

Labor Senators' Dissenting Report

1.1 Labor Senators reject the trumped-up notion that the Broadcasting Legislation Amendment (Media Reform) Bill 2016 represents 'the most significant reforms to our media laws in a generation'.¹ This narrow and shortsighted Bill is not about genuine or meaningful reform to address the disruptive challenges of digitisation and convergence in the long term, nor does it offer sound policy in the public interest.

1.2 Prime Minister Turnbull and Minister Fifield waited two and a half years in office before proposing this piecemeal package of amendments to the regulatory structure governing media in Australia. The fact that the Abbott-Turnbull Government did nothing in media ownership policy for almost three years shows this is all about politics rather than coherent public policy.

1.3 Labor Senators understand that high media ownership concentration is an enduring concern of the Australian public, and that we need diversity in the control of our media to support the effective functioning of our democracy. We note that media concentration in Australia is amongst the highest in the world and reject this Government's move to make the situation worse. We note that the majority of voters disapprove of changing media ownership laws to allow a single company to control a newspaper, TV network and radio network in the same area.²

1.4 Labor Senators understand that Australia needs a thriving media industry to promote a diversity of voices, to create jobs and to produce quality news, information and entertainment. We acknowledge the competitive pressures faced by Australian media in the face of digitisation and convergence.

1.5 Labor has repeatedly indicated its support for the removal of the 75 per cent reach rule and Labor Senators wish to express our disappointment that the government has dithered and delayed this important reform.

1.6 Labor Senators support the proposal to bolster local content following a trigger event, but take no comfort in the fact that these provisions do little to promote diversity. We are cognisant of the compromised position of Australians in regional areas in terms of access to a diversity of news and current affairs content, both in the traditional and new media environments.

1 M Fifield (Minister for Communications), 'Modernising Australian media laws', *Media release*, 1 March 2016.

2 Essential Research, *The Essential Report*, 27 September 2016, p. 13. In response to the question 'Would you approve or disapprove of changing the media laws to allow a single company to own all three of a newspaper, TV network and radio station in a single market?', 61 per cent of respondents answered either 'strongly disapprove' or 'disapprove'.

1.7 Labor supports proposed reductions to commercial broadcast licence fees as a measure to level the competitive playing field between Australian and overseas media companies. Labor Senators regard this measure as important in improving the international competitiveness of Australia's media sector and promoting the production of local content, as has been the case in international markets.

1.8 Labor Senators reject the proposition that scrapping the two out of three rule will promote media diversity and/or a competitive media industry. The widely acknowledged fact borne out by evidence presented to this inquiry is that removing the two out of three rule will lead to further media consolidation and, consequently, reduce media diversity in Australia. The Australian public deserves better than a government that is condemning important media diversity safeguards to the scrap heap in the name of 'reform'.

1.9 Labor Senators oppose the removal of the two out of three rule given this change would achieve so little for industry at potentially great cost to our democracy. There is no compelling evidence to justify its removal.

1.10 The two Senate Inquiries set up to examine the Government's package demonstrate that Parliament does not have available to it, at this time, the evidence or the depth of analysis required to justify embarking on a decision with such significant implications for decades to come. There has not been a comprehensive inquiry into ownership, concentration and competition in the Australian media market conducted by an independent body such as the Productivity Commission since the late 1990s.

1.11 Labor Senators conclude that it is ill-advised to remove the two out of three rule at a time when Australia's media is amongst the most concentrated in the world and when traditional media—newspapers, commercial television and commercial radio—continue to be the main source of news and current affairs for Australians, particularly in regional areas.

1.12 Labor Senators acknowledge the increasing influence of new media in Australia, however we do not mistake the abundance of online content for diversity in terms of diversity of ownership of Australian media. We note that the majority of the top 10 news websites accessed by Australians are either directly or jointly owned by traditional media platforms.³

1.13 Furthermore, and even if the proliferation of new media did solve the issue of media diversity in the true sense (and we are not convinced it does), Labor Senators note that the digital divide means that access to new media still remains out of reach for many Australians given substandard levels of broadband connectivity, particularly in rural and regional areas.

