Chapter 2

Issues

2.1 This chapter covers issues raised in relation to the bill. These include ensuring greater clarity and certainty around the scope of such bills by the development of guidelines to assist parliamentary scrutiny, amendments to the *Broadcasting Services Act 1992* and comments by the scrutiny of bills committee in relation to proposed subsection 152BEA(6) of the *Competition and Consumer Act 2010.*

Clarifying the scope of the amendments contained in the bill

2.2 The government has indicated that this repeal process will occur twice a year. Given this, the Clerk of the Senate has suggested that it may be useful for there to be some legislative policy parameters developed to assist parliamentary scrutiny. The Clerk drew the committee's attention to previous guidelines from 1985 for Statute Law (Miscellaneous Provisions) Bills. These guidelines were developed to address concerns regarding the scope of amendments contained in such bills. The Clerk advised on the current status of the guidelines:

> I am not aware that the 1985 guidelines have any continuing application, although they may continue to inform decisions by the Office of Parliamentary Counsel as to suitable material for statute law revision bills, as contemplated by the current terms of the *Legislation Handbook.*[1]

2.3 Nevertheless, the Clerk submitted that the previous guidelines provided 'useful guidance on what the Parliament could expect to be included in such bills'. The Clerk added:

> A statement from the executive government about what it expects such bills to cover and – perhaps more importantly – not cover would be a useful adjunct to parliamentary scrutiny and would assist in optimising the limited resources of both Houses.[2]

2.4 The Clerk indicated that in the future, without a clear understanding of the scope of the bills:

> …the Senate may wish to apply the full range of scrutiny to bills which might otherwise be able to be considered as non-controversial.[3]

Repeal of appropriation acts for parliamentary departments

2.5 The Clerk also pointed out the intention of the bill to repeal spent, exhausted and lapsed annual appropriations Acts or special appropriations Acts and the claim

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1 Clerk of the Senate, *Submission 2*, pp 2-4.

2 Clerk of the Senate, *Submission 2*, p. 4.

3 Clerk of the Senate, *Submission 2*, p. 4.

that the process is consistent with the process used in relation to the *Statute Stocktake (Appropriations) Act 2013*.[4] The Clerk noted:

> That Act, however, repealed a number of Appropriation (Parliamentary Departments) Acts that were neither spent nor exhausted.[5]

2.6 The Clerk noted that the bill has repeated this error. The Department of the Senate was consulted by the Department of Finance about the repeal of the *Appropriation (Parliamentary Departments) Act (No.1) 2010-11*. The Department of the Senate advised that the 2010-11 appropriation had been spent but that there were unspent funds against the *Appropriation (Parliamentary Departments) Act (No.1) 2011-12*. Despite this advice, the repeal of the Act was included in the bill. The Clerk indicated that:

> [T]his is yet another method by which the executive can threaten the independence of the Parliament by cutting off access to appropriated funds that are also the subject of agreement at ministerial level.[6]

2.7 The use of bills such as the one before the committee bypasses established processes for negotiation between the President of the Senate, on behalf of the Appropriations and Staffing Committee, and the Minister for Finance. This process is set out in several resolutions of the Senate and in the Appropriations and Staffing Committee's 55th report.[7]

2.8 The Clerk advised that while an administrative solution has been found:

> [T]he repetition of the same error that occurred in the Statute Stocktake (Appropriations) Act 2013 is disappointing. It indicates that particular vigilance is needed in relation to these apparently innocuous kinds of bills and that this is even more the case where such bills are to be a regular event.[8]

Amendments to the Broadcasting Services Act

2.9 Part 14 of Schedule 2 of the Bill sets out amendments to the *Broadcasting Services Act 1992* (Broadcasting Services Act) which aim to 'streamline notification and account keeping requirements on commercial broadcasting licensees and to repeal spent and redundant provisions'.[9] The committee received two submissions on the amendments in Part 14 of Schedule 2 which, while generally supportive of the

4 EM, pp 1-2. Clerk of the Senate, *Submission 2*, p. 5.

5 Clerk of the Senate, *Submission 2*, p. 5.

6 Clerk of the Senate, *Submission 2*, p. 5.

7 Clerk of the Senate, *Submission 2*, p. 5. See Also Senate Staffing and Appropriations Committee, 55th report, 16 May 2013, pp 3-4.

