The Senate

Environment and Communications Legislation Committee

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

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Recommendation 1

3.86 The committee recommends that the government consider whether schedule 3 to the bill should be amended to provide that, if:

- **a person is in a position to exercise control of a regional commercial television broadcasting licence; and**
- **the person starts to be in a position to exercise control of a metropolitan commercial television broadcasting licence; and**
- **immediately after that event:**
  - **the person is in a position to exercise control of two or more commercial television broadcasting licences; and**
  - **the combined licence area populations of those licences exceed 75 per cent of the population of Australia;**

that event is also a trigger event for each of those licences that is a regional commercial television broadcasting licence.

Recommendation 2

3.99 Subject to restoration of the bill to the *Notice Paper* of the House of Representatives, the committee recommends that, after due consideration of Recommendation 1, the bill be passed.

Abbreviations

2 out of 3 rule	2 out of 3 cross-media control rule
ABC	Australian Broadcasting Corporation
ACCC	Australian Competition and Consumer Commission
ACMA	Australian Communications and Media Authority
ASTRA	Australian Subscription Television and Radio Association
BSA	*Broadcasting Services Act 1992* (Cth)
CCA	*Competition and Consumer Act 2010* (Cth)
EM	Explanatory memorandum
Foreign Acquisitions and Takeovers Act	*Foreign Acquisitions and Takeovers Act 1975* (Cth)
IPA	Institute of Public Affairs
IPTV	Internet protocol television
MEAA	Media Entertainment and Arts Alliance
SVOD	Subscription video on demand
TVOD	Transactional video on demand
US	United States of America

Chapter 1

Introduction

1.1 On 3 March 2016, the Senate referred the provisions of the Broadcasting Legislation Amendment (Media Reform) Bill 2016 to the Senate Environment and Communications Legislation Committee for inquiry and report by 12 May 2016.[1]

1.2 The bill would amend the *Broadcasting Services Act 1992* (BSA) by repealing two media ownership and control rules: the '75 per cent audience reach rule' and the '2 out of 3 rule cross-media control rule'. The bill would also amend and introduce additional local programming obligations for regional commercial television broadcasting licensees. In particular, 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.

Conduct of the inquiry

1.3 In accordance with its usual practice, the committee advertised the inquiry on its website and wrote to relevant individuals and organisations inviting submissions. The date for receipt of submissions was 21 March 2016.

1.4 The committee received 21 submissions, which are listed at Appendix 1. The public submissions are also available on the committee's website at www.aph.gov.au/senate_ec.

1.5 Public hearings were held in Canberra on 31 March 2016 and in Melbourne on 29 April 2016. A list of witnesses who gave evidence at the hearings is at Appendix 2. The transcripts of evidence may be accessed through the committee's website.

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

Implications of prorogation and a new session of Parliament

1.7 On 21 March 2016, the Governor-General issued a Proclamation proroguing the Parliament from 5 pm on Friday, 15 April 2016, until 9.30 am on Monday, 18 April 2016. At 9.30 am on 18 April 2016, the Parliament met for a new session.

1.8 One consequence of prorogation is that all bills on the notice papers of the Senate and House of Representatives lapse. The bill being examined by this inquiry

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1 *Journals of the Senate*, 2013–16, No. 145 (3 March 2016), p. 3901.

originated in the House of Representatives and, at the time of reporting, had not been restored to the *Notice Paper* of the House of Representatives. However, the prorogation of the Parliament and the status of the bill in the House of Representatives do not affect the ability of the committee to conduct this inquiry. Senate standing committees, including this committee, are appointed for the life of the Parliament and the matters referred to the committee for inquiry continued into the new session.[2] The committee is also considering the 'provisions' of the bill, rather than the bill itself.[3] Thus, the committee has proceeded with the inquiry and conducted its deliberations on the provisions of the bill.

Reports of other committees

1.9 When examining a bill or draft bill, the committee takes into account any relevant comments published by the Senate Standing Committee for the Scrutiny of Bills. The Scrutiny of Bills Committee assesses legislative proposals against a set of accountability standards that focus on the effect of proposed legislation on individual rights, liberties and obligations, and on parliamentary propriety.

1.10 In its *Alert Digest No. 4 of 2016*, the Scrutiny of Bills Committee stated that it had no comment on the bill.[4]

Structure of the report

1.11 This report comprises three chapters. Chapter 1 has outlined introductory information about the referral and conduct of the inquiry. Chapter 2 provides an overview of the current media ownership and control rules and the proposed changes contained in the bill. The evidence received about the bill is outlined and discussed in Chapter 3. The committee's findings are also outlined in Chapter 3.

Note on references

1.12 In this report, references to the committee *Hansard* transcripts are to the proof transcripts. Page numbers may vary between proof and official *Hansard* transcripts.

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2 Department of the Senate, 'Procedural Information Bulletin No. 303', www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Procedural_Information_Bulletins/2016/bull303 (accessed 21 April 2016).

3 This mechanism is often used to enable a Senate standing committee to consider the provisions of a bill that is yet to be received by the Senate. H Evans and R Laing (eds.), *Odgers' Australian Senate Practice*, 13th ed., Canberra: Department of the Senate, p. 305.

4 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest*, No. 4 of 2016, 16 March 2016, p. 1.

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.

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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]

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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)

Company	*Media platforms*	*Licence areas (RA1)*
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 markets[24] 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 condition[25] 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 markets[29] that are affected by a trigger event. In these instances, at least 360 points[30] 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.

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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

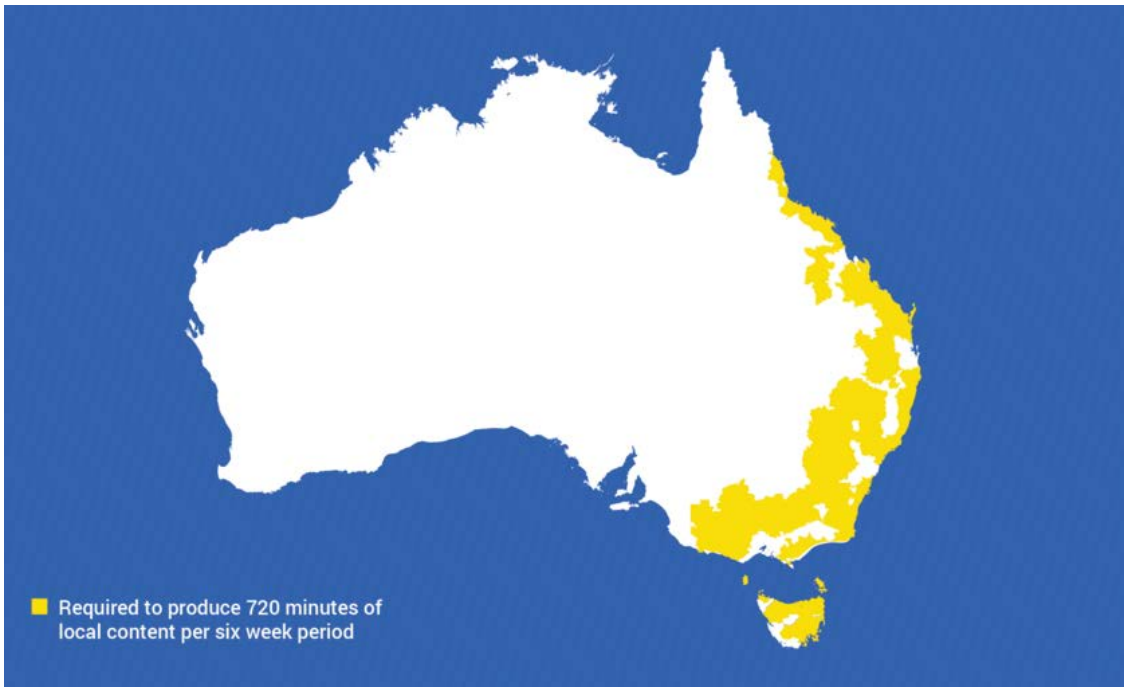
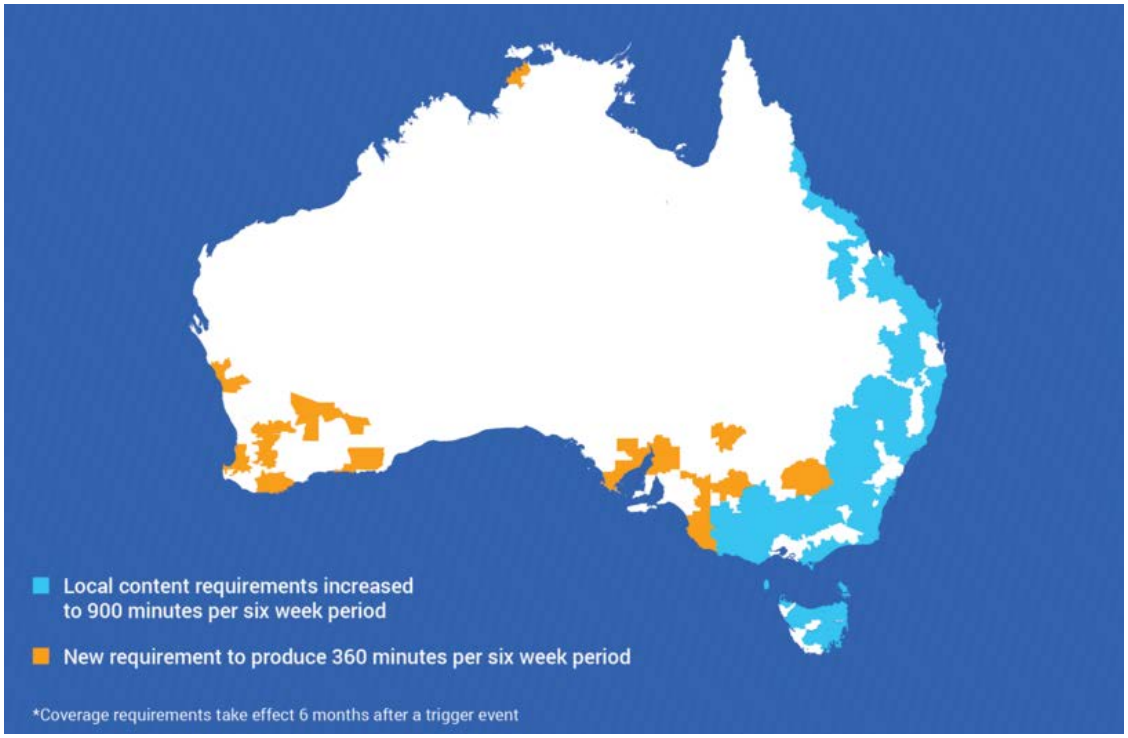


Figure 2.2: Proposed local content requirements after a trigger event



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.

