

MEDIA REFORM: THE NEXT WAVE

By Derek Wilding



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Reform of Australia's media ownership rules has been under discussion for several years, with at least some aspects supported by the previous Labor governments as well as by the Turnbull Liberal government.

On 2 March 2016, the reform push advanced with the tabling of the Broadcasting Legislation Amendment (Media Reform) Bill 2016. The Bill was then referred to the Senate Environment and Communications Legislation Committee which is due to report on 12 May.

This article outlines the main changes proposed by the Bill, against a background of previous attempts at media reform and with reference to the possible impact of these changes.

Industry background

The Explanatory Memorandum ('EM') to the Bill outlines some of the far-reaching changes in the media industry that have occurred over the last decade. These include:

- the rise of new content services such as Netflix, Stan and Presto as well as the arrival of local versions of international news services such as *Guardian Australia*, *HuffPost Australia* and *Daily Mail Australia*;
- the live streaming of metropolitan television services into regional areas;
- the dramatic drop in print media's share of advertising revenue over the past decade, from 37.5 per cent in 2005 to 15.7 per cent in 2014, with online media rising from 6.1 per cent to 36.2 per cent (see p 9 of the EM).

As the EM notes, these and other changes have serious implications for the regulatory scheme in the *Broadcasting Services Act 1992* ('BSA'). Key aspects of the regulatory framework – devised in an era of analogue television, before the arrival of online and other digital media – are based on a categorisation of services according to their perceived degree of influence.

Snapshot

- **The Media Reform Bill removes the last of the rules regulating cross-media ownership of commercial radio, commercial television and associated newspapers.**
- **The Bill also repeals a rule which effectively prevents the regional commercial TV networks being acquired by the Nine, Seven and Ten networks, or vice-versa.**
- **In response to concerns about the impact of potential transactions on services in regional areas, it imposes new or increased local content quotas on any merged metropolitan and regional network.**

The push for reform

The last wave of significant media reform was under then Communications Minister Helen Coonan in 2006. In addition to some important policy shifts affecting Australia's transition to digital television, the 2006 media reform package removed limitations on foreign ownership, changed the existing cross-media rules, and introduced a points system to measure diversity of ownership in local licence areas.

The crucial change to the cross-media rules was to remove the prohibition on holding a controlling interest (as defined in the BSA) in more than one of the regulated platforms of commercial television and commercial radio and newspapers associated with their licence areas. The 2006 Act permitted control of '2 out of 3' of these platforms.

A further attempt to change media ownership laws was made by the Gillard Government in 2013.

Additional rules were to apply to transactions involving an asset that comprised a 'news media voice'. However, this was one of several bills withdrawn by the government after fierce opposition, including to the introduction of aspects of statutory regulation of standards of practice for print media.

The current rules

The current media ownership rules (before any changes introduced by the Media Reform Bill) comprise the following:

- the '2 out of 3' rule applying to individual licence areas;
- a point-based diversity test that prohibits transactions which cause the number of points in a licence area to fall below, or further below, a certain level (the '5/4 minimum voices rule', referring to the different points settings for metropolitan and regional areas);
- a cap of two commercial radio licences in a single licence area;
- a cap of one commercial television licence in a single licence area;
- a cap on the combined national audience reach of all commercial television licences in the network (being 75 per cent of the Australian population).

Only two of these rules (the '2 out of 3 rule' and the '75 per cent audience reach rule') are addressed in the current Media Reform Bill (in schedules 2 and 1 respectively). In addition, the Bill proposes an expanded system of obligations to provide local content on commercial television services in regional licence areas (schedule 3).

Cross-media ownership – the '2 out of 3 rule'

Removing the '2 out of 3 rule' is a straightforward matter. The Bill repeals the principal provisions (in Subdivision BA of Part 5, Division 5A of the BSA) that make an 'unacceptable 3-way control situation' an offence and a civil penalty

provision. It also removes associated provisions, such as the procedure for applying to the regulator, the Australian Communications and Media Authority, for prior approval of temporary breaches.

In theory, the repeal of this rule has direct application to any of the 43 cities and towns in which there is a newspaper associated with a commercial radio licence area.