8 Clerk of the Senate, *Submission 2*, p. 6.

9 EM, p. 42.

amendments in the Bill, proposed changes to further rationalise the operation of the notification requirements in the Broadcasting Services Act.[10]

Reporting on directorships

2.10 Section 62 of the Broadcasting Services Act requires commercial broadcasting licensees, restricted datacasting licensees and newspaper publishers to inform the Australian Communications and Media Authority (ACMA) within three months after the end of the each financial year of:

- the details of all persons who were in a position to exercise control of the licence; and
- the name of each person who was a director of the licensee at the end of that financial year.

2.11 Items 208, 210 and 212 of Schedule 2 amend section 62 to 'narrow the scope of the substantive obligation' by repealing the requirement for notification of the details of persons in a position to exercise control of the licence.[11] The EM explains the effect of the amendment:

> As amended, the control notifications only require the names of the directors of each licensee company or newspaper publishing company as at the end of the financial year.
>
> This amendment reduces the duplication of control change notifications.[12]

2.12 Free TV Australia contended that section 62 of the Broadcasting Services Act should be repealed in its entirety:

> Information on directorships of broadcasting licensees is already reported to [the Australian Securities & Investment Commission (ASIC)]. It is unnecessary duplication for broadcasters to have to report this information annually to a separate government regulator, particularly if there is no change. The ACMA can gain information about directors simply by accessing the ASIC register. This is a clear example of unnecessary red tape for industry.[13]

2.13 News Corp Australia (News Corp) stated that it supported the repeal of subsection 62(3) – which deals specifically with the notification requirements for publishers of newspapers. However, News Corp submitted that the substitute text – which provides for notification of the directors of the licensee – is not required.[14] News Corp argued:

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10 News Corp Australia, *Submission 3*; Free TV Australia, *Submission 4*.

11 EM, p. 42.

12 EM, pp 42-43.

13 *Submission 4*, p. 5.

14 *Submission 3*, pp 1-2.

> [G]iven that the Limitation on directorships within the BSA relates to television and radio, and television and datacasting only, it appears that there is no purpose for the existing requirement to report directorships by publishers (that are companies). Moreover, the substitute text in the Bill would unnecessarily continue a purposeless and redundant obligation, and – if it was pursued – would in fact be counterintuitive to the objectives of regulation repeal.[15]

2.14 In relation to the repeal of section 62, the Department of Communications (the department) has indicated:

> ASIC collects information to assess compliance with very different obligations than the ACMA. Accordingly, we do not consider that the complete repeal of section 62 would be appropriate [at this time].[16]

2.15 However, the department advised:

> The ACMA, in consultation with the Department, has commenced a program of review of statutory reporting obligations in the context of the government's deregulation agenda. This will include consideration of any legislative changes that should be made. The ACMA's review program will of necessity result in further consideration of the need for section 62.[17]

2.16 In relation to the repeal of subsection 62(3) suggested by News Corp, the department agreed that directorship limits in the Broadcasting Services Act do not apply to newspaper publishers. However, the department noted:

> …newspaper company directorships are nevertheless a relevant factor for assessing compliance with the statutory control rules, particularly the cross-media diversity scheme in part 5 of the Broadcasting [Services] Act. For example, the presence of one or more directors, or a number of directors known to be associates, on boards across a number of media companies may provide an early indication of a control relationship. Therefore, at the present time, we do not consider that there is merit in amending section 62 in the manner that has been suggested by News Corp.[18]

Notification of changes in control

2.17 Section 63 of the Broadcasting Services Act sets out the notification requirements for licensees and publishers of newspapers to notify ACMA within five days of becoming aware of either of the following:

- a person who was not in a position to exercise control of the licence, coming into a position to exercise control of the licence; or
- a person who was in a position to control the licence, ceasing to be in that position.

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15 *Submission 3*, p. 2.

16 Correspondence from the Department of Communications, dated 17 April 2014, p. 2.

17 Correspondence from the Department of Communications, dated 17 April 2014, p. 2.

18 Correspondence from the Department of Communications, dated 17 April 2014, p. 2.

2.18 Section 64 of the Broadcasting Services Act deals with the notification requirements for controllers of licences and newspapers to notify ACMA within five days of becoming aware that a person who is not in a position to exercise control of a licence or newspaper comes into a position to exercise the licence or newspaper.

