

Chapter 2

Key issues

2.1 This chapter examines the proposed amendments continued in the bill in detail. It utilises the evidence presented during the inquiry into the earlier version of the bill and introduces the new evidence taken during this inquiry. Readers interested in further detail about the arguments for and against the bill should also refer to the May 2016 report of the committee appointed in the previous parliament.

2.2 The arguments presented in support of the proposed measures stem from technological changes and related developments in the media sector. The first section of this chapter examines these developments. The sections that follow examine the evidence received by the committee about the provisions of the bill and the approach taken to reform. The final section of the chapter contains the committee's findings.

Developments in the media sector and calls for reform of the ownership and control framework

2.3 This section provides context for the bill by discussing some of the developments in Australia's media sector that have led stakeholders and observers to challenge elements of the media ownership and control framework. It repeats the analysis presented in the May 2016 report in part and outlines new evidence taken during this inquiry where relevant.

2.4 The rationale for the bill is expressed in the replacement explanatory memorandum (EM). According to the EM, the 75 per cent rule 'does little to support media diversity as regional viewers essentially receive the same commercial television programming as metropolitan viewers, due to affiliation or content supply agreements'. In relation to the proposed abolition of the 2 out of 3 cross-media control rule, the EM notes that, as the rule focuses on traditional media platforms, it 'does not take into consideration the changed media landscape, where consumers access news content from alternative sources, such as online'.¹

2.5 The technological change that has altered how media content can be consumed is evidenced by the growing popularity of online content. Online video-on-demand services provided by international and domestic businesses distribute products throughout Australia without being subject to the ownership and control regulation rules in the *Broadcasting Services Act 1992* (BSA). For example, the 75 per cent audience reach rule prevents metropolitan television networks from broadcasting directly to 25 per cent of the population, however, this does not apply to online content. Southern Cross Austereo noted that all three metropolitan television networks stream television programming 'with no regard for the exclusive broadcast licence

1 Replacement Explanatory Memorandum (EM), pp. 1–2.

areas and regardless of any cannibalisation this may cause to viewing or revenue in regional licence areas'.²

2.6 The arrival of Netflix crystallised the growing realisation that the existing media regulatory framework does not account for the internet. Emeritus Professor Graeme Turner observed that Netflix's arrival represented the first time 'a major media intervention in Australia [occurred] that has not gone through a series of important regulatory gates'.³

2.7 In addition to online entertainment, the widespread popularity of online news services is another key development. Australian newspaper businesses, and other traditional Australian media companies, operate websites used by many Australians to access news. However, international businesses also provide online news services, with recent entrants in the Australian market including local editions of the *Daily Mail*, *The Guardian*, *Huffington Post* and BuzzFeed. Online newspapers are not covered by the BSA ownership and control framework.

2.8 It is evident that the rise of online services has had a significant effect on Australia's media sector. In particular, it was highlighted how the increase in online advertising services is affecting the advertising revenue on which media companies traditionally relied. Mr Greg Hywood, Chief Executive Officer, Fairfax Media, stated:

The traditional media companies, including publications like us, originally had two main sources of revenue. One was classified advertising and one was display advertising. As we know, over-the-top players have come into the market—such as REA, SEEK and Carsales—and taken that classified component which, for Fairfax, was probably 60 per cent to 70 per cent of our revenue. About another 25 per cent to 30 per cent was display advertising. Most that is now going to Google and Facebook.⁴

2.9 Mr Hywood added that although the 'overall marketing spend in Australia is increasing', this increase does not outweigh the falling market share of advertising that traditional media companies are experiencing. The consequence of this for Fairfax is that:

...we are attempting to invest in Australian media and we are attempting to provide jobs for journalists, which provides the transparency that is so valuable to this community, on a smaller and smaller amount of money.⁵

2 Southern Cross Austereo, *Submission 4*, p. 4.

3 Emeritus Professor Graeme Turner, *Committee Hansard*, 24 October 2016, p. 32.

4 Mr Hywood informed the committee that US research shows 'that 85 per cent of new display advertising coming in to the US market is now going to Google and Facebook. Mr Greg Hywood, Chief Executive Officer, Fairfax Media, *Committee Hansard*, 24 October 2016, p. 12.

5 Mr Greg Hywood, Fairfax Media, *Committee Hansard*, 24 October 2016, p. 12.

2.10 It was argued that although online media services provide useful products for consumers, they are not an adequate substitute for a strong, domestic media sector. Mr Ian Audsley, Chief Executive Officer, Prime Media Group, explained:

The issue at stake here is the future viability of local regional content on free-to-air television and the sustainability of independent regional free-to-air television. Regardless of the increasing availability of content accessed via the internet, regional Australians continue to rely heavily on free-to-air television for information and entertainment. It is fabulous that we can choose to see *House of Cards* on Netflix, if we are happy to pay the subscription fee and the download costs, but it is not telling an Australian story. And *The Guardian*, Crikey and SMH.com.au may keep me up to date with what is happening in Sydney and the world, but it will not tell the residents of Launceston, Mackay or Ballarat anything about what is happening in their own home town.⁶

2.11 If the proposed changes are enacted, consolidation within the commercial television sector would be possible, subject to the *Competition and Consumer Act 2010* and other relevant laws. The EM notes that this would allow 'greater scale in operations, thus allowing commercial broadcasters to compete in an environment where audiences can readily access premium content online'.⁷ Mr Audsley argued that 'without some form of consolidation you are going to see less and less local information and less and less diversity in the voice from regional Australia'. This is because the current economic circumstances regional media companies face will mean that, over time, their finances will not allow continued investment in local content.⁸

