

Chapter 1

Background

Introduction

1.1 On 30 October 2014, on the recommendation of the Senate Selection of Bills Committee, the Senate referred the provisions of the Broadcasting and Other Legislation Amendment (Deregulation) Bill 2014 (the bill) to the Senate Environment and Communications Legislation Committee (the committee) for inquiry and report by 9 February 2015.

1.2 The reasons for referral were that:

- the removal of auditing requirements for Australian content has the potential to significantly impact the amount of Australian content in the local broadcasting media landscape;
- there are significant concerns over the legislation's changes to captioning requirements; and
- both bills have the potential to significantly impact the viewing experience of Australian television content for local audiences.¹

Conduct of the inquiry

1.3 In accordance with its usual practice, the committee advertised the inquiry on its website and wrote to relevant individuals and inviting submissions by 10 December 2014.

1.4 The committee received 27 submissions, which are listed at Appendix 1. The committee held a public hearing in Sydney on 2 February 2015.

1.5 The submissions and transcript of evidence may be accessed through the committee's website at:

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Broadcasting_Deregulation

1.6 The committee thanks all the organisations and individuals who assisted the committee with the inquiry.

Background

1.7 In the second reading speech to the bill, the Hon Malcolm Turnbull, Minister for Communications, stated that the telecommunications and broadcasting sectors are two of the most heavily regulated parts of the Australian economy. The Minister commented that their regulatory frameworks 'are still fundamentally based in a mid-1990s world of relatively stable technologies and business models'.² The Minister

1 Selection of Bills Committee, *Report No. 14 of 2014*, 30 October 2014, Appendix 3.

2 The Hon Malcolm Turnbull, Minister for Communications, *House of Representatives Proof Hansard*, 22 October 2014, p. 11606.

argued that, as a consequence of technological change, regulation had to be brought up to date.³

1.8 Finally, the Minister stated that there was a need to ensure that:

...as we go through our deregulatory agenda in this portfolio...we strike the right balance between deregulation and ensuring that there is diversity in our media industry, whilst always ensuring that consumer protections are both effective and relevant.⁴

Communications Deregulation Roadmap

1.9 The proposed changes set out in the bill align with the Government's commitment to reducing the regulatory burden for business.⁵ In 6 May 2014, the Government released its *Communications portfolio: Deregulation Roadmap 2014* (Communications Roadmap). The Communications Roadmap identified proposals and areas for reform in telecommunications, radiocommunications, broadcasting and regulatory policy. The Communications Roadmap included the following proposed areas of reform and review in relation to broadcasting:

- digital television regulations;
- captioning requirements;
- Australian and children's television content quotas and sub quotas; and
- broadcasting compliance and reporting obligations of the Australian Communications and Media Authority (ACMA).⁶

Overview of the bill

1.10 The bill amends the *Broadcasting Services Act 1992* (BSA), the *Radiocommunications Act 1992* (Radcomms Act) and the *Australian Communications and Media Authority Act 2005* (the ACMA Act) with the aim of reducing the regulatory burden on the broadcasting industry. The measures incorporated in the bill address both the issues identified in the Communications Deregulation Roadmap and through consultation with industry.⁷

3 The Hon Malcolm Turnbull, Minister for Communications, *House of Representatives Proof Hansard*, 22 October 2014, p. 11607.

4 The Hon Malcolm Turnbull, Minister for Communications, *House of Representatives Proof Hansard*, 22 October 2014, p. 11606.

5 Explanatory Memorandum (EM), Broadcasting and Other Legislation Amendment (Deregulation) Bill 2014, p. 1.

6 Department of Communications, *Communications portfolio: Deregulation Roadmap 2014*, http://www.communications.gov.au/deregulation/communications_portfolio_deregulation_roadmap_2014 (accessed 25 November 2014).