2.19 Items 215 and 216 amend sections 63 and 64 of the Broadcasting Services Act to extend the timeframe within which a licensee, controller or newspaper publisher must provide the required notifications of changes in control from five days to 10 days after that person becomes aware of the change in control.[19]

Notification period of 10 days

2.20 Both Free TV Australia and News Corp argued that the period for notification of changes in control in sections 63 and 64 should be 10 business days.[20] Free TV stated:

> Controller/shareholder arrangements can be very complex and it can often take some time to determine whether there has been a change in control.
>
> [Australian Stock Exchange (ASX)] listed companies do not receive notification of changes of substantial shareholdings for up to 3 days after shares are traded. Once notified (by lodgement on the ASX), it can, in some cases, be difficult to ascertain ownership and control of such shares. ASX listed companies therefore must engage third parties to undertake an analysis of the share holdings and these reports are not compiled or delivered in less than 7 days after making a formal request for such information.
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> Five consecutive days is a clear example of an unreasonable and disproportionately burdensome obligation, particularly given the serious consequences that flow from breaching these notification provisions. While ten consecutive days is an improvement, it is still an unreasonably short timeframe, given the complexity of control arrangements.[21]

2.21 Free TV Australia noted that companies have 28 days to notify ASIC when a director or a secretary is appointed. Therefore, '[e]xtending the timeframe will not impact at all on the effective operation of the Register of Controlled Media Groups'.[22]

2.22 In relation to the notification period, the department has responded:

> Relevant licensees, publishers and incoming controllers will be very likely to have advance notice of transactions with the potential to result in changes of control. This would be the case as it would be expected that relevant transactions would be examined carefully to ensure that there was no potential for breach of the statutory control rules in the Broadcasting [Services] Act. This allows consideration, prior to the relevant transaction, of whether a change in control will occur such that notification to the

19 EM, p. 43.

20 See *Submission 3*, p. 2 and *Submission 4*, pp 5-6.

21 *Submission 4*, pp 5-6.

22 *Submission 4*, p. 6.

> ACMA will be required. Accordingly, there is limited need for an additional period of time to be allowed for such notification to occur.[23]

Duplication of notification requirements

2.23 Free TV Australia argued that section 63 should be repealed and consequential amendments made to section 64 to remove the duplication of requirements for both the controller and the licensee to notify the ACMA about control changes:

> Often a licensee will not know if there has been a control change for some time due to the complexity of the relevant transactions and corporate structures, and technical reports on company structures can take a number of days to receive. The licensee may be reliant on the controller to provide information about their activities.
>
> Hence the person entering the position of control or alternatively, leaving the position of control should be the one to notify the ACMA in both instances, rather than the licensee. This will reduce duplication.[24]

2.24 Conversely, News Corp supported the continued operation of sections 63 and 64:

> We support the comments articulated in the Explanatory Memorandum of the Bill, namely that the control reporting obligations contained in sections 63 are '*considered sufficient for the due administration of the [Broadcasting Services Act]*', and are '*complemented*' by those in section 64.[25]

2.25 The department has indicated:

> …it remains appropriate for both [incoming controller and licensee] to have this obligation, to ensure that all relevant notifications are made and there are no inadvertent omissions, particularly as some licensees have a large number of controllers. In any event, we understand that, as a matter of practice, licensees, publishers and controllers are able to provide notification using a single form where the notification relates to a single change of control. Allowing for such a single notification (covering multiple parties) per transaction reduces the administrative burden on parties subject to section 63 and 64 of the Broadcasting [Services] Act. Accordingly, we do not agree that further amendments are required at this time. Again, this position is able to be reconsidered as part of the general review of statutory reporting obligations.[26]

Provision of audited accounts

2.26 Section 205B of the Broadcasting Services Act requires commercial broadcasters to keep accounts for the purposes of determining their licence fee

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23 Correspondence from the Department of Communications, dated 17 April 2014, p. 3.

24 *Submission 4*, p. 5.

25 *Submission 3*, p. 1.

26 Correspondence from the Department of Communications, dated 17 April 2014, p. 3.

liability. One of these account keeping obligations requires broadcasters to submit audited balance sheets and audited profit and loss accounts to the ACMA.[27]

2.27 Item 223 amends section 205B inserting a new subsection which empowers the ACMA to exempt classes of licensees from the requirement to submit audited balance sheets and audited profit and loss accounts:

> The ACMA may specify the classes that will be granted exemptions for the audit rule under this section by making a legislative instrument. The legislative instrument would be subject to Parliamentary scrutiny and disallowance in accordance with the [*Legislative Instruments Act 2003*].[28]

2.28 Free TV Australia noted that the changes in item 223 would give the ACMA the discretion to exclude certain classes of licensee from the requirement to provide audited accounts. However, Free TV argued that some licences should be excluded from the requirement altogether:

> There are a number of small joint ventures holding broadcasting licences issued under section 38B and 38C of the [Broadcasting Services Act]. These are very small licences and the cost of audited accounts separately for these entities is prohibitive…
>
> While we appreciate the moves to allow the ACMA discretion to exclude certain licensees, Free TV does not support the proposal in its current form, particularly in the absence of any criteria or information about how the ACMA would exercise the discretion.[29]