2.12 The Australian Competition and Consumer Commission (ACCC) has also observed that the 75 per cent audience reach rule and the 2 out of 3 rule appear to be outdated as a result of technological change. As the May 2016 report on the earlier version of the bill discussed, the ACCC's views on this were informed by the review it completed in 2015 of a transaction involving the Ten Network and Foxtel.⁹ The ACCC's chairman, Mr Rod Sims, noted that streaming activities by the free-to-air (FTA) networks made it difficult for their activities to be contained by the 75 per cent reach rule. Mr Sims also noted that 'had there not been a 75 per cent reach rule, it is

6 Mr Ian Audsley, Chief Executive Officer, Prime Media Group, *Committee Hansard*, 24 October 2016, p. 35.

7 EM, p. 1.

8 Mr Ian Audsley, Prime Media Group, *Committee Hansard*, 24 October 2016, p. 39.

9 Foxtel proposed to acquire up to 15 per cent of Ten while Ten proposed to acquire a 24.9 per cent stake in the Multi Channel Network (a supplier of advertising opportunities on subscription television channels). Ten also had an option to acquire 10 per cent of Presto TV, a joint venture between Foxtel and Seven West Media. Australian Competition and Consumer Commission (ACCC), 'Mergers register', <http://registers.accc.gov.au/content/index.phtml/itemId/750991> (accessed 21 March 2016).

possible that other buyers could have met a more competitive outcome than the one we ended up with'.¹⁰

2.13 Notwithstanding the evidence regarding the financial challenges some media companies are facing and the view that certain aspects of the media ownership framework are obsolete due to technological change, the continued influence of Australia's traditional media companies is evident. Mr Tim Worner, Chief Executive Officer, Seven West Media, noted that '[o]ver 70 per cent of Australians exclusively rely on free-to-air television for their news, their sport and their entertainment content'.¹¹ Professor Michael Fraser, former director of the now-closed Communications Law Centre, University of Technology Sydney (UTS), cited this figure when he stated that the 'influence of the mainstream media should not be underestimated'. He added:

While it is the case that many people, especially younger people, now obtain their content—including news and current affairs—online, much of that is parasitic on the mainstream media and is recycling content which others have invested in the production and distribution of.¹²

2.14 Professor Fraser added that although there are online sources, 'we are still in this transitional phase where people rely on the mainstream media'.¹³ Similarly, Professor Rodney Tiffen made the following observation:

Technological enthusiasts and others will talk about what is likely to be in two decades time and then assume that that is what is now and there is no transition period needed. For the next decade free-to-air TV will continue to be the main way that people get their news and most of their entertainment. Also even things that seem to be from elsewhere, like the internet...are often dominated by the existing mainstream media.¹⁴

2.15 Although there is an expectation that the availability and popularity of online content will continue to grow, Professor Fraser argued that 'we will still need to ensure that there are mainstream providers of news and information which are regulated, so that the public has confidence in the professionalism and journalistic standards of fairness and accuracy in mainstream media'. To illustrate his point, Professor Fraser commented:

If you go online to any site, you do not know whether it is a dissident in Beirut or somebody in Glasgow pretending to be a dissident in Beirut—you take your chances. But we need to have confidence in a regulated mainstream. That is why I connect these two issues intimately.

10 Mr Rod Sims, Chairman, ACCC, *Committee Hansard*, 31 March 2016, p. 43.

11 Mr Tim Worner, Chief Executive Officer, Seven West Media, *Committee Hansard*, 24 October 2016, p. 2.

12 Professor Michael Fraser AM, *Committee Hansard*, 24 October 2016, p. 7.

13 Professor Michael Fraser AM, *Committee Hansard*, 24 October 2016, p. 9.

14 Professor Rodney Tiffen, *Committee Hansard*, 24 October 2016, p. 17.

The question of diversity of sources must be linked with the standards that apply to the professional level of their production—especially fairness and accuracy.¹⁵

2.16 Emeritus Professor Graeme Turner also emphasised that online news platforms differ from the news reported by traditional media organisations. He provided the following comments on a key difference between the two services:

In accord with its fundamental role in the democratic state, broadcast journalism provides news and information to the whole of the nation and aims to do so via reasonably inclusive representation of the range of opinion within the community. The typical news blog, though, has a very different social and political function. These are smaller, more targeted sites and they speak to a niche market, to a network of users rather than to a broad public, so they are under no obligation to be fair or inclusive in their perspectives, to acknowledge in what they say the existence of a variety of points of view or to maintain the rigorous commitment to accuracy and integrity required of the broadcast media. And so, while in aggregate it might seem as though we have a much more expansive and diverse media sphere now, it is not in the aggregate that they are consumed; rather, consumers access a very small selection of these media outlets where what they receive can actually be the opposite of diversity.¹⁶

2.17 Professor Tiffen warned against abolishing regulation based solely on arguments that technological change has made regulation unnecessary. Professor Tiffen stated:

It seems to me that there is a sort of intellectual nihilism that says, 'Given the scale of changes, no government can hope to regulate properly.' I note that the first time I heard this argument was by representatives of News Corp, as it then was, in the early 1990s who said, 'Now that we have got satellite, all national regulation is passe.' So they are a bit of a broken record on this. With every technological change they say that regulation is no longer pertinent.¹⁷

2.18 Finally, Emeritus Professor Turner argued that the fundamental premise of broadcasting regulation has not changed, despite the technological and market developments that have occurred. He stated:

Since the airwaves are a limited public resource, those exclusive few who have been licensed to use them as commercial enterprises have public as well as commercial obligations. The regulatory regime is there to balance the interests of the public against the commercial interests of the industry.¹⁸

15 Professor Michael Fraser AM, *Committee Hansard*, 24 October 2016, p. 9.

16 Emeritus Professor Graeme Turner, *Committee Hansard*, 24 October 2016, p. 29.

17 Professor Rodney Tiffen, *Committee Hansard*, 24 October 2016, p. 17.

18 Emeritus Professor Graeme Turner, *Committee Hansard*, 24 October 2016, p. 28.

Schedules 1 and 2: Proposed repeal of two media ownership and control rules

2.19 The above section presented the rationale given by the government for repealing the 75 per cent audience reach rule and the 2 out of 3 cross-media control rule, as well as the evidence received by the committee about developments in the media sector that have implications for the effectiveness and relevance of these rules. The following paragraphs discuss the evidence received about the two specific rules and the overall approach taken by the government to reform.

75 per cent audience reach rule

2.20 The issues presented by the application of the 75 per cent audience reach rule were clearly articulated by the regional broadcasters. Mr Ian Audsley of the Prime Media Group explained that, through the affiliation model, Prime Media, Southern Cross Austereo and the WIN Network broadcast the three major metropolitan networks into regional Australia. Although local news is produced, overall '[n]o more than three per cent of the content is local'. Mr Audsley concluded:

So the same voices that are running the media in Melbourne, Sydney, Brisbane, Adelaide and Perth are the same voices that you hear out in regional Australia.¹⁹

2.21 In addition, it is not possible for the regional networks to acquire popular content for themselves. Mr Grant Blackley, Chief Executive Officer, Southern Cross Austereo, explained that 'no local nor US entity of scale and note would sell a regional-only window'. Accordingly, Australian-wide rights are purchased by Seven, Nine or Ten.²⁰

2.22 This commercial reality and the terms of the affiliation arrangements restrict how regional broadcasters can broadcast the content acquired from the metropolitan networks. Mr Audsley explained:

Under the affiliation model, we purchased, for a substantial amount of money, the right and the ability to broadcast their programs and sell advertising in the breaks. We cannot seek out the additional revenue streams that they are able to exploit, we cannot stream the content to our regional audiences, we cannot provide a catch-up TV service, we cannot do deals with Facebook and Twitter, we cannot sell programs or the format rights to those program to other markets and we cannot do deals for product placement in programs to generate additional revenue for our businesses. All of these things are the domain of the networks.²¹

19 Mr Ian Audsley, Prime Media Group, *Committee Hansard*, 24 October 2016, p. 39.

20 Mr Grant Blackley, Chief Executive Officer, Southern Cross Austereo, *Committee Hansard*, 24 October 2016, p. 36.

21 Mr Ian Audsley, Prime Media Group, *Committee Hansard*, 24 October 2016, p. 35.

2.23 Mr Audsley concluded that the regulatory framework for FTA television 'was put in place before paid TV came to Australia and before the internet existed...[and] is self-evidently well past its use-by date'.²²

2.24 Professor Tiffen stated that the 75 per cent reach rule 'is not just outdated; it never made sense'. He explained:

The logic of TV programming, in all its fundamentals, has always been about national networking. Preserving 25 per cent for others to own did nothing for media diversity and little for localism, so I would think that it is well and truly time for that provision to be knocked back or dispensed with.²³

2 out of 3 cross-media control rule

2.25 The WIN Network argued that the 2 out of 3 cross-media control rule 'is as outdated as the 75 per cent audience reach rule'. Although the aim of the 2 out of 3 rule is to protect diversity of voice, WIN claimed that in effect 'all it is doing is constraining the three traditional mediums of TV, radio and press'.²⁴

2.26 Ms Annabelle Herd from Ten Network Holdings argued that because the rule is 'so technologically obsolete' in that it focuses on three traditional platforms, if the rule remains in place 'inevitably people are just going to get around it'. Ms Herd observed that if the weekly newspapers stop printing physical copies of their newspapers and moved their publications entirely online, they would no longer be subject to the rule.²⁵

2.27 Mr Greg Hywood, Chief Executive Officer, Fairfax Media, commented that, since the previous inquiry, the 'pervasive and increasing influence of the giant global search engines and social media platforms on the Australian media industry' has been an issue receiving increasing attention. Mr Hywood stated:

From Fairfax Media's point of view, the extent to which these organisations, based offshore, are diverting advertising revenue away from and undermining Australian media companies that invest in local content and journalists and which pay taxes is one of the prime justifications for abolishing the current two-out-of-three restriction. This artificial and outdated restriction is a disincentive to investment in the Australian media and a severe brake on our ability to compete against global competition.²⁶

22 Mr Ian Audsley, Prime Media Group, *Committee Hansard*, 24 October 2016, p. 35.

23 Professor Rodney Tiffen, *Committee Hansard*, 24 October 2016, p. 17.

24 WIN Network, *Submission 10 (previous inquiry)*, p. 6.

25 Ms Annabelle Herd, Director, Corporate and Regulatory Affairs, Ten Network Holdings, *Committee Hansard*, 29 April 2016, p. 23.

