on law by reducing the concentration of media ownership. The OSCE recognises this paradox; 'the transition from monopolistic to pluralist television should precede the transition to the Gasparri convergence market'.⁹⁰ This view recognises the need to balance competing policy interests so that legislative amendments reflect a range of priorities, rather than one field.

Further, the Frattini Law places a limit upon the extent to which

85 The legislation defines SIC as including 'daily newspapers and periodicals, electronic and directory publishing, including the internet; radio and television; cinema, external advertising, product and service announcements; sponsorship'.

86 International Freedom of Expression Exchange, 'IFJ welcomes president's decision to block communications law', Press Release, 2003, p 1.

87 RAI Social Action Department, 'Digital terrestrial television', 2003, at <http://www.segretariatosociale.rai.it/INGLESE/atelier/dtt/digitale_terrestre.html>, para 6.

88 Ibid.

89 OSCE, above n 64, p 32.

90 Ibid, p 41.

government officials can manage interests that amount to a conflict of interest with their office. The enforceability of the Frattini Law is contained in s 7, which gives the Broadcasting Authority power to take action against media corporations that display preference towards a government official. Yet Prodi's reign was short lived, with Berlusconi again assuming office as the Prime Minister of Italy in May 2006.

Future directions and evaluations

Following Berlusconi's removal from the Office of Prime Minister, after the 2006 national election, there were predictions that: 'The Italian media landscape will go through significant shifts . . . The Prodi cabinet, sworn in May [2006], has already proposed media legislation in order to put some limits to media ownership.'⁹¹

Media ownership laws in Italy are subject to discussions on the adoption of uniform European standards. The introduction of a uniform European standard necessitates indepth analysis on many levels, and while this is not within the scope of this article, it is important to note Italy's position as a European Union (EU) member in any discussion regarding the regulatory framework of its media ownership laws. Italy's positioning within the European Union may provide additional incentive for the country to conform to established standards. The European Federation of Journalists (EFJ) stated that: 'The Italian crisis is unlikely to be solved only at an Italian national level.'⁹²

In 2002, the OSCE Representative on Freedom of the Media, Freimut Duve, brought Italy's failure to guarantee media pluralism to the forefront of the Convention on the Future of the European Union.⁹³ While there was no action taken against Italy to enforce its constitutional obligations as an EU member, it is clear that Italy's position within the EU provides an additional safeguard for media pluralism than in nations which do not have any international or common standards imposed on the law of the nation state.

The future directions and outcomes of reform signalled by the Italian government are unclear. The EFJ believes that:

The situation has not yet deteriorated to a level that sees press freedom and the core democratic right of free expression compromised. Indeed, Italy has a vibrant and plural printed press, a robust and diverse radio landscape, and the country's journalists are able to assert their rights to freedom of speech.⁹⁴

If the EFJ is correct, and the Italian media upholds values of pluralism and press freedom, then the government still faces a challenge. These values should be reflected in law, so that neither the government nor corporate interests can unduly affect regulation of the media industry.

Historical patterns of media ownership regulation in Italy draw attention to an array of policy considerations that will affect future directions. Most notably, there have been:

91 European Journalism Centre, 'Media Landscape — Italy' 2007, at <http://www.ejc.net/media_landscape/article/italy/>, para 3.

92 EFJ, above n 67, p 86.

93 OSCE, 'Italy's Media Ownership — A Challenge to the European Constitutional Architecture', Press Release, 2002, at <<http://www.osce.org/item/6599.html>>, para 3.

94 EFJ, above n 67, p 82.

- concerns that political figures and political policies have unduly impacted upon legislative directions to suit their own interests; and
- a highly concentrated ownership of the media sector, in the form of a duopoly of television broadcasting, whereby television is the primary source through which news and information is accessed.

In analysing the extent to which competing policy interests have resonated in law, Italy has been selected for comparison with Australia as there is evidence that media ownership regulation is not only influenced by the abovementioned technological and economic trends but, rather, is heavily influenced by 'domestic Italian politics'.⁹⁵

The rationale behind the introduction of the Gasparri Law was that it would facilitate the opening up of the market for digital technology, while also promoting pluralism by increasing the number of network channels. This argument resonates closely with that put forward in Australia. Although one inherent difficulty in the Italian model is that by merging all forms of communication together, the task of regulating control of media interests becomes increasingly difficult.

