

Chapter 2

Overview of the current framework and the changes proposed in the bill

2.1 This chapter provides background information on the current media ownership and control framework in Australia and local programming requirements. This chapter also outlines the proposed amendments contained in the bill, key concepts used in the bill and the rationale for the proposed changes.

The current media ownership and control framework in Australia

2.2 Australia's media control and ownership regulatory framework is contained in Part 5 of the *Broadcasting Services Act 1992* (BSA), which is administered by the Australian Communications and Media Authority (ACMA). The merger and acquisition provisions of the *Competition and Consumer Act 2010* (CCA) and the *Foreign Acquisitions and Takeovers Act 1975* also apply to media transactions. This section discusses relevant aspects of these laws in turn.

Broadcasting Services Act requirements

2.3 The BSA framework comprises five rules that limit the 'control'¹ of commercial broadcasting services (television and radio) and newspapers associated with the licence areas.² The five rules are listed below:

- 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 '75 per cent audience reach' rule (applies to television)—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.

1 The Regulation Impact Statement explains that the framework is based 'on the concept of "control", not ownership per se'. That is: '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'. For further information, see Explanatory Memorandum (EM), p. 6.

2 EM, p. 6. As newspapers with a national circulation (such as *The Australian* and the *Australian Financial Review*) are not associated with a relevant licence area, the ownership of these newspapers is not regulated by the media control rules.

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

2.4 The 75 per cent audience reach rule and the 2 out of 3 cross-media control rule are of direct relevance to the bill and are discussed further below.

75 per cent audience reach rule

2.5 The 75 per cent audience reach rule applies to commercial television broadcasting. It prevents a person, either in their own right or as a director of one or more companies, from being in a position to exercise control of commercial television broadcasting licences whose combined licence area populations exceed 75 per cent of the Australian population.⁴ 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

2.6 In a paper published in June 2014, the Department of Communications observed that two of the three major metropolitan commercial television networks, Seven and Nine, are close to the 75 per cent audience reach threshold. The latest figures for combined audiences are as follows: Seven (73.81 per cent), Nine (73.55 per cent) and Ten (66.70 per cent).⁶

2.7 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).⁷

3 EM, pp. 6–7.

4 EM, p. 1.

5 The 60 per cent threshold was introduced by the *Broadcasting (Ownership and Control) Act 1987*. The 75 per cent threshold took effect when the BSA commenced in 1993.

6 Department of Communications, 'Media control and ownership', *Policy background paper*, No. 3, June 2014, www.communications.gov.au/file/1251/download?token=kGQjvOnT (accessed 21 March 2016), p. 19; 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 22 March 2016).

7 Department of Communications, 'Media control and ownership', p. 19.

2.8 Organic population growth does not result in the threshold of 75 per cent of the Australian population being contravened.⁸ 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'.⁹

2 out of 3 rule cross-media control rule

2.9 This rule prohibits a person from controlling more than two of the three types of regulated media platforms (that is, a commercial television broadcasting licence, a commercial radio broadcasting licence and an associated newspaper) in any one commercial radio licence area. The 2 out of 3 rule was introduced in 2006.

2.10 In its June 2014 paper, the Department of Communications observed that there are 'a number of companies that control the maximum allowable two regulated media platforms in a commercial radio licence area'. Under the 2 out of 3 rule, 'those companies would not be permitted to acquire a third media platform in these markets'. The paper used Fairfax's platforms in the Sydney market to illustrate this point:

For example, Fairfax Media would not be permitted to acquire a commercial television licence in Sydney or Melbourne (unless it were to divest its commercial radio or associated newspaper holdings in the relevant licence area).¹⁰

2.11 Companies that control the maximum allowed number of regulated media platforms in a commercial radio licence area (as at June 2014) are listed at Table 2.1.

Table 2.1: Companies that control the maximum allowable two regulated media platforms in a commercial radio licence area (as at June 2014)

<i>Company</i>	<i>Media platforms</i>	<i>Licence areas (RA1)</i>
Fairfax Media	Radio and newspaper	Sydney & Melbourne
Seven West Media	Television and newspaper	Perth
DMG/News Corp	Radio and newspaper	Sydney, Melbourne, Brisbane & Adelaide
Southern Cross Austereo	Television and radio	26 regional licence areas including Canberra, Gold Coast, Hobart & Newcastle
WIN Corporation	Television and radio	Wollongong

Source: Department of Communications, 'Media control and ownership', p. 18.

8 See *Broadcasting Services Act 1992*, s. 52; Prime Media Group, Answers to questions on notice, 31 March 2016 (received 15 April 2016), p. 2; Department of Communications and the Arts, Answers to questions on notice, 31 March 2016 (received 18 April 2016), p. 2.

