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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**BROADCASTING SERVICES AMENDMENT  
(MEDIA OWNERSHIP) BILL 2006**

**REVISED EXPLANATORY MEMORANDUM**

(Circulated by authority of Senator the Hon. Helen Coonan,  
Minister for Communications, Information Technology and the Arts)

## **BROADCASTING SERVICES AMENDMENT (MEDIA OWNERSHIP) BILL 2006**

### **OUTLINE**

The Bill implements the Government's longstanding commitment to reform of Australia's outdated media ownership laws while protecting the public interest in a diverse and vibrant media sector.

The current foreign ownership and control restrictions relating to free to air (FTA) commercial television broadcasting, and cross-media ownership restrictions in the *Broadcasting Services Act 1992* (BSA) relating to the regulated platforms of commercial radio licences, commercial television licences or Associated Newspapers limit competition in the media sector and restrict access to capital, expertise and opportunities for growth. The proposed changes will encourage greater competition and allow media companies to achieve economies of scale and scope, while protecting the diversity of Australia's media.

#### Foreign ownership

The Bill will remove broadcasting-specific restrictions on foreign investment in Australia's media sector. The media will remain a "sensitive sector" under the Foreign Investment Policy (FIP) that operates under the *Foreign Acquisitions and Takeovers Act 1975* as well as under the Australia-United States Free Trade Agreement, meaning that all direct media investment and all portfolio investment over 5 per cent will be required to be notified to and approved by the Treasurer.

#### Cross-media

The Bill will permit cross-media mergers in radio licence areas where sufficient diversity of media groups remains following the merger. At least five separate media groups will be required to remain after any merger activity in mainland State capitals, and four groups in licence areas elsewhere, including regional areas. Any media merger, including one that is not a cross-media merger, will not be permitted if it would reduce the number of media groups in a licence area below the minimum level. Further, control of more than 2 out of the 3 regulated media platforms in a licence area is also prohibited. If a person did obtain control over more than 2 of the platforms, this would be an offence.

To ensure compliance with the minimum number of separate media groups rule, the Australian Communications and Media Authority (the ACMA) will maintain a Register of Controlled Media Groups identifying the ownership and control of media groups in each licence area. The Register will enable industry and the community to identify who controls commercial radio and television licences and Associated Newspapers in each licence area. ACMA will be required to deal with notifications for the Register in the order in which they are received. A person who undertakes a transaction that breaches the BSA will be guilty of an offence, and may be ordered by

the ACMA to divest licences or newspapers to return to compliance with the Act. ACMA will also be able to seek injunctions to prevent transactions that breach the BSA or require parties that have done so to address the breach.

#### Public disclosure of cross-held entities

The Bill will establish a requirement for public disclosure when a media outlet reports on the activities of a cross-held entity.

#### Regional protections

The ACMA will be required to impose licence conditions on commercial television licensees in regional Queensland, NSW, Victoria and Tasmania from 1 January 2008 to provide minimum levels of content on matters of local significance. Licence conditions were put in place by the ABA in 2003 in those markets following an investigation undertaken in response to the closure of local news services. A requirement for licence conditions will also be extended to Tasmanian licensees.

The ACMA will also be required to impose a licence condition on regional commercial radio broadcasting licensees, with effect from 1 January 2008, that requires the licensee to broadcast a minimum level of material of local significance during daytime hours on business days of 4.5 hours. A review of the appropriateness of this minimum level must be conducted before 30 June 2007 and within 15 sitting days of the review report being completed, the Minister will be required to table both the report and an instrument specifying a new level. The Minister may also give the ACMA written directions requiring the ACMA to exercise its powers under section 43 of the BSA to impose licence conditions on regional commercial radio broadcasting licences requiring the relevant licensees to broadcast matters of local significance.

The Bill establishes local content licence conditions and Local Content Plans for regional radio licensees. These are intended to provide protection for local content on radio in regional areas, but will only apply where control over a commercial radio licence is transferred or becomes part of a merged media group. These conditions will establish minimum standards for local news and weather bulletins, local community service announcements, emergency warnings and minimum service standards for other types of local content, if specified by the Minister by legislative instrument. Licensees subject to these conditions will be required to maintain existing higher services, and maintain existing levels of local presence.

Licensees will be required to demonstrate in a Local Content Plan (LCP) how they will meet the local content licence conditions and what resources they will have in place to meet the requirements. These requirements may also be imposed if the format of a commercial radio service is narrowed or the Minister directs the ACMA to consider imposing them. The LCP will need to be considered, approved and registered publicly by the ACMA. The ACMA will have the power to impose its own LCP if the LCP submitted by the broadcaster is inadequate. The ACMA will also be required to evaluate compliance of regional radio licensees with the licence conditions and the commitments made in the LCP.

The LCP requirement is designed to provide a public and visible means of assessing the commitment of broadcasters to meet their local content obligations. It is intended that an LCP will contain information about existing and proposed news-gathering facilities and their use, the number and timing of news bulletins and where the bulletins will be produced. A LCP may also provide information about the levels of non-news forms of local content.

#### **FINANCIAL IMPACT STATEMENT**

No financial implications arise from the Bill.

## REGULATION IMPACT STATEMENT (RIS)

### *Part 1: Media Ownership*

#### **Background**

1. The Government committed in the 2004 election context to reforming Australia's media ownership laws, while protecting the public interest in a diverse and vibrant media sector.<sup>1</sup>
2. On 14 March 2006 the Government released a discussion paper on media reform options, *Meeting the Digital Challenge – Reforming Australia's media in the digital age*. The paper set out the Government's preferred options on a number of media regulatory issues, including a Digital Action Plan to expedite digital television conversion, options for new services on spare broadcasting spectrum and other platforms, options for new services by existing commercial television licensees, changes to the anti-siphoning regime, and changes to restrictions relating to media ownership and control, in particular restrictions on cross-media and foreign media ownership. More than 200 submissions were received from members of the public, media sector commentators and nearly all large, and a number of smaller, radio, television and newspaper owners and their industry associations.
3. After consideration of responses to the media reform discussion paper, the Government proposes:
  - the removal of media-specific foreign ownership and control restrictions in the *Broadcasting Services Act 1992* (BSA), and the discontinuation of newspaper-specific foreign ownership limits under Australia's *Foreign Investment Policy*. The media would be retained as a 'sensitive sector' under the *Foreign Investment Policy*.
  - the removal of cross-media ownership restrictions in radio licence areas where a minimum number of separately-owned commercial media outlets across radio, associated newspapers and commercial television (five in metropolitan markets, and four in regional markets), will remain in the market after the cross-media acquisition occurs, and current BSA licence and reach limits are not breached through the cross-media acquisition.
  - a requirement for commercial television and radio broadcasters and newspapers to disclose any cross-media relationship when reporting on the activities of a cross-held entity;
  - requirements for minimum levels of local content by commercial television licensees in certain regional markets (already provided by licence conditions imposed by the ACMA) and by commercial radio

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<sup>1</sup> 21<sup>st</sup> Century Broadcasting pp.18-19.

licensees in certain circumstances; and

- the removal of the BSA ownership restrictions on commercial radio and television licences issued under section 40 of the BSA for operation outside the Broadcasting Services Bands (BSB).

## **The current Australian media industry**

### *Free-to-air television*

4. There are currently 53 commercial television licences in Australia, with a moratorium on the issue of new commercial licences until 2007. Fifteen are located in mainland State capitals with the balance in regional and remote areas. All mainland State capitals and Canberra have three commercial television services, as do the regional areas in the mainland eastern States.
5. The Government has made provision in section 38A and section 38B of the BSA to encourage incumbent broadcasters in markets with only one or two existing commercial television services to introduce new commercial services. The allocation of commercial television licences under these provisions is exempt from the moratorium on new commercial licences.
6. Section 38B has been, or is being adopted for the joint provision of a third digital-only commercial television service in the Tasmania aggregated regional market (including Hobart and Launceston), Mildura, Darwin and remote Western Australia (all areas outside Perth). Consultations are continuing with broadcasters in the remaining two-service market, Remote Central and Eastern Australia, for the provision of a third commercial service as part of a digital television conversion model.
7. The commercial broadcasters in the five former solus markets, Griffith, Broken Hill, Mount Gambier, Riverland and Spencer Gulf, have all commenced a second analogue and digital service in their markets under section 38A of the Act.
8. Most commercial television licences are owned by one of the larger metropolitan or regional networks. Networks Seven, Nine and Ten broadcast to most major metropolitan areas. The largest shareholder in the Seven Network is Kerry Stokes, while the largest shareholder in the Nine Network is the Packer family-controlled Publishing and Broadcasting Limited. The Canadian group CanWest has the major economic interest in the Ten Network. There are three major regional television broadcasting groups: WIN, Prime and Southern Cross. The Seven Network also owns commercial television licences in regional Queensland.
9. The free to air (FTA) commercial television broadcasting industry is complemented by the two national broadcasters, the ABC and the SBS, both of which provide multichannel services in addition to their main FTA channels. A community television sector is now completing the transition to a

permanent licensing regime and operates in a number of capitals and regional centres.

### *Subscription television*

10. There are currently three main retail pay TV service providers in Australia: Foxtel, Optus and Austar. In addition, there are a number of smaller operators including, Neighbourhood Cable, SelecTV and TransACT Communications, currently delivering subscription broadcasting, broadcast-like, or bundled services to niche and regional markets. According to Australian Consumers' Association research, the penetration of pay TV in Australian households is 26%.<sup>2</sup> Although the pay TV licences held by all of the existing operators are national licences, commercial arrangements have limited direct competition to between Optus and Foxtel in the high-density Sydney, Melbourne and Brisbane markets, and between Austar and Foxtel in parts of the Gold Coast.
11. Foxtel has reported that its digital service carries over 100 channels. In June 2006, Foxtel was reported as having over 1.27 million subscribers, around 90% of which are understood to subscribe to its digital service<sup>3</sup>. Many of these channels are vertically integrated with one or more of the pay TV providers.

### *Radio*

12. There are 261 commercial radio licences over more than 100 licence areas in Australia. Major commercial radio network owners include DMG Radio Australia, Macquarie Regional Radioworks, Southern Cross Broadcasting, the Australian Radio Network (ARN), and Austereo Pty Ltd.
13. As with the commercial television industry, national broadcasting and community radio broadcasting services are available in addition to commercial radio services. The ABC provides four national radio services, an extensive Local Radio network and internet-based radio services. SBS Radio provides two services in Sydney and Melbourne and a single service in major metropolitan and regional centres.
14. There are over 350 licensed community radio services operating in Australia.