3 Department of Communications, *Media control and ownership*, Policy background paper No. 3, June 2014, p. 21.

1.14 Labor Senators recognise that, in the absence of a coherent, evidence-based, vision for the future from the Turnbull Government, the pragmatic course of action at this time is to repeal the 75 per cent reach rule and provide licence fee relief to the commercial broadcasting industry. Once the impact of these changes can be assessed, then the question of media diversity safeguards should be considered properly, in a broader and genuine reform context.

1.15 Labor Senators wish to express our disappointment at the Government's latest thought bubble on media regulation, which undermines diversity without reference to the realities of news media consumption today, without evidence of the knock-on implications and without recalibrating public interest safeguards for the 21st century.

1.16 Labor Senators acknowledge the need to reconfigure Australia's media laws and understand the need for integrated, evidence-based policy to move to an adaptive regulatory framework suited to the contemporary media ecosystem, and the transition to the knowledge economy.

1.17 Labor Senators look forward to engaging in a genuine conversation about the future of our media industry.

Diversity of ownership and control still matters

1.18 Media ownership and control rules are designed to encourage diversity in control of the more influential media by avoiding concentration of ownership, both within a particular medium and between different media. Like much of broadcast regulation, these rules are directed toward social policy ends. As Butler and Rodrick state:

The principal objection to a high concentration of media ownership is not economic. Diversity of ownership is primarily valued, not for its propensity to encourage competition and, as a consequence, lower prices for the consumer, but because it is assumed to be a necessary means of securing a diversity of views, ideas and opinions on a broad range of issues, which is regarded as essential for the effective functioning of a modern democracy.⁴

1.19 The Bill does not propose to amend the objects of the *Broadcasting Services Act 1992*, which include facilitating a broadcasting industry that is 'efficient, competitive and responsive to audience needs'⁵ and encouraging 'diversity in control of the more influential broadcasting services'.⁶ The tension between these objects, and the degree to which concentration of media ownership may support or undermine diversity is the subject of much debate, however the fact is that diversity of

4 Des Butler and Sharon Rodrick, *Australian Media Law* (2015), p. 952.

5 *Broadcasting Services Act 1992*, s. 3(b).

6 *Broadcasting Services Act 1992*, s. 3(c).

information and opinion is 'more likely to be achieved where there is a diversity in the ownership and control of the more influential media'.⁷

1.20 The concept of diversity is enduring and goes to the heart of our democracy. As noted by the Australian Communications and Media Authority:

At the core of liberal democracy is the idea of 'pluralism'—that is, more than one perspective has validity, and there is social and political value in people expressing, and engaging with, these perspectives. The rationale for intervention is that in the absence of intervention, media and communications markets (or other interests) may consolidate perspectives or favour certain opinions at the expense of others, and that a diversity of voices has social value.⁸

1.21 Issues of diversity, ownership and control matter to the Australian public. A recent Essential Poll shows that the majority (61 per cent) of voters across every demographic disapprove of changing media ownership laws to allow a single company to control a newspaper, TV network and radio network in the same area'.⁹

Australia needs a competitive media sector

1.22 Australia needs a thriving media industry to promote a diversity of voices, to create jobs and to produce quality news, information and entertainment. It is imperative that the Australian media industry remains viable and competitive in the modern media environment.

1.23 Australian media proprietors face competitive pressures arising out of digitisation and convergence. Over the top content providers such as Netflix, Google and Facebook don't pay tax in the same way as Australian media companies and aren't subject to detailed Australian media regulation. As noted in Inquiry submissions:

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.¹⁰

And:

7 Productivity Commission, *Broadcasting*, Inquiry Report, No. 11, 3 March 2000, p. 328.

8 Australian Communications and Media Authority, *Enduring Concepts – Communications and media in Australia*, November 2011, p. 42.