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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]

38 EM, p. 25.

Chapter 3

Key issues

3.1 This chapter considers the evidence received from stakeholders regarding the bill. Evidence received on the need for reform and the approach to reform as reflected in the bill is discussed first, followed by stakeholder views on the proposed abolition of the two media rules and the new local content requirements. The committee's overall findings are outlined at the end of this chapter.

The case for reform and the overall approach taken

3.2 The evidence received from media companies and many other stakeholders during this inquiry generally acknowledged, in principle, the case for repealing the 75 per cent audience reach rule and the 2 out of 3 cross-media control rule. However, in what way this reform should be achieved divided stakeholders. The committee heard compelling arguments as to why the proposed changes need be enacted as soon as possible. Conversely, other stakeholders argued that these reforms should only be pursued as part of a broader reform package. Accordingly, a significant amount of evidence received by the committee actually goes to matters that are not included in the bill.

3.3 This chapter outlines the evidence received about whether the proposed reforms should be pursued now and the opposing position that the proposed changes should be delayed so that certain other changes stakeholders consider desirable can be considered.

Arguments for reform based on the bill

3.4 The regional television broadcasters Prime Media Group, Southern Cross Austereo and the WIN Network were the most vocal in expressing support for the bill. 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'.[1] Mr Audsley indicated that the sustainability of the affiliation model the regional networks operate under within the current media control and ownership framework is questionable. He explained:

> The original television model is one of very high infrastructure costs: an affiliation model which is seeing programming fees paid to metropolitan networks escalating and a more challenged media market with increased competition from unregulated media. To exacerbate these problems,

1 Mr Ian Audsley, Chief Executive Officer, Prime Media Group, *Committee Hansard*, 31 March 2016, p. 33.

> metropolitan affiliates are now streaming their signals, containing advertising, into our licensed markets. This is the same material that we pay them for.[2]

3.5 Fairfax Media is 'strongly supportive' of the proposed abolition of the 75 per cent reach rule and the 2 out of 3 cross-media control rule, provisions of the *Broadcasting Services Act 1992* (BSA) that Fairfax described as being 'out of date in a modern global media environment'.[3] Fairfax explained:

> Technology and consumer demand have revolutionised the consumption and distribution of all forms of information and entertainment well beyond the present legislative regulation as to make it irrelevant and restrictive.
>
> The BSA does not even recognise the internet let alone the proliferation of internet based delivery systems such as SVOD, TVOD, IPTV or audio subscription services nor the impact of global search engines like Google or social media sites such as Facebook and Twitter. Overseas online publishers such as *The Guardian*, *Daily Mail* and *The Huffington Post* are creating limited local Australian content and are not subject to the BSA regulations, operating purely as online businesses.[4]

3.6 Like Fairfax, the Ten Network noted that the current legislation predates modern media platforms, such as the internet and subscription TV. Ten argued that the current legislation adversely affects the ability of Australian media companies to compete with global companies that operate in Australia without being subject to ownership and control restrictions. Ten submitted:

> When the media regulatory framework was enacted the 'princes of print and the queens of screen' operated across three defined, easily regulated, and highly influential platforms: printed newspapers, free-to-air terrestrial television channels, and free-to-air terrestrial radio stations, which were limited in number.
>
> In today's fully converged media market where someone in Perth can watch video embedded in an online news article on a Sydney news site, or watch a drama program on a television set in a lounge room in Adelaide that has been streamed over the internet by a US broadcaster without any employees in Australia, these traditional platform-based regulatory restrictions are clearly absurd.[5]

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

3 Fairfax Media, *Submission 11*, p. 1.

4 Fairfax Media, *Submission 11*, p. 1.

5 Ten Network, *Submission 15*, p. 1.

Calls for broader reform

3.7 Although they recognised that aspects of the media ownership and control framework are outdated, some stakeholders questioned why other parts of the framework are not being reformed. For example, News Corp Australia advised that although it supports the passage of the bill in its current form, it would have preferred a 'holistic approach to media reform' that resulted in the removal of all five media ownership and control rules, rather than just two.[6] Similarly, Nine Entertainment Co provided 'conditional support' for the repeal of the rules 'as a path to reform'.[7]

3.8 The Australian Subscription Television and Radio Association (ASTRA) submitted that it is 'not opposed in principle to the reforms contained in the bill'. However, it also argued for 'a whole-of-industry deregulatory agenda'. ASTRA submitted that the reasoning used to support the bill applies 'equally to the subscription TV industry'. It explained:

> The same upheavals in the competitive landscape and the same financial pressures cited by the government as driving the reforms in this bill apply equally to the subscription TV industry. Subscription TV faces the same pressure on advertising revenue and fragmentation of audiences as… [free-to-air] broadcasters, and has to compete with the same largely unregulated overseas competitors, but faces the added challenge of price pressure from other subscription providers.[8]

3.9 The submission from the Institute of Public Affairs (IPA) also called for broader reform. It argued that the regulatory regime should be competitively neutral and 'approach the regulation of communications technologies on a functional basis, rather than on the grounds of their technological legacy'.[9]

3.10 In calling for broader reform, media companies and organisations outlined the various matters that they would like the government to consider.

3.11 The Ten Network's submission described the bill as 'an important first step in dismantling a set of regulations that are making Australian media companies less competitive in a global, converged media market'.[10] Ten 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.[11]

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6 News Corp Australia, *Submission 8*, p. 1.

7 Nine Entertainment Co, *Submission 16*, p. 2.

8 Australian Subscription Television and Radio Association (ASTRA), *Submission 5*, p. 2. Like ASTRA, Foxtel argued for 'holistic' reform. However, Foxtel's submission differed from ASTRA's in that it expressly stated that Foxtel does not support passage of the bill 'at this time'. See Foxtel, *Submission 3*, p. 1.

9 Institute of Public Affairs, *Submission 7*, p. 1.

10 Ten Network, *Submission 15*, p. 1.

11 Ten Network, *Submission 15*, p. 3.

3.12 Nine Entertainment Co, Seven West Media and the Ten Network also called for the removal of television licence fees.[12] Ten submitted that commercial free-to-air broadcasters are required to pay a licence fee equal to 4.5 per cent of gross revenue'.[13] Ten argued that the continued imposition of licence fees is inequitable given that free-to-air networks are:

> …now competing directly for viewers and advertisers against billion dollar global 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 and, in some cases, don't have a single local employee.[14]

3.13 Mr Tim Worner, Chief Executive Officer, Seven West Media, explained that Seven West Media seeks 'broad reform that could truly empower free-to-air broadcasters to meet what is an increasing pace of change that we are facing'. Mr Worner identified the removal of the licence fee as the most important 'by far' of the possible reforms that could be pursued.[15]

3.14 Since this evidence was received, licence fee relief has been announced. On 3 May 2016, as part of the 2016–17 Budget, the government announced that licence fees for commercial television and radio broadcasters would be reduced by approximately 25 per cent, applicable from the 2015–16 licence period.[16] The Minister for Communications also announced that further reductions in broadcasting licence fees will be considered.[17]

3.15 The anti-siphoning list was also identified by some submitters as requiring reform. ASTRA argued that the anti-siphoning scheme 'impairs the operation of the market for 1900 sporting fixtures each year'.[18] Mr Bruce Meagher from Foxtel told the committee that since 'the advent of new streaming and other services it is very obvious that the regime does not apply to anyone other than subscription television'. He argued that the list is discriminatory 'in the sense that it applies only to Foxtel, effectively'. Mr Meagher explained that under the current framework:

> …there would be nothing to stop one of the global streaming companies coming in and, for example, paying over the odds and buying the whole of

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12 Seven West Media, *Submission 14*, pp. 12–13; Ten Network, *Submission 15*, p. 1; and Nine Entertainment Co, *Submission 16*, p. 4.

13 Ten Network, *Submission 15*, p. 1.

14 Ten Network, *Submission 15*, p. 1.

15 Mr Tim Worner, Chief Executive Officer, Seven West Media, *Committee Hansard*, 31 March 2016, p. 14.

16 Australian Government, *Budget 2016–17: Budget Measures—Budget Paper No. 2*, May 2016, p. 8.

17 Senator the Hon Mitch Fifield, 'Supporting public broadcasting and creating a more competitive environment for commercial broadcasters', *Media Release*, 3 May 2016.

18 ASTRA, *Submission 5*, p. 2.

> the Australian Open tennis tournament out from underneath the free-to-air broadcasters and charging whatever they wanted for people to view that. The list does not protect against that.[19]

3.16 Mr Maiden from ASTRA advised that the subscription industry supports 'incremental reform' of the list.[20] The incremental reform sought was outlined by Mr Meagher, who stated that Foxtel accepts an anti-siphoning list of some form will continue to exist to cover events 'that are truly iconic'.[21]

3.17 Whether the definition of broadcasting used for regulatory purposes needs to be updated was also discussed. On this matter, Mr Chris Berg from the IPA commented:

> I very rarely watch television, but I still watch the ABC, because I have a computer plugged into my television where I load up iview or *7.30* or something like that, and I watch it. Is that broadcasting? It is done by a company called the Australian Broadcasting Corporation, but I am streaming it live or on a computer connected to what calls itself a television but is actually a computer monitor.[22]

3.18 Associate Professor Margaret Simons, a board member of the Public Interest Journalism Foundation, argued that to confine the term broadcasting 'to something which is delivered over the broadcasting spectrum is ridiculous, really'. To illustrate how the definition of broadcasting may no longer be appropriate, Associate Professor Simons recounted an occasion when she led a class of students who toured a metropolitan news network. Associate Professor Simons noted:

> In the feedback in the class afterwards, one of my students said, 'It's so quaint—they think everybody's sitting there watching the six o'clock news.' Of course, it is…largely people over 50 who are watching the six o'clock news. These students have already consumed that news content and have expressed their opinion about it on social media. Some of that will have been aggregated into a live blog on *The Guardian* and so on. So, to say broadcasting service means something delivered over the airways in that traditional way—if we take that sort of approach to thinking about what we should and should not do in media regulation then we are condemning ourselves to redundancy very quickly.[23]

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19 Mr Bruce Meagher, Group Director, Corporate Affairs, Foxtel, *Committee Hansard*, 31 March 2016, p. 24.