### *Print*

15. Major metropolitan newspaper proprietors are News Limited, publisher of *The Australian* and daily papers in State capitals, John Fairfax Holdings, publisher of the *Age* and the *Sydney Morning Herald* and West Australian Newspaper Holdings, publisher of *The West Australian*. Regional newspaper ownership is dominated by Rural Press (*The Canberra Times*) and APN (publisher of 14 daily regional newspapers).

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<sup>2</sup> <http://www.choice.com.au/viewarticleasonepage.aspx?id=104630&catId=100170&tid=100008&p=1>.

<sup>3</sup> Schulze, Jane, "Digital fires Foxtel's \$178m profit", *The Australian*, 11 August 2006.

16. General magazine publishing in Australia is also highly concentrated, with most circulation attributable to titles owned by Australian Consolidated Press (ACP, wholly owned by PBL), Pacific Publications (owned by Seven) and News Ltd, or licensed from overseas groups such as Hearst, Hachette, Advance and AOL Time Warner.

#### *New media*

17. Changing patterns of media use in Australia demonstrate an increase in the use of new sources of entertainment and information. It has been estimated that prime-time FTA television audiences have dropped nine per cent over the period 1995-2005, from 3.05 million to 2.77 million.<sup>4</sup> Some of this shift has been to pay television – OzTAM ratings reports from 2003 to 2006 show that subscription television audiences grew from an average 10% share from 6am-midnight to 13%. However, newspapers and radio have also lost consumers. Newspaper circulations are declining in Australia as well as around the world; in the decade from 1990 to 1999, Australian capital city newspapers' circulations are estimated to have dropped over 10 per cent from over 1 billion copies sold per annum to under 900 million.<sup>5</sup> This is similar to overseas experience.<sup>6</sup> In radio, the audience for commercial stations during the breakfast program timeslot in the capital cities dropped from 2 million in 1990 to 1.8 million in 1999.<sup>7</sup>
18. While this loss of audience/readership in part reflects lifestyle choice, it is clear that some has been due to growing use of other media. According to the Australian Bureau of Statistics (ABS)<sup>8</sup> the percentage of Australian households with access to a computer at home has increased steadily from 44% in 1998 to 67% in 2004-05. The percentage of Australian households with access to the Internet at home has increased strongly, rising from 16% in 1998 to 56% in 2004-05. Of these, more than half now have broadband access.<sup>9</sup> There has been sharp rise in the amount of data downloaded by subscribers; in the March 2005 quarter, households downloaded 14,124 million MBs, a 28% increase on the September 2004 quarter. Much of this relates to the downloading, legal or otherwise, of music, films, television programming and other audio-visual content, and 87% of these downloads

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<sup>4</sup> Media agency Fusion Strategy, cited in *Australian Financial Review*, 18 April 2005, "TV's uncertain future", p.61.

<sup>5</sup> Fusion Strategy.

<sup>6</sup> "In 1995-2003, says the World Association of Newspapers, circulation fell by 5% in America, 3% in Europe and 2% in Japan." *The Economist*, "Yesterday's papers", [http://www.economist.com/business/displayStory.cfm?story\\_id=3896039](http://www.economist.com/business/displayStory.cfm?story_id=3896039).

<sup>7</sup> "Sources of news and current affairs" A research report in two stages conducted by Bond University for the ABA, [http://www.aba.gov.au/tv/research/projects/sources/stage2/pdf/aud\\_22.pdf](http://www.aba.gov.au/tv/research/projects/sources/stage2/pdf/aud_22.pdf).

<sup>8</sup> Household use of Information Technology, 8146.0 – 2004-05, available [http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/CA78A4186873588CCA2570D8001B8C56/\\$File/81460\\_2004-05.pdf](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/CA78A4186873588CCA2570D8001B8C56/$File/81460_2004-05.pdf), accessed 24 February 2006.

<sup>9</sup> *Sydney Morning Herald*, 28 April 2005, "TV loses its edge as broadband access multiplies," p.29.



were accounted for by non dial-up customers.<sup>10</sup>

19. This shift has related not merely to entertainment but news and information as well. As noted above, Australian newspaper circulations have been declining, and indeed have been doing so for several decades alongside the development of new media. Use of internet-based news media has been growing rapidly, especially by younger people.<sup>11</sup> While nearly all popular news sites are provided by traditional media companies, the emergence of weblogging (which has had a significant news industry impact in the United States, but less in Australia), online business analysis services and independent online news and commentary services like that provided by Crikey.com.au and New Matilda, has seen more interactive forms of news and current affairs reporting emerge which significantly differ from the news and current affairs models of traditional media. The availability of foreign news media, previously mostly available to Australians only via local media, has also substantially increased, enabling access to non-local news sources and commentary.
20. Mobile telephone content is a relatively new technology connected with the 3G mobile phone platform, and has further diversified the sources from which Australians can obtain information and entertainment. Content providers for 3G services include news, comedy, sport, music and entertainment programming, sourced from diverse providers such as newspaper publishers, as well as pay and FTA television. Since 2005, there has been growing interest in the potential of mobile television services, although services initially would appear to be confined to retransmissions of existing broadcasting services or existing content otherwise repurposed for mobile telephones. A year-long trial of mobile television (DVB-H) conducted by Broadcast Australia in Sydney commenced in July 2005, and DVB-H was also trialled during the March 2006 Commonwealth Games.
21. Use of technologies that provide greater choice and control to media consumers are also expanding rapidly. DVD sales have significantly expanded the home audio-visual content market beyond that created by video cassettes and usage is predicted to continue to increase, with GfK Marketing Services reporting that 2.4 million DVD players were sold in 2005.<sup>12</sup> Digital recorders such as Foxtel's personal video recorder (PVR), which will allow subscribers to Foxtel's digital service to record television shows to a hard disk and watch them when convenient, will further enable time-shifted viewing and advertisement-skipping. Other forms of interactive media usage, including online gaming and gambling, SMS texting and weblogging (blogging<sup>13</sup>) are also increasing or are well-established.

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<sup>10</sup> Internet Activity, Australia, March 2005, 8153.0, available.

<http://www.abs.gov.au/ausstats/abs@.nsf/0/6445f12663006b83ca256a150079564d?OpenDocument> accessed 24 February 2006.

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<sup>12</sup> Australian Film Commission, "Retail sales of DVD players, recordable and non-recordable, 2003–2005", <http://www.afc.gov.au/gtp/wvauvdvd.html>, accessed 19 May 2006.

<sup>13</sup> It is estimated that there are more than 100 million blogs around the world, and more than 450,000 in Australia alone: The Blog Herald, "<http://www.blogherald.com/2005/10/10/the-blog-herald-blog->

### *Diversity*

22. Media diversity is a controversial and much-debated concept, and a comprehensive definition remains problematic.<sup>14</sup> However, the specific objectives of the BSA relate to diversity of ownership and diversity of content in Australian broadcasting. These are identified as goals of the BSA:
- “to promote the availability to audiences throughout Australia of a diverse range of radio and television services offering entertainment, education and information;” (s.3(a)) and
  - “to encourage diversity in control of the more influential broadcasting services” (s.3(c)).
23. In the BSA, diversity of *services* is delivered primarily through the provision of a range of broadcasting categories, including public broadcasting, community broadcasting, subscription broadcasting and narrowcasting, in addition to direct content regulation of broadcasters. For example, certain types of programming such as ‘high quality’, ‘innovative’, ‘performing arts’, ‘multicultural’ or ‘community’ programming are identified as core functions of national or community broadcasters, and the ACMA’s processes for awarding community licences according to merit also allows it to address the question of diversity in types of service. But the BSA empowers the ACMA to make standards for commercial broadcasters to provide certain types of content in regard to local drama and children’s programming, which might not be delivered in an open market. The issue of diversity of media services for regional communities is discussed below.
24. While there is debate about the role of proprietors in determining the voice of media organisations, the BSA assumes that diversity in news and opinion is substantially influenced by the level of diversity in the *ownership* of media groups. This is supported by the PC’s 2000 Report into Broadcasting, and the Government shares this view, as its election commitment indicates. However, restrictions on media ownership (both the foreign and cross-media ownership framework, and licence and reach limits) have an economic impact on the media sector, and in particular prevent companies from accessing economies of scale and scope that may come from consolidation, and from accessing capital and management expertise in other media sectors and other countries. In a rapidly-evolving media environment, it is therefore critical that the Government assess the extent to which the current ownership restrictions achieve the goals of the BSA in relation to diversity as effectively and as efficiently as possible.

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count-october-2005/”, <http://www.blogherald.com/2005/10/10/the-blog-herald-blog-count-october-2005>, accessed 27 February 2006)

<sup>14</sup> See, for example, the discussion in Richard Schultz, *Measuring Media Diversity: Problems and Prospects*, Working Paper Series, Joan Shorenstein Center on the Press, Politics and Public Policy #2005-7.

*Regulation of foreign ownership of media in Australia*

25. Foreign media acquisitions are regulated under the *Foreign Acquisitions and Takeovers Act 1975* (FATA) and the BSA.
26. The current objective of the foreign ownership and control restrictions of the BSA (paragraph 3(1)(d)) is to ensure that Australians have effective control of the more influential broadcasting services.
27. Under the BSA, there are three sections that impose foreign ownership control on commercial and subscription television:
  - section 57 (Division 4, Part 5) of the BSA states that a foreign person must not be in a position to exercise control of a commercial television broadcasting licence (normally, company interest greater than 15%) and two or more foreign persons must not have company interests greater than 20% in such a licence;
  - section 58 (Division 4, Part 5) of the BSA states that, unless approved by the ACMA under special circumstances, not more than 20% of directors of each commercial television broadcasting licensee may be foreign persons;
  - section 109 (Division 3, Part 7) of the BSA states that a foreign person must not have company interests greater than 20% in a subscription television broadcasting licence and that these interests when added to the company interests in that licence held by other foreign persons, should not represent greater than 35% foreign interest.<sup>15</sup>
28. The BSA imposes no specific foreign ownership or control rules on radio.
29. The Foreign Investment Review Board (FIRB) is a non-statutory body that advises the Treasurer on foreign investment matters, utilising foreign investment regulations allowed under Section 39 of the FATA, and the Foreign Investment Policy (FIP), which was reviewed most recently by the Government in 1999. Proposals for investment must be consistent with both the FIP and the national interest, and are considered on a case by case basis. Final responsibility for the Government's foreign investment policy and for making decisions on foreign investment proposals rests with the Treasurer.
30. Under the FATA and the FIP, proposals for foreign investment of 15% or more (individuals) and 40% or more (aggregate) in companies whose gross assets are valued at over \$50 million, or investment in any of a number of sensitive sectors, are notifiable and considered by the Treasurer, who has the power to reject them if he determines that they are contrary to the national interest.
31. In addition, under the FIP, the media is considered a 'sensitive sector', and all direct foreign media investment (and all portfolio investment over 5%)

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<sup>15</sup> As no "control" provisions apply to subscription television, foreign firms are able to invest in the subscription television industry by establishing contractual relations with Australian owned licensees. Under the control rules of the BSA that apply to commercial free-to-air television such arrangements may constitute control and be disallowed.

requires prior approval. The foreign ownership limit stipulated in the FIP for a national or metropolitan daily newspaper is 25% individual and 30% in aggregate. Foreign ownership of suburban and provincial newspapers is limited to less than 50%.<sup>16</sup> Proposals to establish a new newspaper are subject to case-by-case examination. However, media investment proposals that are below the FATA thresholds are subject only to policy disapproval by the Treasurer, although to date no foreign investment has been undertaken in breach of the non-legislative framework.

