

Chapter 1

Introduction

1.1 On 1 September 2016, the government introduced the Broadcasting Legislation Amendment (Media Reform) Bill 2016 in the House of Representatives. Later that day, the Senate referred the provisions of the bill to the Environment and Communications Legislation Committee (the committee) for inquiry and report by 7 November 2016.¹

Overview of the bill

1.2 The changes proposed by the bill are contained in three schedules:

- Schedules 1 and 2 would repeal two media ownership and control rules: the '75 per cent audience reach rule' and the '2 out of 3 rule cross-media control rule'.
- Schedule 3 would amend and introduce additional local programming obligations for regional commercial television broadcasting licensees. Additional local programming requirements would apply if, as a result of a change in control, licences become part of a group of commercial television licences whose combined licence area populations exceed 75 per cent of the Australian population. These proposed changes are intended to address concerns that any television sector consolidation made possible by the proposed changes in schedules 1 and 2 could lead to reductions in local programming.²

Inquiry conducted during the 44th Parliament

1.3 This inquiry follows an inquiry into an earlier version of the bill conducted during the previous parliament. The earlier version of the bill was introduced in the House of Representatives in March 2016. The provisions of that bill were examined by the Senate Environment and Communications Legislation Committee appointed in the previous parliament. That committee received 21 submissions and conducted two public hearings.³

1 *Journals of the Senate*, 1 September 2016, pp. 92–94.

2 The Hon Paul Fletcher MP (Minister representing the Minister for Communications and the Arts), *House of Representatives Hansard*, 1 September 2016, p. 259.

3 Witnesses at the hearings included major metropolitan television broadcasters, regional television broadcasters, News Corp Australia, Fairfax, ASTRA/Foxtel, the Media Entertainment and Arts Alliance (MEAA), the NSW Farmers' Association, relevant academics and other interested stakeholders, and the following government agencies: the Department of Communications and the Arts, the Australian Competition and Consumer Commission (ACCC) and the Australian Communications and Media Authority (ACMA).

1.4 After considering this evidence, on 5 May 2016 that committee presented a report recommending:

- that the government consider amending the 'trigger event' provision in schedule 3 to bill so that the additional local programming obligations proposed by the bill would be triggered in a situation where a regional broadcaster came to be in a position to control a metropolitan broadcaster (the bill only covered situations where a metropolitan broadcaster came to be in a position to control a regional broadcaster); and
- after due consideration of the above recommendation, that the bill be passed.⁴

1.5 The government accepted the first recommendation of the 5 May 2016 report; accordingly, the bill introduced on 1 September 2016 differs from the earlier version of the bill to ensure that that the additional local programming obligations would be triggered if a regional broadcaster came to be in a position to control a metropolitan broadcaster. A minor drafting style change in clause 1 has also been made. The bill is otherwise identical to the bill that was examined by the committee appointed in the previous parliament.

Conduct of this inquiry

1.6 The committee agreed to refer to the evidence received during the previous inquiry. In addition, the committee wrote to individuals and organisations involved in the previous inquiry inviting them to provide updated information. The committee received 12 submissions. These submissions are listed in Appendix 1 and are available from the committee's website: www.aph.gov.au/senate_ec.

1.7 The committee also conducted a public hearing in Sydney on 24 October 2016. A list of the witnesses who gave evidence at that hearing is at Appendix 2.

1.8 The committee thanks all of the individuals and organisations that contributed to the inquiry.

Scope and structure of this report

1.9 As the bill before the committee is largely unchanged compared to the earlier version, it is unnecessary to repeat much of the background information and analysis contained in the May 2016 report. This report will draw on the previous report, at times verbatim, to provide a brief overview of the bill and to highlight the principal issues. The report uses additional evidence received during this inquiry that provides further insight into the arguments made regarding the bill, however, readers interested in a more detailed overview of the proposed measures in the bill and the issues that the bill is intended to address should refer to the May 2016 report.

4 Senate Environment and Communications Legislation Committee, *Broadcasting Legislation Amendment (Media Reform Bill) 2016 [Provisions]*, May 2016, pp. 37, 40.

1.10 This report comprises two chapters:

- The remainder of Chapter 1 provides an overview of the legislative framework governing media control and ownership in Australia.
- Chapter 2 examines the proposed measures contained in the bill in detail. The evidence received by the committee on developments in the media sector that led to the introduction of the bill is discussed first, followed by evidence received regarding the specific measures and the overall approach taken to reform. The committee's findings are set out at the end of that chapter.

Note on references

1.11 The report cites submissions received during the inquiry conducted by the committee appointed in the 44th Parliament and submissions received by the committee during this inquiry. Submissions to both inquiries are assigned a number from 1 onwards based on the order of publication. To distinguish between the two sets of submissions, the text '(previous inquiry)' is added to submissions cited from the inquiry conducted into the earlier version of the bill.

1.12 Similarly, the report refers to the hearing conducted during this inquiry (on 24 October 2016) and the hearings conducted by the predecessor committee (on 31 March 2016 and 29 April 2016). References to the committee *Hansard* transcript for the 24 October 2016 public hearing are to the proof transcript. Page numbers may vary between proof and official *Hansard* transcripts.

Background information on media ownership and control regulation

1.13 The *Broadcasting Services Act 1992* (BSA) includes five rules that limit the 'control'⁵ of commercial broadcasting services (television and radio) and newspapers associated with the licence areas. The bill would repeal the following two rules:

- The '75 per cent audience reach' rule (applies to television)—this rule provides that a person, either in their own right or as a director of one or more companies, must not be in a position to exercise control of commercial television broadcasting licences whose total licence area population exceeds 75 per cent of the Australian population. The rule was first introduced as a 60 per cent reach rule in 1987, and was increased to the 75 per cent threshold in 1993.