Recent ownership structures of the Italian media have illustrated the outcome of blurred boundaries. During Berlusconi's reign, in which the government controlled public interests while also holding corporate interests, the motivations behind media ownership policy were continually questioned. It remained unclear whether decisions were being made to further social and political interests of having a free press or, alternatively, whether decisions to free up the market were made to advance Berlusconi's economic interests in gaining conglomerate control of media interests.

While the Gasparri Law was introduced on the premise of facilitating technological change, in effect the legislation has done little to place restrictions on media ownership, and this could be linked back to political motives as opposed to technological development.

Having examined the recent history and current state of media ownership laws in Italy, it is strikingly clear that political motives have had a much greater impact on the direction of the law than public policy concerns. Berlusconi purportedly attempted to address public policy considerations and yield to the public's interest in pluralism of the press. The introduction of the mild Frattini Law, and its lack of effectiveness in breaking up the Italian media cartel dominated by RAI and Fininvest, is proof that the government introduced legislation that was heavily influenced by political preferences, at the expense of its stated objective of promoting pluralism and democracy.

The SIC structure was fashioned to remove definitional barriers between communication formats, so that technological innovation and digital convergence could be promoted. However, the concept of a merged communication network has created difficulties in regulating ownership of relevant market sectors. This can be contrasted to the model of 'content' regulation that is often promoted within the Australian context. While apparently created to advance technological interests, the SIC structure has effectively allowed the market to become more concentrated. This inconsistency in policy objectives and practical effect raises questions as to

⁹⁵ Hibberd, above n 72, p 51.

whether economic interests played a greater role in instigating the structure of the legislation.

Competition law has done little to prevent ownership structures reflecting the interests of major media corporations. As Hibberd stated, '[t]he Gasparri and Frattini laws have allowed Berlusconi and Mediaset to maintain a dominant hold in the broadcasting sector without reaching the antitrust limit. Pressures to retain the status quo remain strong'.⁹⁶

In Italy, there has been a notable absence of adequate legislation in the area of cross-media ownership. When the legislature has attempted to regulate the media market, such attempts have been largely influenced by the political and economic interests of corporations. Consequently, it is clear that rather than implementing progressive legal policy, Italian legislation has regulated solely to maintain the status quo. In order for the Italian legislature to develop new progressive policies, it will be necessary for the legislature to break the chain of political influence. With a new government in power, the Italian media landscape is now in a position to benefit from the introduction of new policy dimensions.

A comparative analysis of cross-media ownership policies in Australia and Italy

There are several bases on which a comparative study between Australian and Italian cross-media ownership policy and legislation can be carried out. Through analysis of theoretical foundations, and exploration of legislative history and directions in Australia and Italy, this article has established recurring themes which will now be used as a starting point to compare media ownership in Australia and Italy. Relevant grounds for comparative analysis include: legal patterns and history; approaches to deregulation; definitions of 'control' in the media market; and competition law.

Legal patterns and history

The directions of the law in the past, and the extent of political interference in public policy, may shed light on the possibility of patterns continuing or, conversely, changing to reflect a new position:

Australian media policy is marked by pragmatism, which is both its strength and weakness. Laws and policies are formed in response to actual plans and prospects of the major players. Policies can and do change quickly, and they are usually discussed and negotiated in advance with the major players.⁹⁷

The argument is that the Australian legislature is reactive in regulating cross-media ownership. Media moguls such as Rupert Murdoch and the late Kerry Packer are widely believed to have exercised political influence over the directions of media regulation. Australian media policy cannot be defined as solely reactive, as proven by the enactment of the Media Ownership Act, which is one example of media policy being implemented subject to the resistance of major media players.

⁹⁶ Venice Commission: *ibid*, p 54.

⁹⁷ International Institute of Communications, above n 2.

A comparison with Italy highlights a dire situation where political interests have overtly overlapped with legislative policy directions. The process of media legislation in Italy has been referred to as 'photocopy laws', in reference to the fact that the laws have reinforced already existing ownership structures, as opposed to being visionary and overhauling the system to move towards the objective of media pluralism.⁹⁸ The EFJ stated that:

The country's political culture has contributed to a widespread passivity over media matters. Over the past 25 years a powerful commercial television sector has been established, eventually concentrated in the hands of the Berlusconi 'trust'.⁹⁹

Thus, the Italian legislature has not held a leading role in shaping the directions of the Italian media landscape.

