Foreign ownership of broadcasting: will the real limitation please stand up?

Leo Gray examines the background to this topical debate and argues that many of the statements made recently in the press are misleading

The limitation on foreign ownership and control of commercial radio (in s90G) and television (in s.92D) has always been one of the few provisions in the Broadcasting Act 1942 that was guaranteed to make us proud to be Australian. Like kangaroos, meat pies and Holdens.

We could lie in our beds at night secure in the knowledge that our airwaves had been protected by the Parliament from the creeping octopus of foreign multi-national mega-capitalism.

That's how it was and always would be, right? Wrong.

In recent times, the press tells us that consideration has been given to increasing the permissible level of foreign ownership from 20 per cent to 40 per cent, and that some naughty foreigners have been exploiting a "loophole" that allowed them to sneakily acquire up to 50 per cent of a licensee, which the Minister for Transport and Communications, Ralph Willis, described in January as "contrary to the intent of the Act".

What has not really been made clear is that the restrictions on foreign ownership and control have never been as strict as they are popularly presented, and this fact has been well-known to the bureaucracy and to governments of both persuasions.

The best way to understand where we are in policy and drafting terms, is to see where we came from. For the sake of simplicity, I will refer mostly to the limitation as it applies to television, although the principles and comments apply equally to radio.

The 1951 resolutions

The history of the matter starts with the resolutions of each House of Parliament in 1951 that:

"it is undesirable that any person not an Australian should have any substantial measure of ownership or control over any Australian commercial broadcasting station, whether such ownership or control be exercisable directly or indirectly." [emphasis added].

This resolution related to the 1951 acquisition by the UK-owned MPA Productions Pty. Limited of Broadcasting Associates Pty. Limited, a company which was a substantial shareholder in several companies holding licences for commercial radio stations.

Prime Minister Menzies, stated that the motion was:

"... directed to the question of whether people who are not Australians, wherever they may come from, should secure a substantial control over some form of internal propaganda in Australia." [emphasis added]

The companies concerned were willing to give effect to the resolution of the Parliament. After the adjustment in shareholdings, the maximum holding of Broadcasting Associates in any commercial radio station was 44.7%. This was accepted by the government and the Australian Broadcasting Control Board (the Board) as substantial compliance with the resolution of Parliament.

There are three points to note.

First, the concern of the Government was with the potential for foreign control of an organ of propaganda.

Second, the Parliament did not concern itself with any particular percentage of shareholdings or votes but with the concept of a "substantial measure of ownership or control".

Third, a shareholding of less than a majority in any licensee company was accepted by officialdom as "substantial compliance with the resolution of Parliament."

The 1955 television licences report

In its report on the inquiry into the grant of the first four television licences in Sydney and Melbourne, the Board considered what conditions might apply to the licences, and in this context the Board turned its attention to the issue of foreign ownership.

After referring to the 1951 resolutions and extract from the speech of Prime Minister Menzies, set out above, the Board said:

"What was then said of broadcasting [i.e. radio] can be applied with at least equal force to television ... one of its main purposes should be to develop a sound Australian sentiment and the beliefs and standards which will help to make Australia a great country. For this reason, we hold the view that ... the preponderance of the capital invested in commercial television stations should be subscribed by Australians and that the control of those stations should, without any question, be in the hands of Australians ...

"... we consider that it should be a condition of the licence granted for a commercial television station that not less than 80 per cent of the paid-up capital of the licensee company should be held by Australians. If this proposition is adopted, it will be possible for overseas interests to acquire up to 20 per cent of the shares in Australian television companies, but we think that the holding of any individual overseas shareholder should be less than that... we suggest 15 per cent.

"So as to prevent any misunderstanding,... we have proceeded on the basis that in this context:

(a) a company registered in Australia in which the shares are held equally by Australian and overseas shareholders should be deemed to be controlled overseas; and

(b) a company registered in Australia should be deemed to be controlled overseas if it is possible for the company to be controlled indirectly, or in fact, by an overseas company, irrespective of the shareholding."

The following comments can be made.