20 Mr Andrew Maiden, Chief Executive Officer, ASTRA, *Committee Hansard*, 31 March 2016, p. 25.

21 Mr Bruce Meagher, Foxtel, *Committee Hansard*, 31 March 2016, p. 24.

22 Mr Chris Berg, Senior Fellow, Institute of Public Affairs, *Committee Hansard*, 29 April 2016, p. 60.

23 Associate Professor Margaret Simons, Board Member, Public Interest Journalism Foundation, *Committee Hansard*, 29 April 2016, p. 47.

Should the measures in the bill be pursued at this time?

3.19 Some media organisations expressed concern 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.

3.20 Seven West Media was one of the main proponents of this argument. Seven West advised the committee that it 'has neither sought nor opposed changes to media ownership rules'. However, it submitted that:

> In the debate around changes to media ownership rules, we have consistently warned that if these are addressed without knowing what other regulatory changes might be considered by the government, we are likely to find that there are quid pro quos down the track.[24]

3.21 Other stakeholders countered these arguments. Mr Grant Blackley, the Chief Executive Officer of Southern Cross Austereo, maintained that there is an 'urgent need' for the reforms in the bill to progress. He told the committee:

> There is a level of urgency upon a segment of the market in media called regional television, and I can say that, without the scale that we have with radio, we may not have a television business, because we lean on the resources within our radio sector to support television, not vice versa. I think there is an urgent need to address these considerations first and foremost…I have spent the best part of 30 years in media and I can assure you that there has not been meaningful legislative change that I can recall in the sector in that term. So one must start somewhere.[25]

3.22 Mr Greg Hywood, the Chief Executive and Managing Director of Fairfax Media, offered a similar perspective:

> We just have this opinion: let's get cracking and get something done now. We are not against further consideration of further reform—not at all.[26]

3.23 Although the bill is focused on two specific media control and ownership rules, it is possible that other reforms are under consideration. Mr Richard Windeyer, a first assistant secretary at the Department of Communications and the Arts, noted that the government has indicated 'this is not the end of reform'. He commented:

> This is the opportunity and proposal we have at the moment but it certainly does not preclude other things happening.[27]

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24 Seven West Media, *Submission 14*, p. 3.

25 Mr Grant Blackley, Chief Executive Officer, Southern Cross Austereo, *Committee Hansard*, 31 March 2016, p. 40.

26 Mr Greg Hywood, Chief Executive and Managing Director, Fairfax Media, *Committee Hansard*, 29 April 2016, p. 39.

27 Mr Richard Windeyer, First Assistant Secretary, Content Branch, Department of Communications and the Arts, *Committee Hansard*, 31 March 2016, pp. 70–71.

Stakeholder views on the proposed abolition of the 75 per cent audience reach rule and the 2 out of 3 cross-media control rule

3.24 The preceding paragraphs considered the evidence received about the overall approach taken to reform, as indicated by the proposals contained in the bill. This chapter now turns to the evidence received about the specific provisions in the bill, starting with the proposed repeal of two of the five media control and ownership rules in the BSA.

3.25 It is instructive to recap the positions of the major market participants here. As indicated in the previous section, three businesses involved in regional television (Prime Media Group, Southern Cross Austereo and the WIN Network) and Fairfax Media support the repeal of the 75 per cent reach rule and the 2 out of 3 rule without equivocation. Ten Network supports the repeal of the two rules, although it would like to see further reform including the repeal of the remaining three rules and the removal of licence fees. Seven West Media called for broader reform.

3.26 Nine Entertainment offered 'conditional support' for the removal of the two rules as proposed in schedules 1 and 2 (see paragraph 3.7), however, this support is linked to the local content regulation proposals in schedule 3: Nine Entertainment argued that the repeal of the control and ownership rules should not result in 'additional regulation with regard to local content.[28]

3.27 Other stakeholders also submitted their views on the abolition of the two media control and ownership rules. The NSW Farmers' Association acknowledged that the current regulatory regime 'does not account for the contemporary media landscape'. However, NSW Farmers noted that 'the traditional media platforms are the most powerful in the bush because data coverage is not universal…[and] it is often inconsistent when it is available'. NSW Farmers' views on the abolition of the two media control and ownership rules are also influenced by the proposed new local content requirements, which are discussed in the next section. The NSW Farmers' Association acknowledged that 'there may be merit' in the bill's objective of 'pursuing a more sustainable industry through economies of scale'. However, it argued that this 'will only work for regional programming if the quotas/points systems mean something and the rules are enforced'.[29]

3.28 Other submitters offered support for the abolition of the rules if other measures to promote quality journalism are considered.

28 Nine Entertainment Co, *Submission 16*, p. 2.

29 NSW Farmers' Association, *Submission 9*, p. 5.

3.29 The following paragraphs will consider the evidence received specifically about the abolition of the two media control and ownership rules. The first section will consider the 75 per cent audience reach rule in isolation, followed by the 2 out of 3 rule and evidence received about the likely effects of the abolition of both rules on diversity in the sector.

75 per cent audience reach rule

3.30 Of the two media control and ownership rules that the bill would repeal, the abolition of the 75 per cent reach rule received the largest amount of unqualified support. Among others, the Media Entertainment and Arts Alliance (MEAA), Prime Media Group, Southern Cross Austereo, and the WIN Network all support the abolition of the 75 per cent reach rule. The following extract from Southern Cross Austereo's submission provides an overview of the arguments generally made against the continued existence of the rule:

> The 75 per cent audience reach rule creates an artificial construct which prevents operation of a national free-to-air television business. Instead a broadcaster must enter into an agreement or number of agreements (an affiliation agreement) to ensure their programs are broadcast free-to-air to all Australians.
>
> This results in the regional broadcasters in effect acting as broadcast re-transmitters for the metropolitan networks.
>
> With changing viewer habits and levels, revenue resulting from this re-transmission is under pressure. After payment of costs of government licence fees, affiliation costs to purchase the content and the cost to transmit across large expanses of Australia country, the viability of the regional re-transmission business model is severely challenged.[30]

3.31 MEAA emphasised that the 75 per cent audience reach rule 'should be removed now'.[31]

3.32 On the basis of the bill before the committee being the only option for reform,[32] Professor Ricketson, a professor of journalism at the University of Canberra, advised that he supports the repeal of the 75 per cent audience reach rule. He stated that:

> …this part of the existing legislation has been superseded by the advent of streaming video on demand technology, which has enabled television

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

31 Mr Paul Murphy, Chief Executive Officer, Media Entertainment and Arts Alliance (MEAA), *Committee Hansard*, 31 March 2016, p. 61.

32 However, Professor Ricketson questioned whether the government had considered other options for reform. For example, he suggested that concerns about the entry of international media companies could potentially be addressed by regulating those companies. See *Committee Hansard*, 31 March 2016, p. 1.

networks to stream their content to more than 75 per cent of the population prescribed in the Broadcasting Services Act.[33]

3.33 Professor Jock Given from Swinburne University advised that he is 'reasonably relaxed about the proposed removal of the 75 per cent reach rule'.[34]

3.34 The Prime Media Group argued that, since the Parliamentary Joint Select Committee on Broadcasting Legislation recommended the abolition of the rule in 2013, the case for its repeal 'is now more pronounced'. This is because of, among other things, the entry of international 'giants' such as Netflix, local on-demand services, the online catch-up services offered by the ABC and SBS, and the live online streaming of metropolitan free-to-air broadcasts 'potentially into all Australian households'.[35] In particular, Prime noted that the online streaming of metropolitan broadcasts demonstrates why the reach rule should be repealed, as these online streaming services:

- do not include any local regional news;
- do not include local regional advertising;
- do not include any local community service announcements; and
- are not subject to the Commercial Television Industry Code of Practice (because they do not meet the definition of 'broadcast').[36]

3.35 In addition to the video-on-demand services and online streaming of metropolitan broadcasts, Prime added that the regional television industry is facing several other 'significant structural challenges', including:

- a reduction in the size of the regional advertising market (Prime advised that the regional television industry has encountered a loss of $65 million in combined advertising revenue in the past three years);
- a decline in actual audience numbers year-on-year 'with the aggregated markets of Queensland, northern and southern NSW and Victoria losing 6.9 per cent of the total audience, a decline of 10 per cent for people aged 25–54 and a fall of almost 15 per cent in the audience for people aged 16-39'; and
- affiliation fees payable by regional broadcasters to metropolitan networks that increase each year.[37]

33 Professor Matthew Ricketson, *Committee Hansard*, 31 March 2016, p. 1. See also *Committee Hansard*, 31 March 2016, p. 5.

34 Professor Jock Given, *Committee Hansard*, 29 April 2016, p. 1.

35 Prime Media Group, *Submission 8*, p. 2.

36 Prime Media Group, *Submission 8*, p. 3.

37 Prime Media Group, *Submission 8*, p. 3.

3.36 Although the abolition of the 75 per cent rule was largely supported by submitters, Seven West Media questioned the arguments put forward for repealing the rule based on challenges faced by regional broadcasters. Seven West Media highlighted how Seven Queensland, which is owned by Seven West Media but managed as a stand-alone operation, is a regional broadcaster with a high share of advertising revenue and a popular local news program.[38]

3.37 The NSW Farmers' Association also expressed some misgivings about the proposed abolition of the 75 per cent audience reach rule. It noted that, following the bill's enactment, consolidation in the commercial television sector would be subject to the *Competition and Consumer Act 2010* (CCA). NSW Farmers stated that 'we have often found that in thin markets, competition law has been a weak tool'.[39] The ability of the CCA to promote diversity in the media sector is discussed later in this chapter.