26 Mr Greg Hywood, Fairfax Media, *Committee Hansard*, 24 October 2016, p. 12.

2.28 According to Mr Hywood, removal of the 2 out of 3 rule would be beneficial as, in the face of declining revenues and the implications of this for supporting journalism and local content, companies could consider restructuring to achieve a better financial result. He explained:

...if you are restricted at amortising your content to just a small range of available platforms, it restricts your ability to monetise that content effectively or to its maximum. So what we are asking for is the optionality. That does not mean, necessarily, that free to air and Fairfax get together, but it does provide us that option if that improves the economics of our business. We are really just asking to be able to make that choice, if it is economically viable and to the advantage of our businesses, so that we can invest in journalism.²⁷

2.29 When questioned whether the abolition of the 2 out of 3 rule could potentially lead to a loss of media diversity, Mr Hywood commented:

That horse bolted years ago. I mean there is not anybody that has access to the internet that cannot access instantaneously a range of diverse opinions. I do not just mean social media which have not been filtered. I mean that, if you want to get a perspective on an economic development, you can go to a range of offshore publications of the highest quality to get those perspectives. Everybody does that in terms of their modern media mix, and that is to be encouraged. No-one is saying that that should change whatsoever. We are not asking for protection at all. We are just asking for some liberation.²⁸

2.30 During the inquiry conducted in the previous parliament, Dr Derek Wilding, who works on media and communications industry issues at UTS, argued that regulation of the media sector should be designed 'to not address "diversity" per se, but the things diversity seeks to protect'. According to Dr Wilding, this includes 'accuracy, fairness and privacy, as well as localism—while helping to shore up Australian newsgathering'.²⁹ Dr Wilding stated that he believes the current media landscape 'is worth supporting' with respect to news and analysis. He concluded:

I am in favour of repealing 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.³⁰

27 Mr Greg Hywood, Fairfax Media, *Committee Hansard*, 24 October 2016, p. 12.

28 Mr Greg Hywood, Fairfax Media, *Committee Hansard*, 24 October 2016, p. 13.

29 Dr Derek Wilding, *Submission 17*, p. 12.

30 Dr Derek Wilding, *Committee Hansard*, 31 March 2016, p. 8.

2.31 Professor Tiffin supported the abolition of the 2 out of 3 rule 'as long as the four/five rule remains in metropolitan areas'.³¹ Professor Tiffin observed that 'in some very small areas, three different media may not be viable, especially with the collapse of regional daily newspapers'. Overall, he is of the view that the abolition of the rule 'will have a negative effect on media concentration, but it is a very negligible media effect'.³² Professor Tiffen added:

It is likely that, as local newspapers in particular decline, the two-out-of-three rule is going to become hard to work. I think media diversity is terribly important. If anything, this will go against media diversity, but only in a very minor way.³³

2.32 Some stakeholders, however, expressed stronger reservations about the proposed abolition of the 2 out of 3 rule. Emeritus Professor Graeme Turner argued that the rule 'remains a rational and justifiable means of limiting concentration and protecting diversity notwithstanding the media's technological convergence'. He added:

I think it is marginally pro-competition and I am not convinced that the structures it addresses—that is, the existing corporate structures—are necessarily impacted by the digital revolution. If one applies the public interest test, I think there is an argument that the existing industrial configurations are preferable to the likely outcomes of the abolition of the rule in terms of both the maintenance of diversity and limiting media concentration.³⁴

2.33 Professor Turner added:

The arguments made in support of the bill are largely directed towards removing from broadcasters restrictions that other media provers do not have to observe. I understand and accept that argument, but I think it is also true that broadcasters have a different role in relation to the state than most of their competitors. Not everybody gets to operate a television licence, and that opportunity involves a more onerous set of obligations because of the national importance of the service being provided and the fact that each licensee enjoys protection from the full force of free market competition. So it is vital that regulation establishes a viable operating environment for these businesses, but regulation should also ensure that the interests of the public are not sacrificed.³⁵

31 Emeritus Professor Rodney Tiffen, *Submission 10*, pp. 1, 7.

32 Professor Rodney Tiffen, *Committee Hansard*, 24 October 2016, p. 17.

33 Professor Rodney Tiffen, *Committee Hansard*, 24 October 2016, p. 19.

34 Emeritus Professor Graeme Turner, *Committee Hansard*, 24 October 2016, p. 29.

35 Emeritus Professor Graeme Turner, *Committee Hansard*, 24 October 2016, p. 29.

2.34 Professor Turner concluded that, with respect to diversity and concentration, he is of the view that 'the industrial configurations that we have now' are preferable to the structure that could result following acquisitions enabled by the bill. He added:

The result of those acquisitions would be to concentrate media power more than it is at present. I am trying to be fairly objective about it by saying that I can see the argument for it and I understand why that would be argued for, but, on balance, my view is that the public interest test would say, 'Probably not. It probably isn't advisable at this point to do that.'³⁶

Implementation of reform

2.35 As noted above, the idea of abolishing the 75 per cent reach rule largely received unqualified support. The proposed abolition of the 2 out of 3 rule received some strong support, but also mixed feedback from other observers. Where stakeholders differed in their views significantly, however, is with respect to the overall approach that should be taken to reform.