In summary, the Italian jurisdiction shows overt examples of legislation being implemented to reinforce and legalise existing ownership structures. While there is evidence to support this stance in Australia, it appears that the Australian legislature has been more effective at intertwining competing interests to introduce proactive policies.

Approaches and rationales underlying deregulation

As previously established, Australian regulations are highly influenced by technological dimensions. By looking forward and implementing legislation that will foster a move towards new communication access structures, the Australian legislature is using the law to direct the structure of the media industry. This pre-emptive approach can be contrasted to the situation in Italy, where 'photocopy'¹⁰⁰ laws have been introduced after the fact to mirror the existing status of media ownership. By simply legislating to authorise existing structures, the Italian legislature is prevented from developing forward-thinking regulations that will adequately balance all competing interests.

In Italy, deregulation has been the result of disorganised and haphazard legal policy. The link between policy and legislative outcome has been summarised by the EFJ, which states:

although the Gasparri Law was born with the intention to create a new, more suitable framework for the regulation of a fast-changing media landscape, it immediately raised fears that it was intended to give more possibilities for Mediaset to expand.¹⁰¹

Analysis of legal history shows that attempts to regulate the media have often been limited to the legalisation of already existing market structures. Consequently, rather than being the result of a planned policy initiative, deregulation in the Italian market has occurred haphazardly, and has not justified its position amidst the scope of political, economic and technological issues.

Doyle and Hibberd argue that 'advanced capitalist societies now have more market-driven media industries as a result of a response to economic and

⁹⁸ OSCE, above n 64, p 22.

⁹⁹ EFJ, above n 67, p 76.

¹⁰⁰ OSCE, above n 64, p 22.

¹⁰¹ EFJ, above n 67, p 25.

technological changes'.¹⁰² Recognising this general trend, the ownership situation in Australia and Italy is not seen as exclusive, but rather the culmination of a broader international move towards the deregulation of the media. Matthew Hibberd places the study of media ownership regulation in Italy in context, stating:

Italy is not unique in experiencing the following trends: move away from mono-media ownership to cross-media ownership, the development of 'old' and 'new' media industries under the control of single multinational corporations.¹⁰³

Following the inception of the Media Ownership Act, the Australian media landscape is undergoing a process of deregulation. It is clear that media entities are restructuring to take advantage of opportunities to expand and realign their economic interests. Also undergoing change, the Italian media market is at a different stage, and can shed light on Australian directions. In Italy, the deregulation of cross-media ownership barriers, and the introduction of the SIC structure, has facilitated the growth and dominance of large media corporations. In Australia, it is unclear whether deregulation will ultimately lead to further conglomeration of the media market. By maintaining divisions between 'traditional' and 'new' forms of media, it is possible that Australia may avoid the fate of the Italian media landscape, which has blurred the barriers and boundaries by creating an 'integrated communications system'.

Italian and Australian policy directions both recognise technological development and the digital revolution as the primary instigators of legislative change. While it is argued that, in practice, technological and economic interests indirectly advance social political interests, the practical outcomes in Italy suggest otherwise.

Departing from the same emphasis on technological development, the situation in Italy can be used as a warning for Australian policy directions. The Italian legislature believed that by expanding the definition of the SIC, corporations would be benefited by being able to align their economic interests with opportunities in the technological sector. In practice, the strategy appears to have been furthered by economic rather than technological interests, as rather than simply repositioning their interests in light of technological development, large corporate entities have extended their reach over the market. To a certain extent, Australian policy directions appear to have been fashioned more cautiously as there are specific provisions based solely on social and political interests.

The role of competition law

The role of competition law has been maintained in both the Australian and Italian media markets. Around the globe, competition law is believed to hold an important role in regulating the media industry.¹⁰⁴ Many nations believe that competition laws are sufficient to form the basis of cross-media ownership

¹⁰² Hibberd, above n 72, p 50.

¹⁰³ Ibid.