9 Essential Research, 'The Essential Report', 27 September 2016, p. 13.

10 Ten Network, Submission to Senate Environment and Communications Legislation Committee, *Inquiry into Broadcasting Legislation Amendment (Media Reform) Bill 2016*, 27 September 2016, p. 1.

[S]tructural and cyclical change in the Australian media industry drives local players towards consolidation and scale as a means of responding to increased competition.¹¹

1.24 Labor in Government recognised the challenges faced by commercial TV broadcasters in the convergent media environment and the pressures on local content production. In announcing licence fee relief in February 2010, then Communications Minister Conroy also stated that Labor was committed to reviewing the future role of licence fees in Australia in the face of significant change, specifically noting that licence fee rebates would ensure that commercial broadcasters can continue to invest in new Australian content.¹²

1.25 Labor supports the proposed further reduction in licence fees and the removal of the 75 per cent reach rule as a pragmatic response to the pressures of convergence. Labor rejects the notion that removal of the two out of three rule addresses competitive pressures effectively and notes the risk of unintended consequences if removed before the impact of the reduction in licence fees and the removal of the 75 per cent reach rule is known. As stated by Nine in its submission to the Inquiry:

Changing any ownership rules before addressing onerous and unfair licence fees has the potential to distort the market and have unintended consequences.¹³

Australia's media ownership is heavily concentrated

1.26 The present state of concentration in the Australian media is a matter for concern. Evidence to the Inquiry from three eminent professors includes the following:¹⁴

Professor Michael Fraser:

It is notorious, in terms of news and current affairs, that we, among the democracies, have the least diversity in our newspapers and have very little in television.

Professor Rodney Tiffin:

11 ASTRA, Submission to Senate Environment and Communications Legislation Committee, *Inquiry into Broadcasting Legislation Amendment (Media Reform) Bill 2016*, 27 September 2016, p. 1.

12 Stephen Conroy, 'Government moves to protect TV content', *Media release*, 8 February 2010.

13 Nine, Submission to Senate Environment and Communications Legislation Committee, *Inquiry into Broadcasting Legislation Amendment (Media Reform) Bill 2016*, 22 September 2016, p. 1.

14 Evidence to Senate Environment and Communications, *Inquiry into Broadcasting Legislation Amendment (Media Reform) Bill 2016*, Proof Committee Hansard, 24 October 2016, pp. 9, 21 and 28.

Media concentration in Australia is amongst the highest in the world. Our daily press is the most concentrated in the world...Our pay TV industry is the most concentrated in the world.

Professor Graeme Turner:

[It] is important that we are alert to the likelihood of any relaxation of media ownership restrictions making what is already an undesirable situation any worse.

1.27 A study of Australian media ownership and control by the Department of Communications states that 'the print sector has historically exhibited relatively high levels of concentration, dominated by News Corp Australia, Fairfax and APN' and that commercial television and commercial radio are 'more moderately concentrated' but that 'affiliation agreements, programming syndication and joint venture operations tend to result in fairly homogenous content (i.e. channels and stations) being available to consumers in any given market'.¹⁵

1.28 Australia already has a highly concentrated news market, by international comparison. As noted in the Finkelstein Inquiry into the Media:

Australia's newspaper industry is among the most concentrated in the developed world...Australia is the only country in which the leading press company accounts for more than half of daily circulation, while in 20 of the 26 countries it is under 40 per cent. With a share of 86 per cent, Australia also ranks highest by a considerable margin when considering the share of the top two companies. The share of the top two companies exceeds 60 per cent in only six of the 26 countries.¹⁶

1.29 In terms of the industry structure within Australia, the Finkelstein Inquiry notes:

Overall the industry comprises four major publishers and is highly concentrated. Measured by circulation, News Limited is by far the largest with 65 per cent of total circulation of metropolitan and national daily newspapers, or 58 per cent of circulation when counting all daily newspapers. Fairfax Media, the second largest group, controls 25 per cent of metropolitan and national daily circulation, or 28 per cent of all daily newspaper circulation.¹⁷

15 Department of Communications, *Media control and ownership*, Policy background paper No. 3, June 2014, p. 21.

16 The Hon R Finkelstein QC, *Report of the Independent Inquiry Into the Media and Media Regulation*, Report to the Minister for Broadband and the Digital Economy, 28 February 2012, pp. 59–60.