2 out of 3 rule cross-media control rule

3.38 The proposed abolition of the 2 out of 3 rule attracted more debate than the 75 per cent reach rule. The following paragraphs will outline the principal arguments presented by stakeholders in support of repealing the rule, followed by the evidence received regarding the potential implications for diversity, competition and quality of journalism.

Arguments in support of repealing the 2 out of 3 rule

3.39 Prime Media Group, Southern Cross Austereo and the WIN Network support the repeal of the rule. WIN Network, for example, argued that the 2 out of 3 rule 'is as outdated as the 75 per cent audience reach rule'. Although the aim of the rule is to protect diversity of voice, WIN argued that in effect 'all it is doing is constraining the three traditional mediums of TV, radio and press'.[40] WIN added:

> The 2 out of 3 rule simply does not make sense in 2016 with hundreds of media platforms and independent voices spanning Australia without borders.[41]

3.40 The WIN Network also highlighted how the existence of the 2 out of 3 rule presents challenges for its business to organise itself in the most efficient way, capitalise on regional growth opportunities and invest in 'media assets that need scale'. WIN continued:

> In a challenged regional media environment, having the potential to merge with or acquire a regional radio network and a regional newspaper publisher would provide the opportunity to bulk up and be better placed to defend

38 Seven West Media, *Submission 14*, p. 5.

39 NSW Farmers' Association, *Submission 9*, p. 4.

40 WIN Network, *Submission 10*, p. 6.

41 WIN Network, *Submission 10*, p. 6.

> ourselves from much larger, often foreign owned media organisations. At a time when organisations, some with market capitalisation multiple times that of the Australian Television industry combined, are free to infiltrate Australian markets unrestricted, the 2 out of 3 cross media control rule restricts the ability of the Australian media to bulk up and compete more effectively with such organisations.[42]

3.41 Ms Annabelle Herd from the Ten Network, which also supports the repeal of the 2 out of 3 rule, 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 noted 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.[43]

3.42 Fairfax Media is another supporter of the abolition of the 2 out of 3 rule. It argued that repealing the rule would benefit consumers. Fairfax explained:

> The removal of the 2/3 rule would provide media owners the opportunity to explore amortising their investment in local content across multiple channels thereby improving the economics of such an investment. From a consumer perspective, this would lead to more high quality content being made available than would otherwise be possible.[44]

3.43 In support of this argument, Fairfax stated that the 'the ability of traditional media companies to invest in creating this content is being increasingly eroded', with newspapers and free-to-air television 'losing advertising revenue share to internet-based media platforms'. Fairfax argued that the below chart (Figure 3.1) 'demonstrates the inequity of continuing to apply ownership regulation to the three traditional formats…when the media market has drastically changed and their combined share continues to fall'.[45]

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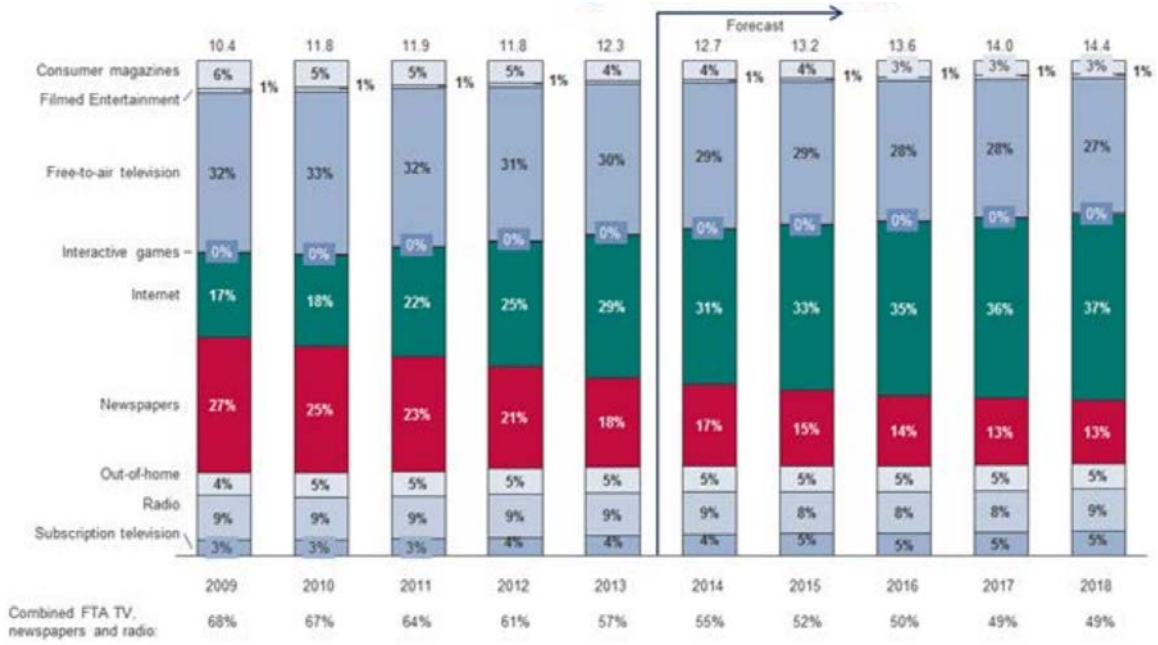
42 WIN Network, *Submission 10*, p. 7.

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

44 Fairfax Media, *Submission 11*, p. 3.

45 Fairfax Media, *Submission 11*, pp. 1–2.

Figure 3.1: Australian advertising market, 2009 to 2018 ($billion)



Note: Digital advertising figures for newspapers and consumer magazines have been excluded from each segment's totals, as they are included in the internet advertising figures.

Source: PricewaterhouseCoopers, *Entertainment and Media Outlook 2014–2018*; reproduced in Fairfax Media, *Submission 11*, p. 2.

Implications for diversity, competition and quality of journalism

3.44 In reviewing this bill, a key consideration is the likely effect of the measures on diversity in the media sector. Market participants and other interested stakeholders differed in their views on this issue.

3.45 Fairfax submitted that the benefits associated with the removal of the 2 out of 3 rule 'would not come at the expense of media diversity given how drastically the media market has changed since the 2/3 rule was enacted'.[46] Fairfax added:

> The restrictive nature of the current legislation impacts adversely not only on the Australian media industry but importantly on consumer choice, affordability and diversity.
>
> Despite some agenda-driven claims to the contrary, Fairfax Media believes the repeal of the current legislation will increase the diversity of information sources. Existing media operations will be afforded the opportunity to expand services across a wide range of media platforms and consumer choice will be increased.[47]

46 Fairfax Media, *Submission 11*, p. 3.

47 Fairfax Media, *Submission 11*, p. 1.

3.46 Fairfax and the Ten Network also argued that the current arrangements limit the ability of Australian media companies to access scale and attract investment. Ten suggested that the current laws therefore threaten the ongoing viability of a strong Australian voice and diversity in the market.[48] Ms Herd from Ten added that the bill could potentially 'allow the Ten board to have access to other sources of capital and scale that we do not have at the moment', which would help Ten to invest in innovation and content to compete with the international businesses.[49]

3.47 Fairfax argued that the current laws not only restrict investment opportunities for Australian media businesses, but have resulted in 'active disinvestment in the sector', which has implications for the quality of journalism. Fairfax stated:

> Disinvestment has very real consequences for quality journalism of the standard that Fairfax Media provides. The scale of journalism and standard of reporting that Australian consumers presently enjoy from Fairfax Media requires an investment environment that encourages it, not discourages it.[50]

3.48 Associate Professor Margaret Simons, a board member of the Public Interest Journalism Foundation, argued that diversity remains a concern. Associate Professor Simons explained:

> More outlets does not necessarily mean more journalists on the ground. And while the new digitally based players are indeed providing local content if you look at national content, they are not touching state parliaments and regional and country areas.[51]

3.49 Some stakeholders called for the pursuit of a different approach to supporting diversity in the sector. The CEO of MEAA, Mr Paul Murphy, emphasised that 'the starting point for any discussion of media law reform has to be acknowledging the clear public interest in having a diverse range of reliable sources for news, information and entertainment'. Mr Murphy told the committee that although the proposed reforms 'have some merit', the bill is 'focused almost exclusively on consolidation of the old analog world to the exclusion of anything to do with building opportunities offered by new platforms'. Accordingly, MEAA does not support repealing the 2 out of 3 rule 'until some further system reforms are advanced that address the need for plurality in our media'.[52]

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48 Ten Network, *Submission 15*, p. 1.

49 Ms Annabelle Herd, Director, Corporate and Regulatory Affairs, Ten Network, *Committee Hansard*, 29 April 2016, p. 22.

50 Fairfax Media, *Submission 11*, p. 4.

51 Associate Professor Margaret Simons subsequently added that the concern about diversity is partly about the number of journalists on location: 'For example, am I likely to find out what is happening in the Supreme Court in Melbourne today? Can I, as a citizen, be confident that by consuming media I will know the things I need to know to be an effective and informed citizen'. See Associate Professor Margaret Simons, Board Member, Public Interest Journalism Foundation, *Committee Hansard*, 29 April 2016, pp. 43, 49.