32. The media sector is also a sensitive sector under the Australia-United States Free Trade Agreement (AUSFTA). In sensitive sectors, the threshold for US investors is \$52 million, indexed annually to the GDP implicit price deflator (compared to an \$831 million threshold for US investors in non-sensitive sectors).<sup>17</sup>
33. There is significant foreign investment in Australian media. A non-exclusive list would include, most prominently, News Limited, which has been incorporated in the United States since 12 November 2004; Canadian media firm CanWest currently owns approximately 14.5 per cent of the issued ordinary shares of Ten Group, but has overall economic interests in the Ten Group of approximately 57 per cent; Independent News & Media PLC (INM) of Ireland has a stake of approximately 40% in Australian Provincial Newspapers (APN); APN has a partnership with US company Clear Channel in Australian Radio Network (ARN); approximately 46% of Austar shares are owned by public shareholders, with the remainder owned and controlled by Liberty Global Inc; and Optus is wholly owned by SingTel, which is in turn majority owned by the Singapore Government.

#### *Regulation of cross media ownership in Australia*

34. The cross-media regime under the BSA is monitored and enforced by the ACMA. It was first introduced in 1987 and retained with the passage of the BSA in 1992. It operates in addition to the general competition law provisions of the *Trade Practices Act 1974* (TPA), which specifically address competition issues; while competition is related to diversity, the issues are separate, and the TPA does not permit the ACCC to consider the impact on media diversity of transactions in the media sector. The cross-media restrictions are in addition to restrictions on the limits on the number and type of licences that a person may control in a licence area (two commercial radio licences per market, or one television licence per market, with national commercial television reach limited to 75%).
35. The cross media rules prohibit a person from being in a position to exercise control, or being a director, of any combination of a commercial television licence, commercial radio licence and an associated newspaper in the same

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<sup>16</sup> "Summary Of Australia's Foreign Investment Policy", Australian Treasury, Jan 2006, [http://www.firb.gov.au/content/\\_downloads/General\\_Policy\\_Summary.pdf](http://www.firb.gov.au/content/_downloads/General_Policy_Summary.pdf) p.7.

<sup>17</sup> Summary Of Australia's Foreign Investment Policy", Australian Treasury, Jan 2006, [http://www.firb.gov.au/content/\\_downloads/General\\_Policy\\_Summary.pdf](http://www.firb.gov.au/content/_downloads/General_Policy_Summary.pdf) p.2.

licence area.<sup>18</sup> In accordance with the BSA, the ACMA requires licensees to regularly report the names of the directors of a licensee, and persons who, to the knowledge of the licensee, are in a position to exercise control of the licence. Licensees are also required to notify the ACMA of any changes to the control of a licence.

36. There are also two relevant moratoria in commercial broadcasting. In September 2003, the ACMA announced an administrative halt to the allocation of further commercial radio licences following the completion of planning of all radio licence areas across Australia. This policy established an effective five year moratorium on the issue of new commercial radio licences following the allocation of the last commercial radio licence in each market. There is also a legislative moratorium on the issue of additional commercial television licences until 2007.

#### *Productivity Commission Inquiry*

37. In 1999, the Productivity Commission (PC) conducted an inquiry into broadcasting, which stemmed from the Commonwealth's commitment under the Competition Principles Agreement to review legislation that restricts competition. The primary legislation under review was the BSA, which had been amended a number of times since 1992, including the 1998 digital television conversion amendments. The Commission's Report, which was released in March 2000, made, *inter alia*, a number of recommendations to reform the operation of the cross media and foreign ownership and control regime.
38. Specifically, the PC recommended reform of the cross-media ownership regime, beginning with the introduction of a media specific public interest test under the TPA. In relation to foreign ownership and control restrictions, the PC recommended the removal of foreign investment, ownership and control restrictions from the BSA and leaving the sector to be regulated by Australia's general foreign investment provisions.
39. While a good analysis of the broadcasting sector at the end of 1990s, many of the issues identified by the PC have been overtaken by the media developments since that time. The extent to which the current media ownership framework achieves the goals of the BSA as efficiently and effectively as possible needs to be reconsidered in the context of changes in the media sector.

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<sup>18</sup> ACMA is required to maintain an Associated Newspaper Register, which records the broadcasting licence area(s) with which a newspaper is associated. A newspaper is deemed to be associated with a commercial television broadcasting licence area if at least 50% of the circulation of the newspaper is contained within that licence area. A newspaper is determined to be associated with a commercial radio broadcasting licence area if at least 50% of the circulation of a newspaper is within that licence area, and the circulation is at least 2% of the licence area population.

## PROBLEM

### *Current market structure*

40. Australia's major media companies, and the commercial broadcasting licences and Associated Newspapers they control, are listed at Attachment A. Metropolitan licence areas support a number of large, highly profitable companies, and as a consequence there is a greater level of diversity of ownership and services than in regional licence areas, which have high levels of concentration and limited diversity.
41. Changes to the means of protecting media diversity must thus recognise the different characteristics of and levels of diversity in metropolitan and regional markets; the current cross-media and foreign ownership restrictions regulate all markets under the same framework, subjecting regional media companies to the same ownership limits as metropolitan-based companies, despite the significantly different characteristics of the companies' operating environments.

### *Foreign ownership*

42. The foreign ownership restrictions in the BSA, while aimed at ensuring Australian control of the more influential broadcasting services, prevent the television sector from accessing foreign sourced- or controlled capital, and reduce the market pressure on Australian media to pursue innovation and efficiency gains. The restrictions are also inconsistent with the regulation of the commercial radio sector. Further, the BSA restrictions on foreign control of subscription television licences has not prevented substantial foreign entry into that market.
43. The foreign ownership restrictions in the *Foreign Investment Policy* similarly act to restrict access by newspaper companies to foreign capital and expertise.
44. However, the proliferation of new media, with large amounts of both local and foreign content, has reduced the relative cultural, political and social importance of television and newspapers, thereby undermining the basis for continuing to single out these commercial television and newspapers for specific and onerous restrictions on foreign ownership.

### *Cross media restrictions*

45. In introducing the cross media provisions in 1987, the then-Minister for Transport and Communications stated that the new rules would "provide safeguards for the future. The sources of news and information will not be able to become concentrated in the hands of one owner."<sup>19</sup> However, as discussed above, the Australian media environment has undergone significant

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: <sup>19</sup> Second reading speech, Broadcasting (Ownership and Control) Bill 1987, 29 April 1987.

change since 1987.<sup>20</sup> In 1987, the main forms of media were newspapers, commercial television and radio, national broadcaster television and radio services, a small community radio sector, magazines and other print media, and cinema.

46. Audiences now have access to an extensive and growing range of news and information from several forms of media, supplementing traditional broadcasting and newspaper services. As noted above, this has been reflected in the decline in free-to-air television audiences and newspaper readerships and the growth in pay-television audiences and usage of new media such as the internet, computer games, online gambling, mobile telephony and DVDs. The growth in available platforms, and the information technology and communications sector more generally, is also creating new commercial opportunities for both existing and new media companies to reach consumers, provide content and supplement traditional mass media-driven activities with niche services and content.
47. Despite the proliferation of new media, the provision of news and current affairs is still dominated by traditional media organisations, and commercial radio and television and daily newspapers remain the most influential sources of news and information. Diversity in the ownership of these influential media therefore remains a critical objective of Australia's media regulatory framework.
48. However, the current regime is strongly prescriptive, and creates an inflexible regulatory framework. By targeting specific media platforms it does not account for changes in industry structure, or emergence of new media. This has the effect of inhibiting the growth of new services, as well as preventing media companies from obtaining economies of scale and scope which may be obtainable while preserving diversity of ownership. It also prevents the television, radio and newspaper sub-sectors from sharing capital and expertise.
49. As part of its media reform package, the Government has also proposed amendments to the BSA in relation to the regulatory framework for digital broadcasting services. Most relevantly, it is proposed to enable the provision of a wider range of datacasting services, which existing free-to-air licensees will not be permitted to provide. This will enable companies in other media sectors, communications infrastructure companies or new entrants to provide a services the primary limitation on which will be that they not resemble free-to-air television services, thereby potentially expanding diversity of media ownership and of content.
50. Together, the foreign ownership and cross-media restrictions significantly limit investment and innovation in Australian media, and thereby undermine the BSA's objective, under section 3(b), "to provide a regulatory environment that will facilitate the development of a broadcasting industry... that is efficient, competitive and responsive to audience needs." In its 2000 report,

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<sup>20</sup> Including the aggregation of television licence areas in regional Australia, legislation for which was introduced that year; previously, regional television markets had been commercial monopolies.

the PC recommended the removal of foreign investment, ownership and control restrictions from the BSA. The argument for removal has strengthened since that time.

## **OBJECTIVES**

51. The objective of the Bill is to remove impediments to greater efficiency, competitiveness and responsiveness in the media sector, while continuing to support the existing objectives of the BSA relating to diversity and quality of the media. The key groups affected are consumers, media companies, and foreign and local investors.
52. For foreign ownership and control specifically, an objective is to allow greater access to capital and the benefits of foreign investment, such as managerial expertise and innovation, in the context of continuing general foreign investment safeguards.
53. In the case of cross media reform, the proposals are intended to allow increased scope for obtaining efficiencies, new sources of capital and exploitation of new media opportunities. However, reform of media ownership restrictions must also recognise the importance of the objective of diversity that those restrictions were originally intended to achieve.

### *Options – foreign ownership and control of media*

54. Three options for regulating foreign ownership of broadcasting services have been considered:
  - a. to make no change to the current regulatory arrangements;
  - b. to amend, but not remove, the media-specific provisions within the BSA to allow for greater levels of foreign investment in Australian media; and
  - c. to remove all foreign ownership and control limits from the BSA and discontinue newspaper-specific provisions under general foreign investment policy.

### *Impact Analysis*

#### Option (a): to make no change to the current regulatory arrangements

55. Retaining the existing framework would require no change to the existing regulatory arrangements, and would not alter the current roles of regulators.
56. The primary argument for retaining media-specific foreign ownership restrictions is that television and newspapers remain critical sources of news and information, and as such their ownership should be restricted to Australians, who are more likely to act in a manner consistent with the national interest, and to provide content of relevance to Australians.



