

Reform in NSW: Report of Attorney-General's Task Force on Defamation Law Reform, pp.13-14.

26 See eg *Re: FAI General Insurance Co Limited and RAI Insurance Brokers Limited* (1992) 108 ALR 479.

26 "Carr moves to restrict payouts for defamation", S. Gibbs and J. Pearlman, *The Sydney Morning Herald*, 10 July 2002.

26 See comments of Peter Bartlett as reported in "Mixed reaction to NSW reform package". A. Crossland, *The Australian Financial Review*, 12 July 2002.

26 Defamation Law – Proposals for Reform in NSW: Report of Attorney-General's Task Force on Defamation Law Reform, p.(i)).

26 Defamation Law – Proposals for Reform in NSW: Report of Attorney-General's Task Force on Defamation Law Reform pp.(ii), 6; "Cost penalties: big stick in defamation reform plot", *Gazette of Law & Journalism*, 24 July 2002.

26 Defamation Law – Proposals for Reform in NSW: Report of Attorney-General's Task Force on Defamation Law Reform, p.3.

26 *Ibid.*, p.(ii).

26 *Ibid.*, p.(ii).

26 *Ibid.*, p.(ii)).

26 Tobin & Sexton, *Australian Defamation Law and Practice*, 14.090.

26 Defamation Law – Proposals for Reform in NSW: Report of Attorney-General's Task Force on Defamation Law Reform, pp.(iv)-(v).

26 *Ibid.*, p.(v).

26 *Ibid.*, pp. (v)-(vi).

26 See, in relation to government and political matters *Lange v ABC* (1997) 189 CLR 520 at 574.

26 Defamation Law – Proposals for Reform in NSW: Report of Attorney-General's Task Force on Defamation Law Reform, pp.11-

12.

26 Defamation Law – Proposals for Reform in NSW: Report of Attorney-General's Task Force on Defamation Law Reform pp.8-9; "Change for change's sake will not serve the defamed", R.Coteman, *The Sydney Morning Herald*, 15 July 2002; "Defamation reformer presses on", K. Marshall, *The Australian Financial Review*, 19 July 2002.

26 NSWLRC Discussion Paper 32 (1993) – Defamation, paras 1.10-1.18.

26 See eg "Justice Levine says defamation law is not working: 'The nonsense must end'", *Gazette of Law & Journalism*, 1 September 1999; NSWLRC Report 75 (1995) – Defamation, paras 4.2-4.6,

26 "Push for defamation law unity", K. Marshall, *The Australian Financial Review*, 12 July 2002; "NSW plan 'doesn't go far enough'", K. Marshall and "Attorneys-general face full agenda for two-day meeting", K. Towers, *The Australian Financial Review*, 19 July 2002.

The Media Ownership Bill – A Divided Senate

Raani Costelloe provides an update on the cross media ownership debate.

The Senate Environment, Communications, Information Technology and the Arts legislation committee (**Committee**) released its Report on the *Broadcasting Services Amendment (Media Ownership) Bill 2002 (Bill)* on 19 June 2002. The Bill was introduced into Parliament in late March 2002 and was immediately referred to the Committee. The Committee invited submissions and held public hearings at which it heard from interested parties.

The Bill proposes to amend the *Broadcasting Services Act 1992 (BSA)* by repealing media-specific foreign ownership restrictions and creating an exemption to the cross-media ownership restrictions which would permit a person or company controlling a commercial radio licence, a commercial television licence and/or a newspaper in the same licence area (each a **media operation**) provided that separate editorial processes are maintained between the individual media operations.

The Report is in two parts:

- one part being the view of Government Senators comprising the majority of the Committee which supports the Bill subject to some recommendations; and
- the other part being the dissenting view of the minority Committee members of the Australian Democrats

and Australian Labor Party (ALP) which rejects the Bill and calls for a broader inquiry into the media industry.

The Bill therefore faces a difficult passage through the Senate given that the Government requires the support of members of opposition parties in the Senate to ensure that it is enacted, particularly the ALP and the Australian Democrats. While the ALP has indicated support for the repeal of media-specific foreign ownership restrictions while opposing the cross-media ownership amendments, the Government has said that it will only deal with foreign ownership and cross-media together in one package and not separately.

CURRENT CROSS MEDIA & FOREIGN OWNERSHIP RESTRICTIONS

The BSA presently prevents any one person controlling more than one of the following in any geographic licence area:

- a commercial free-to-air television licence;
- a commercial radio licence; or
- a major newspaper.

The BSA contains specific foreign ownership restrictions with respect to free-to-air and pay television licences, including:

- **free-to-air television:** foreign persons must not be in a position to **control** a free-to-air television licence and the total of foreign interests must not exceed **20%**;
- **pay television:** foreign interests are limited to a **20%** company interest in a pay television licence for an individual and a **35%** company interest in aggregate.