First, the Board changed the emphasis of the policy from one of preventing foreign control of a means of propaganda, to one aimed at assisting the development a "a sound Australian sentiment and the beliefs and standards which will help to make Australia a great country".

Second, the Board moved away from the notion of control alone, and suggested that television should be an "Australian enterprise", that is, Australian-owned.

Third, despite the strong rhetoric, the Board was remarkably vague about what was meant by an "Australian". The real difficulties lay with corporate shareholders in licensee companies. Assuming that the Board intended that its remarks should apply to any company (not just a licensee), the Board appeared to regard a company as an "overseas shareholder" if it had a 50 per cent foreign shareholding or was "controlled indirectly, or, in fact, by an overseas company, irrespective of the shareholding". In other words, it seems consistent with the Board's expressed views that 100 per cent of a licensee's paid-up capital could be held by Company X, even though Company X was 49 per cent owned by foreign shareholders, provided that the foreign shareholding did not result in Company X being "controlled indirectly, or, in fact, by an overseas company."

The 1956 and 1960 amendments

In 1956, the Board's recommendations were enacted in a new s.53B of the Act, subsequently renumbered as s.92. Section 92 explicitly embraced residency as the test of Australianness for any natural person, but entrenched in legislation the vagueness in the Board's recommendations concerning corporate shareholders.

In 1960, s.92 was amended and renumbered to s92D. The new s.92D(1) was identical to the old s.92(1). There was, however, a significant amendment to the provisions which dealt with the concept of "control". Postmaster-General Davidson explained that it was necessary to specify the percentage of votes which would put a person to be in a position to exercise control of a company, so as to avoid any legal devices aimed at avoiding the ownership and control limits. This was achieved by the new deemed control provision in s.92B, which provided that, for the purposes of Division 3, a person -

"... in a position to exercise control of more than 15 per cent of the total votes that could be cast at a general meeting of a company is deemed to be in a position to exercise control of that company and of any voting rights of that company as a shareholder and of all acts and operations of that company."

The Board remained in doubt about whether "controlled", as used in s.92D, was to be interpreted by reference to the test in s.92B, or general law notions of control of a company.

The 1965 amendments

In 1965, Part IV Division 3 was again repealed and a new Division 3 enacted. It had been possible to circumvent the 1960 amendments by restricting, through the articles of association, a shareholder's voting rights to 15 per cent, irrespective of the size of the shareholding held. The 1965 amendments introduced into the Act, the concept of a "prescribed interest" in a licence, along with associated provisions for tracing and identifying control.

Whatever else the 1965 amendments did, they did not clarify the confusion about the scope of s.92D. In 1967, the Attorney-General's Department advised the Board that it was:

"... doubtful whether regard can be had to the provisions of section 92B in determining for the purposes of section 92D whether a company is controlled by a person, but the relationship between the two sections is obscure and consideration should be given to an amendment of the Act to clarify the matter."

The advice added:

"... if section 92B does not apply in relation to section 92D, the references in the latter section to 'control' would have to be construed as meaning control of more than 50 per cent of the voting rights."

Justice Morling in Re Control Investments and the ABT (1982) also expressed the opinion that, under the pre-1981 law, s.92B did not apply to s.92D.

The 1981 amendments and after

The 1981 amendments changed the test from a "residency" test into a "citizenship" test. Ironically, it was widely believed that this was done to benefit Rupert Murdoch, who remained (at that time) an Australian citizen, although he still called America home. In September 1985, when he took US citizenship, he fell a foul of the very same provision that had enabled him to keep control of Network Ten over the previous years.

