In the last few months the face of media ownership in Australia has changed dramatically. The Labor government's announcement that it was intending to change the TV ownership limits started some unprecedented selling of TV stations, at unprecedented prices.

The current broadcasting laws limit any company to only owning two TV stations. Over the last ten years the rules have been criticised as inequitable, since they equate stations in Mt. Isa or Kalgoorlie with stations in Sydney or Melbourne.

Since 1982, various Tribunal and Department of Communications reports have recommended changes to the ownership limits, so that they reflect the discrepancies in industry power between the owners of stations in the largest cities, and the owners of stations in smaller country areas.

The options for change which have been proposed in the past, however, always suggested lifting the ownership limits in such a way that new limits allowed the smaller owners to increase their holdings. It was proposed by the Minister for Communications, Michael Duffy, that smaller TV owners should be allowed to expand up to the market level of the largest owners. The largest then were Packer and Murdoch who reached 43 percent of the national TV audience through their stations in Sydney and Melbourne. By owning more than two stations, in smaller markets, the smaller owners could work towards an equivalent total reach of 43 percent.
Duffy's proposal for a new ownership limit based on a ceiling of a 43 percent audience reach was clearly a policy which was designed to allow smaller TV owners to grow in size and strength in the TV industry to equal the size of Packer's and Murdoch's holdings.

Duffy's 43 percent proposal, however, and presumably the policy considerations underlying it, was swept aside in the surprising Cabinet decision to introduce a new, far higher ownership limit of a 75 percent audience reach. Under this proposal, any one owner, formerly limited to two stations, could hold TV stations in every capital city, plus some more in the country. The final Cabinet decision appears to be based on a policy of "let the biggest get bigger", with no other analysis or strategy underlying it.

The government justified this deregulatory step on total ownership limits by also proposing the introduction of cross media rules — prohibiting any one company from owning a TV station and a newspaper in the same area. The cross media rules, however, won't force owners to sell off existing holdings. So Fairfax, for example, owning both ATN-7 and the Herald in Sydney, would be allowed to keep both media going and would not be required to divest. Companies with such cross media holdings can retain them until they choose to sell.

The announcement of these proposed new rules began a summer spree of buying and selling in the media industry. The fact that companies owning two TV stations could own more meant that the competition to expand was fierce, and the bidding would be high. The chance to buy an Australia-wide network of stations may not occur again for years.

In an early and massive billion dollar deal, the Bond corporation, which owned TV stations in Perth and Brisbane, purchased Packer's stations in Sydney and Melbourne to give it the first Australia-wide network. Bond is counting on the proposed changes getting through the parliament, despite murmurings of disquiet from the Democrats, and even the odd Liberal.

At the same time, and probably partly in response to the new ownership rule announcement, Murdoch made his bid for the Herald and Weekly Times (HWT) — the largest of Australia's media owners. He fought off or bought off counter-bids, first from Holmes a'Court and later from Fairfax, and now appears to have control of the media giant — albeit a giant now reduced in size after some hasty asset selling.

Murdoch's takeover of HWT ran into considerable legal difficulties. Although there is no law stopping foreigners from owning our newspapers, the broadcasting laws prohibit foreigners from owning or controlling any Australian radio and TV stations. Murdoch was forced by similar US laws to become an American citizen when he purchased TV stations there in 1985.

The Broadcasting Tribunal had for some time been looking at whether Murdoch was in breach of the foreign ownership laws in relation to the Channel 10 stations in Sydney and Melbourne, with Murdoch relying on some fancy corporate restructuring which tried to distance him from control of the broadcasting companies, while still allowing him to reap the profits. The Tribunal's extensive and long running inquiry into the Channel 10s was on hold when the HWT takeover began, waiting for a Federal Court decision on the legal question of whether Murdoch was in "control" of the stations or not.

The Federal Court happened to deliver its decision relating to Murdoch's control of the Channel 10 stations, and the effect of the corporate restructuring, in the midst of his attempt to take over the Herald and Weekly Times. The Federal Court took a strong line that the purpose of the Act was clearly to avoid foreign control, and that corporate restructuring should not avoid it. They ruled that the way Murdoch had restructured his companies was not necessarily an effective way of removing him from control of the TV licences.