7 EM, p. 1.

Digital switchover and restack provisions

1.11 On 10 December 2013, the switchover from analogue television to digital-only was completed and the restack program commenced. The restack program involves the progressive reorganisation of television services across Australia to ensure that no television services use the digital dividend spectrum. The term 'digital dividend' refers to the spectrum that has been freed up by the switch from analogue to digital television.⁸ The restack program is also to ensure that television services are transmitted in a more spectrally efficient manner. The restack program was scheduled to be completed by 31 December 2014.⁹

1.12 The regulatory framework to facilitate the switchover from analogue to digital-only television broadcasting was contained in Schedule 4 of the BSA. The bill proposes to amend the BSA, Radcomms Act and the ACMA Act to remove or amend the planning and licensing provisions that related to digital switchover and restack (once restack is completed).¹⁰

Australian Communications and Media Authority planning powers

1.13 Part 3 of the BSA sets out a range of Australian Communications and Media Authority planning powers in respect of the broadcasting services bands spectrum.¹¹ This includes planning criteria, consultation requirements and the requirement for the ACMA to develop a number of different types of planning instruments, including frequency allotment plans, licence area plans and television licence area plans.¹²

1.14 The Minister noted that, while these planning provisions were necessary when the ACMA was first established, 'many are now considered onerous, given the other legislative requirements the ACMA is required to adhere to'.¹³ The Schedule 1 of the bill proposes the following amendments to the BSA to:

- repeal the requirement for the ACMA to prepare and maintain frequency allotment plans on the basis that the ACMA has completed the initial planning of services in the broadcasting services bands spectrum and has sufficient information and tools at its disposal to ensure that planning in one licence area will not compromise plans for adjacent licence areas (repeal of sections 24 and 25);¹⁴

8 Department of Communications, *Digital dividend*, http://www.communications.gov.au/radio/radiofrequency_spectrum/digital_dividend (accessed 19 January 2014).

9 EM, p. 2.

10 EM, p. 2.

11 EM, p. 2.

12 EM, p. 2.

13 The Hon Malcolm Turnbull, Minister for Communications, *House of Representatives Proof Hansard*, 22 October 2014, p. 11607.

14 EM, p. 2.

- broaden and extend the scope of the Minister's directions power to provide specific or general directions to the ACMA concerning the preparation or variation of a frequency allotment plan (proposed subsection 26(8));¹⁵
- repeal the requirement for the ACMA to provide for wide public consultation when performing particular functions on the basis that the completion of the ACMA's initial planning of services in the broadcasting services bands spectrum means the requirement is unnecessary (proposed sections 27 and 35);¹⁶ and
- make consequential amendments resulting from the amendments.¹⁷

Captioning

1.15 In his second reading speech, the Minister commented that reflecting stakeholder feedback, the Communications Roadmap identified captioning reporting as an area for reform in 2014.¹⁸ He noted that, the Department of Communications and the ACMA had consulted with industry and key accessibility groups on a range of potential reforms that primarily seek to improve administrative arrangements for free-to-air broadcasters and subscription television licensees while requiring that they continue to meet captioning obligations.¹⁹ The Minister concluded that:

I want to make it quite clear that broadcasting licensees will still be required to meet the same specified level of captioning for television programs to assist viewers with hearing impairment.²⁰

1.16 Captioning is the text version of the audio component of an audio-visual program such as a television show. The provisions relating to captioning are currently set out in Part 9D of the BSA and aim 'to assist viewers with a hearing impairment by requiring Australian free-to-air broadcasters and subscription television licensees to meet specified levels of captioning for television programs'.²¹ Part 9D also requires free-to-air broadcasters and subscription television licensees to meet target, quality, record-keeping and reporting requirements.²²

15 EM, p. 12.

16 EM, pp 13–14.

17 EM, pp 11–13.

18 The Hon Malcolm Turnbull, Minister for Communications, *House of Representatives Proof Hansard*, 22 October 2014, p. 11607.

19 The Hon Malcolm Turnbull, Minister for Communications, *House of Representatives Proof Hansard*, 22 October 2014, p. 11607.

20 The Hon Malcolm Turnbull, Minister for Communications, *House of Representatives Proof Hansard*, 22 October 2014, p. 11607.