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

10 Department of Communications, 'Media control and ownership', p. 18.

Application of the Competition and Consumer Act 2010 to transactions

2.12 Mergers and acquisitions in the media sector are subject to the general competition law prohibition of anti-competitive acquisitions outlined in the 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.

2.13 In recent years, the ACCC has reviewed various transactions in the media sector that were not subject to the BSA media control rules (as they related to subscription television broadcasting licences and subscription video on demand services). A list of acquisitions in the media sector considered by the ACCC since 2006 was provided in response to a question on notice.¹¹ The ACCC's approach to assessing mergers in the media sector is discussed in Chapter 3.

Foreign Acquisitions and Takeovers Act 1975

2.14 The Foreign Acquisitions and Takeovers Act 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 of 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'.¹²

Schedules 1 and 2: Proposed changes to media ownership and control laws

2.15 The bill contains proposed amendments to the BSA that would repeal the 75 per cent audience reach rule and the 2 out of 3 rule cross-media control rule. These proposed measures are contained in schedules 1 and 2 to the bill: schedule 1 contains three items that would abolish the 75 per cent reach rule; schedule 2 contains various items necessary to effect the abolition of the 2 out of 3 rule.

Rationale for the proposed changes

2.16 The explanatory memorandum (EM) stated that 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 noted that, as the rule focuses on traditional media

11 See Australian Competition and Consumer Commission (ACCC), Answers to questions on notice, 31 March 2016 (received 21 April 2016), pp. 1–13.

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

platforms, it 'does not take into consideration the changed media landscape, where consumers access news content from alternative sources, such as online'.¹³

2.17 If the proposed changes are enacted, consolidation within the commercial television sector would be possible, subject to the CCA and other relevant laws. The EM noted 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'.¹⁴

2.18 The Parliamentary Joint Select Committee on Broadcasting Legislation recommended the abolition of the 75 per cent audience research rule in 2013.¹⁵

2.19 One of the key developments in the media market in recent years is the growth in online streaming of content. Online video-on-demand services provided by international and domestic businesses distribute products throughout Australia.¹⁶ In addition, Southern Cross Austereo noted that all three metropolitan television networks stream television programming 'with no regard for the exclusive broadcast licence areas and regardless of any cannibalisation this may cause to viewing or revenue in regional licence areas'.¹⁷

2.20 The increasing popularity of online news services is another key development. Australian newspaper companies, 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.

2.21 To illustrate the growth in online news and the range of news websites available, News Corp Australia provided Neilson data that indicated:

- there are 41 news websites with over 300,000 unique visitors/month, and of those, 19 (46 per cent) 'are "international" or not "traditional" (Australian) media companies';

13 EM, p. 1.

14 EM, p. 1.

15 Southern Cross Austereo, p. 4. The Joint Committee recommended that the rule be abolished 'provided there is legislation or legally enforceable undertakings to safeguard local content in regional Australia'. That committee's report added: 'Prior to the introduction of the legislation, a clear definition of local content needs to be established which ensures regional viewers have access to appropriate levels of high quality, locally devised, and locally presented programming'. Joint Select Committee on Broadcasting Legislation, *Three broadcasting reform proposals*, June 2013, p. 17.

16 Southern Cross Austereo, *Submission 4*, p. 5.

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

- twenty-two (54 per cent) of the news websites have an audience in excess of one million unique visitors per month, and of those, nine are not traditional (Australian) media companies; and
- of the top 10 news websites, News Corp Australia noted that five are linked to traditional (Australian) media companies, four are not traditional (Australian) media companies, and one is the ABC.¹⁸

2.22 The 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. The ACCC's views on this were informed by the review it completed in 2015 of a transaction involving the Ten Network and Foxtel.¹⁹ The ACCC's chairman, Mr Rod Sims, noted that streaming activities by the free-to-air 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 possible that other buyers could have met a more competitive outcome than the one we ended up with'.²⁰

2.23 The 2 out of 3 rule was also relevant in the Foxtel–Ten transaction, in that Foxtel was a buyer that was not one of the three regulated platforms. Mr Sims explained:

There is a whole lot of content on Foxtel—not just the obvious sport that we all watch it for but also Sky News and things like that—yet it was not part of the three. So...[at the time of the review] we made some comments about whether that rule is limiting perhaps a better outcome in the media sector and whether it is constraining proper leveraging of platforms.²¹

18 News Corp Australia, *Submission 8*, p. 3. This data is based on desktop consumption—that is, mobile and tablet use is not included.