In practice, however, a number of these licence areas would not be affected by the removal of this prohibition, for the following reasons:

- the '5/4 minimum voices rule' will prevent further consolidation in some licence areas already at or below the statutory threshold under the points scheme;
- the commercial television networks or the major print groups may decide it is not commercially viable to combine businesses at this time; and
- even if transactions involving the larger players do take place, there are some licence areas where radio licences and newspapers are owned by smaller operators who will not be part of these national transactions.

Transactions that take advantage of legislative change could, for example, result in the News Corp regional dailies in Cairns and the Gold Coast being in the same group as the Ten Network television licence. But it is worth noting that this combination of print and television would be permitted under the current rules.

Perhaps the most significant impact is likely to be seen in the metropolitan areas. For example, the amendments would mean there is no prohibition on combining the Nine Network television licence with the newspaper and commercial radio licences held by Fairfax Media in each of Sydney and Melbourne, where the greater number of media operations also removes the application of the '5/4 minimum voices rule'.

National networks – the '75 percent audience reach rule'

The repeal of this rule is also straightforward. The Bill removes both the principal control rule in section 53 of the *BSA* and the corresponding rule in section 55 applying to persons who are directors of companies in control of commercial television licences.

The repeal of this rule could, in practice, bring significant change. In effect, it maintains a separation of the three

metropolitan networks (the Seven, Nine and Ten networks) and their regional affiliates (Prime, WIN and Southern Cross). It should be noted, however, that both the Seven Network and the Nine Network already control a regional licence in Queensland and New South Wales respectively without breaching the 75 per cent limit.

In part, the Bill is motivated by a desire to remove this statutory mechanism that had its genesis in an earlier wave of media reform in the late 1980s and the desire to maintain services in regional Australia. As the EM indicates and testimony to the Senate Committee demonstrates, most contributors to the debate regard the provision of regional content as a matter better dealt with by separate regulatory provisions.

Local content in regional areas

This aspect of the Bill is more complicated as it expands local content requirements applying in some licence areas and introduces obligations in areas where currently there are no such rules.

Already under the *BSA* there are requirements to provide certain levels of local programming. These obligations currently only apply in parts of regional Queensland, New South Wales (including the ACT), Victoria and in Tasmania. Concerns that repeal of the '75 per cent audience reach rule' will result in the disappearance of regional networks and a reduction in regional content have led to the mechanism in the Bill for increasing local content quotas after such a transaction occurs (ie following a change in control of a licence, known as a 'trigger event').

The new scheme modifies the points system used in the current scheme. More points are awarded to news content specific to the local area, including (in the new scheme) news content filmed in the local area.

The new local content obligations in these areas increase the number of points required per week on average over a six week period, as well as the weekly minimum. In addition, quotas will now apply to most licensees following 'trigger event' transactions affecting licences in regional South Australia and Western Australia and in the Northern Territory as well as some smaller areas in regional New South Wales, Victoria and Queensland. They also comprise a weekly minimum and a six week average, but these quotas are set at a lower level.

Senate Committee review

The Media Reform Bill was referred to the Senate Environment and Communications Legislation Committee which, by early April, had received 20 written submissions and held one day of public hearings in Canberra, with another planned for Melbourne in late April. The most notable aspects of this input are:

- unanimous and strong support from the regional television networks for the repeal of the two control rules;
- support from the Nine Network and the Ten Network, with Ten calling for further deregulation;
- opposition from the Seven Network to the current proposals in the absence of a more comprehensive, less 'piecemeal' approach to media reform;
- support from News Corp Australia and Fairfax Media, but with News Corp calling for further deregulation; and
- opposition from Foxtel, in the absence of further deregulation.

In addition, all the commercial broadcasters used the opportunity of the Senate Committee review to push for the abolition or further reduction of television licence fees. News Corp and Foxtel called for a reduction to the anti-siphoning list which restricts sports broadcasting on subscription television.

Conclusion

Discussion at the Senate Committee hearings indicates there could be changes to the local content rules set out in the Bill, but the nature of these discussions and the broad support for the repeal of the '75 per cent audience reach rule' suggest schedule 1 and (in some form) schedule 3 of the Bill are likely to be passed. If so, the transactions they facilitate would comprise the most significant changes to the regulatory environment – and to the ownership structures of Australian media – in the last decade.

There is less confidence in the attempt to repeal the '2 out of 3 rule', about which the ALP and Australian Greens have expressed some reservations.

These amendments could prompt even greater structural change, should the two major print media companies merge with television and/or radio networks to produce converged cross-media entities. **LSJ**