21 EM, p. 2.

22 EM, p. 2.

1.17 The bill proposes to amend Part 9D of the BSA to increase flexibility for free-to-air broadcasters and subscription television licensees in complying with captioning obligations by:

- removing annual reporting requirements for free-to-air by reverting to a complaints based compliance framework which reflects the increased consumer transparency afforded by 100 per cent captioning between 6am and midnight on primary channels (repeal of subsections 130ZZC(1) to (4));²³
- allowing for the annual captioning target for subscription television channel providers to be 'averaged' across an associated group of sports channels (proposed subsection 130ZV(3));²⁴
- granting exemptions from captioning obligations for new subscription television channels from one to almost two years, depending on when the new service commences (proposed subsection 130ZV(6));²⁵
- restricting repeat captioning obligations to programs provided by the same channel provider (proposed subsection 130ZZ(2));²⁶
- establishing a more efficient 'two-tiered' record keeping framework (proposed new section 130ZZD); and
- removing the obligation for the ACMA to conduct a review of captioning obligations by 31 December 2015 (repeal of Division 7).

1.18 The proposed amendments will also provide ACMA with greater flexibility when assessing whether free-to-air broadcasters and subscription television licensees are meeting the captioning quality standards by:

- requiring the Captioning Quality Standard²⁷ to differentiate between live and pre-recorded broadcasts (proposed subsection 130ZZA(2A));²⁸ and
- introducing a new exception to captioning quality breaches where the breach is due to engineering or technical failures (proposed subsection 130ZZA(7A)).²⁹

New Eligible Drama Expenditure Scheme auditing requirements

1.19 The New Eligible Drama Expenditure Scheme, set out in Division 2A of the BSA, requires certain subscription television channel providers and licensees to spend

23 EM, p. 44.

24 EM, p. 3.

25 EM, p. 3.

26 EM, p. 3.

27 The Captioning Quality Standard sets rules about the quality of captions for television services requiring them to be readable, accurate and comprehensible.

28 EM, p. 3.

29 EM, p. 3.

at least 10 per cent of their total programming expenditure on new Australia or New Zealand drama productions or co-productions.³⁰ In addition, New Eligible Drama Expenditure Scheme participants are required to report their annual eligible drama expenditure for the financial year by 20 August of the following year. The annual return must be in an ACMA approved form and accompanied by an auditor's certification.³¹

1.20 The bill proposes to remove the scheme's audit requirements by amending section 103B and subsections 103ZA(1) and 103ZB(1) of the BSA. The new provisions which still require subscription television channel providers and licensees to submit annual returns to ACMA. Subdivision 1 of Division 2A of Part 7 of the BSA is also to be repealed to remove the requirement for ACMA to issue compliance certificates to licensees, channel providers and part-channel providers, which state whether eligible drama expenditure requirements have been met, or whether there is a shortfall that needs to be made up the following year.³²

Control and ownership

1.21 The bill proposes amendments to certain provisions within the media ownership and control framework. These amendments aim to address a number of anomalies regarding the operation of the legislation and to reduce reporting requirements. The Minister stated that:

The bill will also correct an anomaly in the way certain licence areas are treated with respect to the media ownership and control rules. This will make sure that the method used to calculate media diversity voices —the requirement variously five or four independent media voices—more accurately reflects the practical reality of commercial radio services available to residents in certain licence areas.

The bill will ensure, for example, that, where a smaller commercial radio licence area is entirely within another larger commercial radio licence area, the commercial radio services licensed to operate in the larger licence area are also counted as media diversity voices in the smaller licence area.³³

Complete overlapping licences areas

1.22 The bill proposes to amend subsection 61AC(1) of the BSA to address an anomaly with regard to the calculation of media diversity voices in commercial radio licence areas. The anomaly arises as a commercial radio service licensed to operate in a licence area that entirely overlaps another licence area is not counted as voice in the smaller, overlapped licence area. The amendments aim to ensure that 'the method used

30 EM, p. 3.

31 EM, p. 3.

32 EM, pp 36–37.

33 The Hon Malcolm Turnbull, Minister for Communications, *House of Representatives Proof Hansard*, 22 October 2014, p. 11608.

to calculate media diversity points more accurately reflects the practical reality of services available to residents in overlapped licence areas'.³⁴