19 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. ACCC, 'Mergers register', <http://registers.accc.gov.au/content/index.phtml/itemId/750991> (accessed 21 March 2016).

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

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

Schedule 3: Local programming requirements

2.24 Schedule 3 to the bill would insert a new Division 5D in Part 5 of the BSA that would establish new local programming requirements for regional commercial television broadcasting licensees. The schedule is divided into two parts: Part 1 would insert new local programming requirements and Part 2 would abolish the existing local programming requirements after a transition period.

2.25 The proposed requirements in schedule 3 are intended to address concern that television sector consolidation enabled by the proposed changes in schedules 1 and 2 to the bill could lead to reductions in local programming.²²

Existing local content requirements

2.26 Since 2003, as part of licence condition imposed by the ACMA, regional commercial television broadcasting licensees have been required to broadcast minimum levels of material of local significance ('local content') in local areas within specified aggregated markets.²³

2.27 Under the current licence condition, licensees in four aggregated markets²⁴ and Tasmania are 'required to provide minimum levels of local programming to specified local areas, with the minimum required levels set by a points system'. Licensees subject to the licence condition²⁵ are required to meet minimum quotas of an average of 720 points per six-week period and a minimum of 90 points per week. Licensees accumulate points by:

...broadcasting local programming during eligible periods (6:30am to midnight Monday to Friday, and 8am to midnight on weekends) for timing periods defined in the [licence condition]. Points are accumulated on a 'per minute' basis, i.e. 1 point for 1 minute of qualifying programming, with local news programming incentivised through being allocated 2 points per minute broadcast.²⁶

Key aspects of the new framework

2.28 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

22 The Hon Paul Fletcher MP, *Proof House of Representatives Hansard*, 2 March 2016, p. 7.

23 EM, pp. 7–8.

24 Regional Queensland, Northern NSW, Southern NSW and Regional Victoria.

25 The licence condition is outlined in the Broadcasting Services (Additional Television Licence Condition) Notice 2014.

26 EM, p. 8.

group of commercial television broadcasting licences whose combined licence area populations exceed 75 per cent of the Australian population'.²⁷

Licensees in aggregated markets and Tasmania

2.29 For affected regional commercial television broadcasting licensees in aggregated markets and Tasmania, the bill would provide that, in the absence of a trigger event, the local programming requirements in an aggregated market are 720 points in each timing period and 90 points in each week included in a timing period.²⁸

2.30 Six months after a trigger event occurs, local programming requirements would increase to 900 points in each six-week timing period and a minimum 120 points each week (that is, an increase of approximately 30 points per week).

Licensees in non-aggregated markets

2.31 The bill would also introduce local programming requirements to regional commercial television broadcasting licensees in non-aggregated markets²⁹ that are affected by a trigger event. In these instances, at least 360 points³⁰ of material of local significance to each local area in each six-week timing period would be required, with a minimum of 45 points per week. This requirement would commence six months after a trigger event.³¹

2.32 Although the bill extends local broadcasting requirements to non-aggregated markets, the EM noted that broadcasts 'to remote areas of Australia will be excluded given the large geography and lack of large population centres'.³²

2.33 Maps of the areas covered by the current local programming requirements and the proposed changes are at Figure 2.1 and Figure 2.2.

27 EM, p. 36.

28 A timing period is defined in proposed new subsection 61CY(2) as: the period of 6 weeks starting on the first Sunday in February in a year; (b) each subsequent period of 6 weeks until the end of the 42nd week after the first Sunday in February; (c) the period: (i) starting at the end of the 42nd week after the first Sunday in February; and (ii) ending immediately before the first Sunday in February in the following year.

29 These include the following licence areas: Broken Hill, Darwin, Geraldton, Griffith and Murrumbidgee Irrigation Area (MIA), Kalgoorlie, Mildura/Sunraysia, Mount Gambier/South East, Mt Isa, Remote and Regional WA, Riverland, South West and Great Southern, and Spencer Gulf.

30 Schedule 3, part 1, proposed new section 61CX. Note: at page 2 of the EM, there is an incorrect reference to '60' points rather than 360 points.