52 Mr Paul Murphy, Chief Executive Officer, MEAA, *Committee Hansard*, 31 March 2016, p. 58.

3.50 The Public Interest Journalism Foundation argued that, although the restrictions on mergers and acquisitions in the BSA are outdated, the government has a continued responsibility to 'ensure a diverse range of sources of news and information for all Australians'.[53]

3.51 Dr Derek Wilding, who works on media and communications industry issues at the University of Technology, Sydney, argued that regulation of the media sector should be designed 'to not address "diversity" per se, but the things diversity seeks to protect—most importantly, accuracy, fairness and privacy, as well as localism—while helping to shore up Australian newsgathering'. Dr Wilding submitted that this approach 'necessarily involves an acceptance of the repeal of the 2 out of 3 rule as well as the 75 per cent audience reach rule, encouraging a shift to cross-media standards of practice in the gathering and presentation of news and analysis and a streamlined, industry-based system to administer them'.[54]

3.52 Dr Derek Wilding told the committee that he believes the current media landscape 'is worth supporting' with respect to news and analysis. Dr Wilding 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.[55]

3.53 In any event, the Ten Network stressed that the 75 per cent audience reach rule and the 2 out of the 3 rule should be repealed simultaneously. According to Ms Herd, industry stakeholders had not argued that the 2 out of 3 rule is 'serving a purpose'. Ms Herd concluded:

> There does not seem to be any different level of urgency for getting rid of the reach rule than the two-out-of-three rule. They are both equally redundant and equally overtaken by technology. Given that, it would be crazy to do one without the other.[56]

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53 Public Interest Journalism Foundation, *Submission 13*, pp. 2–3. Professor Matthew Ricketson referred to the Foundation's recommendations when he informed the committee that he would support the repeal of the 2 out of 3 rule if 'specific mechanisms are put in place to support independent, quality journalism in Australia'. See *Committee Hansard*, 31 March 2016, p. 3.

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

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

56 Ms Annabelle Herd, Director, Corporate and Regulatory Affairs, Ten Network, *Committee Hansard*, 29 April 2016, p. 24.

Application of competition law and role of the ACCC

3.54 As noted in Chapter 2, section 50 of the CCA prohibits mergers and acquisitions that would result in a substantial lessening of competition. The ability of this test to take into account the unique features of the media was questioned. In particular, the Public Interest Journalism Foundation argued that, in the absence of sector-specific regulation, the policy objectives associated with the media sector cannot be met by the substantial lessening of competition test in the CCA.[57]

3.55 Professor Julian Thomas, a board member of the Public Interest Journalism Foundation, explained that the Australian Competition and Consumer Commission (ACCC) 'is properly preoccupied with the efficiency of media markets'. Professor Thomas added:

> 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.[58]

3.56 Dr Wilding commented that his concern with the reliance on competition law is that it would focus on the number of separate operators. He emphasised that a relevant concern should be 'whether you have companies that are able to invest in employment of journalists and the development of news gathering capability'.[59]

3.57 The ACCC, which administers the merger and acquisition provisions of the CCA, was questioned about its role in assessing acquisitions in the media sector. In particular, the ACCC was asked about the relationship between the substantial lessening of competition test that the ACCC applies when assessing mergers and acquisitions, and the concept of diversity in the media landscape.

3.58 Mr Rod Sims, the Chairman of the ACCC, explained that the substantial lessening of competition test has three components: 'one is price, two is quality of service and three is almost diversity really'. Mr Sims stated that, in his view, the overlap between the substantial lessening of competition test and diversity in the media sector 'is strong'.[60] He remarked:

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57 Public Interest Journalism Foundation, *Submission 13*, p. 2.

58 Professor Julian Thomas, Board Member, Public Interest Journalism Foundation, *Committee Hansard*, 29 April 2016, p. 45.

59 Dr Derek Wilding, *Committee Hansard*, 31 March 2016, pp. 10–11.

60 However, Mr Sims emphasised that news and current affairs would be of greater interest to the ACCC than entertainment, given the multitude of sources for movies and other forms of entertainment that exist. Mr Rod Sims, Chairman, ACCC, *Committee Hansard*, 31 March 2016, p. 43.

> …in media, because much of the content is superficially free, in the sense that it is free to air or radio, I think the question of the diversity of voices—to pick up your news, current affairs and opinion—would be a relevant criteria…Whether the [substantial lessening of competition] test…meets people's needs for diversity is of course a subjective matter, but potentially the main thing we would be looking at is diversity but through the lens of substantial lessening of competition.[61]

3.59 Should the bill be passed, the ACCC Chairman advised that he expects 'diversity of content available would probably be an even more important consideration' for the ACCC when it reviews an acquisition in the media sector.[62]

3.60 Mr Sims also responded to concerns that the competition law may not be as effective as specific media ownership and control rules. Mr Sims observed, for example, that the 5/4 minimum voices rule in the BSA:

> …is potentially much less restrictive than I think the merger laws would be. You could have three different radio station owners, one newspaper and one television, which means you might allow the three television stations to merge. Whereas under the competition provisions I am pretty sure we would not allow that to happen. I think the competition test is probably a more rigorous one in that sense, because we see a media market but we also see, within that, television markets, radio markets and newspapers. Of course they overlap but I suspect our provisions would have more effect on the number of voices than the five players in a market rule.[63]

3.61 Mr Sims also remarked that the removal of the two ownership and control rules could, potentially, enhance diversity. He stated:

> You have got a two-out-of-three rule. You have got a 75 per cent reach rule. [Abolishing the rules] clearly will lead to some merger activity and therefore some form of consolidation. But, with all the overseas players coming in and the wide range from which people can get content, removing artificial constraints on the local players could, as I say, allow them to be stronger players. They could leverage their journalism better. We were saying earlier that it could even enhance the role of the journalist. I do not think there is a one-to-one relationship between some consolidation that might occur and diversity. If we have got very strong overseas players who are leveraging marginal content in Australia and you have got hamstrung local players, you could find the removal of these rules gives us stronger local players, and that might actually ultimately enhance diversity.[64]

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

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

63 Mr Rod Sims, ACCC, *Committee Hansard*, 31 March 2016, p. 47.

64 Mr Rod Sims, ACCC, *Committee Hansard*, 31 March 2016, p. 49.

3.62 Officers of the Department and Communications and the Arts also emphasised that diversity in the sector would be protected by the three remaining media ownership and control rules. The minimum voices or 5/4 rule, for instance, provides a 'diversity floor' that will remain.[65]

Stakeholder views on local programming requirements

3.63 This section outlines the views expressed in submissions and by witnesses about the proposed local programing requirements in schedule 3.

Overall approach

3.64 The importance of meaningful local content for people living in regional areas was emphasised by Mr Derek Schoen, the President of the NSW Farmers' Association. Mr Schoen told the committee:

> It is vitally important to maintain local content in delivery of media services to country areas. It is a little bit like if I went to go to Sydney I would find the news there very alien to me. And if you came to Corowa, I am sure you would find the media that we dish out fairly alien to you. It is vitally important that the content is applicable to the audience that is going to receive it.[66]

3.65 However, some submitters questioned the need for the proposed amendments in schedule 3. The IPA is one such submitter; it provided the following reasoning in support of its views:

> The fact that there are stakeholders that benefit from the current regime and may lose those benefits if the regime changes does not demonstrate that the current regime is in the public interest. Local content has never been cheaper to produce and it is possible that local content requirements are crowding out alternative entrepreneurs in this space.
>
> After all, the demand for local content is not infinite. The government has not demonstrated that there is a clear market failure in local content provision that would establish the case for the current regime, let alone an increased regulatory burden after a given ownership change.[67]

3.66 Nine Entertainment Co is 'greatly concerned' by the proposed additional local content requirements that would follow a trigger event. Nine submitted:

> It is curious that the additional quotas only come into effect where there is a change of ownership, therefore suggesting that no genuine market failure

65 Mr Richard Windeyer, First Assistant Secretary, Content Branch, Department of Communications and the Arts, *Committee Hansard*, 31 March 2016, p. 71.

66 Mr Derek Schoen, President, NSW Farmers' Association, *Committee Hansard*, 31 March 2016, p. 51.

67 Institute of Public Affairs, *Submission 7*, p. 2.

exists and therefore no public policy requirement for these additional quotas.[68]

3.67 Nevertheless, the majority of submitters expressed support for, or did not comment on, the proposal for additional local content requirements to accompany the abolition of the media control and ownership rules. For example, MEAA considered that the proposed extension of local content requirements following trigger events 'is a necessary and desirable change'.[69]

3.68 The specific approach taken in the bill was also endorsed; for example, the WIN Network supported two key aspects of the provisions, namely that:

- the increased local content requirements would apply only after a trigger event occurs; and
- a transitional timetable of six months would be provided for licensees to reach the new quota.[70]

3.69 Although the local programming requirements were supported by submitters overall, some specific aspects of the provisions were queried. The following sections explore this evidence.

Quantity and quality of local content following the proposed amendments

3.70 The methodology used for the new local content requirements was questioned. Seven West Media submitted that 'the new local content requirements will not maintain current levels of local news, much less increase them'. It noted that, based on the most recent figures available, 'many regional broadcasters in aggregated licence areas comfortably exceeded the proposed 'increased' local content levels of 900 points per six week period'. In addition, Seven West suggested that the new three point category for locally produced material could result in reduced local content overall, as the extra point for certain local news could allow a regional broadcaster to reach the minimum level of content required more quickly if three points are provided for certain local news rather than two points.[71]

3.71 The committee's public hearings provided an opportunity to examine the potential consequences arising from the addition of a three-point category. At the committee's Canberra hearing, the regional broadcasters argued that the proposed inclusion of a three-point category for local content would not lead to a reduction in local content. In response to concerns about the possible effects of the proposed new points system, regional broadcasters emphasised the amount of locally produced content that is currently broadcast and the reasons why they produce this content. For

68 Nine Entertainment Co, *Submission 16*, p. 7.

69 MEAA, *Submission 2*, p. 1.

70 WIN Network, *Submission 10*, p. 7.

71 Seven West Media, *Submission 14*, p. 6.

example, Mr Ian Audsley, Chief Executive Officer, Prime Media Group, advised that Prime exceeds the point system obligations 'dramatically'. He added:

> …we have committed to a local news bulletin in Western Australia, where we had no licence requirement to do it, says that we are not looking to cut back the amount of local content. We would much prefer to produce more local content.[72]

3.72 Mr Andrew Lancaster from WIN Network provided the following observations:

> From a practical perspective, if you as a broadcaster are going to go to the trouble of putting a cameraperson or a journalist and a cameraperson into a market to capture that footage to be locally relevant, why would you give it a reduced amount of time? It is good content. If you are going to invest in the capturing of that content to get that video content, you would not reduce the amount of minutes or the amount of time over a period that you aired that content. It does not make practical sense.[73]

3.73 Mr Grant Blackley from Southern Cross Austereo added that, in his view, the 'the advent of the three-point system acknowledges the value of the content produced to local communities'. He suggested that the existence of a three-point category 'provides an incentive for us to produce more, because we will achieve a higher threshold in that regard'.[74]

Concepts and definitions relied on in the bill

3.74 The NSW Farmers' Association recommended that the bill be amended to ensure 'that the character and quality of "local" content within a regional licensee's area is maintained following any future merger'.[75]

3.75 The concepts of 'local area' and 'material of local significance' also attracted some comment. As noted in Chapter 2, it is intended that these terms will be defined by the local programming determination made by the Australian Communications and Media Authority (ACMA).[76] Ms Jennifer McNeill from the ACMA explained how the

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72 Mr Ian Audsley, Chief Executive Officer, Prime Media Group, *Committee Hansard*, 31 March 2016, *Committee Hansard*, 31 March 2016, p. 38.