17 *Ibid.*, p. 58.

1.30 The Department's assessment of media diversity across the country found the level of diversity at a market level to be at or below the minimum number of 'voices' required by the 5/4 rule¹⁸ in 70 per cent of all licence areas (in 73 of the 105 licence areas).¹⁹ In the mainland State capitals, where over two thirds of the Australian population resides, the Department reports the number of 'voices' to be above the minimum level required by the 5/4 rule, with Sydney at 10 voices, Melbourne at 9 voices, Brisbane at 8 voices.²⁰ Adelaide currently sits at 6 voices (only one above the minimum safety net) and Perth at 7 voices.²¹ In regional and remote areas the level of diversity falls away and is either at the minimum level, or below it, with 42 per cent of licence areas at, and 28 per cent of licence areas below, the minimum 'floor'.²²

Traditional media still dominates

1.31 Traditional media still dominates the media landscape in Australia, in terms of reach, penetration and influence. While new media is growing in importance, the traditional media still dominates when it comes to news and current affairs production and consumption. As Chris Mitchell, former editor-in-chief of *The Australian* states:

The truth is that newspaper editors still drive the national media agenda. Their ideas are followed by news directors in the electronic media and on social media.²³

1.32 Industry research and marketing company Think TV states that 'Television is the number 1 medium', that 'TV is ubiquitous; every home has one (99+ per cent)—the majority of homes have two or more TV sets' and that '[d]espite the diverse range of entertainment and information options and devices on which to view content, [Australians] spend around 3 hours a day watching TV on a TV set'.²⁴

1.33 Industry peak body Commercial Radio Australia reports that the first major comprehensive study of Australia's audio consumption has found that 'the entry of global players such as Pandora, Spotify and Apple Music have failed to dent Australian radio's dominance of the audio landscape' and that 'the findings showed

18 The 5/4 'minimum voices' rule requires a minimum of four voices in regional areas and a minimum of five voices in the mainland state capitals.

19 Department of Communications, *Media control and ownership*, Policy background paper No. 3, June 2014, p. 17-18.

20 *Ibid.*, p. 18.

21 *Ibid.*, pp. 55–56 (Appendix B).

22 *Ibid.*, pp. 17–18.

23 Chris Mitchell, *Making Headlines* (2016), Prologue.

24 ThinkTV, *More Reasons Why TV*, webpage, accessed 6 November 2016 available at http://www.thinktv.com.au/content_common/pg-more-reasons-why-tv.seo. See also ThinkTV, *Australian Television*, Fast Facts available at http://www.thinktv.com.au/content_common/pg-tv-fast-facts-television-viewing-in-australia.seo. ThinkTV is a research and marketing company, backed by Australia's free-to-air and subscription television broadcasters.

radio was dominant across the day for all demographics, including younger listeners'.²⁵

1.34 In terms of the main sources of news, in particular:

Broadcast television remains the main source of news, including for Australians who access news online'.²⁶

And:

Older Australians tend to consider the more traditional platforms of television (free-to-air or subscription), print newspapers and traditional radio to be their main sources for news, while younger generations have a greater affinity with the internet and social media' and that 'more regional viewers tend to identify television as their main source compared with city dwellers'.²⁷

Diversity potential of new media is yet to be realised

1.35 In the online space, traditional media still dominate the provision of news to Australians and diversity safeguards remain necessary in the Australian media environment. On the question of whether online news enhances media diversity, the Department of Communications concludes that 'the news genre is in a state of dynamic change and...the diversity-enhancing potential of the online space is yet to be fully realised'.²⁸ The Department notes:

[T]he proliferation of online sources of news content does not necessarily equate to a proliferation of independent sources of news, current affairs and analysis. Indeed, the internet has, to date at least, tended to give existing players a vehicle to maintain or actually increase their influence...[T]he established media outlets have tended to dominate the online news space.²⁹

And:

[I]t is notable that eight of the top ten news websites in Australia in 2013, in terms of average unique daily users, are owned by these major mastheads or their publishers...There is also a notable clustering of users with the top 2 or 3 news websites.³⁰

25 Commercial Radio Australia, 'Aussie radio reigns supreme in battle for ears', *Media release*, 7 October 2016.

26 Australian Communications and Media Authority, *Communications Report 2014-15*, 2015, p. 77.

27 Department of Communications, *Media control and ownership*, Policy background paper No. 3, June 2014, p. 29.

28 Ibid., p. 37.

29 Ibid., p. 36.

30 Ibid., p. 28.

1.36 While the internet has facilitated the entry of new voices (for example *New Daily* and *The Guardian Australia*) it is worth noting that overseas competitors in the media space are not necessarily concerned with quality coverage of matters of public interest in Australia. Further, it is a mistake to confuse the proliferation of content for diversity of ownership or opinion. As Lesley Hitchens cautions:

It is the case that the media ecosystem seems to be characterized by abundance – there are multiple ways in which news, information and opinion, and entertainment content can be accessed. Of course, very often one is simply receiving much the same content via these new platforms, as would be received via the traditional platforms. And so there is a need for caution to ensure that one is not misled by an illusion of diversity. Scarcity may be present despite the appearance of abundance.³¹

Digital divide undermines diversity in regional areas

1.37 The digital divide in Australia means that, in regional Australia, the diversity-enhancing potential of the online space is even further away from being realised. This was expressed in direct terms by the National Farmers' Federation at the Inquiry:

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.³²

1.38 The interplay of these factors highlight an important point: any further concentration of traditional media through the removal of two out of three rule will have a disproportionate impact on diversity for regional segments of the population, who by virtue of various factors consume less content over the internet and are more dependent on traditional sources of media for news.

1.39 When considering the potential impact of removing the two out of three rule it is important to consider how broadband availability and use in regional Australia shapes preferences for the sources of news consumed.

1.40 The Australian Bureau of Statistics Household Use of Information Technology 2014-15 survey highlights there remains a gap (albeit narrowing) in internet penetration between the cities and the regions. In major cities the proportion of households with internet access is 88 per cent, compared to 82.3 and 79 per cent respectively for inner and outer regional areas. This drops to 66 per cent when controlled for the lowest quintile of household income, compared to 97.8 per cent for

31 Lesley Hitchens, 'Media Regulatory Frameworks in the Age of Broadband: Securing Diversity', *Journal of Information Policy* 1 (2011), 217–240.

32 National Farmers' Federation, Submission to Senate Environment and Communications Legislation Committee, *Inquiry into Broadcasting Legislation Amendment (Media Reform) Bill 2016*, 6 October 2016, p. 1.

the highest quintile.³³ Further, when taken as a proportion of the segmented population there are almost twice as many regional and remote households who do not have internet access compared with individuals living in urban areas and the cities.

1.41 The availability of broadband has not been helped by Malcolm Turnbull's bungling of the NBN Sky Muster Satellite Service which has caused delays for tens of thousands of regional and remote households. Further, a recent report by the Australian National Audit Office on the Mobile Black Spot Programme found the Government wasted \$28 million on 89 mobile towers that delivered minimal to no coverage of additional premises.³⁴

1.42 The higher cost of data in regional areas may also affect the capacity of individuals to access digital content with the frequency of city counterparts. An ACMA survey of price data indicates those living outside major capital cities are more likely to have the lowest data-cap allowances, with 14 per cent having less than 6 GB and 10 per cent having 6–30 GB (compared with six per cent and seven per cent respectively for those in major capital cities).³⁵

1.43 There is strong evidence demographic and age factors influence platform preferences. For example, the Reuters Digital News Report illustrates the strong effect age has on the main source of news. For example, consumers over the age of 50 are almost two and a half times more likely nominate traditional TV as their main source of news, in contrast to younger age cohorts who prefer online channels.³⁶ Further, data from the 2014–15 Roy Morgan Single Source survey indicates that non-urban areas have a higher representation of older Australians (56 per cent aged over 50, compared with 39 per cent in major capital cities).