2.29 Free TV Australia estimated that removal of this requirement is expected to save more than $220, 000 per annum.[30]

2.30 In the alternative, Free TV Australia proposed:

> [A]mend the [Broadcasting Services Act] so that section 38B and 38C licensees are not required to provide audited accounts unless requested to so by the ACMA and only in respect of the most recent financial year.[31]

2.31 The department considered that the changes suggested by Free TV outlined above:

> …would favour particular classes of licensee to the potential exclusion of others who could also claim that they were entitled to an equivalent

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27 EM, pp 43-44.

28 EM, p. 44.

29 *Submission 4*, p. 6. Section 38B of the Broadcasting Services Act deals with allocation of an additional commercial television broadcasting licence for licence areas where there are only two commercial television broadcasting licences in force. If there is more than one existing licensee in a licence area, they may either apply for the additional license as a joint venture company or apply separately. Section 38C of the Broadcasting Services Act deals with the provision of satellite televisions services by commercial television broadcasting licences.

30 *Submission 4*, p. 6.

31 *Submission 4*, p. 6.

> exemption. It is therefore more appropriate to provide the ACMA with the flexibility to respond to evidence and circumstances which may change from time to time.[32]

Comments by the Scrutiny of Bills Committee

2.32 The Senate Standing Committee for the Scrutiny of Bills has drawn attention to part 2, schedule 2, item 3, proposed subsection 152BEA(6) of the *Competition and Consumer Act 2010* (CCA). This section provides that an instrument made by the Australian Competition and Consumer Commission (ACCC) for the purposes of specifying information that must be included in quarterly reports about access agreements is not a legislative instrument. The Explanatory Memorandum (EM) notes that proposed subsection 152BEA(6) represents a substantive exemption from the *Legislative Instruments Act 2003* (LIA). However, the EM also provides a detailed explanation of the reason for the exemption:

> The reason for exempting this type of instrument from the LIA is that the ACCC, as the independent expert regulator responsible for administering and enforcing compliance with Part XIC of the CCA, is best placed to decide what additional information should, from time to time, be included in the quarterly reports…The ACCC has the relevant technical and industry expertise to determine what additional information would assist it in performing its role.
>
> Subjecting these decisions of the ACCC to disallowance would not be consistent with the operation of the ACCC as an independent regulator and would cause some uncertainty for the regulated companies. The proposed exemption from the LIA is consistent with other substantive exemptions in respect of the written statements made by the ACCC under existing paragraphs 152BEA(4), (5), (6) and (7) for the purposes of existing paragraphs 152BEA(1)(d), (2)(d) and (3)(b).[33]

2.33 The Scrutiny of Bills Committee noted the following additional information contained in the EM:

> …that written instruments made by the ACCC under new subsection 152BEA(3) operate for a maximum of five years and that it is anticipated that the instruments will be reviewed more regularly than would be the case under the sunsetting provisions of the LIA. Finally it is noted that the instruments must be published on the ACCC's website.[34]

2.34 The Scrutiny of Bills Committee concluded:

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32 Correspondence from the Department of Communications, dated 17 April 2014, p. 3.

33 EM, p. 10.

34 Senate Standing Committee for the Scrutiny of Bills, Alert Digest, No.4 of 2014, 26 March 2014, p. 19; EM, p. 10.

> In light of this detailed justification, the committee leaves the question of whether the proposed approach is appropriate to the Senate as a whole.[35]

Conclusion

2.35 The committee supports periodic repeal of spent legislation to ensure legislation in the statute books is current. Noting the government's intention for this process to occur on a regular basis, the committee is supportive of the suggestion by the Clerk of the Senate that guidelines to assist parliamentary scrutiny be developed by government.

2.36 The Department of Communications has considered and responded to the issues raised in relation to the Broadcasting Services Act. The committee notes the ongoing consultation process being undertaken by the department which commenced in September 2013 and the review of statutory reporting obligations being undertaken in consultation with the ACMA.

2.37 The committee notes the views of the Senate Standing Committee for the Scrutiny of Bills in relation to part 2, schedule 2, item 3, proposed subsection 152BEA(6) of the *Competition and Consumer Act 2010* and refers the Senate to these comments.

Recommendation 1

2.38 The committee recommends that the Senate pass the bill.

Senator Cory Bernardi

Chair

35 Senate Standing Committee for the Scrutiny of Bills, Alert Digest, No.4 of 2014, 26 March 2014, p. 19.