73 Mr Andrew Lancaster, Chief Executive Officer, WIN Network, *Committee Hansard*, 31 March 2016, p. 38.

74 Mr Grant Blackley, Chief Executive Officer, Southern Cross Austereo, *Committee Hansard*, 31 March 2016, p. 38.

75 NSW Farmers' Association, *Submission 9*, p. 4.

76 The ACMA already makes determinations about these matters; for example, an officer from the Department of Communications and the Arts noted that, within the large licence area for regional Queensland, the ACMA had 'developed a determination that sets out different local areas within that licence area'. Mr Rohan Buettel, Assistant Secretary, Content Branch, Department of Communications and the Arts, *Committee Hansard*, 31 March 2016, p. 69.

two concepts relate to each other and the approach that the ACMA is expected to take when formulating definitions for the purposes of the bill. Ms McNeill stated:

> Material of local significance currently is defined by reference to local areas. The ACMA, under the current arrangements, has had to develop a determination describing what a local area is. We would need to do the same thing under these new arrangements. My expectation is that we would take, as a starting point, the current approach to local areas, but we would necessarily publicly consult on whatever approach was proposed. In general terms, local areas correspond with major population centres within licence areas. In determining what amounts to a local area, we are likely to have regard to population, population density and commonality of interest—these sorts of things.[77]

3.76 The Prime Media Group raised two issues related to the concept of 'control'. The Regulation Impact Statement explains that the media ownership framework is based 'on the concept of "control", not ownership per se'. For instance, a person with company interests exceeding 15 per cent is 'regarded as being in a position to exercise control of the company'. In addition to holding company interests, there are other situations where a person may be regarded as being in a positon to exercise control.[78] The mechanism for determining whether a person is in a position to exercise control of a licence, a company or a newspaper for the purposes of the BSA is outlined in schedule 1 to the BSA.

3.77 The first matter raised by Prime is its view that an interest exceeding 15 per cent in a regional commercial television broadcasting licence is 'unlikely to yield any "consolidation", "additional scale" or "efficiency", and clearly is not the intention of the bill as outlined in the EM and second reading [speech]'.[79] That is, Prime argued a change in ownership which led to a person owning 15.1 per cent of Prime 'would not necessarily yield synergies or efficiencies'.[80]

3.78 Prime suggested that a more appropriate threshold would be based on actual control without reference to the 15 per cent deemed control threshold provided in Part 3 of schedule 1 to the BSA. Prime argued that paragraphs 2(1)(d) and (e) of

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77 Ms Jennifer McNeill, General Manager, Content, Consumer and Citizen Division, ACMA, *Committee Hansard*, 31 March 2016, p. 69. An officer from the Department of the Communications and the Arts noted that the existing Broadcasting Services (Additional Television Licence Condition) Notice 2014, which prescribes the current points scheme, provides a 'good guide' to the approach that will be taken in the new instrument. Mr Rohan Buettel, Assistant Secretary, Content Branch, Department of Communications and the Arts, *Committee Hansard*, 31 March 2016, pp. 68–69.

78 Explanatory Memorandum (EM), p. 6.

79 Prime Media Group, *Submission 8*, p. 7. See also Mr Ian Audsley, Prime Media Group, *Committee Hansard*, 31 March 2016, p. 33.

80 Prime Media Group, Answers to questions on notice, 31 March 2016 (received 15 April 2016), p. 3.

schedule 1 to the BSA provide a more appropriate methodology for determining control.[81]

3.79 The second matter raised by Prime was that the concept of control is 'not two-way'. That is, the definition of a trigger event only refers to a person who starts to be in a position to exercise control of a regional commercial television broadcasting licence'. If a regional commercial television broadcasting licensee starts to exercise control of a metropolitan commercial television broadcasting licence, the increased local programming requirements for affected regional commercial television broadcasting licensees would not be triggered.[82]

3.80 The Department of Communications and the Arts was questioned about the two issues raised regarding the concept of control. In relation to whether changes in deemed control should result in a trigger event, Dr Simon Pelling, a first assistant secretary at the department, commented that this is an issue for the minister that the department will 'need to consider further'. Nevertheless, Dr Pelling added:

> …if you start to play around with the definition of control in the Broadcasting Services Act, which has been well established over many years and around which all sorts of structures have been set up, there is some associated risk that would need to be thought through. For example, if you went from 15 to 50 per cent then the threshold would be suddenly much different. At the moment there are a number of media players who operate at round about the 15 per cent level, so they have a reasonable shareholding but they are not actually in control of the company. They could suddenly increase their threshold if you took it up to 50 per cent unless you did some strange thing which said 'only applies in this circumstance but not in that circumstance'. It would be, to my mind, quite complex as to how you would actually apply that.[83]

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81 Prime Media Group, *Submission 8*, pp. 7–8. Paragraph 2(d) provides that a person is in a position to exercise control of a licence or a company if the person, either alone or together with an associate of the person, is in a position to: (i) veto any action taken by the board of directors of the licensee or the company; or (ii) appoint or secure the appointment of, or veto the appointment of, at least half of the board of directors of the licensee or the company; or (iii) exercise, in any other manner, whether directly or indirectly, direction or restraint over any substantial issue affecting the management or affairs of the licensee or the company. Paragraph 2(e) provides that a person is in a position to exercise control of a licence or a company if the licensee or the company or more than 50 per cent of its directors: (i) act, or are accustomed to act; or (ii) under a contract or an arrangement or understanding (whether formal or informal) are intended or expected to act; in accordance with the directions, instructions or wishes of, or in concert with, the person or of the person and an associate of the person acting together or, if the person is a company, of the directors of the person. *Broadcasting Services Act 1992*, schedule 1, paragraphs 2(d)–(e).

82 Schedule 3, Part 1, item 1 [proposed new section 61CV].

83 Dr Simon Pelling, First Assistant Secretary, Content Division, Department of Communications and the Arts, *Committee Hansard*, 29 April 2016, p. 65.

3.81 The department also responded to the evidence received highlighting that, as currently drafted, the concept of control used in the bill for a trigger event is not two-way. Dr Pelling again noted that whether the government would amend the bill is a matter for the minister, however, he advised that the department's view is that, in a situation where a person who controls a regional licence starts to control a metropolitan licence, it is not intended for this to be immune from causing a trigger event. Dr Pelling explained that his understanding of the government's policy intent is 'a focus on the formation of a group, not on whether it is one or the other which drives the process'. He stated:

> The broad intention here is that where groups form which go over the 75 per cent control rule, no matter who initiates it, the key issue is that the group is formed and then that constitutes the trigger event. In that sense, whether a regional broadcaster controls the rights of a metropolitan broadcaster or a metro broadcaster has the rights of a regional broadcaster should not necessarily be the key issue.[84]

3.82 In response to a question on notice, the department subsequently acknowledged that the definition of a 'trigger event' in proposed new section 61CV 'would not include changes in control where a regional broadcaster came to be in a position to control a metropolitan broadcaster'. As a result, 'the additional local programming obligations in proposed sections 61CW and 61CX would not apply'. The department advised that it considers this a technical error and it will seek authority from the minister to amend the bill.[85]

Committee comment

3.83 The concept of 'control' that the bill relies on is not new, it is used for all of the media control and ownership rules in the BSA. The concept of control is also not straightforward, however, it establishes that a person who has company interests exceeding 15 per cent is to be regarded as being in a position to control the company. The committee notes the argument that such a circumstance may not provide significant efficiency and scale benefits for regional broadcasters.

3.84 Based on the evidence before it, however, the committee has not recommended that a different test for control should be used for the bill. 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

84 Dr Simon Pelling, First Assistant Secretary, Department of Communications and the Arts, *Committee Hansard*, 29 April 2016, p. 65.

85 Department of Communications and the Arts, Answers to questions on notice, 29 April 2016 (received 4 May 2016), p. 1.

present a compliance challenge. Nevertheless, the committee draws the evidence received about deemed control to the government's attention for further consideration.

3.85 The committee also notes the argument that the bill, as currently drafted, would not impose additional local broadcasting obligations in a situation where a regional commercial television broadcasting licensee starts to be in a position to exercise 'control' of a metropolitan commercial television broadcasting licence. The Department of Communications and the Arts has advised the committee that this is a drafting error, and the department will seek authority from the minister to amend the bill.

Recommendation 1

3.86 The committee recommends that the government consider whether schedule 3 to the bill should be amended to provide that, if:

- **a person is in a position to exercise control of a regional commercial television broadcasting licence; and**
- **the person starts to be in a position to exercise control of a metropolitan commercial television broadcasting licence; and**
- **immediately after that event:**
  - **the person is in a position to exercise control of two or more commercial television broadcasting licences; and**
  - **the combined licence area populations of those licences exceed 75 per cent of the population of Australia;**

that event is also a trigger event for each of those licences that is a regional commercial television broadcasting licence.