¹⁰⁴ See Table 1; K Deirde, 'Media Ownership and pluralism: regulatory trends and challenges in the European Union Member States' (2004) *European Public Real Estate Association (EPRA)*, at <<http://www.epra.org/content/english/press/papers/Media%20ownership%20and>

regulation, and therefore do not introduce specific cross media ownership laws. Those nations that have competition law as well as regulation specific to the media industry recognise that:

Although competition law is an important part of regulation, it is not designed to deliver greater diversity and plurality in the media. Competition rules can address issues of concentration, efficiency and choice, and will tend to encourage dispersed ownership and new entry . . . however, they cannot guarantee any of it.¹⁰⁵

In Australia, the Trade Practices Act has retained its status following the enactment of the Media Ownership Act. The ACCC will continue to assess whether media mergers satisfy competition requirements. The chairman of the ACCC, Graeme Samuel, has reinforced the important role of competition law in facilitating an open media market. He said:

Regardless of any changes made to media ownership laws, s 50 of the Trade Practices Act — which prevents mergers or changes in ownership between two or more entities which result in a substantial lessening of competition — should continue to prevent undue concentration or accumulation of market power in the media, which would result in higher prices or lower quality service for consumers.¹⁰⁶

Competition law has also retained its position under Italian law, despite the regulatory structure undergoing a number of changes. In Italy, competition law represents a fundamental framework in the area of media regulation, as despite the political influence that has directed media specific legislation, competition law has remained relatively stable.

Thus, a comparison of regulatory structures in Italy and Australia reveals that both nations place relevance on the important role of competition laws in regulating the media market. Although there are disparities in the way that media specific regulations are influenced by social political, economic and technological dimensions, both nations recognise that competition laws are insufficient to account for all competing interests.

Defining control and the barriers of the 'media market'

In Italy, legislative structures have moved towards an integrated communications system which broadly defines the scope of legislation. This definition broadens the applicability of cross-media ownership quotas and, accordingly, has allowed for greater concentration of media ownership. In Australia, while the legislature is moving towards recognition of new media, there are still boundaries between different mediums.

In Italy, the SIC structure was introduced based on the rationale that it would facilitate technological development and digital convergence. Consequently, the structure has allowed an already concentrated media market

%20pluralism%20Kevin%20Istanbul%20final.ppt>; and Office of Communications (OFCOM), 'Review of Media Ownership Rules', 2006, at <http://www.ofcom.org.uk/research/media_owners/rulesreview/rules.pdf>, p 49.

105 Department of Culture, Media and Sport, *Consultation on media ownership rules*, 26 November 2001, para 1.10.

106 G Samuel, Speech delivered at the Australian Communications & Media Authority 1st Annual Conference, Australian Competition and Consumer Commission, 2005, at <<http://www.accc.gov.au/content/item.phtml?itemId=713959&nodeId=46345e11cff0892258d2bacf451cbca3&fn=20051110%20ACMA.pdf>>.

to become further concentrated without breaching established limits. Amendments to the Australian media scope under the Media Ownership Act have also incorporated a focus on opening the market to allow technological opportunities to be taken up.

Similar to Australian legislation, the Gasparri Law sets out certain stipulated caps on cross-media ownership holdings. In Italy, these are in the form of market ceilings, although these laws have been deemed incapable of reducing the media concentration in the Italian media market.¹⁰⁷ The shortcomings of this broad, integrated approach to market regulation can be compared to the continued existence of segregation in the Australian legislative model.

The continued division of broadcasting sectors can be seen as an important step in ensuring that media diversity can be kept in check, as there are constructive barriers that facilitate checks and balances in the aim towards pluralism.

While the Italian situation has moved towards recognition of an integrated communications network, the Australian situation has not yet gone this far as there are still caps on certain types of cross-media ownership, as well as in the form of the 5/4 rule, notably distinct from the broad 20% rule which exists under the Gasparri Law.

While the Gasparri Law effectively introduced a form of limitation on cross-media ownership, the form of regulation created under the Act facilitated a different outcome to that under Australian law. Due to limitations imposed by the Australian Constitution and statutory definitions, the application of the Media Ownership Act extends to cover radio, television, print and data-casting services. Conversely, the Gasparri Law has opened up the realm of cross-media entities to include not only dominant forms of media, but also 'film and music production, book publishing, text publishing, on-line services, advertising and marketing, and the public service sector'.¹⁰⁸

By covering such a broad range of media, it is argued that it is difficult to define dominant market players. Amendments to the Media Ownership Act in Australia have attempted to curtail perceived difficulties in determining dominant market players by imposing a system for media owners to register their interests with the ACMA.¹⁰⁹

Other comparative considerations

One key point of difference between these two jurisdictions is the structure of constitutional frameworks. As Australia does not have a formal bill of rights which protects freedom to communicate and media diversity, it is essentially up to the legislature to address these interests. On the other hand, media regulation in Italy is further informed by the jurisprudential and regulatory framework of the European Union.

¹⁰⁷ OSCE, above n 64, p 51.