5 The regulation impact statement published in the replacement Explanatory Memorandum (EM) explains that the framework is based 'on the concept of "control", not ownership per se'. If 'a person has company interests exceeding 15 per cent, they are regarded as being in a position to exercise control of the company. However, holding company interests is not the only way to be in a position to exercise control'. Another example of control is the ability 'to control the selection or provision of a significant proportion of the licensee's programming'. For further examples, see EM, p. 6.

The latest figures for combined audiences are as follows: Seven (74.51 per cent), Nine (73.96 per cent) and Ten (67.31 per cent). For regional networks, which are generally affiliated with a metropolitan counterpart, the audience figures in 2014 were as follows: Prime (24.33 per cent), WIN Network (25.15 per cent) and Southern Cross (34.11 per cent).⁶

Organic population growth does not result in the threshold of 75 per cent of the Australian population being contravened.⁷ However, the current audience reach of the metropolitan networks and the application of the 75 per cent audience reach rule means that 'no metropolitan network can take over a regional network (acquiring all licences) without divesting one or more commercial television licences'.⁸

- The '2 out of 3' cross-media control rule (television, radio and newspapers)—this rule provides that mergers cannot involve more than two of three regulated media platforms (commercial television, commercial radio and associated newspapers⁹) in any commercial radio licence area. The 2 out of 3 rule was introduced in 2006.

1.14 The other three rules (which would remain if the bill is enacted) are:

- The '5/4' rule (applies to television, radio and newspapers)—this rule, which is also known as the 'minimum voices rule', is a requirement that at least five independent media operations or media groups must be present in the mainland state capital cities and at least four must be present in regional commercial radio licence areas.
- The 'one-to-a-market' rule (television)—a person, either in their own right or as a director of one or more companies, must not be able to exercise control of more than one commercial television broadcasting licence in a licence area.

6 ACMA, 'Statutory control rules', www.acma.gov.au/Industry/Broadcast/Media-ownership-and-control/Ownership-and-control-rules/statutory-control-rules-media-ownership-control-acma (accessed 7 October 2016); Department of Communications, 'Media control and ownership', *Policy background paper*, No. 3, June 2014, www.acma.gov.au/Industry/Broadcast/Media-ownership-and-control/Ownership-and-control-rules/statutory-control-rules-media-ownership-control-acma (accessed 21 March 2016), p. 19.

7 See *Broadcasting Services Act 1992*, s. 52.

8 Department of Communications, 'Media control and ownership', p. 19. See also EM, p. 1.

9 Under the BSA framework, a newspaper is associated with:

- a television broadcasting licence if 'more than 50 per cent of its circulation is within the relevant licence area'; and
- a commercial radio licence if 'more than 50 per cent of its circulation is within the relevant licence area and the newspaper circulation covers at least two per cent of the licence area's population'.

National newspapers, such as *The Australian* and *The Australian Financial Review*, are not included in the definition of associated newspapers. Dr Simon Pelling, First Assistant Secretary, Content Division, Department of Communications and the Arts, *Committee Hansard*, 24 October 2016, p. 43.

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- The 'two-to-a-market' rule (radio)—a person, either in their own right or as a director of one or more companies, must not be able to exercise control of more than two commercial radio broadcasting licences in the same licence area.¹⁰

Application of the general competition law

1.15 In addition to the BSA regime, mergers and acquisitions in the media sector are subject to the general prohibition of anti-competitive acquisitions outlined in the *Competition and Consumer Act 2010* (CCA). Section 50 of the CCA prohibits acquisitions that would have the effect, or be likely to have the effect, of substantially lessening competition in any market. The Australian Competition and Consumer Commission (ACCC) administers the CCA.

1.16 Should the bill be passed, the ACCC's chairman, Mr Rod Sims, advised that 'diversity of content available would probably be an even more important consideration' for the ACCC when it reviews an acquisition in the media sector.¹¹ Since this evidence was given, the ACCC released a draft version of updated *Media merger guidelines* for public consultation. The draft update, which was released on 26 August 2016, responds to changes in the delivery and consumption of media since the 2006 guidelines and the changes to the BSA proposed by the bill. The guidelines outline how the ACCC will consider particular issues arising in media merger assessments.¹²

Foreign acquisitions

1.17 The *Foreign Acquisitions and Takeovers Act 1975* provides a regime for ensuring that foreign investment proposals are not contrary to Australia's national interest. The Act enables the Treasurer to prohibit or impose conditions on foreign investment proposals. In addition, as the media sector is considered to be a 'sensitive sector' under the Australian Government's Foreign Investment Policy, 'all foreign investment in local media over 5 per cent must be notified to and approved by the Treasurer, who may grant approvals subject to the parties meeting certain conditions'.¹³

10 EM, pp. 6–7.

11 Mr Rod Sims, Chairman, ACCC, *Committee Hansard*, 31 March 2016, p. 50.

12 See ACCC, *Draft media merger guidelines*, August 2016, [https://consultation.accc.gov.au/mergers-and-adjudication/draft-media-merger-guidelines/supporting_documents/Draft Media Mergers Guidelines.pdf](https://consultation.accc.gov.au/mergers-and-adjudication/draft-media-merger-guidelines/supporting_documents/Draft_Media_Mergers_Guidelines.pdf) (accessed 15 September 2016), p. 12.

13 Department of Communications, 'Media control and ownership', p. 11.