57. This argument was disputed by the PC in its Broadcasting Inquiry, which found that media proprietors are bound by commercial imperative, local content regulation and competition from alternative services to show programming of relevance to audiences. The PC also discussed the possibility that foreign owners may also be less likely to seek to interfere in domestic affairs or to have conflicts of interest in the local market, aiding the BSA's objective of encouraging diversity of opinion. In any event, legitimate concerns about foreign control of Australian media on national security grounds can still be addressed through FATA and general foreign investment policy.
58. Further, the current foreign ownership and control provisions have not been fully effective in maintaining Australian control of television and newspapers. CanWest's role in Network Ten, significant foreign control of pay TV companies, and US-based News Limited's ownership of significant Australian newspaper assets (protected by the 'grandfathering' provisions of the BSA and its predecessor), are all inconsistent with the objective of the restrictions. Yet no case has been made that any of those media organisations are less "Australian" or produce less local content than competitors.
59. Retention of foreign ownership restrictions would continue to deny television and newspaper companies access to foreign capital and the opportunity to fully integrate into global markets. Technological change in the communications sectors has required media operators to undertake significant investment in digitisation and emerging media platforms.<sup>21</sup> Digitisation of broadcasting production and transmission has enabled new content and interactive services to be offered, and reduced the cost of producing content, but has required large capital outlays. Similar investment will continue to be required if media companies are to respond effectively to further technological change and respond to audience and consumer demands. Restricting Australian media outlets' access to foreign capital reduces the capacity of the Australian media to adopt new technologies, thus also limiting the potential diversity of Australian media.
60. In an environment of continued growth of global communications networks, Australian media proprietors seeking to expand internationally may be limited by their restricted access to capital. Preventing increased foreign investment in Australia may similarly restrict the capacity of Australian media enterprises to forge strategic international partnerships. Limiting the foreign control of Australian media enterprises could also restrict access to managerial expertise and potential for innovation.

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<sup>21</sup> For example, FreeTV Australia has cited an expenditure of over \$1 billion by commercial television licensees to meet the digital conversion requirements of the BSA. Telecommunications companies have also invested heavily in spectrum and infrastructure for 3G networks.

Option (b): to amend the media-specific provisions within the BSA to allow for greater levels of foreign investment in Australian media.

61. Restrictions on foreign control and ownership of commercial television licences contained in the BSA are comprehensive, including prohibitions on direct ownership and control, passive investment<sup>22</sup>, and foreign-managed but Australian-sourced funds above a defined level. The definition of control in the BSA is extensive, in recognition of the often complex interests and relationships in a company.
62. An alternative to the current regime is to amend the BSA to allow greater investment by foreign sources in Australian media. This could be achieved by removing restrictions on either or both passive investment or investment by foreign-managed but Australian-sourced funds.
63. The introduction of exemptions for passive investments would probably require reference to a decision-making body (such as the ACMA) in cases where the terms and conditions of securities contracts require individual consideration (e.g. hybrid or individualised securities). Compliance would be the responsibility of the broadcaster and the regulator who would need to ensure that ownership limits were not breached. A number of investment and securities types are defined under the *Corporations Act 2001* and related legislation. The introduction of exemptions for passive investments could utilise existing definitions subject to consideration on a case by case basis. Alternatively, economic interests could be exempted without limit, or up to individual and aggregate percentage limits.
64. Enabling passive investment in commercial television stations would potentially increase access to capital. However, in its report the PC doubted that many foreign investors would accept an entirely passive role. This approach would also entail a heavy administrative burden in determining and monitoring holdings and in enforcing compliance by 'passive' shareholders.
65. A second option is to remove restrictions on investment by foreign-managed but Australian-sourced funds in commercial television broadcasters. This was the approach recommended by the PC in the event that sole reliance on Australia's general foreign investment policy was unachievable. There are a number of precedents in Australia which embody the concept of a substantially Australian investment fund, such as arrangements relating to the sale of Telstra.
66. A similar model in the broadcasting sector would provide opportunities for 'Australian money' deposited in foreign-controlled investment funds to be invested in Australian broadcasters. With a high proportion of foreign-owned fund managers operating in Australia, there is an argument that the restrictions

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<sup>22</sup> Passive investment may broadly be defined as non-voting interests. The BSA definition of company interests (section 6) includes consideration of shareholding interest, voting interest, dividend interest and/or winding-up interest (section 8). Non-voting shares may be deemed company interests on the basis that they involve one or other of these interests.

on foreign-managed but Australian-sourced funds unduly limit access to capital. It also increases the costs of monitoring and compliance with the legislation.

67. This option is preferable to offering exemptions for passive investment, as it facilitates access to capital, while incurring lower compliance costs. However, it would not achieve the full benefits of removing restrictions, as restrictions on foreign investors would remain.
68. A further option is to raise the current limits on foreign ownership (for example, to 49%, as considered by the PC). As with the other options considered above, this would not achieve the full benefit of removing restrictions which have an ongoing negative impact on the Australian media sector.

Option (c): remove foreign ownership and control limits from the BSA, and discontinue newspaper-specific provisions under general foreign investment policy

69. Abolition of all media-specific foreign ownership and control limits in the BSA is legislatively simple. Discontinuing the newspaper-specific provisions under the Foreign Investment Policy is a policy matter at the discretion of the Treasurer. The BSA provisions and newspaper-specific foreign investment policy provisions have similar objectives, and it would be consistent to remove them simultaneously.
70. As discussed above, repeal of restrictions under the BSA on foreign investment will improve access to capital, increase the pool of potential media owners and act as a safeguard on media concentration. Removing the foreign investment constraints will open up the capital market for television broadcasters and print media, improve access to technology and managerial expertise, and, particularly in print media, increase the possibility of greater diversity through new market entrants. The maintenance of a restriction on foreign investment in the media sector is at odds with policies that encourage international competition in other sectors of the economy.
71. Removing the restrictions on foreign ownership and control in the BSA would also introduce consistency in the application of foreign investment regulation in the media sector. Compliance costs for the industry would be reduced through simplification of regulation and through removing the need to monitor foreign interests for the purposes of compliance with the BSA.
72. With the removal of foreign ownership restrictions in the BSA, Australia's general foreign investment provisions will govern foreign investment in the media. These provisions apply across other sectors of the economy, including some of equal or greater sensitivity or economic importance than television or newspapers. For example, there are no specific limitations on foreign investment in Australian commercial radio licences. Experience in the radio industry suggests that foreign investors increase the potential pool of media owners, and create increased competition in the sale of licences.

### *Consultation*

73. All industry submitters to the March 2006 discussion paper were supportive of the proposed changes for foreign investment rules, except News Limited, which opposed ownership reform due to the lack of commercial opportunities in relation to other elements of the media reform package.
74. Supporters of the proposed foreign ownership rule changes cited the benefits they would bring to the Australian media and the Australian community through increased access to foreign capital and an increased pool of potential owners, acting as a safeguard to possible concentration of ownership through new foreign entrants. Fairfax noted in its support that the proposed changes would bring the regulation of foreign investment in the media into line with regulation of foreign investment in other sectors.

### **Conclusion and Recommended Option**

75. Option (a) is to make no change to the current regime, which imposes fixed restrictions on foreign ownership and control of commercial television broadcasters in Australia and prevents access to capital, expertise and innovation. The current restrictions are limited to television and newspapers.
76. Option (b) provides for greater levels of foreign investment in Australian media. While this approach offers improved flexibility from the current regime, and easier access to capital, it is not certain that this option would be sufficiently attractive to foreign investors, and does not remedy the problems of the current restriction.
77. Option (c) introduces more consistent and simplified regulation to foreign investment. It opens access to foreign and domestic capital markets and promotes greater diversity in ownership and control, subject to the operation of the general foreign investment law. In simplifying regulation, it also removes some compliance costs and improves Australia's attractiveness as a site for investment. General foreign investment provisions would remain as a safeguard of national interest.
78. The Bill will implement Option (c), as it facilitates access to foreign investment and expertise in the Australian media sector, ensures legislative consistency and provides greater opportunity for diversity of opinion by increasing the pool of potential media investors.

### *Implementation and Review*

79. Option (c) is legislatively simple to implement and involves removing the following sections from the BSA:
- subsection 3(1)(d) of the BSA;
  - ss.57-58 (Division 4, Part 5) on the limitation on foreign control of television for commercial FTA services;

- s.109 (Division 3, Part 7) on foreign ownership limits for subscription television broadcasting licences), and
  - a number of other consequential amendments.
80. Concomitant with these amendments, newspaper-specific provisions under Australia's general foreign investment policy would be rescinded, and the sector would be subject only to Australia's general foreign investment policy for sensitive sectors. Proposals by foreign interests to directly invest in the media sector, irrespective of size, would remain subject to prior approval by the Treasurer.<sup>23</sup>

*Options – Cross media regulation*

81. In seeking to address the problems of existing cross-media restrictions while protecting media diversity, the Government has considered three main options:
- to retain the current legislative framework;
  - to replace the current framework with a *qualitative* mechanism of diversity protection, by allowing exemptions to the existing regime subject to the application of an assessment mechanism; and
  - to replace the current framework with a *quantitative* mechanism of diversity protection, to allow exemptions to the existing regime subject to a minimum number of media organisations remaining.
82. Another option, to remove all diversity protections from the media ownership framework, was not considered in detail, given the Government's commitment to the protection of diversity.

*Impact Analysis*

Option (a): to retain the current legislative framework.

83. As indicated above, this approach would continue the negative impacts of the current framework.
84. With the digitisation of production and distribution facilities, media organisations around the world are under pressure to invest in new technologies and to recoup that investment through efficiency savings. The current cross media ownership restrictions limit the ability of media companies to invest in different types of media services, and restricts the corporate structure of media companies. An example of the disadvantages of the current restrictions is limitations on businesses achieving economies of scope. The PC noted that although cross media restrictions do not prevent media operators from purchasing different media in different markets, the

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<sup>23</sup> "Summary Of Australia's Foreign Investment Policy", Australian Treasury, Jan 2006, <[http://www.firb.gov.au/content/\\_downloads/General\\_Policy\\_Summary.pdf](http://www.firb.gov.au/content/_downloads/General_Policy_Summary.pdf)>, Attachment, p. 12.

majority of media organisations had not pursued this strategy to any marked degree (with the exception of Southern Cross Broadcasting). Cross media restrictions act as a significant deterrent to media organisations pursuing economies of scope, an approach at odds with market and technology trends in the media sector.