The Federal Court's decision put the ball back in the Tribunal's court, to then examine whether Murdoch in fact remained in control of the stations, thereby breaching the foreign ownership law.

As well as raising legal problems for Murdoch's ability to keep the Channel 10 stations he had formerly owned, the Federal Court decision raised some more urgent problems for his Herald and Weekly Times takeover. Since HWT owned both TV and radio stations, the steadily increasing News Ltd. shareholding in the company again raised the prospect that a foreigner was "controlling" broadcasting stations.

The final Cabinet decision appears to be based on a policy of 'Let the biggest get bigger', with no other analysis or strategy behind it.

The Tribunal reacted to this new potential breach of the foreign ownership and control prohibitions by calling another inquiry. The timing of the inquiry was critical, since Murdoch's News Ltd. was daily buying more parcels of shares in HWT. The Australian Journalists Association (AJA), Actors Equity, and Free the Media argued strongly that the Tribunal should step in immediately and make orders to stop Murdoch from buying any more shares, effectively preventing him from proceeding with the takeover until the foreign control issue was resolved. The Tribunal adopted a far less interventionist stance, refusing to stop the Murdoch group purchasing HWT shares. The Tribunal only disallowed the registration of any shares he had purchased. During an adjournment of a few days within the inquiry, then, Murdoch's takeover of HWT was sewn up as he reached a shareholding level of well over fifty percent.

When the Tribunal's inquiry resumed in early February, it was clear that Murdoch already had a majority of shares, bought but not registered, and that Murdoch appeared to be in clear breach of the Act, as a foreigner then controlling the HWT stations. While News Ltd. doggedly argued to the Tribunal that Murdoch was no longer on their board, and had no authority to bind the company, the front page stories each day outlining Rupert's new deals with
various rivals undermined the credibility of claims that he was not personally controlling the takeover.

At this point, the Tribunal could have taken strong action. It had the power to examine the evidence of Murdoch's personal involvement in the takeover, and to order that the unregistered shares be divested in order to "cure" the breach of the law which appeared to have occurred. Such an order would have stopped Murdoch's takeover attempt dead in its tracks, and perhaps encouraged more serious analysis of the then rival Fairfax bid.

The Tribunal, however, chose not to flex its muscles and step into the takeover battle in such a spectacular way. It chose instead to adopt the approach that it was the responsibility of the HWT board to ensure that the laws prohibiting foreign ownership of its broadcasting stations were not being breached as a result of the takeover. The HWT board asked the Tribunal for an adjournment of the inquiry so that it could meet and attempt to resolve the legal difficulties itself. Clearly, the HWT board supported Murdoch's bid for the company and would have been keen to avoid having the Tribunal take any steps to block the takeover.

The Tribunal gave the adjournment, and the HWT board, faced with the need for drastic action to resolve the breach of the law, then called its extraordinary auction sale of all its broadcasting stations. By selling the stations it could remove the problem of foreign control, and ensure that Murdoch's takeover of the remaining print components of the company could proceed. Companies opposing Murdoch picked up some of the jewels from the crown —

and withdrew their opposition to the takeover. It was alleged in the daily press that Murdoch helped hand out the goods. Fairfax got HSV-7 in Melbourne, West Australian entrepreneur Kerry Stokes picked up ADS-7 Adelaide, and a number of radio stations and smaller press titles also changed hands.

The Tribunal, however, chose not to flex its muscles ....

The auction itself raised questions, however, as to whether the prince of print had himself been handing out the jewels, before he was allowed to join the HWT board.

The Tribunal, unfortunately, was not interested in pursuing the allegations of Murdoch's involvement in the assets sale, although any such involvement could have been further evidence of a breach of the laws prohibiting foreign control.

The Tribunal instead decided not to intervene, and to accept the auctioneering approach of the HWT board as a lawful way to overcome the breaches of the law. O'Connor later, in evidence to the Senate Committee on TV Equalisation, referred to their approach as one of "licensee responsibility", whereby the Tribunal threw back onto the licensees themselves the responsibility for ensuring that the broadcasting laws are not breached. In this case, however, it could be argued that the breach existed for some weeks before the licensee took steps to resolve it, and that the steps taken were not "resolved" but simply exacerbated the breach.

