

## Ten Network submission to the Environment and Communications Committee Inquiry into the Broadcasting Legislation Amendment (Media Reform) Bill 2016

27 September 2016

### Introduction

Ten Network (Ten) supports the *Broadcasting Legislation Amendment (Media Reform) Bill 2016* (the Bill) which will repeal the 75 per cent audience reach rule and the '2 out of 3' cross-media ownership rule currently in the *Broadcasting Services Act 1992* (BSA).

Removing these outdated media laws is an important step in dismantling a set of regulations that are making Australian media companies less competitive in a global, converged media market at a time when the foreign technology companies continue to grow and dominate advertising revenue growth at astonishing rates.

By arbitrarily restricting Australian media companies' access to scale, capital and cross-platform growth, the current rules threaten the ongoing viability of Australian diversity and a local voice.

### Update on the media landscape – the growth of big tech/media continues

When the two out of three rule was introduced, before Facebook, smartphones, and tablets existed, the 'princes of print and the queens of screen' operated across three defined, easily regulated, and highly influential platforms: printed newspapers, free-to-air terrestrial television channels, and free-to-air terrestrial radio stations, which were limited in number. Media businesses were vibrant and profitable and owners held a strong grip over the dissemination of news and opinion in Australia.

That is no longer the case. Financially challenged Australian media companies are now competing directly against the foreign internet companies that are exempt from local media regulation, don't pay television licence fees, pay minimal corporate tax despite taking billions in advertising revenue in this market and, in some cases, don't have a single local employee.

These companies have balance sheets that dwarf the combined market capitalisation of the Australian media industry and their advertising revenue growth continues at a staggering rate:

- In the full financial year ending 30 June 2016 **online advertising increased \$1.6 billion to reach \$6.8 billion, which was a 29.7% increase over the previous year**, the fastest growth rate in the past five years.<sup>1</sup>
- According to Morgan Stanley: *"Global tech players are taking all the ad market growth, and then some. In C2016E we estimate global media/ad tech players... will collectively extract A\$4bn-A\$5bn worth of ad revenue – representing 35-40% share of the total pool of ad revenues in Australia (A\$13.9bn). It's a big number and critically, it's growing fast..."*<sup>2</sup>

<sup>1</sup> IAB Australia, *Online advertising spend reaches record \$6.8 billion in 2016 financial year*, 23 August 2016, [www.iabaustralia.com.au](http://www.iabaustralia.com.au)

<sup>2</sup> Morgan Stanley Research, *Australia Media, Internet and Technology*, 27 January 2016, page 1



- *PWC forecasts that **by 2020, internet advertising will clearly dominate the advertising sector, reaching \$10 billion or approximately 50 percent of the market.***<sup>3</sup>

Unfortunately local journalism and local content will not benefit from this growth with an estimated **70-80% of total Australian digital advertising revenue going overwhelmingly to two foreign technology companies, Google and Facebook**<sup>4</sup>, neither of which are contributing in any meaningful way to news or local content production here.

Despite not contributing to the creation of news content, **Facebook has recently been described as the most powerful media company the world has ever seen**<sup>5</sup> due to its increasing domination of internet advertising share and control over the distribution of news and opinion through its platform. Of course Facebook is not covered by Australian media ownership rules.

Since only February this year when Ten last submitted to a Senate Committee review into this Bill, the **market capitalisations of all the big tech companies have grown substantially** while most Australian media companies' market capitalisations remained flat to negative.

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<sup>3</sup>PwC Australian Media and Entertainment Outlook 2016-2020,  
[https://outlook2016.ezimerchant.com/category41\\_1.htm](https://outlook2016.ezimerchant.com/category41_1.htm)

<sup>4</sup> Morgan Stanley Research, Australia Media, Internet and Technology, 27 January 2016, page 10.

<sup>5</sup> Rosoff M, *Why Facebook is so terrifying to media companies*, Business Insider Australia, 30 June 2016,  
<http://www.businessinsider.com.au/facebook-is-a-media-company-not-a-journalism-company-2016-6>



In contrast, for the period January to June 2016 advertising revenue for commercial FTA television networks **declined by 4.3%** compared to the corresponding period in 2015. That equates to a decline of over \$78m.<sup>6</sup>

In this environment, with this wealth of evidence of the growing force of the foreign big tech players, we are yet to see any cogent argument justifying the continued existence of the two out of three rule, or any rational explanation of how it remains relevant or effective in protecting diversity by constraining three offline Australian platforms while ignoring the existence of the Internet and the powerful and influential online players now operating in this market.