Stakeholders that strongly support the changes and their timely implementation

2.36 The regional television broadcasters (Prime Media Group, Southern Cross Austereo and the WIN Network), Fairfax and Ten Network Holdings strongly support repealing the two control and ownership rules. For example, Mr Ian Audsley, the Chief Executive Officer of the Prime Media Group, told the committee that these three networks are 'in unanimous agreement that the existing media ownership laws are outdated and act as a brake on regional media being able to organise itself in an economically efficient manner'.³⁷ Mr Audsley described the bill as being 'a very positive first step in media reform, which is needed in a rapidly-changing media environment'.³⁸

2.37 Ten Network Holdings argued that ultimately all five media ownership and control rules should be repealed, with mergers and acquisitions in the sector subject to competition law requirements only.³⁹ Nevertheless, Ten supports proceeding with the bill in its current form—Mr Paul Anderson, Chief Executive Officer, Ten Network Holdings, explained:

...there is a risk that, if these bills do not go through, then nothing happens. As we said before, this is incremental reform, so we think it is a good thing, but we also support further holistic reform, if that is the right word.⁴⁰

36 Emeritus Professor Graeme Turner, *Committee Hansard*, 24 October 2016, p. 31.

37 Mr Ian Audsley, Prime Media Group, *Committee Hansard*, 31 March 2016, p. 33.

38 Mr Ian Audsley, Prime Media Group, *Committee Hansard*, 24 October 2016, p. 36.

39 Ten Network Holdings, *Submission 15 (previous inquiry)*, p. 3.

40 Mr Paul Anderson, Chief Executive Officer, Ten Network Holdings, *Committee Hansard*, 24 October 2016, p. 26.

2.38 Prime Media Group, Southern Cross Austereo, the WIN Network, Ten Network and Fairfax argued that the repeal of the 2 out of 3 rule should occur at the same time as the repeal of the 75 per cent reach rule. Accordingly, those stakeholders argued against the possibility of splitting the bill to pursue the repeal of the less controversial 75 per cent reach rule and delaying or not proceeding with the repeal of the 2 out of 3 rule. Ms Annabelle Herd from Ten Network Holdings stated:

The point about not splitting these two issues is: why would you split them? I certainly have not heard an argument from anybody about what the two-out-of-three rule is actually doing right now to protect diversity. It applies to some printed newspapers, it applies to television channels that broadcast over terrestrial spectrum and to radio stations that broadcast over terrestrial spectrum. How is that protecting diversity when most of the media industry is now cross-platform and is comprised of different channels to market that go well beyond the ones I mentioned in the BSA? Where is the argument in favour of keeping two out of three?⁴¹

2.39 Similarly, Mr Anderson stated:

In this environment with its wealth of evidence of the growing force of the foreign big-ticket players, it is blindingly obvious that these pre-internet era laws are now achieving the opposite of what they were intended to do. They are now working against a strong, viable and diverse media sector, and they must go. We do not support splitting the bill so only the reach [rule] will pass. Splitting the bill and allowing some media companies to benefit from regulatory reform while leaving others constrained will potentially leave those still regulated worse off than under the status quo.⁴²

Other views on the changes and the approach taken to reform

2.40 News Corp Australia expressed support for the bill being passed without amendment, although it noted its preference for reform that is more comprehensive.⁴³

2.41 Seven West Media expressed concerns that, although the reforms contained in the bill have merit, enacting them now may reduce the likelihood that other reforms will be pursued in the near future. Seven West also argued that the legislation effectively would allow one transaction to occur as other rules, such as the 5/4 rule, would remain. Its submission to the previous inquiry stated:

Removing the 2 out of 3 rule with no corresponding consideration of the minimum voices impacts in effect allows for only one major national deal to occur. Once the number of voices in Adelaide reaches the permitted minimum of 5, there are no further deals of this scale permitted.⁴⁴

41 Ms Annabelle Herd, Director of Corporate and Regulatory Affairs, Ten Network Holdings, *Committee Hansard*, 24 October 2016, p. 26.

42 Mr Paul Anderson, Ten Network Holdings, *Committee Hansard*, 24 October 2016, p. 23.

43 News Corp Australia, *Submission 6 (previous inquiry)*, p. 1.

44 Seven West Media, *Submission 14 (previous inquiry)*, p. 10.

2.42 Mr Worner, Chief Executive Officer, Seven West Media, stated that:

...holistic reform is what is required to help our industry compete with global competitors, who are simply not playing on the same playing field that we are. They are playing with a different set of rules. This bill on its own does not address that. It may be of use to one or two players for one or two deals, but it does not do anything for our entire industry.⁴⁵

2.43 He added:

...if we are going to make changes, they should assist the entire industry, not one or two players. We have a situation here where an entire industry is in peril. If we want a situation where Australia basically becomes an outer suburb of Los Angeles, that is what we are heading towards. Whenever we get the chance to shine a light on the inequality of what is occurring, we have a responsibility to do that—and that is what we are doing.⁴⁶

2.44 ASTRA (the subscription television industry association) advised that it is 'not opposed in principle to the reforms contained in the bill', but noted that the subscription television industry faces similar pressures to those faced by the companies directly affected by the bill. The anti-siphoning list was identified by ASTRA and Foxtel as requiring reform, although commercial television broadcasters opposed this.

2.45 During the inquiry conducted in the previous parliament, Nine Entertainment Co, Prime Media Group, Seven West Media and Ten Network Holdings called for the removal of television licence fees.⁴⁷ In particular, it was noted that the fee of 4.5 per cent of gross revenue is 'by far highest free-to-air television licence fee in the world'.⁴⁸

2.46 Since that evidence was received, the government announced as part of the 2016–17 Budget that licence fees for commercial television and radio broadcasters would be reduced by approximately 25 per cent, applicable from the 2015–16 licence period. A bill to give effect to this commitment was introduced in September 2016.⁴⁹

2.47 Nevertheless, in submissions to this inquiry, calls for licence fee relief continued. In its additional submission, Nine argued that changing ownership rules prior to addressing licence fees that, in its view, are 'onerous and unfair', potentially would 'distort the market and have unintended consequences'. According to Nine,

45 Mr Tim Worner, Seven West Media, *Committee Hansard*, 24 October 2016, p. 2.

46 Mr Tim Worner, Seven West Media, *Committee Hansard*, 24 October 2016, p. 3.

47 Seven West Media, *Submission 14 (previous inquiry)*, pp. 12–13; Ten Network Holdings, *Submission 15 (previous inquiry)*, p. 1; Nine Entertainment Co, *Submission 16 (previous inquiry)*, p. 4; and Prime Media Group, *Submission 3*, p. 1.