31 EM, p. 36.

32 EM, p. 2.

Figure 2.1: Markets covered by current local content requirements

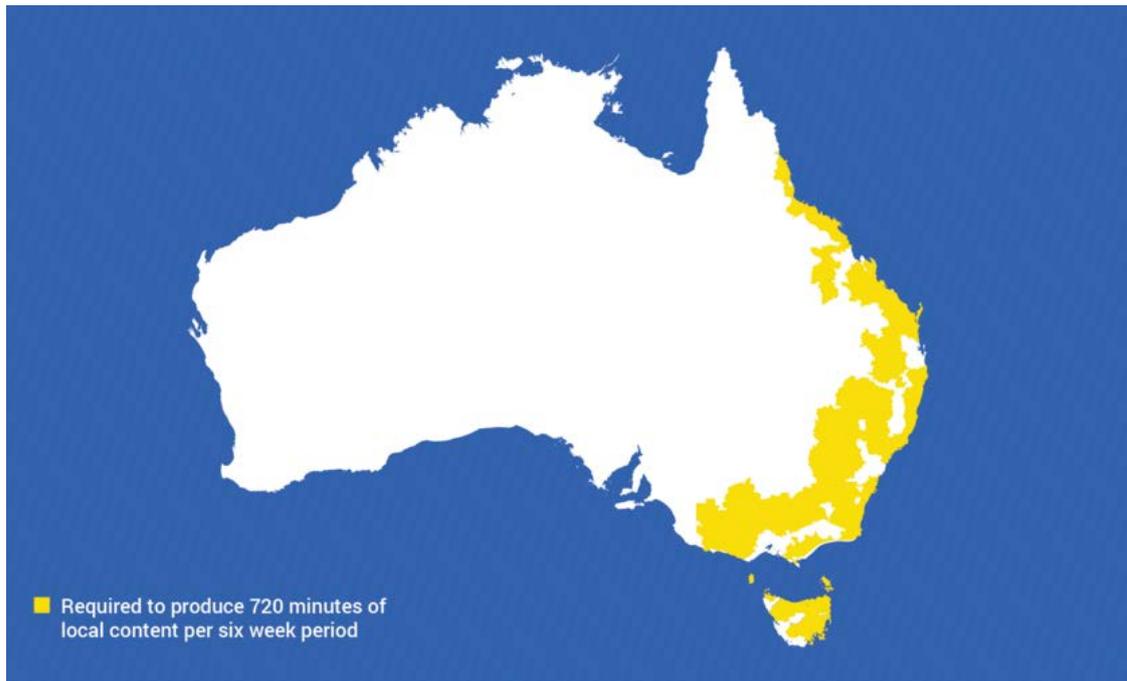
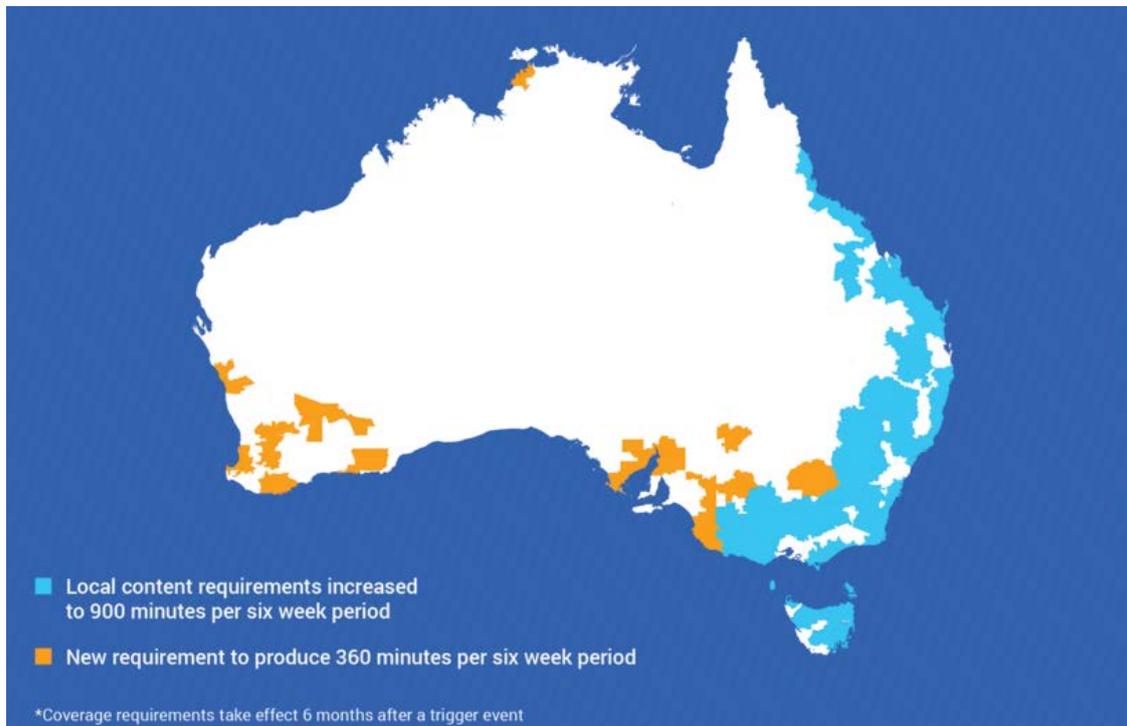


Figure 2.2: Proposed local content requirements after a trigger event



Source: Department of Communications and the Arts, 'Updating Australia's media laws', www.communications.gov.au/what-we-do/television/media/updating-australias-media-laws (accessed 22 March 2016).