*Removal of both the ownership rules and the broadcasting tax is urgently needed to maintain a strong Australian voice and protect diversity*

Even with the May 2016 reduction, commercial free-to-air broadcasters continue to pay **3.375% of gross revenue** to the Government as an additional “broadcast tax” on top of normal corporate taxes and in addition to meeting onerous and increasingly expensive Australian content obligations. **This remains by far the highest free-to-air television licence fee in the world.**

This strange tax was introduced in the 1950s as a “super profits tax” reflecting the fact that free-to-air spectrum granted exclusive access to TV sets across the country which allowed broadcasters to generate healthy profits. Clearly, that spectrum no longer provides any exclusive access to any screen and yet Ten must continue to pay this ‘super-profits tax’ even when making a loss.

Today the extremely high cost of meeting onerous local content obligations is unique to commercial free-to-air networks and justifies the allocation of spectrum that is used to provide a free service to 24 million people.

The cost of Australian content has escalated dramatically in recent years while free-to-air advertising revenues remain flat. This is causing immense pressure on free-to-air broadcasters’ ability to make expensive Australian content and dedicate funds to innovation.

This was recognised in previous evidence to the Committee from Ms Megan Brownlow of PwC:

*“That type of content is very expensive, whether it is creating a big reality TV show or whether it is sports rights. That is a very significant driver. And then there is diversifying your business model. This is a management requirement that also takes money and new types of people. Hiring people who have technological skills can be quite expensive. So there are a number of factors driving costs.”<sup>7</sup>*

Removing the licence fee in addition to removing outdated ownership regulations would allow Ten to invest millions of additional dollars in local content which would, in turn, drive additional investment and jobs in the local production sector.

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<sup>6</sup> Free TV Advertising Revenue - Jan to Jun 2016, see [http://www.freetv.com.au/Media/News-Media\\_Release/Free\\_TV\\_Advertising\\_Revenue\\_Figures\\_Jan\\_to\\_Jun\\_2016.pdf](http://www.freetv.com.au/Media/News-Media_Release/Free_TV_Advertising_Revenue_Figures_Jan_to_Jun_2016.pdf)

<sup>7</sup> Ms Megan Brownlow, PricewaterhouseCoopers, *Committee Hansard*, 29 April 2016, p. 17.



*“...it is possible that there may be a financial benefit for some players as a result of this legislative change. If we judge it on the history of, in particular, free-to-air television, what do they do when they get a financial windfall? They spend it on content”.<sup>8</sup>*

### Commercial free-to-air broadcasters underpin Australian content production

Commercial free-to-air television is by far the largest contributor to domestic content production in Australia and underpins the entire production sector. It is vitally important to local production therefore that regulation does not impede the broadcasters’ ability to transform their businesses in response to the structural challenges brought about by digital disruption.

Commercial free-to-air television broadcasters:

- Spend over **\$1.5 billion** annually on domestic programming;
- Fund **six in every 10** dollars of local production;
- Employ over **15,000** people directly and indirectly around the country;
- Provide a vital **training ground** for people in the industry both on and off-screen. Almost every one of the Australians succeeding in Hollywood and other markets today started out on free-to-air TV; and
- Provide year round employment for hundreds of production industry professionals both on and off-screen on long-running popular serial dramas such as *Neighbours*.

Ten alone broadcast:

- Over **161 hours of first release Australian drama** in 2015;
- Over **8,000 hours of Australian content** (6am-midnight) in 2015; and
- Over **54 hours of locally produced news and current affairs programming each week** which equates to approximately 2800 hours of local news and current affairs programming each year.

Addressing the exorbitant television licence fees in addition to updating media laws is essential if Australia is to continue to have a vibrant, diverse and competitive Australian media industry going forward. Given the pace of change in the media landscape, these reforms are critical and urgent if we want to retain local voices in our media and a local content production industry.

### Diversity and the ‘offline’ media ownership and control rules

In Ten’s view, the reach rule and all other current media ownership rules including: the ‘voices’ test and the limits on owning more than one television licence in a market or two radio licences in a market should be removed. All media mergers and acquisitions should instead be determined under existing competition law which is well equipped to take account of rapidly changing market dynamics.

Diversity of major sources of information and perspectives is an enduring concept that is vital to our democracy. However, access to a diverse range of information, sport, entertainment and news and

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<sup>8</sup> Ms Megan Brownlow, PricewaterhouseCoopers, *Committee Hansard*, 29 April 2016, p. 17



opinion no longer depends on a diversity of terrestrial television, radio and print newspaper operations within a given geographic area. On various internet-enabled devices, consumers can personalise their news, information and entertainment sources from a vast array of local, national and global sources, including primary source user-generated content.

Existing media ownership and control rules in the BSA are highly technology specific and applied asymmetrically which has rendered them outdated and ineffective in assessing the true impacts of media mergers or acquisitions on diversity. The Australian Communications and Media Authority (ACMA) has noted that current media ownership and control mechanisms are ‘broken’ and do not reflect market realities.<sup>9</sup> In 2012 the Convergence Review recognised that the current rules were limited in their application because they do not apply to a number of influential sources of news and opinion, including online news services.