1.44 The sum of these factors is captured in the recent Digital Inclusion Index, which highlights important differences between regional and urban areas in levels of digital inclusion. For example, the Capital-Country gap has widened to 6.6 points.³⁷ The evidence is clear that geography and socio-economic factors are critical for access, affordability and digital activity in Australia.

33 ABS, *Household Use of Information Technology, Australia, 2014-15*, 18 February 2016.

34 Australian National Audit Office, *Award of Funding under the Mobile Black Spot Programme*, 1 September 2016, p. 8.

35 ACMA, *Research Snapshot: Regional Australians Online*, 28 April 2016.

36 Reuters Institute, *Digital News Report 2015*, p. 10.

37 Roy Morgan, *Measuring Australia's Digital Divide: Australian Digital Inclusion Index 2016*, p. 5.

1.45 The news consumption habits of consumers in regional areas differs to those in the cities. The ACMA's Regional Australians online research snapshot illustrates that accessing news and reading news online are higher in major capital cities than in non-urban areas (respectively 10 and 13 percentage points).³⁸

1.46 The evidence demonstrates the impact of the digital divide on online media consumption is not simply a function of how many people have access to quality internet, but also driven by how different population segments make use of the connection they have to consume content. This highlights the importance of considering how the reconfiguration of market structures impacts consumers with different geographic and demographic characteristics.

Removal of the 2 out of 3 rule not justified

1.47 Removal of the two out of three rule will achieve very little at potentially great cost. There is no compelling evidence that this will improve the competitiveness of the sector but there is a significant risk that it will reduce media diversity. The knock-on effects are unclear and it is ill-advised to condemn this rule to the scrapheap at a time when Australia's media market is amongst the most concentrated in the world. This uncertainty about knock-on effects is also shared within industry:

[W]hat we would like to see is a comprehensive package of changes so that we can understand the full implications of regulatory change for our business, for our industry and for consumers more generally.³⁹

1.48 As numerous commentators have noted, removal of the two out of three rule will permit further media consolidation in Australia's already highly concentrated media environment, leading to a reduction in media diversity in Australia. Such consolidation may undermine the things diversity seeks to protect, such as quality news and current affairs, jobs in the production sector and the number of journalists on the ground. For example, as stated by the ABC's Media Watch:

The two-out-of-three rule currently stops anyone owning TV, newspapers and radio in the same market. And if it goes, as almost all media proprietors want, we're likely to see some mergers: Like Fairfax Media teaming up with Channel Nine or Channel Seven and perhaps News Corp and Channel Ten doing the same. And that will mean even greater concentration of media ownership than we have now.⁴⁰

38 ACMA, *Research Snapshot: Regional Australians Online*, 28 April 2016.

39 Mr Tim Worner, *Evidence to Senate Environment and Communications Legislation Committee, Inquiry into Broadcasting Legislation Amendment (Media Reform) Bill 2016*, Proof Committee Hansard, 24 October 2016, p. 1.

40 Media Watch, *They're back: Media Reforms 2016*, transcript, 1 February 2016. Note that 'Fairfax teaming up with Channel Nine' refers to merger activity going beyond joint ventures like StreamCo/Stan.