48 Ten Network Holdings, *Submission 15 (previous inquiry)*, p. 1.

49 Broadcasting Legislation Amendment (Television and Radio Licence Fees) Bill 2016.

all media reform proposals should be 'deferred until the issue of licence fees is addressed'.⁵⁰

2.48 Despite the planned reduction in licence fees from 4.5 per cent of gross revenue to 3.375 per cent, Ten argued that Australian commercial FTA television networks will still 'pay more than any other free-to-air broadcasters in the world'. Ten's view on this outcome is as follows:

That is about 3½ times more expensive than the closest market, Singapore, and 115 times greater than the US, where broadcasters pay 0.06 per cent of revenue. In the UK, broadcasters pay 0.18 per cent of revenue, which covers spectrum access and a licence fee. Given the similarities that exist between here and the UK, particularly in relation to the content obligations imposed on broadcasters, we strongly believe that the UK is the single best and most fitting model for us to apply here. On that basis, we should be paying no more than 0.2 per cent of gross revenue.⁵¹

2.49 In support of its call for licence fee relief, Seven West Media argued that past cuts have been used for local content. Ms Bridget Fair from Seven West Media explained:

Up until 2009 we were actually paying around nine per cent of gross revenue in licence fees, and that was cut to 4½ per cent by the Rudd government. We have tracked the expenditure across the industry of where those licence fees have gone and can demonstrate that it has been ploughed back into content and reinvestment in new delivery platforms to make sure that we remain competitive. It is a little early to say—just a few months on—where the one per cent or the 25 per cent cut of the 4½ per cent that went through in the May budget has gone, but...we can absolutely demonstrate...that there is far and away a reason for us to reinvest in our business and that we have done so.⁵²

2.50 In its updated submission, ASTRA responded to the arguments for licence fee relief. ASTRA argued that further licence fee changes should 'only be considered as part of a comprehensive package of deregulatory reforms'. In particular, ASTRA argued that licence fees should not be reduced 'without a corresponding reduction in the privileges and protections from competition that FTA television networks have amassed over decades'.⁵³ ASTRA explained:

50 Nine Entertainment Co, *Submission 2*, p. 1.

51 Mr Paul Anderson, Ten Network Holdings, *Committee Hansard*, 24 October 2016, p. 23.

52 Ms Bridget Fair, Group Chief, Corporate and Regulatory Affairs, Seven West Media, *Committee Hansard*, 24 October 2016, p. 5. Seven West Media also provided the committee with information indicating that the sector has reinvested previous licence fee cuts in content and new delivery platforms: see *Additional Information 2* (Venture Consulting, 'The case for the abolition of the broadcast licence fee (summary)', September 2016).

53 ASTRA, *Submission 7*, pp. 4–5.

Whilst Australian licence fees are high by international standards, this is no accident. Australian FTA television licence fees reflect the value of unusually significant protections and privileges enjoyed by the major broadcasters, rendering invalid any comparison with fees paid by their international peers.

In exchange for paying licence fees, Australian FTA broadcasters enjoy a legislated ban on competition, guaranteed access to broadcasting spectrum and the world's most protected position for the acquisition of sports broadcast rights.

These strange protections and privileges simply do not exist to anywhere near the same degree in any of the jurisdictions referenced by FTA broadcasters in their international comparisons, a fact which renders those comparisons meaningless.⁵⁴

2.51 Other stakeholders also questioned the view that the reforms proposed in the bill should be viewed as a lower priority than, or contingent on, licence fee reductions. My Greg Hywood from Fairfax Media stated:

...the two main issues here are around really to accept the existence of the internet. The current legislation does not even acknowledge the existence of the internet, because it was essentially drawn up prior to that. Our view is really that the two-out-of-three rule and the reach rule are the two fundamental issues. Issues around licence fees and others are really up for free-to-air televisions to talk about, and governments have to make a judgement about the level of protection that the free-to-airers have through antisiphoning and what that is worth financially. So I would not see that as a principal issue; that is just a commercial arrangement. The two key principles are the two-out-of-three and reach...⁵⁵

2.52 Others commented that stakeholders who criticise the bill because it represents what they consider is 'piecemeal' reform were, by promoting licence fee reductions as the most pressing issue, also seeking piecemeal reform.⁵⁶

2.53 Professor Fraser, who has other views on the regulatory approach that should be applied to the mainstream media to ensure diversity of voices,⁵⁷ but who nevertheless supports the bill, noted that media reform in general in Australia could be described as piecemeal. He explained:

54 ASTRA, *Submission 7*, p. 4.

55 Mr Greg Hywood, Fairfax Media, *Committee Hansard*, 24 October 2016, p. 14.

56 Mr Ian Audsley, Prime Media Group; Mr Andrew Lancaster, Chief Executive Officer, WIN Network, *Committee Hansard*, 24 October 2016, p. 40.

57 Professor Fraser called for the introduction of a 'broad, minimum number of voices rule that takes into account a public interest test'. Further, he argued for a 'strong systems of enforceable industry standards...[to] be developed and implemented to ensure fairness, accuracy and high standards of journalism in news and current affairs across all major platforms'. Professor Michael Fraser AM, *Committee Hansard*, 24 October 2016, p. 8.