85. There are mixed views within the sector as to the source of other benefits from cross-media reform. Industry respondents to the PC Inquiry nominated content sharing as one, but not the only, advantage of cross-controlled companies. Cross-selling of advertising, cross-promotion of products and services, and sharing of administrative and corporate functions, such as marketing, have also been anticipated.<sup>24</sup> However, the actual extent of the benefits remains unclear.
86. By restricting investment in certain combinations of media services but not others, the regulatory framework also directs the market towards outcomes that may not be the most economically efficient. The current approach is also inconsistent with the Government's competition policy, which requires that, as far as possible, universal and uniformly-applied rules of market conduct should apply to all market participants, regardless of the form of business ownership. While mergers and acquisitions are assessed on a case by case basis under general competition law, the cross media provisions are applied indiscriminately to mergers between certain types of media. As the PC noted in its report, this approach ignores research into patterns of media consumption, which indicates that mergers between newspaper groups and commercial television licensees can have very different effects on different audience segments' access to a diversity of sources of information and opinion.<sup>25</sup>
87. Retaining the cross-media provisions but changing the allowable percentage of ownership and control is not considered as a separate option, as it does not address the inherent structural problems of the current regime. Further, given that there is no accurate measure of the influence of different media, it would be difficult to set an appropriate level for ownership and control limits that reflects the overarching goal of protecting diversity.

Option (b): to apply a qualitative test to media mergers and acquisitions.

88. The issue of removing the current, flawed cross media legislative framework while preserving its diversity objectives has previously been considered. In its 2000 Report on Broadcasting, the PC recommended the eventual removal of the cross media rules subject to certain conditions, including deregulation of FTA broadcasting and changes to digital implementation. The PC concluded that the current provisions of the TPA remained inadequate to address the public interest considerations associated with media mergers because, *inter alia*, it could not readily address the issue of diversity of sources of news and opinion. The PC proposed the immediate implementation of a media-specific

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<sup>24</sup> For example, "You say synergy, I say buzzword," SMH 3 May 2005.

<sup>25</sup> Productivity Commission 2000, Broadcasting, Report no. 11, AusInfo, Canberra, pp. 344-45.

public interest test to be administered by the Australian Competition and Consumer Commission (ACCC), acting after advice from the then-ABA. The PC found that three key factors would need to be addressed prior to implementation of the test: the definition of the test, the development of guidelines and the designation of which sectors were to be covered.

89. The PC suggested that the media specific public interest test should address the public interest in promoting diversity of ownership and diversity in sources of opinion and information. While not articulating the elements of a test, the PC pointed to the media-specific public interest test then used in the UK. The then-UK Independent Television Commission (ITC) assessed applications for merger approval on a case-by-case basis. In that process, the ITC was required to consider: promotion of plurality of ownership and diversity of sources of information and opinion; possible economic benefits from the merger; and the overall effect on the market or markets.
  
90. Some submissions to the Government's media reform discussion paper noted that a "voices" test such as the proposed five/four test would not be adequate protection for diversity because all operators would be treated as being equivalent regardless of size or perceived influence. The Communications Law Centre (CLC) report *Content, Consolidation and Clout*, released in early 2006, advocates a qualitative test which would focus on identifying "the mergers that matter".<sup>26</sup> The CLC suggests that the ACCC should be responsible for first assessing the entire Australian media market, and then making decisions on proposed mergers on the basis of the principal sources of local news, other forms of news and local information, and local advertising, and opposing mergers in areas where there is a small number of "genuine sources" of such content. The CLC also notes that if the ACCC was unable to adequately test the effects of a merger on a local market for news, then there must be a media-specific public interest test implemented along the lines of that proposed by the Productivity Commission in its 2000 report. DMG's submission made similar points about the voices test not recognising the varying levels of influence of different voices, and proposed an alternative "real voices" test, although DMG's submission did not outline how their proposed test would work.
  
91. The Government disagrees with such views. The fundamental problem of a qualitative mechanism such as a media-specific public interest relates to its subjectivity. As a number of industry participants, and the PC itself acknowledged, there are no generally accepted methods for measuring diversity or plurality, or related parameters such as media concentration or share of voice, across different media markets. As a result, the criteria that would be used in assessing the public interest impact of a media merger would inevitably require a high degree of subjective judgement by a single individual or group of individuals (the regulator, the relevant Minister, or through the relevant legal framework, the judiciary). For example, the 'diversity index' used by the Federal Communications Commission in the US as an analytical

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<sup>26</sup> Communications Law Centre: *Content, Consolidation and Clout*, 2006, pp. xxii-xxiii.

tool in the early 2000s was strongly criticised as not giving proper weighting to the relative influence of different media – again reflecting the need for subjective judgements.

92. This subjectivity has two significant concerns. Firstly, such a test would create uncertainty for the industry, as the outcome of the test, and its consequences for mergers and acquisitions, would be dependent on subjective factors. This would therefore replace the certainty and clarity – even if restrictive – of the current regime with a fundamentally uncertain and unpredictable assessment framework.
93. Secondly, public confidence in the objectivity and efficacy of media diversity protections would be dependent on the subjective judgement of the regulator or Minister. Media mergers and acquisitions are likely to attract considerable public and industry interest, with consequent attention on decision-makers at all stages of their assessment. Perceptions that assessments are dependent on subjective decisions may erode public confidence in the objectivity and transparency of such a system.
94. It may be argued that the TPA, by prohibiting transactions that substantially lessen competition, requires the ACCC to undertake a qualitative assessment of mergers similar to that proposed by some parties in relation to media diversity; this is particularly the case where the ACCC considers authorising mergers that would substantially lessen competition on the basis that the merger is in the public interest.
95. The ACCC's assessment of the impact on competition of mergers uses a range of widely-understood analytical tools relating to issues such as substitutability of products, barriers to entry, levels of market concentration, market growth and levels of vertical integration. Central to such assessments is a capacity to define a market. Market definition in relation to some media products (advertising, content) is relatively straightforward; however market definition in relation to the key element of media diversity, news and information, is problematic given news and information are not traded between consumers and media organisations except in rare circumstances. An assessment of the impact of media mergers on news and information therefore cannot rely on the tools employed to assess the competitive impacts of mergers.

Option (c): to allow exemptions to the existing regime subject to a quantitative mechanism.

96. The Government has proposed that cross media mergers and acquisitions would be permitted, subject to there remaining a minimum number of independent commercial media entities in the relevant market (proposed to be four in regional markets, five in mainland capitals). This limit would be in addition to existing limits relating to television and radio licences. This would ensure that there are a minimum number of commercial media platforms (supplemented by other platforms, such as national broadcasters, pay TV, community broadcasters, Internet and non-local newspapers) through which information, entertainment and opinion can be obtained. The Government has also proposed that mergers be limited to 2 out of 3 of the regulated platforms.



This would not provide an additional limit beyond that provided by a minimum number of independent commercial media groups, but rather restrict the types of mergers that could occur, preventing a three-way media entity from being created within a single licence area.

97. The key benefit of a quantitative mechanism is that it uses establish clear, numerical limits on ownership in the media sector, preventing transactions that led to a diminution of separately-owned firms below that limit. This provides an objective and transparent framework to protect media diversity. It is also consistent with other numerical ownership restrictions in the BSA, which relate to television and radio licence limits and a national television reach limit.
98. However, such a mechanism is likely to prevent any mergers in many regional markets where the number of separate media organisations is already at four, or in some markets is less. In markets where the current number of separate media organisations is four or less, no mergers would be permitted unless a new entrant increased the number of media groups.
99. Provision for a requirement for a minimum number of media organisations could be introduced via amendments to existing legislation. The minimum number of media outlets would be calculated using the relevant commercial radio broadcasting licence areas, as they more closely reflect the influence of the relevant radio services or newspapers than television licence areas, which can be highly diverse in geographies and communities.
100. Issues relating to regional media services are addressed separately below.

### *Impacts*

101. The effect on the structure of the Australian media of allowing exemptions to the cross-media regime together with repeal of foreign ownership and control restrictions is difficult to quantify as relevant assets have not recently been made available in an international market or a comparable investment climate. The change in market outlook for the communications sectors in April 2000 (the time of the 'dotcom crash') and its recent recovery is evidence of the difficulty of predicting how the market will develop. There was also a significant increase in the value of media stocks (between 20% and 60%) following indications in 2004 that the Government would obtain control of the Senate, although most of these gains have since dissipated and normal cyclical and performance factors have reasserted themselves.
102. Amendments to the current foreign and cross media ownership rules would be expected to facilitate some consolidation amongst Australian firms through acquisition. However, new foreign entrants would be expected to increase diversity and competition, and there is the potential for new entry in changes to the digital broadcasting regulatory framework in relation to datacasting. The primary types of media transactions that commentators have speculated on have been:

- the entry of new newspaper owners in metropolitan single newspaper markets;
  - purchase of existing newspapers by television networks or vice versa;
  - acquisition of radio networks by television networks; and
  - mergers between regional media groups.
103. Of the three sectors currently regulated under cross media rules, the radio sector has the greatest potential for consolidation. There are a greater number of potential commercial radio licences compared with commercial television broadcasting, and no national reach limit. However, licence limits, and the emergence of Macquarie Regional Radioworks as the largest regional radio owner, may place practical constraints on significant structural change.

### **Metropolitan impacts**

104. In metropolitan areas, requiring a minimum of five media groups strikes a balance between setting too high a threshold, which would enable only a small number of mergers to occur, and undermining diversity by establishing too low a threshold. In Sydney and Melbourne, due to the operation of the radio licence limits, there must be a minimum of six media groups. A minimum of five media groups will permit several mergers in Brisbane, Adelaide and Perth; however, it should be noted that as a consequence of common ownership of assets in the capital cities by large media companies (the three metropolitan television networks, News Ltd, ARN, DMG, Austereo, Southern Cross and, to a lesser extent, Fairfax), mergers undertaken based in the dominant Sydney and Melbourne markets will lead to consequential mergers in the smaller capitals.
105. Establishing a minimum of six groups would in effect place the other capitals on the same footing as Sydney and Melbourne, despite the much larger size of the latter two markets. Due to the common ownership of metropolitan assets, a minimum of six may prevent mergers in Sydney and Melbourne markets without divestiture of major assets to ensure that merged entities comply with a minimum requirement of six groups in markets such as Adelaide or Perth. Establishing a lower minimum, for example of four media groups, would in the Government's view undermine diversity of ownership in the largest and most important media markets.

### **Regional impacts**

106. In establishing a lower minimum number of media groups in markets outside mainland State capitals, the proposed amendments recognise the differing characteristics of metropolitan and regional markets. By requiring a minimum of 4 media groups, the proposed amendment would set a lower threshold in regional licence areas, in recognition of the more concentrated state of regional markets. However, the minimum remains sufficiently high to prevent mergers in most regional markets. Attachment B demonstrates how a minimum of 4 media groups acts as a break point separating larger regional centres from the majority of regional licence areas. A minimum of four media groups will ensure that 64 per cent of regional radio licence areas would be unable to bear

any mergers without a new entrant.