Notification requirements

1.23 The bill proposes to remove the requirement that commercial television broadcasting licensees, commercial radio broadcasting licensees, specified datacasting licensees and companies that publish associated newspapers provide an annual list of their directors to the ACMA (repeal section 62 and amend sections 63, 65A and 65B of the BSA). It was noted that the ACMA can access this information from other sources including the Australian Securities and Investments Commission.³⁵

1.24 The amendments to section 63 will extend the requirement for commercial broadcasting licensees, specified datacasting licensees and publishers of associated newspapers, and persons who obtain control of any such licences or newspapers, to notify the ACMA of changes in control under sections 63 and 64 of the BSA from 10 calendar days to 10 business days from any such change. It was noted that this amendment will reduce the administrative burden on relevant entities by providing a more reasonable notification timeframe, while still allowing the ACMA to maintain accurate and current control registers.³⁶

1.25 The amendments to sections 65A and 65B are consequential to the repeal of section 62.

Licence area population determination

1.26 Section 30 of the BSA provides that the ACMA may determine the population of a licence area, the populations of areas where licence areas overlap, and the total population of Australia. Population determinations inform a range of provisions in the BSA, including certain media ownership and control limits and local content obligations for regional commercial radio.

1.27 The bill proposes to amend sections 43C and 52. The amendments will provide grandfathering relief for commercial broadcasting licensees that, as a result of the making of a new population determination, would be in breach of the relevant statutory control and local content rules if they maintained their current commercial radio operations. This will prevent broadcasting licensees being adversely affected as a result of factors that are entirely beyond their control (i.e. changes in the population of licence areas).³⁷

Requirement to review codes of practice

1.28 The bill proposes the repeal of section 123A and subclause 28 of Schedule 6 of the BSA. Section 123A requires the ACMA to periodically conduct reviews to assess whether a number of provisions of the BSA operate in accordance with

34 EM, p. 4.

35 EM, p. 4.

36 EM, p. 4.

37 EM, p. 5.

prevailing community standards. Those provisions relate to codes of practice developed by industry groups representing commercial and community television licensees, open narrowcasting television services or datacasting licensees regarding community standards and the protection of children from harmful content.³⁸ Clause 29 mirrors section 123A and requires the ACMA to periodically conduct a review of the operation of subclause 28(4) to see whether that subclause is in accordance with prevailing community standards.

1.29 The Minister noted that there has never been a review under section 123A since its enactment in 1992 as there are alternative mechanisms for the ACMA to determine whether those provisions operate in accordance with prevailing community standards. Further, 'both provisions are clearly redundant and should be repealed'.³⁹

Reports of other committees

1.30 On 25 November 2014, the Parliamentary Joint Committee on Human Rights (PJCHR) tabled its *Sixteenth Report of the 44th Parliament* in the Senate, which examined the bill in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The report examined the bill and considered that the proposed changes to captioning requirements may constitute a limitation on the rights of persons with disabilities. The report sought further advice from the Minister for Communications regarding the compatibility of the proposed amendments to the captioning provisions with the rights to equality and non-discrimination.⁴⁰

1.13 The Senate Standing Committee for the Scrutiny of Bills in its *Alert Digest No. 15 of 2014* raised concerns regarding Schedule 4, item 1 which would repeal section 123A of the BSA. As noted above, the section would remove the requirement for ACMA to conduct reviews to assess whether codes developed under subsections 123(3A) and (3C) of the BSA are in accordance with community standards and for these recommendations to be tabled in parliament. Due to the proposed removal of this tabling requirement, the committee requested the advice of the Minister as to why these amendments should not be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny. The committee noted that pending the Minister's reply the provisions may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the committee's terms of reference.⁴¹

1.31 The committee notes the reports of the PJCHR and the Scrutiny of Bills Committee and the matters raised.

38 EM, p. 5.

39 The Hon Malcolm Turnbull, Minister for Communications, *House of Representatives Proof Hansard*, 22 October 2014, p. 11608.

40 Parliamentary Joint Committee on Human Rights, *Sixteenth Report of the 44th Parliament*, November 2014, p. 4.

41 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 15 of 2014*, 19 November 2014, p. 21.