Changes to point categories for qualifying programming

2.34 An additional proposed change is the introduction of a three-point category for material of local significance. Under the proposed changes, 'each minute of local news programming that depicts people, places or things in the relevant local area (ie. is filmed in the local area) will be allocated 3 points'.³³ The proposed system of 1 and 2 points for other qualifying programming will 'largely replicate the current material of local significance points system' currently imposed by the ACMA's licence conditions.³⁴ The proposed point system is outlined in the following table.

Table 2.2: Proposed point system for material of local significance in a local area

Item no.	Material	Points*
1	News that: (a) is broadcast during an eligible period by a licensee covered by subsection 61CW(1) or 61CX(1); and (b) has not previously been broadcast to the local area during an eligible period; and (c) depicts people, places or things in the local area; and (d) meets such other requirements (if any) as are set out in the local programming determination.	3
2	News that: (a) is broadcast during an eligible period; and (b) has not previously been broadcast to the local area during an eligible period; and (c) relates directly to the local area; and (d) is not covered by item 1.	2
3	Other material that: (a) is broadcast during an eligible period; and (b) except in the case of a community service announcement—has not previously been broadcast to the local area during an eligible period; and (c) relates directly to the local area.	1
4	News that: (a) is broadcast during an eligible period; and (b) has not previously been broadcast to the local area during an eligible period; and (c) relates directly to the licensee's licence area.	1
5	Other material that: (a) is broadcast during an eligible period; and (b) except in the case of a community service announcement—has not previously been broadcast to the local area during an eligible period; and (c) relates directly to the licensee's licence area.	1

* Points are accumulated for each minute of material.

Source: Schedule 3, Part 1, item 1 [proposed new subsection 61CY(3)].

33 EM, p. 37.

34 EM, p. 37. See Schedule 3, part 1, proposed new subsection 61CY(3).

Other amendments

2.35 The bill contains various other measures intended to support the implementation of the new local programming requirements.

Local programming determination

2.36 Proposed new section 61CZ would provide for the ACMA, by legislative instrument, to make a local programming determination that prescribes various matters relevant to the operation of the proposed local programming requirements, such as the meaning of 'local area' that is used in the points system.

Compliance reports and record-keeping requirements

2.37 Proposed new section 61CZB would require licensees affected by a trigger event to provide compliance reports to the ACMA. The reports would include an initial report on compliance with the local broadcasting requirements during the first 12-month period that commences six months after the trigger event. A second report covering compliance during the subsequent 12-month period must also be provided. Both reports would need to be provided with 28 days of the end of the relevant reporting period.³⁵

2.38 The bill also includes measures that require licensees to make and keep audio-visual records of material of local significance that the licensee broadcast in its local areas. The records must be kept for 30 days after the end of each timing period, or a longer period if directed by the ACMA.³⁶

Review by the ACMA

2.39 The bill would require the ACMA to conduct a review of the operation of the statutory local programming requirements and its local programming determination within 30 months after Royal Assent (that is, 24 months after the additional obligations take effect).³⁷

Minister's ability to give a direction to the ACMA about the exercise of its powers

2.40 Proposed new section 61CZD would enable the Minister, by legislative instrument, to give a direction to the ACMA about the exercise of the powers conferred on it by the new Division 5D (the local programming requirements). However, a direction could not be given in relation to the review that proposed new section 61CZC would require.

35 EM, p. 41.

36 Schedule 3, part 1, proposed new section 61CZA; EM, p. 41.

37 Schedule 3, part 1, proposed new section 61CZC.

2.41 The EM includes the following statement about this proposed ministerial reserve power:

It is proposed that the legislation specifically empower the Minister to give directions to the ACMA in relation to its powers under the new provisions. This could include aspects of the local programming notice, or to direct the ACMA to undertake a review of the provisions earlier than the two year timeframe set out above. This is designed to allow the ACMA to determine key parameters and specifics of the local programming arrangements whilst at the same time preserving a level of control for the Minister. A similar provision exists in section 121G of the BSA in relation to Australian programming obligations.³⁸