The ACMA's ability to enforce compliance

3.87 As noted in Chapter 2, licensees affected by a trigger event would be required to provide two reports to the ACMA on compliance with the local broadcasting requirements. The first report would cover the first 12-month period that commences six months after the trigger event, and the second report would cover compliance during the subsequent 12-month period. The bill also includes record-keeping requirements.

3.88 Representatives from the ACMA discussed the proposed compliance arrangements during their evidence to the committee. Ms McNeill explained that the local content obligation persists beyond the two years during which licensees are required to 'proactively report on compliance'. Ms McNeill added that, following the two-year reporting period, the record-keeping obligation 'would equip the ACMA either to respond to complaints that it received or to proactively undertake some kind

of an audit program if there were indicators that that were an appropriate course of action if there were widespread concerns about compliance'.[86]

3.89 The committee received evidence that indicated support for the ACMA's proposed role in relation to the local programming requirements and its ability to monitor compliance with the provisions. Representatives from MEAA told the committee that it considers the proposed provisions in relation to the ACMA's role are adequate. They also noted that the planned review of the operation of the bill would allow any issues related to whether there was reasonable monitoring of compliance.[87]

3.90 The NSW Farmers' Association questioned why the compliance reporting requirement is intended to expire. Ms Jamie Lovell from the Association remarked that the limited compliance reporting requirements mean the additional local programming obligations effectively cease within three years.[88] In its submission, the NSW Farmers' Association argued that, if a trigger event is met, the ACMA's role in enforcing local content requirements is 'more important than ever'.[89]

3.91 The Department of Communications and the Arts was questioned about the approach taken to the compliance reporting requirements. Mr Richard Windeyer, a first assistant secretary at the department, told the committee that the drafting approach reflects the government's intention not to 'impose more burden on industry than necessary'. Mr Windeyer added that the two-year reporting period enables the ACMA to review compliance 'in the early stages'. Following this:

> …there are the tools like the record-keeping rules and the normal activity of the ACMA…which kick in and, if that initial reporting indicates a need for particular interventions, then there are things like the record-keeping rules that can continue to be used to gather data. The point is that the normal range of activity powers—investigative capacity and ability to monitor and get information from the industry, which the ACMA has at its disposal—remains, and that that continues to be an appropriate way to grapple with the measures in this bill and other aspects of the industry.[90]

86 Ms Jennifer McNeill, ACMA, *Committee Hansard*, 31 March 2016, pp. 66–67.

87 Mr Paul Murphy, Chief Executive Officer; Mr Matthew Chesher, Director, Legal and Policy, MEAA, *Committee Hansard*, 31 March 2016, p. 63.

88 Ms Jaimie Lovell, Policy Director, NSW Farmers' Association, *Committee Hansard*, 31 March 2016, p. 51.

89 NSW Farmers' Association, *Submission 9*, p. 5.

90 Mr Richard Windeyer, First Assistant Secretary, Content Branch, Department of Communications and the Arts, *Committee Hansard*, 31 March 2016, pp. 71–72.

Committee comment

3.92 On face value, the reasoning put forward by some submitters that the compliance reporting requirements should extend beyond two reports has merit. However, the committee is mindful that reporting requirements are a clear example of a regulatory burden on business. The committee is also aware that, in other areas of broadcasting regulation, there have been efforts to move away from regular reporting requirements to a complaints-based approach.[91]

3.93 The intent of the reporting measure is to enable the ACMA to be satisfied that a licensee is properly complying with the local content obligations before the reporting obligation ceases.[92] If the ACMA is concerned by the content of either compliance reports provided after a trigger event, or if it has received complaints that are worthy of investigation, the record-keeping requirements provided for in the bill enable the ACMA to pursue the matter after the reporting obligations cease.

3.94 As it is not clear that the regulatory burden associated with extending the reporting requirements will result in better regulatory outcomes, the committee has not recommended amendments to the reporting requirements.

Committee view

3.95 The 75 per cent audience reach rule and the 2 out of 3 cross-media control rule focus on the traditional media platforms of commercial television, commercial radio and newspapers. These platforms continue to attract large numbers of consumers. However, it is clear that the current regulatory framework ignores key features of the contemporary media environment, including subscription television, online video streaming services, Australian-based online-only news sources and the ease of access to international news sources. The 75 per cent audience reach rule and the 2 out of 3 cross-media control rule are not required for a modern regulatory framework. The committee considers there is a compelling case for repealing these two rules.

3.96 The committee also supports the proposed local programming requirements that are contained in the bill. Although there is evidence that regional commercial television broadcasting licensees exceed their local programming requirements and that there is a commercial incentive for providing this content, the strengthened obligations will ensure that residents of most regional areas will have access to local content.

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91 For example, the *Broadcasting and Other Legislation Amendment (Deregulation Act 2015* introduced amendments to allow for a complaints-based system for captioning services instead of annual reporting requirements.

92 EM, p. 41.

3.97 The committee recommends that the bill be passed. Before concluding this report, however, the committee will respond to the market participants in the media sector and other interested observers who argued that the reforms in this bill do not go far enough.

3.98 The inquiry provided an opportunity for market participants to advocate for further changes they consider are necessary. The committee acknowledges the calls for further reform and is confident that the government will continue to tackle remaining areas of media reform in a carefully considered and methodical way. However, the committee rejects criticism that the bill is pursuing 'piecemeal' reform. It is important to emphasise the broad agreement in the industry that the two media control and ownership rules targeted by the bill are outdated. An opportunity is available in the near future to make valuable changes that will improve the regulatory landscape while protecting local content. Reform is a continual process, which the committee is confident does not end with this bill. Indeed, further reforms are being implemented by the government, such as the recent announcements as part of the 2016–17 Budget that licence fees for commercial television and radio broadcasters will be reduced by approximately 25 per cent, and that further licence fee relief will be considered.

Recommendation 2

3.99 Subject to restoration of the bill to the *Notice Paper* of the House of Representatives, the committee recommends that, after due consideration of Recommendation 1, the bill be passed.

Senator Linda Reynolds CSC
Chair

Labor Senators' Dissenting Report

1.1 Labor Senators reject the desperate tactics of a Government determined to distract the public from a budget that slugs working and middle class Australians whilst delivering tax cuts for the big end of town. The tabling of this report is a stunt from a desperate Government that dithered for two and a half years.

1.2 It is clear that the Broadcasting Legislation Amendment (Media Reform) Bill 2016 will not be considered by the Parliament before the Parliament is dissolved.

1.3 The fact that Prime Minister Turnbull and Minister Fifield waited two and a half years before proposing any reform to the regulatory structure governing media in Australia demonstrates that this is all about politics and not good public policy or the public interest.

1.4 Labor Senators have been given less than 48 hours to review the chair's report, which was not due to be tabled until May 12. We will not rush consideration of the arguments put forward by academics, media companies and everyday Australians. We will take time to review the evidence presented before determining our position on reforms.

1.5 Labor Senators are cognisant of the material impact that further delay to media reform will have on regional programming.

1.6 Labor has repeatedly indicated its predisposition to support 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.

1.7 The Government's inaction for two and a half years is squarely to blame for any negative impact on regional television viewers as a consequence of the 44th Parliament having no time left to consider this bill.

1.8 Furthermore, a Shorten Labor Government will undertake a more thorough and genuine consultation process with all interested stakeholders.

1.9 Labor Senators look forward to engaging in a genuine conversation about the future of our media industry in the early stages of the 45th Parliament.

Senator Anne Urquhart
Deputy Chair
Senator for Tasmania

Senator Jenny McAllister
Senator for New South Wales

Australian Greens' Dissenting Report

1.1 At this time, the Greens have concerns regarding the nature of the proposed reforms, which the Government have not yet clarified.

1.2 The Government has yet to make the case for how these reforms will encourage media diversity, or if any targets for media diversity have already been met.

1.3 The Government has not yet made a coherent argument for how this plan will strengthen new media start-ups and create more opportunities for online-based news sources such as BuzzFeed, Junkee and *The Guardian*.

Senator Scott Ludlam
Senator for Western Australia

Additional comments by Senator Bridget McKenzie

1.1 Senator McKenzie recognises the intention of the Bill to remove what are in effect defunct rules such as the 'reach rule' and the uncompetitive '2 out of 3' rule.

1.2 Senator McKenzie appreciates the great difficulties facing all media companies given the trend away from traditional forms of broadcasting towards streaming and the consequent loss of revenue to support their operations as they are currently structured. However, her primary focus is to ensure regional communities have access to locally produced news, current affairs and programming.

1.3 Commercial regional licensees have been hit hard. Due to the streaming of metro-based stations into their regional licence areas, they have seen a reduction in their advertising revenue with no commensurate reflection of that market share usurpation in their affiliate agreements with the encroaching metro-based, regional-streaming broadcasters.

1.4 Submissions to the inquiry by regional broadcasters highlight the difficulties of licence fee costs and affiliation fee increases, the reduced value of a programming relationship towards ensuring a business's profitability has challenged their ability to service regional communities as they would like. The value of an ongoing affiliation is a poisoned chalice and regional commercial broadcasters are prudent to be consolidating their operations, however unfortunate for their regional audiences.

Securing local content for regional communities

1.5 The removal of the 'one to a market' rule should be a matter seriously considered by the Government as part of this Bill. This would allow regional broadcasters to consolidate amongst each other instead of operating in silos and their operational ability being diminished without an alternative redress to selling up.

1.6 As evidence was provided to the committee, a failure to allow regional broadcasters to consolidate will see the ABC as the sole provider of local content in rural and regional Australia – this simply unacceptable. Regional Australians are entitled to a variety of local content provision.

1.7 Another issue raised throughout the inquiry is the impact of metro-affiliates streaming content that regional licensees have purchased into their licence areas. The ability of regional licensees to compete with operators streaming over them is compromised. Also made more difficult is the production of local content in the regions.

1.8 As Hansard will show, metro-broadcasters have conflicting views on the relevance of the 2002 Ministerial Direction defining broadcasting services. Senator McKenzie sees the Direction as it stands as completely out of touch when considering current media environment.