Throughout the lengthy debate around the current proposed changes to the media ownership rules, no one has been able to articulate how the two out of three rule is still protecting diversity rather than threatening it.

#### The two out of three rule is outdated and has been overtaken by technology

The two out of three rule was passed when TV, radio and printed newspapers were the primary media Australians accessed and media companies largely operated through a single distribution platform.

Even in 2006 when the two out of three rule was introduced the world was a different place: YouTube had only just launched in 2005, Facebook and Twitter launched to the public in 2006. Smartphones and tablets did not exist (the iPhone was released in 2008, iPad was launched in 2010). There were only 3 commercial free-to-air channels, the first commercial multichannels (ONE, 7TWO and Go!) were not launched until 2009. There was no online catch-up television with ABC iView only launching in 2008.

Now all media companies include digital and media brands must be made available across all platforms and across numerous devices in order to compete.

The media ownership rules in the BSA only apply to associated **printed** newspapers, and **free-to-air television and radio services delivered over Broadcasting Services Band spectrum by licensed operators**. These laws do not apply to any online services.

While Ten’s three terrestrial channels (TEN, ELEVEN, ONE) are covered, free linear programmed channels offered using the designated Broadcasting Services Bands by telecommunications companies like Telstra or Optus are not covered. Similarly, the existing rules do not contemplate linear channels delivered by IPTV or streamed over the Internet.

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<sup>9</sup> The Australian Communications and Media Authority, “Broken concepts—A 2013 Update on the Australian communications legislative landscape”, June 2013. Available at <http://acma.gov.au/theACMA/About/The-ACMA-story/Connected-regulation/broken-concepts>



An 'associated' newspaper that prints an edition at least four times per week such as *The Age* is captured but theage.com.au is not covered and neither is *The Age* iPhone/iPad application. Therefore, when Fairfax decides to cease distribution of printed versions of *The Age* or *The Sydney Morning Herald* then it will no longer be covered by the existing ownership rules in those markets. Of course, national newspapers like *The Australian* and *The Australian Financial Review* are not covered because they are not 'associated' to a particular geographical market. Likewise the Sunday editions of the major metropolitan daily newspapers such as *The Sun-Herald* or *The Sunday Telegraph* are not covered by the rules.

Commercial free-to-air FM/AM radio stations transmitted terrestrially over spectrum are covered irrespective of the format of the station. Radio services distributed online such as Spotify or Pandora are not covered.

The rules do not apply to other influential services such as:

- Online news sites such as smh.com.au, The Guardian, The Huffington Post, or BuzzFeed
- Online free-to-air TV catch-up such as tenplay, 7Plus and 9Now
- Online TV channels or video platforms such as YouTube
- Online radio and streaming services such as Pandora, Spotify or digital radio stations
- Subscription video on demand (SVOD) services such as Netflix, Stan or Presto
- Online social media platforms such as Facebook, Twitter, Instagram, or Snapchat
- Other online content providers such as Apple or Amazon
- National broadcasters: ABC, SBS
- Pay TV providers (cable/satellite/IPTV) such as Foxtel and Fetch TV
- Telecommunications companies providing broadcasting-like or news content: TelstraTV, OptusTV, Vodafone
- National printed newspapers: *The Australian*, *The Australian Financial Review* and Sunday editions
- Google

#### [The two out of three rule is threatening diversity and hurting Australian media companies](#)

Australian media companies must be allowed to configure themselves in ways that can better support their viability and allow them to access scale and capital. If they can do this then they are in a stronger position to compete with the online giants and continue to invest in local content and journalism. The two out of three rule prevents this. Without numerous profitable local media voices, diversity in local news and information is seriously threatened.

By arbitrarily preventing Australian media companies from accessing scale and becoming truly cross-platform, the rules are now actively hurting our efforts to compete for viewers and for advertising revenue with overseas-based technology companies that are exempt from media regulation, don't pay television licence fees, pay minimal corporate tax despite taking billions in advertising revenue in this market, and in some cases don't have any local employees. ACCC Chairman Rod Sims has recognised this:



*"It may be that to compete in the world of media local players need to leverage their content across all media platforms, and if we don't allow them we may be holding them back in competition against international companies."*<sup>10</sup>

Evidence to the recent Senate committee inquiry into the Bill from Dr Derek Wilding of the University of Technology Sydney also recognised the need to retain viable local players and supported the repeal of the two out of three rule:

*"...if it helps support the transition of print media companies into converged news gathering organisations in a landscape where we have at least three strong, local commercial players".*<sup>11</sup>

Dr Wilding also noted that these "enhanced" commercial players would of course be supplemented by the national broadcasters, some community media, and international media<sup>12</sup>.