I feel, and I think the community feels, cynical about political horsetrading with powerful media interests, and that has meant we have always had these small, piecemeal approaches taken.⁵⁸

Schedule 3: Local programming requirements

2.54 Schedule 3 to the bill would insert a new Division 5D in Part 5 of the BSA establishing new local programming requirements for regional commercial television broadcasting licensees. The proposed new local programming requirements will apply additional local content requirements to regional commercial television broadcasting licences that are affected by a 'trigger event'. The trigger event is where, 'as a result of a change in control, a regional commercial television broadcasting licence becomes part of a group of commercial television broadcasting licences whose combined licence area populations exceed 75 per cent of the Australian population'.⁵⁹

2.55 The predecessor committee's report discussed the proposed measures in schedule 3 in detail. Witnesses who participated in this subsequent inquiry also expressed support for the measures. For example, Professor Michael Fraser advised that he welcomed the proposed amendments in schedule 3 as 'a step in the right direction', although he argued that more attention needs to be given to 'providing incentives for local news and current affairs and also more incentives for Australian cultural productions to make them commercially viable in a global marketplace'.⁶⁰ The phrase 'a step in the right direction' was also used by Emeritus Professor Graeme Turner to describe schedule 3.⁶¹

2.56 As the measures received wide support during both inquiries and the government adopted the committee's recommendation about a drafting issue, discussion of schedule 3 in this report is limited to two specific issues raised during this inquiry. The previous report provides further information about the amendments and particular stakeholders' views on them.

Deemed control

2.57 In its latest submission, Prime reiterated its concerns about the definition of a trigger event and the concept of control that it raised during the previous inquiry. Prime is of the view that a test based on actual control as opposed to deemed control should be used. Prime stated:

...there should be no reference to a 15% 'deemed control' threshold because a 15% interest in (or 'deemed control' of) a regional commercial television broadcasting licence is unlikely to yield any 'consolidation', 'additional scale' or 'efficiency' that will benefit the business operations of regional

58 Professor Michael Fraser AM, *Committee Hansard*, 24 October 2016, p. 8.

59 EM, p. 36.

60 Professor Michael Fraser AM, *Committee Hansard*, 24 October 2016, p. 11.

61 Emeritus Professor Graeme Turner, *Committee Hansard*, 24 October 2016, p. 32.

broadcasters, and clearly is at odds with the intention of the Bill as outlined in the EM and Second Reading of the Bill on 1 September 2016.⁶²

2.58 Prime also outlined concerns about a potential scenario where a trigger event occurs due to the acquisition of shares, however, the acquisition is not sustained. Prime provided the following explanation:

...in the case of all publicly-listed media companies, including Prime, the Bill does not contemplate what happens if the threshold is reached by a person or a company taking a 15% interest in a listed company on a "particular day" (the words used in the Bill)—which would technically give rise to a Trigger Event—but then the very next day, week or month afterwards, a person or a company reduces their shareholding to 14.9%. The proposed mechanism will introduce a level of uncertainty into the business operations of regional broadcasters. It is likely to cause confusion, has the potential to adversely affect vulnerable regional media companies, leaving them susceptible to manipulation and facing a further regulatory burden without any additional scale, efficiency or consolidation having been achieved.⁶³

2.59 After expressing concerns about the 'ambiguities and loopholes' that the current rules may provide, Emeritus Professor Tiffien argued that 'it would be better to specify allowable share holdings rather than slipperier concepts like control'.⁶⁴

Committee comment

2.60 The committee notes that the concept of 'control' and Prime's concerns regarding the use of the deemed control threshold were discussed in detail in the May 2016 report on the earlier version of the bill. That report observed:

The concept of control should cover all relevant scenarios where a person may be in a position to control a broadcasting licence. The committee also notes that the local content requirements provide *minimum* local content obligations intended to ensure the availability of local content in most regional areas. In light of the evidence that the regional broadcasters provide content in excess of the obligations, it is not apparent that a trigger event caused by a change in company interests of 15 per cent would present a compliance challenge.⁶⁵

62 Prime Media Group, *Submission 3*, p. 4.

63 Prime Media Group, *Submission 3*, p. 4.

64 Emeritus Professor Rodney Tiffen, *Submission 10*, p. 7.

65 Senate Environment and Communications Legislation Committee, *Broadcasting Legislation Amendment (Media Reform Bill) 2016 [Provisions]*, May 2016, pp. 36–37.

2.61 The committee appointed in the previous parliament did not recommended any changes to the test for control relied on by the bill, although it drew the evidence received about deemed control to the government's attention for further consideration.⁶⁶ This committee maintains the view of its predecessor on this matter.

2.62 Regarding Prime's concern that the bill does not differentiate between trigger events caused by a short-term transaction and sustained acquisitions, the committee again notes that the bill seeks to provide minimum local content obligations and the evidence before it is that regional broadcasters exceed these obligation. Stakeholders often prefer for every foreseeable scenario to be addressed specifically in legislative proposals. However, to avoid overly complex legislation, a balance between precision and simplicity needs to be struck. Given the limited consequences that appear to arise should the scenario outlined in Prime's evidence eventuate, the committee does not consider the bill needs to be amended in response.

Regional media consumers

2.63 The NSW Farmers' Association highlighted how the media needs of many residents in regional Australia differ to residents in metropolitan areas. The Association explained:

We noted that a lot of submissions took as assumed that the media landscape had changed substantially for all Australians, and therefore that the old style of media ownership did not have the same reach or importance for consumers.