107. As Attachment B demonstrates, setting a minimum of five media groups would prevent mergers in all but nineteen regional markets, effectively preventing regional media companies from accessing the benefits of media ownership reform. A reduction of the minimum to three would, in the Government's view, represent an unacceptable loss of diversity of ownership and, potentially, services.

### **Financial impacts**

108. Reflecting the nature of broadcasting regulation and associated high barriers to entry, Australian broadcasters are generally highly profitable, with commercial radio and television licensees regularly achieving profit levels of between 15-25% of expenditure.<sup>27</sup> Reflecting the highly concentrated nature of regional markets, regional media companies tend to make lower actual profits but obtain higher profits as a proportion of expenditure.
109. As discussed above, the benefits of cross-media ownership reform, while unclear at this time, are likely to be obtained primarily from reduction in expenditure. Figures for television and radio licensee and newspaper expenditure in recent years provide an indication of the scale of benefits to be obtained from even relatively small reductions in expenditure.

	<b>TV Expenditure \$m</b>		<b>Radio expenditure \$m</b>	
	<b>Metro</b>	<b>Regional</b>	<b>Metro</b>	<b>Regional</b>
<b>2004/05</b>	2851.60	533.2	221.9	221.9
<b>2003/04</b>	2549.40	487.6	235.9	235.9
<b>2002/03</b>	2392.20	468	197.8	197.8
<b>2001/02</b>	2306.80	426.4	194	194
<b>2000/01</b>	2309.00	421.7	186.5	186.5

110. While newspapers in general do not generate as consistently high levels of profit:expenditure as commercial broadcasting, both metropolitan and regional newspapers would also obtain significant benefits from any reductions in expenditure that may arise from mergers with other media groups.<sup>28</sup>

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<sup>27</sup> Data obtained from Australian Communications and Media Authority, "Commercial Television and Radio Broadcasting Financial Results 2004-05", Australian Communications and Media Authority, June 2006.

<sup>28</sup> Data obtained from company annual results.

<b>Newspaper Profit and Expenditure</b>						
	<b>APN</b>		<b>Rural Press</b>		<b>Fairfax</b>	
	<b>Expenditure</b>	<b>Profit</b>	<b>Expenditure</b>	<b>Profit</b>	<b>Expenditure</b>	<b>Profit</b>
<b>2004/05</b>	1227.35	149.66	458.70	112.80	1632.10	259.70
<b>2003/04</b>	1154.60	128.27	428.01	87.11	1575.40	276.00
<b>2002/03</b>	1063.16	103.55	400.57	68.41	1100.50	125.50
<b>2001/02</b>	981.56	90.18	387.91	53.75	1107.60	53.70
<b>2000/01</b>	550.52	48.17	413.52	24.90	1201.50	128.10

### Compliance costs

111. Compliance costs relating to the different options considered in this Statement cannot be modelled at this point. However, a number of conclusions may be made given the likely impact on media companies of different arrangements.
112. In relation to foreign ownership amendments, compliance costs – chiefly the cost associated with notification of investment proposals to the Foreign Investment Review Board – will remain the same as under current arrangements. To the extent that the removal of foreign investment restrictions encourages higher levels of foreign investment, industry as a whole will generate a higher level of costs.
113. In relation to cross-media ownership changes, there would be significant differences in the compliance costs of different approaches. Compliance costs for a qualitative mechanism are potentially very high. High profile mergers which have been considered by the ACCC in the past have demonstrated the extent to which even a relatively well-established and widely-understood assessment process like the ACCC's assessment of the impact of mergers on competitions can require extensive document preparation and legal costs, while both the outcome and the duration of such a process remains uncertain, potentially leading to costs for merger parties associated with financing. When a merger is contested (e.g. a hostile takeover), the uncertainty of such an assessment process, and compliance demands on associated parties (particularly legal costs) will be significantly increased by the capacity of takeover targets (and, potentially, other competitors) to contest elements of the qualitative assessment process through various appeal avenues.
114. Compliance costs of a quantitative mechanism will depend on the type of mechanism established by Parliament. However, a key benefit is that companies will be able to determine, without cost, whether a merger or transaction will be compliant, which is not possible under a qualitative approach without meeting a potentially significant compliance burden. It is likely that there will be legal, documentation and compliance costs associated with meeting the ACMA's requirements in relation to the 5/4 test, but they will be similar to costs currently borne by companies undertaking media transactions in relation to compliance with the existing reach and licence limits of the BSA.

*Timing*

115. Two options for timing of the media ownership proposals have been considered: implementation in 2007, or implementation simultaneous with switchover to digital broadcasting (expected 2010-12).
116. Should the proposals be implemented in 2007, they would provide industry with access to the benefits of a liberalised ownership regime discussed in this Statement, allowing the development of more efficient media companies, able to take advantage of economies of scale and scope through combinations of 'old' and 'new' media.
117. Should the changes be implemented at the same time as digital switchover then the benefits outlined above would obviously be delayed until 2010-12. The extent to which the consolidation permitted under the proposed media ownership changes would be offset in 2010-12 by greater levels of media diversity via new services is currently unclear. Following the changes to the digital broadcasting regulatory framework currently also under consideration, there may be greater levels of media diversity through established datacasting services, a possible fourth commercial television network, and potentially greater diversity of content available via multichannelling. However, it is difficult to predict what will be available at that time, and what the effect of these new services will be on the types of content available to audiences (including regional audiences), the profits of existing media companies and the role of regulators.

*Consultation*

118. Since its inception in 1987, the cross media ownership and control regime has been the subject of considerable debate. Since 1996, the Government has consistently received representations from stakeholders, including industry, community representatives, and regulators.
119. A majority of submissions to the March 2006 media reform discussion paper from companies in traditional media industries supported the proposed reforms to cross media rules. PBL supports the proposed changes, saying that cross-media rules should be repealed in their entirety but that the proposed regime is preferable to the existing restrictions. Ten, Fairfax, Austereo and Southern Cross Broadcasting strongly support the proposals. However, several industry stakeholders supported the proposals but suggested different approaches.
120. DMG, as discussed above, supported the 5/4 test but proposed a "real voices" test, although it was unclear from their submission how this would work; the A confidential industry submission suggested that the proposed "voices" test did not provide adequate protection for diversity, and that a more sophisticated mechanism was required. Other submitters suggested that local non-associated newspapers and community radio/television should be counted as separate media groups for the purposes of the test because of the significant local content they provide, and because it would expand the otherwise limited scope for cross-media transactions in many regional areas.

121. News Limited was among the few submitters who opposed the proposed changes to cross media rules, suggesting that it would artificially alter the value of FTA television assets by allowing greater competition for the same pool of assets. News stated that it could not support the proposals in the absence of a fourth FTA licence. Some regional radio groups were opposed to the changes, suggesting that allowing the creation of economies of scale and scope would lead to the dominance of markets by one company, less diversity of opinion on local matters, increased advertising rates, loss of local employment and less incentive to maintain services.

### **Conclusion and Recommended Option**

122. Option (a) proposes that no change be made to the current regime. Although diversity objectives of the current framework remain valid, it is doubtful that this approach is the most efficient, or effective, means of achieving these objectives given its limited scope and lack of flexibility in responding to new technological or commercial developments.
123. Option (b) provides for exemptions to the existing regime subject to a qualitative test such as a media-specific public interest test. Such a test would not provide certainty or transparency for either for the industry or for the public, as it would rely on the subjective judgement of the regulator or other party charged with making the assessment.
124. Option (c) provides for exemptions to the current regime, providing there remains a minimum number of media organisations in each market. Quantitative ownership limits are the most effective and least problematic means of ensuring diversity of content. A quantitative mechanism provides greater certainty for industry, and permits the Parliament to establish a threshold for ownership which it regards as the minimum to maintain diversity in most markets and circumstances.
125. The Bill implements Option (c), as it introduces a greater measure of flexibility into the regulatory regime, while at the same time guaranteeing diversity of ownership and opinion in most markets.

### *Implementation and Review*

126. An implementation issue relates to the location of the cross media exemption mechanism. It is proposed that the exemption mechanism be included in the BSA, under which it would be administered by the ACMA, rather than the TPA (in which case, the ACCC would implement the exemption mechanism, along with assessments arising from s.50 of the TPA). While there are process-related benefits to co-locating the exemption mechanism with competition policy provisions, it is intended to serve the diversity objective of the BSA. Sections 62-65 of the BSA enable the ACMA to require ownership and control notification of the three main kinds of commercial media (newspapers, radio and television). Further, the ACMA has expertise in relation to issues arising from the implementation of ownership restrictions,

and the BSA has the additional benefit of allowing for specific requirements to be placed on broadcasters as licence conditions, and the ACMA also has capacity under s.67 of the BSA to approve temporary breaches of the cross-media and licence ownership restrictions which may be useful to media companies considering mergers which may require divestment of assets in some markets. On this basis, the ACMA is recommended to oversee and monitor an exemption mechanism.

127. Given the quantitative approach employed in the Government's preferred option, it is conceivable that the proposed reforms to media ownership regulation will initiate a "race for the threshold" in those markets where the number of separate media organisations is greater than the proposed limit of five in metropolitan areas and four in regional markets. In such circumstances, it is expected that media organisations will seek to use the new framework in their own interests to the maximum extent possible, both in pursuing and potentially avoiding acquisitions.
128. To address this, the ACMA will maintain a Register of Controlled Media Groups identifying the ownership and control of media groups in each licence area, relying on the control notification requirements of ss 62-65.. A person who undertakes a transaction (whether cross-media or not) that breaches the BSA will be guilty of an offence, and may be ordered by the ACMA to divest licences or newspapers to return to compliance with the BSA. The Register will enable industry and the community to identify who controls commercial radio and television licences and Associated Newspapers in each licence area.

## **ASSOCIATED MEASURES**

129. As part of reforms to the cross-media and foreign ownership restrictions, the Government is proposing several related reforms designed to address specific media issues. These are:
  - a. a requirement that three-way cross-media mergers (involving a commercial television and commercial radio licence and Associated Newspaper) in regional licence areas obtain clearance from the ACCC as to its compliance with the TPA;
  - b. a disclosure requirement for the broadcasting or publishing of matter relating to a cross-controlled media organisation, and
  - c. the exemption of non-Broadcasting Services Band (BSB) broadcasting services from the operation of the cross-media provisions at the same time as commercial BSB broadcasting services and newspapers are provisionally exempted. Non-BSB licences would remain subject to general competition law and the *Foreign Investment Policy* provisions relating to 'sensitive sectors', but would not be subject to rules such as the licence area ownership limits or the 75 per cent audience reach restrictions.