1.9 It is incongruous that the definition of broadcasting remains archaic and does not include streaming. Whilst understanding that this definition underpins the regulation of broadcasting and that to attempt to alter the definition would affect digital rights and other rights also – but it must be made relevant.

1.10 Ultimately, the definition does not reflect the current landscape and has skewed competition. Regulation of the media landscape in the future must evolve to better reflect the market realities. At present, traditional media forms are advantaged over other players, by an illogical definition, that it has nonetheless become embedded in our outdated media law framework.

1.11 The flaw and the fact that broadcasting rights and digital rights have had to be dealt with separately since that definition was created, has meant the landscape has evolved and diverged in a multi-pronged way for some time. In turn, the legacy of this policy is that now it is a major impediment to necessary reform in the drastically evolved media market.

1.12 For a healthy media landscape we must allow a competitive industry, but also to remove impediments to healthy competition through deregulation where deregulation is called for. The exception to this is in local content where there is a lack of provision.

1.13 Senator McKenzie questions the need or purpose of a 'trigger event' to introduce the new local content regulations when most regional commercial broadcasters meet and exceed their local content quotas. To increase them further is a public policy initiative in recognition of the need to improve and maintain relevant discourse and news programming in the regions.

1.14 The behaviour of stakeholders in this rapidly changing environment has led Senator McKenzie to believe that the inclusion of the 'trigger event' as a means of incentivising the production of local content, is meaningless.

1.15 The original purpose of the trigger event was to aid in the smoothness of acquisition of regional broadcasters in any merger. Given a number of public assertions which bring in to question any desire to by metropolitan networks to acquire regional broadcasters, one wonders why the trigger event need be in place at all.

1.16 For example, when asked where acquiring a regional broadcaster sat as a priority, Mr Marks said:

> "I don't see acquiring a regional broadcaster as high on our priority list." Hansard
>
> "I don't know if there will be a rush of mergers and acquisitions…my focus is [on being] a content business…as a content business the platform becomes less relevant."

1.17 In the past it was also noted by David Gyngell, former Nine CEO in late 2014 that "In five years' time we will just go around regional television and stream our content into those markets. We ultimately won't have a regional affiliate deal."

1.18 In turn, Senator McKenzie seeks the removal of the need for a 'trigger event' to institute the increased regional content quotas (with the six-month lead-in time still remaining). This should apply to all licensees in aggregated and non-aggregated and Tasmanian markets.

1.19 Should any mergers take place, the status quo would remain. Secondly, any of their perceived efficiencies would still not be able to reduce adequate regional news programming.

1.20 With Nine expected to provide targeted ads on live streaming by the end of the 2017 year and regional affiliates' reliance on programming at a high cost (50% of advertising revenue in the case of Southern Cross), the need for Nine and other companies to acquire regional broadcasters is defunct. Again, they can simply stream over the top of regional broadcasters.

1.21 The 'one to market' rule means that regional broadcasters cannot consolidate their businesses amongst themselves as a competitive business model.

1.22 From evidence to the inquiry and in public debate, it is clear that affiliate fees are highly unlikely to decrease, further affecting regional broadcasters' ability to operate when their advertising revenue is diminishing. This is in large part due to metro-companies streaming over their heads and attracting advertising to themselves.

1.23 There is no way to control what metro broadcasters charge for content and this pressure is enormous considering the encroachment by other media companies into regional markets.

1.24 As the Nine CEO reminded the committee, metropolitan broadcasters do not need to acquire regional broadcasters to compete in regional markets. Their ability to stream into regional areas where they do not have a licencing agreement circumvents any urgency or need to acquire regional broadcasters.

1.25 In addition to ensuring regional broadcasters can compete, Senator McKenzie acknowledges that the exclusion of remote areas from requirements is rational. It further highlights the case for market-failure regions to be better served by our public broadcaster, the ABC. Regional Australians are entitled to a competitive media market and successful, commercial regional broadcasters exist - and should be given the opportunity to compete as a result of any media reforms.

1.26 Regional Australians are missing out on the forensic dialogue on important issues that is taken for granted by metropolitan residents. This has negative consequences for the decision-making and the cultural education of regional communities.

1.27 Senator McKenzie commends the Minister's commitment to ensure that the production of local content is promoted and protected.

1.28 The Government's Budget announcement of a 25% reduction in broadcasting licence fees is welcomed.

1.29 Material of local significance definitions must be carefully reviewed at some point in the future, given the problem in quality and journalism when 'rip and read' broadcast meet the local significance definition, but it is effectively poor quality journalism and outsourced to the detriment of those regions. It does not take much to understand that the quality and embeddedness of the best kind of journalism has not been evident here.

1.30 Our media laws must be amended to better reflect the reality of today's media landscape. Similarly, we must acknowledge unfair playing fields and seek to do what we can to enable broadcasting operators that are maintaining good programming and news delivery in regional areas, to continue their good work.

1.31 In summary, Senator McKenzie recommends that the Bill be passed and include the removal of the 'one to a market' rule, the definition of 'broadcasting services' be updated to include the internet and other forms of streaming.

Senator Bridget McKenzie
Senator for Victoria

Appendix 1

Submissions, tabled documents and answers to questions on notice

Submissions

1	Name withheld
2	Media Entertainment and Arts Alliance
3	Foxtel
4	Southern Cross Austereo
5	Australian Subscription Television and Radio Association
6	News Corp Australia
7	Institute of Public Affairs
8	Prime Media Group
9	NSW Farmers' Association
10	WIN Network
11	Fairfax Media Limited
12	Professor Matthew Ricketson
13	Public Interest Journalism Foundation
14	Seven West Media
15	Ten Network
16	Nine Entertainment Co.
17	Dr Derek Wilding
18	Special Broadcasting Service
19	DigEcon Research
20	Screen Producers Australia
21	Ms Megan Brownlow, PricewaterhouseCoopers

Tabled documents

Senator Scott Ludlam – Letter from various sports and media organisations to the then Minister for Communications, dated 12 August 2014 (public hearing, Canberra 31 March 2016)

Mr Jon Bisset on behalf of the Community Broadcasting Association of Australia – Opening statement (public hearing, Melbourne 29 April 2016)

Answers to questions on notice

WIN Network – Answers to questions on notice (public hearing, Canberra, 31 March 2016)

Seven West Media – Answers to questions on notice (public hearing, Canberra, 31 March 2016)

Prime Media Group – Answers to questions on notice (public hearing, Canberra, 31 March 2016)

New South Wales Farmers' Association – Answers to questions on notice (public hearing, Canberra, 31 March 2016)

Department of Communications and the Arts – Answers to questions on notice (public hearing, Canberra, 31 March 2016)

Australian Subscription Television and Radio Association and Foxtel – Answers to questions on notice (public hearing, Canberra, 31 March 2016)

Australian Communications and Media Authority – Answers to questions on notice (public hearing, Canberra, 31 March 2016)

Australian Competition and Consumer Commission – Answers to questions on notice (public hearing, Canberra, 31 March 2016)

Department of Communications and the Arts – Answers to questions on notice (public hearing, Melbourne, 29 April 2016)

Appendix 2

Public hearings

Thursday, 31 March 2016 – Canberra

Professor Matthew Ricketson – Private capacity

Professor Derek Wilding – Private capacity

Seven West Media

Mr Tim Worner, Chief Executive Officer

Ms Bridget Fair, Group Chief, Corporate and Regulatory Affairs

Mr Ben Roberts-Smith VC, MG, General Manager, Seven Queensland

Australian Subscription Television and Radio Association

Mr Andrew Maiden, Chief Executive Officer

Ms Holly Brimble, Policy and Regulatory Manager

Ms Mandy Pattinson, Executive Vice President and General Manager, Discovery Networks Asia Pacific

Foxtel Management Pty Ltd

Mr Bruce Meagher, Group Director, Corporate Affairs

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

Australian Competition and Consumer Commission

Mr Rod Sims, Chairman

Mr Rami Greiss, Executive General Manager, Merger and Authorisation Review Division

NSW Farmers' Association

Mr Derek Shoen, President

Ms Jaimie Lovell, Policy Director

Mr Charlie Cull, Senior Policy Advisor

Media Entertainment and Arts Alliance

Mr Paul Murphy, Chief Executive Officer

Mr Matthew Chesher, Director, Legal and Policy

Department of Communications and the Arts

Mr Richard Windeyer, Acting First Assistant Secretary, Consumer and Content Division

Mr Rohan Buettel, Assistant Secretary, Content Branch

Ms Ann Campton, Assistant Secretary, Media Branch

Australian Communications and Media Authority

Ms Jennifer McNeill, General Manager, Content, Consumer and Citizen Division

Ms Jenny Brigg, Manager, Diversity, Localism and Accessibility Section

Mr Jason Ives, Senior Investigations and Compliance Officer

Friday, 29 April 2016 – Melbourne

Professor Jock Given – Private capacity

Dr Dennis Muller – Private capacity

Ms Megan Brownlow, Executive Director, PricewaterhouseCoopers

Ten Network

Mr Paul Anderson, Chief Executive Officer

Mr Russel Howcroft, Executive General Manager, Melbourne

Ms Annabelle Herd, Director of Corporate and Regulatory Affairs

Nine Entertainment Co

Mr Hugh Marks, Chief Executive Officer

Ms Clare Gill, Director, Regulatory Affairs

News Corp Australia

Mr Michael Miller, Executive Chairman, News Corp Australasia

Mr Campbell Reid, Director of Corporate Affairs and Content Innovation

Fairfax Media

Mr Greg Hywood, Chief Executive Officer and Managing Director

Public Interest Journalism Foundation

Professor Julian Thomas, Board Member

Associate Professor Margaret Simons, Board Member

Community Broadcasting Association of Australia

Mr Jon Bisset, Chief Executive Officer

Ms Kath Letch, Consultant

Mr David Sice, Technical Consultant

The Institute of Public Affairs

Mr Chris Berg, Senior Fellow

Department of Communications and the Arts

Dr Simon Pelling, First Assistant Secretary, Content

Ms Ann Campton, Assistant Secretary, Media

Mr David Jansen, Acting Assistant Secretary, Content and Copyright