We would like nothing better than for regional NSW to be part of the digital age—but sadly communications in the bush are more 19th Century than 21st. As a consequence, and as we have made clear in our submission, the media landscape has not changed substantially for regional Australians, yet. Therefore, the old style media platforms (newspaper, radio and television), still have strong penetration in the regions—regional internet remains very poor in comparison with urban populations. Regional NSW (most of which is an 'aggregated market' under the terms of the Bill) continues to suffer from substandard data coverage making traditional media platforms in many areas just as powerful as they have ever been.⁶⁷

2.64 Emeritus Professor Tiffen submitted that he supports 'the need for strengthening of local programming requirements in regional areas especially if media ownership becomes more concentrated'.⁶⁸ However, Professor Tiffen called for regulation that provides further support for local production and services in regional areas for both television and radio.⁶⁹ He explained:

66 Senate Environment and Communications Legislation Committee, *Broadcasting Legislation Amendment (Media Reform Bill) 2016 [Provisions]*, May 2016, pp. 34–37.

67 NSW Farmers' Association, *Submission 9*, p. 1.

68 Emeritus Professor Rodney Tiffen, *Submission 10*, p. 1.

69 Emeritus Professor Rodney Tiffen, *Submission 10*, p. 1.

As we move towards national and global generation of services, there is still a need to ensure local windows of programming.

In theory, what have been called hyper-local services are now possible, but in practice these are often precarious, unfunded projects of inconsistent standards and reliability.

The regulation should ensure in television and radio that national players have to support local windows of programming.⁷⁰

2.65 On the text of the bill itself, specific concerns about the definition of 'local' were expressed. The NSW Farmers' Association submitted:

...we fear that the definition of 'local' may shift as the 'footprint' of a broadcaster increases as the result of the repeal the '75 per cent audience reach rule'. The additional requirements for local content upon exceeding the 75 per cent are meaningless if 'local' is not effectively defined.⁷¹

2.66 The NSW Farmers' Association recommended that the bill be amended to:

- ensure the Australian Communications and Media Authority (ACMA) has 'clear responsibilities in terms of effective compliance activities in regard to policing "local" content'; and
- ensure 'that the character and quality of "local" content within a regional licensee's area is maintained following any future merger'.⁷²

2.67 The NSW Farmers' Association also recommended that consumer protections in 'voice and data in telecommunication are upgraded to ensure that regional people have equal access to both voice and data'. After it noted that the Productivity Commission is currently conducting an inquiry into the future direction of a universal service obligation in the telecommunications market, the Association recommended that consideration of the bill should be delayed until the Productivity Commission's inquiry is complete and the government has responded to its findings.⁷³

Committee comment

2.68 The committee shares concerns about the ability of regional consumers to access adequate telecommunications services and notes that improved data capabilities will help regional media consumers engage in the online media environment. As the NSW Farmers' Association recognised in its submission, the Productivity Commission is currently undertaking an inquiry into the telecommunication's universal service obligation. The committee awaits the

70 Emeritus Professor Rodney Tiffen, *Submission 10*, p. 6.

71 NSW Farmers' Association, *Submission 9*, p. 2.

72 NSW Farmers' Association, *Submission 9*, p. 2.

73 NSW Farmers' Association, *Submission 9*, p. 1.

Commission's report with interest, however, it does not accept that the bill should be delayed until that inquiry is finalised.

2.69 The committee also notes the concerns about the character and quality of post-merger local content and the ACMA's ability to 'police' compliance with the local programming requirements. The bill provides for a review of the local programming requirements to commence within two years following the commencement of the additional obligations. Rather than responding to concerns relating to the obligations that may not eventuate, the committee considers that any demonstrated issues with the operation of the local content requirements can be examined as part of that dedicated review.

Committee view

2.70 This inquiry has provided a further opportunity for senators to consider this important bill. The committee reiterates the finding of the committee that examined the earlier version of the bill in the previous parliament; namely, that the bill be passed.

2.71 The media environment has changed significantly since the 75 per cent audience reach rule and the 2 out of 3 cross-media control rule were introduced. It is clear that both rules are now outdated and do not meaningfully contribute to media diversity. Certain printed newspapers and FTA television and radio broadcasters are covered by the rules, yet national newspapers, news websites, subscription television and radio services, and various online entertainment platforms are not. Despite the 75 per cent audience reach rule, affiliation agreements and online streaming provide essentially the same content throughout Australia.

2.72 Technological developments and related changes to consumer preferences have made the 75 per cent reach rule and the 2 out of 3 rule redundant. The rules now act to restrict certain media companies from restructuring their operations to allow them to better compete with other entities, including international internet and media behemoths. No compelling argument to the contrary was presented to the committee.

2.73 The issues that were raised by industry stakeholders, such as licence fees and the anti-siphoning list, are in the committee's opinion separate to the matter of media ownership and control. Although the government should carefully consider the merits of these arguments, the reform measures contained in the bill should not be delayed further in preference for a comprehensive reform package. Despite calls for other matters to be examined and different views on how reform should proceed, there is broad agreement among stakeholders and other interested parties that the two media control and ownership rules targeted by the bill are outdated. With this knowledge, it would be irresponsible to leave these technologically obsolete rules in force while other potential changes are developed and debated—their continued existence can only inhibit the industry participants from adapting efficiently to the significant changes in the media environment that have occurred.

Recommendation 1

2.74 The committee recommends that the bill be passed.

**Senator David Bushby
Chair**