### *Disclosure requirement*

130. During previous consideration of cross-media reform, stakeholders expressed concern about the potential for conflicts of interest to occur in news reporting

and commentary in the event of greater consolidation of media.

131. The Government considers that the concern is a valid one, and accordingly proposes an obligation on commercial television and radio broadcasters and newspapers to disclose a cross-media relationship at the time they broadcast or publish matter, other than advertising matter, that is wholly or partly about the business affairs of a cross-controlled media organisation.
132. Such an obligation will place some compliance obligations on media companies, to the extent that such disclosure is not currently undertaken (it is currently common practice in quality print media). It will also impose monitoring and enforcement obligations on the ACMA. However, in the Government's view, a disclosure requirement will be valuable in providing comfort as to the impact of media ownership reforms on the accuracy of news and information.

*Non-BSB services*

133. It is also proposed to amend the BSA so that commercial broadcasting services provided via means other than the broadcasting services bands (BSBs) are exempt from the current ownership restrictions. Non-BSB commercial television licences are subject to the same moratorium as BSB commercial television licences, which ends in 2007. Non-BSB services are also subject to the same ownership restrictions as BSB services, even though they do not have the same influence as other media. The current laws thus potentially restrict the ownership of new forms of broadcasting, including satellite broadcasting. The restrictions on non-BSB services should therefore be removed to further promote diversity in broadcasting.



**Attachment A (to RIS Part 1)****Australian media companies**

The main metropolitan media companies and their assets are:

Company	Television assets	Radio assets	Newspaper assets
Fairfax	Nil	Nil	<i>Sydney Morning Herald</i> (Syd) <i>The Age</i> (Mel)
News Limited	Nil	Nil	<i>The Daily Telegraph</i> (Syd) <i>The Herald-Sun</i> (Mel) <i>The Courier Mail</i> (Bris) <i>The Advertiser</i> (Ade)
PBL	Nine Network in: Sydney Melbourne Brisbane	Nil	Nil
Seven	Seven Network in: Sydney Melbourne Brisbane Adelaide Perth	Nil	Nil
Ten	Ten Network in: Sydney Melbourne Brisbane Adelaide Perth	Nil	Nil
Austereo	Nil	Licences in: Sydney Melbourne Brisbane Adelaide Perth	Nil
ARN	Nil	Licences in: Sydney Melbourne Brisbane Adelaide	Nil
DMG	Nil	Licences in: Sydney Melbourne Brisbane Adelaide Perth	Nil
Macquarie Radio Network	Nil	Licences in: Sydney	Nil
WA Newspapers	Nil	Nil	<i>The West Australian</i> (Per)
Southern Cross Broadcasting	Nine-affiliated station in Adelaide	Licences in: Sydney Melbourne Brisbane Perth	Nil
WIN	Nine-affiliated station in Perth	Nil	Nil
Grant Broadcasters	Nil	Licence in Perth	Nil

The main regional media companies and their assets are:

Company	Television assets	Radio assets	Newspaper assets
APN	Nil	Nil	Newspapers in Qld and NSW
Rural Press	Nil	9 licences in Qld and SA	Newspapers in ACT, NSW, Vic & Tas
WIN	Nine-affiliated network in ACT, NSW, Qld, SA, Vic & Tas	1 licence in Wollongong	Nil
Prime	Seven-affiliated network in ACT, NSW, Qld, Vic & WA	6 licences in Qld	Nil
Southern Cross Broadcasting	Mostly Ten-affiliated network in ACT, NSW, NT, Qld, SA, Vic & Tas	Metro only	Nil
Grant Broadcasters	Nil	17 licences in NSW, NT, SA, Vic, Tas & WA	Nil
West Australian Newspapers	Nil	8 licences in WA only	<i>Kalgoorlie Miner</i>
Broadcast Operations Group	Nil	32 licences in NSW & Qld	Nil
Macquarie Regional Radioworks	Nil	85 licences in NSW, Qld, SA, Vic, Tas & WA	Nil

**Attachment B (to RIS Part 1)****Radio licence areas and media groups**

There are currently 99 radio licence areas (not including remote licence areas) and 27 TV licence areas. The table below lists the number of media groups in the 99 licence areas; it excludes remote licence areas as well as licence areas adjacent to mainland State capitals which receive capital city newspapers and broadcasts.

<u>Metropolitan</u>	<u>Large Regional</u>	<u>Smaller Regional</u>
Sydney (12)	Cairns (7)	1. Albany (4)
Melbourne (11)	Geelong (7)	2. Alice Springs (3)
Brisbane (10)	Newcastle (7)	3. Armidale (4)
Adelaide (7)	Mackay (7)	4. Atherton (4)
Perth (8)	Nambour (7)	5. Bega (4)
	Albury (6)	6. Bridgetown (3)
	Ballarat (6)	7. Broken Hill (4)
	Bundaberg (6)	8. Bunbury (4)
	Canberra (6)	9. Burnie (4)
	Dubbo (6)	10. Carnarvon (3)
	Gold Coast (6)	11. Charleville (3)
	Gympie (6)	12. Charters Towers (4)
	Maryborough (Qld) (6)	13. Colac (4)
	Mildura (6)	14. Cooma (4)
	Orange (6)	15. Darwin (4)
	Rockhampton (6)	16. Deniliquin (4)
	Shepparton (6)	17. Devonport (4)
	Toowoomba (6)	18. Emerald (4)
	Townsville (6)	19. Esperance (3)
	Bathurst (5)	20. Geraldton (3)
	Bendigo (5)	21. Goulburn (4)
	Coffs Harbour (5)	22. Griffith (4)
	Gosford (5)	23. Gunnedah (4)
	Grafton (5)	24. Hamilton (4)
	Hobart (5)	25. Horsham (4)
	Lismore (5)	26. Innisfail (4)
	Tamworth (5)	27. Inverell (4)
	Wagga Wagga (5)	28. Kalgoorlie (4)
	Warrnambool (5)	29. Karratha (3)
	Wollongong (5)	30. Katanning (3)
		31. Kempsey (4)
		32. Kingaroy (4)
		33. Launceston (4)
		34. Lithgow (4)
		35. Longreach (3)
		36. Mandurah (3)
		37. Margaret River (2)
		38. Maryborough (Vic) (4)
		39. Merredin (3)
		40. Moree (4)
		41. Mt Gambier (4)
		42. Mt Isa (4)
		43. Mudgee (4)
		44. Murray Bridge (4)
		45. Murwillumbah (4)
		46. Muswellbrook (4)
		47. Narrogin (3)
		48. Northam (4)
		49. Nowra (4)

		<ul style="list-style-type: none"><li>50. Parkes (4)</li><li>51. Port Hedland (3)</li><li>52. Port Lincoln (3)</li><li>53. Port Macquarie (4)</li><li>54. Port Pirie (3)</li><li>55. Queenstown (3)</li><li>56. Riverland (3)</li><li>57. Roma (3)</li><li>58. Sale (4)</li><li>59. Scottsdale (3)</li><li>60. Swan Hill (4)</li><li>61. Taree (4)</li><li>62. Wangaratta (4)</li><li>63. Warragul (4)</li><li>64. Young (4)</li></ul>
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## ***Part 2: Regional media services***

### **Background**

#### *Television*

134. There are 38 commercial television licensees outside the mainland State capitals. Control of these licences is dominated by three major regional television broadcasting groups: WIN Corporation (which also owns half of SPT, owner of NBN), Prime Television, and Southern Cross Broadcasting (SCB). The Seven Network also owns licences in regional Queensland and the Nine Network owns a licence in Darwin. Imparja primarily provides services to remote communities.

#### *Radio*

135. There are 218 commercial radio licences outside the mainland State capitals. Including joint ventures, the major regional radio licensees are Macquarie Regional Radioworks (85 licences), Super Radio Network (31), Grant Broadcasters (20) and ACE Broadcasters (13). 74% of regional markets are radio monopolies; all but two of the remainder are duopolies.

#### *Newspapers*

136. There are Associated Newspapers (which are papers regulated under the cross-media provisions of the BSA<sup>29</sup>) in 35 regional radio licence areas. Two-thirds of these are controlled by either APN (13) or Rural Press (11); another 6 are controlled by News. APN and Rural Press also publish large numbers of non-daily titles.

#### *Advertising*

137. Regional radio advertising is dominated by the Regional Radio Bureau (established by RG Capital and DMG and now owned by MRR) which manages advertising for both MRR and a large number of non-MRR stations. According to press reports, RRB represents 149 licences or approximately three-quarters of the regional radio market.
138. In 2005 Radio Sales Network was established by Grant Broadcasting to serve smaller licensees. The group includes the Caralis Group, the Capital Radio group and Grant Broadcasters. There is little overlap between the groups in terms of stations represented.

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<sup>29</sup> A newspaper is entered into the Associated Newspaper register as being associated with one or more licence areas if ACMA is satisfied that at least 50 per cent of its circulation is within that licence area and, in the case of commercial radio licence areas, the circulation of the newspaper within that licence area is at least 2 per cent of the licence area population. The newspaper must be in the English language, be published on at least four days each week, and at least 50 per cent of its circulation must be by way of sale.

139. The main companies operating in regional media are listed at Attachment A.

*Non-commercial services*

140. The ABC has 55 Local Radio stations outside Brisbane, Sydney, Melbourne, Adelaide and Perth, including in all larger and many medium-sized regional markets.
141. There are more than 160 non-indigenous community broadcasters in regional licence areas. Nearly 80% of regional licence areas have at least one community radio licensee. All larger regional markets and nearly all medium-sized markets have community radio services. The majority of licence areas without a community broadcaster are in WA or SA.

*Regulatory requirements*

142. The provision of ‘appropriate coverage of matters of local significance’ is one of the objects of the BSA (s. 3(g)).
143. Under s.8(2)(a) of Schedule 2 of the BSA, commercial radio broadcasters are required to:
- provide a service that, when considered together with other broadcasting services available in the licence area of the licence (including another service operated by the licensee), contributes to the provision of an adequate and comprehensive range of broadcasting services in that licence area.*
144. Following the cessation of some television news services by Prime and Southern Cross Broadcasting in 2001 and a subsequent investigation by the then-Australian Broadcasting Authority (ABA), the ABA exercised its power under s.43 of the BSA to amend commercial television licence conditions in a number of regional markets. Since 1 February 2004, commercial television broadcasters in regional Queensland, northern NSW, southern NSW and regional Victoria have been required to provide minimum levels of local news and regional programming broadly equating to 60 minutes of local news or 120 minutes of regional programming per week.
145. In April 2003, the then Minister issued a Direction to the ABA (*Australian Broadcasting Authority (Revisiting Radio LAPs) Direction No.1 of 2003*) that required the ABA to consider varying a licence area plan when certain conditions were met following a change of commercial radio licence ownership or control. If the ABA found that, at any time up to 3 years after divestiture, the program format of the service changed from one of broad appeal to one of more limited appeal, and this change had reduced the number of services of broad appeal in a licence area, it would be required to consider varying the licence area plan for the allocation of a new commercial radio broadcasting licence.