¹⁰⁸ EFJ, above n 67, p 27.

¹⁰⁹ Section 61AU of the Broadcasting Services (Media Ownership) Act 2006 sets out the requirement for the ACMA to maintain a Register of Controlled Media Groups.

Conclusion

In all societies the questions of who owns and controls the media, and for what purposes, have been political issues.¹¹⁰

Decisions made throughout the legislative process are not always made on a factual basis or according to empirical research. Rather, decisions and outcomes can be the result of ad-hoc processes and influences that are not clearly stipulated. The interaction of the diverse theoretical fields explored above ultimately rests on political decisions. Doyle refers to those with media ownership interests as having:

the political power to re-design media ownership policies to their own ends, they have also been uniquely well placed to sustain a climate of public indifference to any negative consequences arising from these changes. It seems that a continuation of alignments between corporate media and political interests suits all those who are empowered to instigate changes.¹¹¹

Academics and theorists from different schools of thought and policy analysts alike acknowledge the desirability of reforming media ownership. While change is desired, the structure of change remains under scrutiny. With the introduction of the Media Ownership Act, changes in the structure of the media market will draw attention to any alleged shortcomings of the law.

Individuals, corporations and societies with interests in media regulation have framed their views within certain limitations and scopes. Defining the media landscape as a field that is heavily influenced by technological developments incorporating the 'new media' as well as 'the digital age', a deregulated mode of legislative amendment has emerged as favourable. In an era where change is rapid, it is important to objectively look at the state of the field and consider changes to media ownership amid a wider field.

Recognising that regulation of the media is influenced by competing dimensions, the complexity of the question of reform becomes increasingly evident. At the same time, the importance of resolving this question fairly and accurately emerges more clearly. It is clear that amendments to cross media ownership regulations will facilitate even greater concentration of media ownership¹¹² and, accordingly, will reduce the scope of media diversity. Therefore, despite new rationales that have been put forward in favour of lessening restrictions on conglomerate ownership, it would be highly desirable for the traditional foundations upon which media ownership laws have been founded to continue to be recognised, and carried forward in the regulation of media ownership interests.

While there are heady arguments for the complete deregulation of cross-media ownership laws to allow competition law to regulate the market, there are many points of contention surrounding this view. Barendt has argued that 'public monopolies may in practice provide the best guarantees of

110 E Herman and R McChesney, 'The power of the media' in Feintuck, above n 69, p 18.

111 Doyle, above n 20, p 177.

112 Refer to table of current media outlets and projected changes to ownership: Gardiner-Garden and Chowns, above n 26, p 66.

plurality in media output'.¹¹³ As media regulation is supported and underpinned by a range of foundations, including the socio-political and the need to uphold democracy, as opposed to solely economic theory, there are ostensibly many shortcomings in using competition law as a basis for regulating media ownership.

Defining cross-media ownership predominantly within the legal realm poses significant limitations in itself. Any radical overhaul or amendment to the law should occur following widespread public debate on the issue. The multiplicity of divergent frameworks and interests in cross-media ownership laws should be considered and carefully balanced.

Analysis of the development and apparent consequences of cross-media ownership in other jurisdictions, including Italy, draws attention to the widespread impact that amendments to this field of law can have. It is clear that regulation of the media must be informed and defined by the interaction of diverse fields of influence.

While the trend towards deregulation in Australia has followed the increasingly international move towards the deregulation of media ownership and foreign ownership restrictions internationally, it is questionable whether this is the best means of balancing competing interests.

It is indisputable that the shift towards digital means of accessing media and information, as well as the technological revolution, has created the need for a regulatory framework which allows traditional forms of media to compete and enter this new realm. At the same time, the way in which media reform has occurred arguably does not go far enough in protecting the public interest and notion of pluralism.

While public policy considerations are often cited as reasons for limiting regulation (in order to encourage a freeing up of the market and the opportunity for greater diversity), this is often not the case in practice. The highly concentrated ownership of the Italian media scope is proof that relaxed cross-media ownership regulation ultimately leads to greater concentration as opposed to greater diversity.

A comparative study of Italy and Australia's regulatory practices has shown that while both nations have aspired to balance all three objectives, neither country has succeeded in accomplishing best practice. Italy has ostensibly suffered worse consequences than Australia. However, both nations have a long way to go.

113 E Barendt, 'Competition law and the public interest in media regulation' in Feintuck, above n 69, p 87.