"The policy and effect of the legislation...is really very little different to that put in place back in the fifties"

But the 1981 amendments also appeared to try and legitimise the administrative practice which had been adopted for many years. Senator Chris Puplick raised the problem in the Senate debate on the 1981 Bill:

"In those sections [ss. 90G and 92D] 'controlled' could mean the 15 per cent shares and/or votes test currently applied under section 92B or it could mean the 50 percent vote test used under common law. The first interpretation ... would allow non-residents to own directly 84 per cent of the shares in a licensee provided no individual non-resident or company which non-residents were in a position to control, and they are the words of section 92B, held more than 15 per cent of the shares. The second interpretation ... would allow, for example, 100 per cent of the shares in the licensee to be held by a company in which 80 per cent or more of the shares were held by non-residents, provided the non-residents held less than 50 per cent of the voting rights in that company. It has to be acknowledged that the existence of those varying interpretations has led to some confusion. In recent years one would suspect that the Tribunal has inclined to the 50 per cent rule ... The redrafted sections apply the current interpretation and strengthen it. Apart from whatever consequences may flow from the alteration of the word 'resident' to 'citizen' it is not true to suggest that the proposed new sections allow a larger proportion of the shares in the licensee to be held by persons who are not citizens than was allowed for non-residents previously.

The solution adopted by the Government was to apply both the 15 per cent and 50 per cent tests in a way that was more readily understandable, even though it appeared on its face to be a radical departure from what had gone before.

Section 92D(1) applied the 15 per cent tracing test by using the formula of words contained in s.92B of the Act (now renumbered as s.89K), but with the addition of the words "directly or indirectly". Thus the section now prohibited a "foreign person" from holding in a licensee any of those classes of interests outlined in s.92B(1), even if those interests were deemed to be held by virtue of tracing under s.92B through a chain of companies.

Until 1986, no consideration was given to the possibility that s.92D(1) might also include de facto control of a licensee, i.e. control arising not from any shareholding or voting interest, but from control over the appointment of directors or any other means of controlling the affairs of the licensee company. That matter was considered by the Full Federal Court in Re News Corporation Ltd (1987). That case arose from the Tribunal inquiry into the reorganisation of the News Group holdings in Network Ten following Rupert Murdoch's assumption of American citizenship. In the course of the inquiry, the Tribunal referred a number of questions of law to the Federal Court under s.22B of the Act, including whether s.92B exhaustively defined the meaning of "in a position to exercise control, directly or indirectly, of a company" as used in s.92D.

The Court found that s.92B was not exhaustive. The court said:

"I consider that the term "in a position to exercise control of a company" in s.92D(1) should be taken to mean the power to direct or restrain what the company may do on any substantial issue. The situations referred to in s.92B(1) will be included within the expression "control of a company", but do not exclusively define its limits. The application of such a definition may give rise to difficult questions of fact in future cases, but that is to be preferred to an illogical interpretation of s.92B(1) which would stultify the purpose of the Act."

The Court also held that control of the board of directors of a company also fell within the expression "in a position to exercise control of a company", and that a power to veto action by the board was a power to control it. Chief Justice Bowen thought the position was no different where the putative controller appointed one less than half the directors of the company, but had the power to appoint another director at any time and thereby exercise a veto power.

As always, the real problem in s.92D is

not when a natural person is a "foreign person" - that is determined simply by reference to the person's status under the Australian Citizenship Act 1949 (Cth). The problem is still the position of corporation shareholders. After 1981, the status of a corporation is determined by reference to sub-section (4). That sub-section brings in the 50 per cent voting power test which had been applied in fact by the Board and the Tribunal, but also adds to it the classes of interest of the kind set out in s.92B. In this respect, Senator Puplick's reference to strengthening the pre-1981 position is actually correct.

Section 92B (and the present s.89K) applied to s.92D(4), but not to ss.92D(2), (5) or (6): see s.92B(89K)(1). Thus a company that is exactly 50 per cent foreign-owned will be a "foreign person" (and thus limited to an interest in a licensee of no more than 15 per cent of votes or paid up share capital) if one or more of the foreign shareholders holds a shareholding or voting interest exceeding 15 per cent of the relevant interests in that company. With any other spread of shareholdings, such a company is able to hold 100 per cent of the interests in a licensee.

Because the real issue is when a corporate shareholder is deemed to be a foreign person, the 80:20 ratio of Australian to foreign shareholdings in the licensee itself remains (as it has really always been) a complete red herring.