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The “resolution” in fact gave rise to further possible breaches, because the HWT TV stations were sold to companies which already owned two stations, Fairfax and Stokes, putting them both over the two station limit. Like Bond, both companies will try to wait out their breach of the two station rule until the new rules allowing ownership of three stations are introduced. The Tribunal will be examining the various transactions one by one in inquiries over the next few months. The new legislation may well be in place by then. Even if the new laws are not passed by then, the companies with more than two stations would be able to take advantage of the “period of grace” the current Act allows them for divesting excess holdings.

Murdoch’s sale of the Sydney and Melbourne Channel 10 stations to Northern Star, which closely followed the HWT sales, backed by Westfields, again accentuates the concentration of ownership. Moreover, the media changes may not be over yet. Companies moving now to take advantage of the proposed seventy-five percent ownership limit will undoubtedly be wanting to buy as many stations as they can, as quickly as possible.

The break-up of the Herald and Weekly Times, and the other changes in media ownership over the past few months, have been spectacular. The corporate manoeuvrings attracting vast media coverage as news stories in themselves. Less coverage has been given to the long-term policy implications of the changes, the prospects for a vigorous and critical media under the proposed new rules, or the policy arguments against further concentrating our media ownership.
The last barrier to the Murdoch takeover was removed on 3 March when the Trade Practices Commission announced that it was satisfied that the News Ltd. takeover of HWT had not increased the concentration of ownership of the print media in Australia.

The commission's decision must be seen as a blow to those arguing for a greater diversity of ownership of our press. The Trade Practices Act prohibits takeovers which will leave one company in a dominant position in a market as a result of their acquisition of a second company. Although the takeover sees News Ltd. increasing its press holdings substantially from 28 percent of the circulation capital city dailies to 58 percent, the commission argued that HWT had been a prominent press publisher before the takeover, and that News Ltd. had not been allowed simply to aggregate its own holdings with that of HWT.

Instead of looking at the total percentage of influential capital city circulation in the control of the one proprietor, the commission focussed on the divestitures made by the Murdoch group.

The commission emphasised, in particular, the divestiture of West Australian Newspapers from the HWT group, and the sale of Murdoch's papers in Adelaide and Brisbane.

They took a market by market approach, analysing the ownership changes state by state, and ignoring the total picture of an unprecedented dominance in the national market.

While the Hawke government has shown its willingness to deliver the goods to friendly media owners ... Senate may yet have its day and decide to block the new rules.

Moreover, while the commission stressed the emergence of new competitors to News Ltd., the strongest of the competitors, Fairfax, has only 24 percent of the total circulation compared to Murdoch's 58 percent; other supposed competitors are very small and relatively insignificant press proprietors in national terms.

The Trade Practices Commission's blind eye to the increase in press control resulting from the takeover is the last link in a chain of decisions by government and statutory bodies which have facilitated the takeover.

The options from here are limited. Both the Australian Consumers Association and the Australian Journalists Association took legal advice on whether the takeover contravened the Trade Practices Act, and received a QC's advice that a breach had occurred. The groups applied for — and received — legal aid from the Legal Aid Commission of NSW to challenge the legality of the takeover. Although willing to take the risk of having to pay costs of some tens of thousands of dollars, the two groups were forced to drop the challenge when informed that the costs of the legal teams which would be ranged against them (and which they might have to pay if they lost) could be as high as $100,000. The legal process thus remains beyond the reach of even some of the larger union and consumer groups. While the controls and mechanisms of the law appear to have worked only in the interests of the major media owners, the average newspaper reader may have cause to wonder whether the processes of legal protection are worth the paper they're written on.

At the time of going to press, the Senate Committee on TV Equalisation is still hearing evidence covering many of the issues raised by the changes. The committee may well deliver a split report, possibly even with some strong opposition to the new ownership proposals. While the Hawke government has shown its willingness to deliver the goods to friendly media owners, and regulatory bodies like the Trade Practices Commission, the Foreign Investment Review Board and the Tribunal have not taken effective action, parliament, or more specificaly, the Senate, may yet have its day and decide to block the new rules. Perhaps we'll then have some enjoyment watching the new media owners reshuffle again, leaving them somewhat more wary in future about their confidence in the government's support.

*An earlier version of this article was published in Communications Update, the newsletter of the Media and Communications Council.

KATE HARRISON works at the Public Interest Advocacy Centre in Sydney.