1.49 Consolidation of media assets through merger and acquisition activity may lead to job losses, including a reduction in the number of services and journalists on the ground, as well as the concomitant undermining of the things diversity seeks to protect, such as quality news and current affairs. For example, the merger of Macquarie Radio and Fairfax was reported to have resulted in an approximate reduction of 10 per cent of roles across the combined business.⁴¹

1.50 Removal of this rule will achieve little in terms of alleviating the commercial pressures felt across the broadcasting sector. According to the Regulation Impact Statement to the Bill:

In most licence areas, the 2 out of 3 rule is not in play as no single entity controls media assets from two of the three regulated platforms in these areas. If the rule is removed, the great majority of regional and remote licence areas of Australia would see little change as the retention of the 5/4 minimum voices rule would ensure preservation of existing levels of media diversity.⁴²

1.51 It is difficult to justify the removal of the two out of three rule on the basis that it will assist regional broadcasters in remaining commercially competitive when the vast majority of licence areas would not be affected by its removal. According to evidence from representatives of the Department of Communications and the Arts, the removal of the two out of three rule would have 'no impact' in 72 of the 99 regional or remote licence areas on the following basis:

There are 99 regional or remote radio licence areas for the purposes of the media control rules; 62 of them have no newspaper, so the two-out-of-three rule is not relevant, and 10 of the remainder are constrained by the five-out-of-four rule, so no further consolidation can take place in those areas...So, there are 27 areas that could have further consolidation done to them.⁴³

1.52 Further, it is difficult to justify the removal of the two out of three rule on the basis that it will assist metropolitan operators in remaining commercially competitive or facilitate a level playing-field given the likelihood that only a limited subset of the industry may take advantage of the change, which risks creating uneven outcomes across the industry:

[B]ecause only some ownership laws are being looked at and not others, there are a very limited number of transactions available post these changes – in fact, possibly only one national transaction out of the changed two-out-of-three rule.

41 Mumbrella, *Macquarie Radio to Cut 10% of Staff*, 1 May 2015.

42 Broadcasting Legislation Amendment (Media Reform) Bill 2016, Replacement Explanatory Memorandum, p. 18.

43 Dr Simon Pelling, *Evidence to Senate Environment and Communications Legislation Committee*, Inquiry into Broadcasting Legislation Amendment (Media Reform) Bill 2016, Proof Committee Hansard, 24 October 2016, p. 43.

We are having this massive national debate so that there can be one transaction. It is first in, best dressed because after that the gate closes in terms of the number of voices in metropolitan markets, and I am specifically speaking about Adelaide, where there are six voices and there needs to be a minimum of five...The gate is closed; that is it.

So we are really having this discussion about who is going to get their deal away first. We just do not think that this is an outcome that is even-handed across the industry and that is going to drive positive outcomes across the industry.⁴⁴

1.53 Removal of the two out of three rule would mean only basic diversity safety-nets remain, with transactions otherwise subject to general competition law. Transactions in the media sector will remain subject to section 50 of the *Competition and Consumer Act 2010* under which the Australian Competition and Consumer Commission (ACCC) considers whether mergers will cause a substantial loss of competition in a media market.

1.54 Competition law is of questionable efficacy as a tool for achieving social policy objectives as contained in the *Broadcasting Services Act 1992*. It is important to recognise there are subtle but important differences between the objectives of a public interest test and the test performed by the ACCC to establish whether there has been a substantial lessening of competition. The former is about diversity and what that means for our democracy, the latter is a market-based test that is not designed to capture the intangible considerations at stake. These were encapsulated by Professor Julian Thomas, a board member of the Public Interest Journalism Foundation:

The ACCC's remit does not extend to the public and civic function of journalism, and they have never pretended that it does. But that is what we are concerned with here, because we think that independent journalism—and journalism more broadly—has a vital part to play in the proper functioning of our democratic process as well as its importance in the economy to enable markets to form and to make sure that businesses can communicate with consumers.⁴⁵

1.55 Another pertinent issue about the role and remit of the ACCC is its power in relation to blocking mergers or acquisitions. While, at the request of the Communications Minister, the ACCC has released draft Media Merger Guidelines⁴⁶ to

44 Ms Bridget Fair, *Evidence to Senate Environment and Communications Legislation Committee, Inquiry into Broadcasting Legislation Amendment (Media Reform) Bill 2016*, Proof Committee Hansard, 24 October 2016, p. 3.