It is easy to see how a fairly unsophisticated and inexpensive structure could be set up - involving a small number of foreign companies and a single Australian citizen - which could exploit this relationship between the 15 per cent and 50 per cent measures, and the fact that the proportional tracing method set out in s.89N also does not apply to either s.89K or s.92D. Without going into detail, it is possible to lift the total direct and indirect foreign equity to a level as close to 100 per cent as the parties feel they can go without creating a situation where a finding of de facto control of the licensee (under the News Corporation test) by one of the foreign shareholders becomes inevitable.

But whatever may be the shortcomings of the 1981 amendments, one thing is clear: the policy and effect of the legislation as it now exists is really very little different to that put in place back in the fifties. If anything, s.92D since 1981 is more restrictive in its reach than the legislation which preceded it (putting aside the residency/citizenship issue). What this means is that the current debate about whether total foreign ownership should be "kept" at 20 per cent or "lifted" to 40 per cent or some higher figure, is at best proceeding in a direction tangential to the real world, and is at worst as misdirected and muddled as most other debates about broadcasting policy.

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The great book debate

The "Great Book Debate" of 1989 revolved around those provisions in the Copyright Act 1968, prohibiting the parallel importation of literary works. Section 37 prohibits the importation of a book by a person, without the permission of the copyright owner, for the purpose of selling, or offering for sale, or distributing for sale that book. Similarly, s.38 prohibits persons, without the permission of the copyright owner of a book, from selling, hiring or offering for sale, that book.

After inquiries by the Copyright Law Reform Committee, the Prices Surveillance Authority and much public debate, the Attorney-General announced that the Copyright Act was to be amended so that copyright owners would lose control over imports for all non-pirated copies of books published after the amendment of the Act.

The A-G's scheme would exempt from this general provision all books published in Australia either first or within 30 days of first publication overseas in any signatory nation to the Berne Copyright Convention.

The scheme also provides that where stocks of a book become exhausted and are not replenished within 90 days, that book may be imported by any person without penalty until such time as the copyright owner can again meet booksellers' orders.

The scheme's requirements to meet demand will not be satisfied by the mere supply of a hardback edition where a paperback edition is available overseas.

Finally, booksellers will be able to import any book the subject of documented order from a customer wanting the book for non-commercial purposes.
Ed

Laurie Muller, president of the Australian Book Publishers Association

The Fairfax Media

In October 1988 the Sydney Morning Herald and The Age ran a prominent series of articles, by Robert Haupt, alleging British publisher monopolisation of the Australian book industry using territorial copyright as the means. These articles were followed up by others including editorials.

The front, feature and editorial page prominence of the initial and subsequent articles on this subject was certainly without precedent in any average of the Australian book industry. The articles and editorials did not strive for any balance on what is a complex issue. The initial articles pre-empted the Copyright Law Review Committee (CLRC) Report and created an extremely hostile climate for its reception The Fairfax media maintained its hostility to the book publishing industry throughout the whole period using the Sydney Morning Herald, Age and Financial Review to maintain their crusade for far reaching copyright reform.

While a significant amount of the coverage was insightful and valuable, the overall effect was so far out of balance and of such a crusading nature that it presented a distorted picture to a confused and angry public and a troubled industry. To most people it was their only source of knowledge on what was a complex multi-faceted debate, the interested public was poorly served by the media generally.

Overall the media involvement in the controversy fell well short of any reasonable standard of balance and created a climate where it was very difficult to maintain any sense of perspective.

CLRC Report

Six years in the making, the CLRC Report was a model of thoroughness and respect for copyright. It introduced the radical concept that territorial copyright be subject to a performance test based upon a notion of reasonable time. The book industry reacted with some caution and set about attempting to find workable industry definitions of reasonable time and associated details.

To the surprise of the book industry, the Australian Booksellers Association (ABA) and the Australian Book Publishers Association (ABPA) managed to agree on an extensive range of crucial definitions. Both Associations advised the A-G of the agreement and generally welcomed the reform of the industry as recommended by the CLRC.