Ms Megan Brownlow also gave evidence to the Committee on the possible impacts on local media companies if the laws were not changed:

*"I think some more drastic action would need to be taken by the existing players if there was not the opportunity to make commercial decisions that perhaps gave them economies of scale or gave them the opportunity to compete against other unregulated competitors"*<sup>13</sup>

According to CNBC the top five largest companies by market capitalisation right now are the tech giants Apple, Google, Microsoft, Amazon and Facebook.<sup>14</sup> These powerful companies have balance sheets and market capitalisations that dwarf the combined market capitalisation of the Australian media industry and these are the companies that Ten is now competing directly against for viewers and advertising revenues. If local media companies remain hamstrung by these archaic rules, cost cutting and job losses will continue across the sector.

### Protecting diversity

The Internet and an explosion in online content services and communications devices such as tablets and smartphones mean that Australians can access more content, including news and information, than ever before in multiple ways. However, without strong and viable Australian media companies, diversity in this market will be threatened by increasing competition from powerful overseas-based media and technology companies that have no commercial incentives to make local content or provide local or regional news services.

### *The Australian Competition and Consumer Commission (ACCC)*

Media mergers and acquisitions that would likely substantially lessen competition in a relevant market are prohibited unless authorised or granted formal clearance by the ACCC (Section 50 of

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<sup>10</sup> Rod Sims, ACCC Chairman. Diversity Key in Mergers Clearance – Michael Roddan, *The Australian*, 25 November 2015

<sup>11</sup> Dr Derek Wilding, University of Technology, *Committee Hansard*, 29 April 2016, p. 8

<sup>12</sup> *ibid*

<sup>13</sup> Ms Megan Brownlow, PricewaterhouseCoopers, *Committee Hansard*, 29 April 2016, p. 16.

<sup>14</sup> <http://www.cnbc.com/2016/09/23/amazon-climbs-into-list-of-top-five-largest-us-stocks-by-market-cap.html>





the Competition and Consumer law). In carrying out this oversight role the ACCC is not limited to considering only particular media platforms or services but can look at all relevant players, platforms, and services in a market.

ACCC Chairman Rod Sims has recently confirmed that diversity is a key factor that the ACCC looks closely at in approving proposed mergers or acquisitions.

*“Under the Competition laws we look at diversity as much as we look at price. People often think with mergers that we are just making sure two competitors are not making a market less competitive and making prices go up. But don’t overlook the fact that Section 50 can deal with ‘diversity’ as well as with price.”<sup>15</sup>*

*“There’s not much difference between a substantial lessening of competition and people’s desire for diversity. We look at diversity as part of our economic assessment.”<sup>16</sup>*

#### *Several media ownership rules will remain in the BSA*

Ten supports the removal of all media ownership rules in the BSA. However, this Bill only removes two. The following rules will remain and continue to constrain media companies that own television, radio and newspaper assets:

- **The Voices Test** – after any merger or acquisition no less than five independently-controlled TV, radio or newspaper ‘voices’ must remain in a metro area, and four in a regional area.
- **One-to-a-market rule:** cannot control more than one commercial TV licence in an area.
- **Two-to-a-market rule:** cannot control more than two commercial radio licences in the one area.

#### *75% Reach Rule*

Ten’s position on the repeal of the 75% reach rule has been consistent: pulling one major policy lever without removing any others is not good media policy and we remain strongly opposed to the removal of the reach rule in isolation.

Ten does support repeal of the reach rule as proposed in the *Broadcasting Legislation Amendment (Media Reform) Bill 2016*. Both rules are equally outdated and ineffective in protecting diversity and removing both the reach rule and the two out of three rule at the same time ensures that all media companies are freed up to pursue growth at the same time. To remove one rule without the other would provide an unfair commercial advantage to some media companies while leaving others unjustifiably constrained and possibly worse off than under the status quo.

#### *About Ten Network*

Ten owns and operates free-to-air broadcasting licences in Australia’s five largest metropolitan capitals: Sydney, Melbourne, Brisbane, Adelaide and Perth. In these markets Ten broadcasts a primary channel, TEN (simulcast in high definition and standard definition), as well as channels

<sup>15</sup> “ACCC addresses fears over News Corp expansion” – Dominic White, *The Australian Financial Review*, 1 February 2016

<sup>16</sup> “No Longer a Bachelor: Foxtel secures ACCC approval for move on Ten” – Darren Davidson, *The Australian*, 23 October 2015



TEN NETWORK HOLDINGS



tenplay 

ELEVEN and ONE. Ten also offers a wide range of freely-available content across numerous platforms including catch-up programming and live streaming through our online catch-up and streaming service, tenplay. Ten employs over 1,400 staff around the country and indirectly employs many more in the Australian production sector through an outsourced content production model.