

The Senate

Environment and Communications
Legislation Committee

Broadcasting Legislation Amendment
(Media Reform) Bill 2016 [Provisions]

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Chapter 1

Introduction

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

Overview of the bill

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

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

Inquiry conducted during the 44th Parliament

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

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

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

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

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

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

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

Conduct of this inquiry

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

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

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

Scope and structure of this report

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

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

1.10 This report comprises two chapters:

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

Note on references

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

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

Background information on media ownership and control regulation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Application of the general competition law

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

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

Foreign acquisitions

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

10 EM, pp. 6–7.

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

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

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

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 recommend 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 obligations. 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**

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.

Australian Greens' Dissenting Report

1.1 The Australian Greens believe the Government has missed an important opportunity to progress meaningful reform of the Australian media landscape, and has instead settled on a simplistic deregulatory approach that will do nothing to improve media diversity.

1.2 All witnesses to both iterations of this inquiry, in May and October 2016, agreed that the media landscape is changing rapidly, and that online delivery of content is one of the key drivers of change. Media regulations drafted in the pre-internet age have not kept up with the pace of technological innovation or changing habits of content consumption and creation by the public. Australia also has one of the most highly concentrated media ownership structures in the world, which makes support for public, community and independent broadcasters and publishers all the more important.

1.3 Instead of grappling with these complex issues in a meaningful way, after nearly three years of consideration the Government has done nothing more than taken the path of least political resistance, the bare minimum that the handful of commercial broadcasters and publishers could agree on, to propose the abolition of two regulations originally intended to protect media diversity.

1.4 Despite the emergence of online content and news delivery forming the basis of the Government's rationale for this bill, nowhere does the bill provide any form of support for these emerging sources of diversity. The Government's attacks on the funding and independence of respected public broadcasters ABC and SBS have been subjected to sustained criticism. Ongoing neglect and crippling funding shortfalls for community radio and television broadcasters have severely limited the potential of these important sources of media diversity. In addition, responses to the large-scale structural changes to the global media environment canvassed in the 2011 Convergence Review remain entirely unaddressed in this legislation.

1.5 Lastly, a number of submitters made the self-evident assertion that access to fast broadband services to deliver new sources of on-demand content remains dramatically uneven across the country. If anything, the 'digital divide' between those with access to rapid telecommunications services has worsened under the Abbott-Turnbull Government's hopelessly incompetent handling of the National Broadband Network. This has put fast broadband out of reach for millions of Australian households; even if a flourishing mix of local and international content were being produced for consumption, access for millions of Australian households will be out of the question for the foreseeable future.

1.6 It is therefore the view of the Australian Greens that the bill should not pass in its current form, and that the 2/3 rule should remain at the bare minimum. Until such time as the above preconditions for healthy media diversity have been met, the

2/3 rule provides a flawed but necessary bulwark against further consolidation of media ownership in Australia.

1.7 The Greens do agree that the abolition of the reach rule and marginal improvements to local content rules could be supported under the condition that the 2/3 rule remains in place, but contend that until such time as the Government is prepared to directly engage with the larger issues at play, the bill as a whole represents a step backwards. It exemplifies the approach of this Government more broadly: upholding the interests of commercial actors at the expense of the broader public interest, dressing up a counterproductive deregulatory agenda as though it represents genuine reform. It is our view that the bill should not pass the Parliament unless the schedule abolishing the 2/3 rule is removed from the legislation.

Senator Larissa Waters
Deputy Leader of the Australian Greens
Senator for Queensland

Appendix 1

Submissions and additional information received by the committee

Submissions

1	Southern Cross Austereo
2	Nine Entertainment Co
3	Prime Media Group
4	WIN Network
5	News Corp Australia
6	Ten Network
7	Australian Subscription Television and Radio Association
8	Mr Roger Colman
9	NSW Farmers' Association
10	Professor Rodney Tiffen
11	DigEcon Research
12	Confidential

Additional information

Associate Professor Tim Dwyer – 'Media owners steer government away from reform in the public interest', article dated 15 September 2016

Seven West Media – Venture Consulting, 'The Case for the Abolition of the Broadcast Licence Fee (Summary)', September 2016

Appendix 2

Public hearing

Monday, 24 October 2016 – Sydney

Seven West Media

Mr Tim Worner, Chief Executive Officer

Ms Bridget Fair, Group Chief, Corporate and Regulatory Affairs

Professor Michael Fraser AM

Fairfax Media

Mr Greg Hywood, Chief Executive Officer

Emeritus Professor Rodney Tiffen

Ten Network Holdings

Mr Paul Anderson, Chief Executive Officer

Mrs Annabelle Herd, Director of Corporate and Regulatory Affairs

Emeritus Professor Graeme Turner

Prime Media Group

Mr Ian Audsley, Chief Executive Officer

Southern Cross Austereo

Mr Grant Blackley, Chief Executive Officer

WIN Network

Mr Andrew Lancaster, Chief Executive Officer

Department of Communications and the Arts

Dr Simon Pelling, First Assistant Secretary, Content Branch

Ms Cathy Rainsford, Assistant Secretary, Media Branch