A person is regarded to be in a position to exercise control of a licence, company or newspaper if the person has company interests exceeding **15%**. Company interests can be shareholding, voting, dividend or winding-up interests. The Australian Broadcasting Authority (ABA) may also have regard to other non-company interest factors in determining the issue of control.

In addition to the BSA, there are controls on foreign investment in the media under the *Foreign Acquisitions and Takeovers Act 1975 (Cth) (FATA)*. In summary:

- **all media:** all **direct** (ie, non-portfolio) proposals by foreign interests to invest in the media sector irrespective of size are subject to prior approval under the Government's foreign investment policy on a **national interest** basis. Proposals involving **portfolio** share holdings of **5%** or more must also be approved;

DISSENTING MINORITY VIEW

A minority dissenting report by the ALP and Australian Democrat members of the Committee opposed the rationale of the Bill in respect of cross-media ownership, arguing that the Bill would result in concentration of media ownership amongst three commercial media companies which is against the public interest. They rejected the Government's view that new technology such as the Internet has resulted in greater diversity in media because of the dominance of existing media companies in new platforms.

The dissenting report was highly critical of the exemption certificate regime on the basis that it was ineffective and overly interventionist. It also raised the issue that the regime may be open to legal challenge on the basis of it being unconstitutional in respect of its regulation of newspaper editorial processes.

The Australian Democrats opposed amendments media-specific foreign ownership restrictions that would allow foreign control of media operations. Conversely, the ALP was supportive in principle of the provisions in the Bill which allow foreign control provided that national interest considerations remain.

CONCLUSION

The Government will most likely proceed with amending the Bill to address the concerns raised in the majority Report and introduce the Bill into Parliament. However, the substantial rejection of the Bill by the minority parties in the Senate is going to make it difficult for the Government to enact the Bill.

The views expressed in this article are those of the author and not necessarily those of the firm or its clients.

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sufficiently specific and detailed to meet the objective of editorial separation for the relevant set of media operations.

The observance of the objectives is a condition of the entity's relevant commercial television or radio broadcasting licence. The ABA's enforcement powers include notification of a licensee to rectify a breach and the suspension or cancellation of a licence.

Regional news

The Bill also provides for new licence conditions on regional commercial television and radio broadcasting licensees which are subject to an exemption certificate to **maintain existing or minimum levels of local news and information.**

SENATE REPORT - MAJORITY VIEW

The Report supported the rationale of the Bill and concluded that the Bill should be enacted subject to the following four recommendations, of which three relate to **regional media issues** which is a highly sensitive area within the Coalition of Liberal and National Parties comprising the Government:

- where a media company has a cross-media exemption, it be required to **disclose its relevant cross-media holding** when it reports on issues or matters relating to that holding (for example, when there is a cross-promotion);
- the Government consider extending its requirement for the provision of local news and information by regional media companies the subject of a cross-media exemption certificate to **all regional media companies** irrespective of cross-media interests provided that there is sufficient flexibility so as not to undermine the financial viability of regional broadcasters;
- in regional markets, cross-media exemptions should only be allowed in relation to proposals that could result in a media company having cross-ownership in **only two** of the three generic categories of newspapers, radio and television. This effectively maintains a cross-media restriction on a company controlling all three media operations in one licence area;
- the Government investigate the feasibility of providing appropriate **incentives** for regional media to provide local content, such as licence rebates.

- **newspapers:** the maximum permitted aggregate foreign (non-portfolio) interests in **national and metropolitan** newspapers is **30%**, with a **25%** limit on any single foreign shareholder. The aggregate non-portfolio limit for **provincial and suburban** newspapers is **50%**.

ABOLITION OF MEDIA SPECIFIC FOREIGN OWNERSHIP RESTRICTIONS

The Bill proposes to **repeal the media-specific foreign ownership restrictions** in the BSA with the effect that all foreign ownership investment in media will be only subject to the general foreign ownership laws under FATA which take account of national interest concerns. The Government's rationale is that the current restrictions impede investment in Australia and that the repeal of the restrictions would result in a more competitive media sector.

Cross-media ownership exemption certificates

The Bill does not propose to repeal the cross-media ownership restrictions. Instead, it creates a regime whereby an entity seeking to take control of a set of media operations (in circumstances where control would breach the BSA) may apply to the ABA for an **exemption certificate**. The holder of an exemption certificate will not be in breach of the cross-media rules provided that the conditions of the certificate are met.

The application must identify the set of operations currently controlled and proposed to be controlled, and include proposed organisational charts and editorial policies that show how each media operation will achieve **separate:**

- editorial policies;
- editorial decision-making; and
- editorial news management, news compilation processes, and news gathering and interpretation capabilities.

Provided that separation is maintained in these areas, the relevant media operations may share resources and co-operate.

The rationale behind the exemption certificate regime is that it **protects** diversity of news sources and opinions while allowing for common control of media operations.

The ABA must issue an exemption certificate if it is satisfied that the conditions included in the application are