45 Professor Julian Thomas, Board Member, Public Interest Journalism Foundation, *Evidence to Senate Environment and Communications Legislation Committee, Inquiry into Broadcasting Legislation Amendment (Media Reform) Bill 2016*, Committee Hansard, 29 April 2016, p. 5.

46 The draft Media Merger Guidelines were released on 26 August 2016 further to a request from the Communications Minister on 29 March 2016 noting the Government had introduced the Broadcasting Legislation Amendment (Media Reform) Bill 2016 into Parliament on 2 March 2016.

'give parties contemplating a media merger, and those potentially affected by a media merger, a greater awareness of some of the key issues the ACCC may focus on',⁴⁷ these do little to assist Parliament in understanding what mergers would be blocked under competition law and whether competition law provides adequate safeguards for diversity in the event of the removal of the two out of three rule. Further, the Guidelines cannot provide an indication as to whether a particular merger might or might not be cleared by the ACCC⁴⁸ and will have no legal force when finalised.

1.56 Competition law outcomes are subject to the discretion of decision-makers in the ACCC, the Competition Tribunal and the courts, acting in accordance with law. It is instructive to note the submission of DigEcon to the Inquiry which states as follows:

The ACCC's functions in relation to mergers and acquisitions are outlined in Division 3 of Part VII of the Act. On application the ACCC may grant a "clearance" for a proposed merger or acquisition; the clearance may be accompanied by other conditions. The basis on which the ACCC is to decide on whether to grant the clearance is whether in the ACCC's assessment the merger or acquisition results in a breach of section 50, that is, results in a substantial lessening of competition.

The ACCC provides both an informal and a formal clearance process, only the latter offers legal protection. Specifically, if the ACCC grants the clearance then "section 50 does not prevent" the acquisition so long as it occurs in accordance with the clearance.

However, the ACCC does not have the power to block a merger or acquisition. If the application for clearance is refused the parties have recourse to the Australian Competition Tribunal. Parties can apply directly to the Tribunal for authorisation.

...

In removing the "2 out of 3" rule the Parliament's concern is primarily over what mergers will be blocked. The ACCC's guidelines on when it would not provide a clearance is of no particular relevance at all. The only thing that will matter is the interpretation of the Australian Competition Tribunal.

...

Absent a specific legislative provision requiring the consideration of media diversity in proposed mergers competition law cannot be relied upon to

47 ACCC, 'ACCC seeks comments on its draft guidelines for assessing media mergers', *Media release*, 26 August 2016.

48 Ibid.

preserve diversity. The removal of the "2 out of 3" rule without some other legislative provision places media diversity at significant risk.⁴⁹

Conclusion

1.57 Labor Senators reject the government's piecemeal, short-sighted approach to the future of our media industry. The proposed reforms offer no safeguards in terms of diversity of ownership and no coherent vision for the contemporary media ecosystem in terms of the public interest role of the media in the effective functioning of our democracy.

1.58 Labor Senators reject the notion that the only way to support the health of our media industry is by removing diversity safeguards. Australians deserve meaningful public interest safeguards to ensure the health of our democracy now and in the future.

1.59 Labor will look to promote a diverse and competitive media sector, along with sustained production of local content and jobs, by responding effectively to the changes in the media landscape.

1.60 Labor supports Schedule 1 and 3 (abolition of the 75 percent audience reach rule and introduction of new local programming requirements following a trigger event) and opposes Schedule 2 (abolition of the two out of three cross-media control rule).

Senator Anne Urquhart
Senator for Tasmania

Senator Anthony Chisholm
Senator for Queensland

49 DigEcon Research, Submission to Senate Environment and Communications Legislation Committee, *Inquiry Into Broadcasting Legislation Amendment (Media Reform) Bill 2016*, 26 September 2016, pp. 1–4.