## PROBLEM

146. Levels of localism have been an ongoing concern for communities in regional Australia for several years. In recent years, there has been a general reduction in the level of local programming on both television and radio in many regional markets. This trend appears to be a function of two broad developments:
- regional broadcast markets have been the subject of ownership consolidation over recent years, with new owners seeking to achieve cost efficiencies; in television, in particular, this led to some reduction in the provision of different local news services in local markets with larger regional licence areas; and
  - the introduction of digital broadcast technology has allowed efficiencies to be achieved through the centralisation of news broadcast production. A number of television and radio networks now broadcast, or at least coordinate the production of, news programs and other content from a single location or several hubs.
147. The level of local content on regional commercial radio services was the subject of *Local Voices: an Inquiry into Regional Radio*, by the House of Representatives Standing Committee on Communications, Transport and the Arts, chaired by the Member for Hinkler, which reported in September 2001. This inquiry identified concerns arising from levels of consolidation of ownership in the regional radio industry, the loss of independently owned local stations and an increase in networked, pre-recorded, automated and syndicated programming.
148. The ABA's 2002 investigation<sup>30</sup> into local content on regional television found that:
- there had been an overall increase in the quantity of local news broadcast in the markets investigated but there had been a decline in competing sources of news since the mid-1990s;
  - there had been a significant decline in local information (other than news) broadcast in the four aggregated markets since aggregation;
  - that there were legitimate community concerns in the investigated markets that there was a lack of diversity in broadcasts of matters of local significance by commercial televisions licensees in those markets;
  - that there was a lack of competition in delivering local news and information;
  - that some regional commercial television broadcasters were not sufficiently responsive to audience needs for local content, particularly programs about matters of local significance;
  - compliance by regional commercial television broadcasters in the four aggregated licence areas with the statutory conditions relating to local content had not, of itself, resulted in the achievement of objects of the Act.

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<sup>30</sup> Adequacy of local news and information programs on commercial television services in Regional Queensland, Northern NSW, Southern NSW and Regional Victoria, ABA, August 2002.

149. A survey conducted for the Community Broadcasting Association of Australia in 2004 indicated that community broadcasters in regional Australia consistently attracted audiences due to their provision of local news and information and (to a lesser degree), the opportunity to hear local voices and personalities.<sup>31</sup>
150. An independent study by the Communications Laws Centre in 2006, has separately identified concerns:

*For broadcast media, while there is a small number of dynamic local radio and television services, national syndication of programming and low production standards mean that regional communities more often see television and radio – with the exception of the ABC – as entertainment media rather than sources of serious news and current affairs... Residents of all locations point to the lack of coverage of major local issues... In some locations, citizens have no confidence in the capacity of local media to fulfil the traditional role of monitoring the political sphere and exposing corruption.*<sup>32</sup>

151. The removal of cross-media ownership restrictions (see separate Regulation Impact Statement) may also lead to the diminution of levels of local content. Cross-media companies operating in a number of different licence areas and across two or three media may also lead to reductions in local content as such firms, perhaps based in metropolitan areas, focus on other operational areas.
152. This concern was expressed by the Communications Law Centre, which stated that “we fear that partnerships between the only real sources of local news will have the opposite result [to raising the standard] – that standards will decline.”<sup>33</sup> It was also expressed in several submissions to the Government’s media reform discussion paper. The Independent Regional Radio group noted that both current levels of content and future levels following cross-media mergers would be unacceptable:

*while it is true that local content would probably be reduced substantially if and when a member station of IRR were taken over by certain other operators, the fact is that for the rest of the regional*

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<sup>31</sup> *Community Radio National Listener Survey – Summary Report of Findings* prepared by McNair Ingenuity Research Pty Ltd for the Community Broadcasting Association of Australia. The reasons cited by community radio users were:

<b>Region</b>	<b>Local Information/ News (%)</b>	<b>Local voices/local personalities (%)</b>
National non-metro	58	43
NSW non-metro	63	44
Victoria non-metro	66	39
Queensland non-metro	46	39
South Australia non-metro	69	49
Western Australia non-metro	57	61

<sup>32</sup> Communications Law Centre: *Content, Consolidation and Clout*, 2006, p. xxiv.

<sup>33</sup> Communications Law Centre: *Content, Consolidation and Clout*, 2006, p. 169.



*commercial radio industry this horse has already bolted. There are many instances of dissatisfaction in regional markets where local announcers have been sacked, programs emanate from some remote centre, local place names are incorrectly pronounced, weather information does not accord with what listeners can see for themselves, and local news and localism generally have been ignored.*

153. Regional radio operator Grant Broadcasters observed “merged entities will be seeking the efficiencies promised by the merger... These efficiencies will be sought at the cost of localism.”

*Impact of emerging media technologies*

154. A number of new media technologies have emerged in the last decade, and online content has now become established as a significant industry and source of news and information, including audio-visual material, in its own right. 3G telephony content is also maturing into an established market, and a number of other emerging technologies also provide the means for the provision of news and content, including IPTV, weblogging, podcasting, and forms of digital broadcasting such as datacasting and mobile television. All of these offer the potential for alternative means of delivery of news and information to regional communities that may offset declines in local content in the regulated media of commercial television and radio.
155. However, two issues prevent new media forms from offering significant levels of local content at this time:
- many regional communities, and particularly smaller communities, have lower levels of communications infrastructure or services than metropolitan areas and lower levels of new media technology usage, meaning that the traditional, regulated platforms of commercial television and radio and Associated Newspapers are relatively more important than in metropolitan areas;
  - while new media increases the availability of national and international news, information and comment, local news and information requires local news-gathering infrastructure and personnel, which is costly and unlikely to be established by new media service providers (which generally rely on traditional media for news and information).
156. Online services do provide regional communities with greater capacity to interact, especially across great distance. For example, ABC Local Radio stations also provide a range of online services that provide a form of combined community “bulletin board” and forum for discussion of relevant local issues. However, the originating, production and dissemination of news and information in regional areas is dominated by traditional media.

**OBJECTIVES**

157. It is a Government priority to ensure that the liberalisation of the media regulatory framework does not lead to further reductions in local content on commercial television or commercial radio and that, where possible, concerns

about diminishing levels of local content should be addressed within a flexible regulatory framework. The Government intends to ensure that, should cross-media regional media companies emerge following the removal of cross-media restrictions, such companies, which will be operating across a number of markets and multiple media, continue to provide adequate local services to each licence area in which they operate.

158. However, the Government recognises that the imposition of greater regulatory requirements on regional broadcasters would involve additional costs. The capacity of the regional media sector (particularly regional radio, the least profitable of the regulated media sectors) to meet additional obligations is ultimately linked to its commercial viability, including its capacity to achieve the economies of scale and scope that cross-media mergers can provide. The Government seeks to balance these competing considerations when considering whether additional requirements such as local content requirements might be reasonably required.

## OPTIONS

### Television

159. In seeking to address concerns about local content on commercial television in regional licence areas, the Government has considered two main options:
- impose additional requirements to those currently imposed by the ACMA; or
  - retain existing requirements.
160. In the Government's view, there is no clear case for adding to the requirements imposed by additional television licence conditions imposed by the ACMA. A recent audit by the ACMA of television licensee compliance with the requirements showed that all broadcasters were meeting the minimum level, and in many cases substantially exceeding it. The Communications Law Centre's study of regional media, which was generally critical of the Government's approach to broadcasting regulation, conceded that the requirements had had some success in increasing the coverage of matters of local significance by regional television broadcasters.<sup>34</sup>
161. Given the demonstrated effectiveness of the current requirements, it is not proposed to impose additional requirements to those currently in place. However, the Government will formalise the existing licence conditions (which have been imposed by the ACMA using its discretionary powers) by amending the BSA to require the ACMA to impose such licence conditions on regional television licensees (although the actual level of local content required will be left to the ACMA's determination).
162. In addition, as proposed in the Government's media reform discussion paper, the requirement for licence conditions will be extended to regional

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<sup>34</sup> Communications Law Centre, *Content, Consolidation and Clout*, 2006, p. vi.

broadcasters in Tasmania. The current Tasmanian television licensees are Southern Cross Broadcasting and WIN. Both broadcasters have indicated in their submissions to the discussion paper that they have no concerns with the existing requirements being extended to Tasmania, where both provide local news services (SCB did indicate its concerns about any *increase* in the current conditions). As both are currently meeting the minimum requirements in their Tasmanian services, there will be no compliance costs associated with the extension of the requirements to Tasmania.

## **Radio**

163. The remainder of this Statement relates to commercial radio in regional licence areas.
164. In seeking to address concerns about local content on commercial radio in regional licence areas, the Government has considered three options:
- to make no change to the current requirements relating to local content in regional radio licence areas; or
  - to impose additional local content requirements on regional radio licence areas; or
  - to provide additional local content via non-regulatory means.

### *Impact Analysis*

#### Option (a): to make no change to the current requirements relating to local content in regional licence areas

165. Making no changes to the current high-level requirements for local content will not address existing concerns about the diminution of local content. Further, the potential impact of the removal of cross-media restrictions on local content levels will not be addressed.
166. The result of the imposition of regional television licence conditions relating to local content suggests that concerns about local content can be addressed successfully without a significant impact on the viability or profitability of regional media companies. The requirements were announced in April 2003 and commenced on 1 February 2004; any deterioration in profit or expenditure should have thus been demonstrated in 2003-04 as broadcasters prepared to meet the licence conditions commencing mid-way through that year. Profitability figures<sup>35</sup> for regional commercial licensees show increasing profitability in recent years despite the imposition of local content requirements, while total expenditure in the regional television sector has only recently risen above 2000-01 levels; advertising revenue has continued growing, albeit at a slower rate due to the reduction in revenue growth that has occurred across the free-to-air television industry since 2005.

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<sup>35</sup> Australian Communications and Media Authority Broadcasting Financial Results 2004-05.

**Table 1: Profitability of regional television licensees 2000-2005**

<b>Year</b>	<b>Profit (\$m)</b>	<b>Expenditure (\$m)</b>	<b>Advertising revenue (\$m)</b>
<b>2000-01</b>	72.7	626.8	614.9
<b>2001-02</b>	113.7	515.6	599.8
<b>2002-03</b>	142.4	552.6	665.5
<b>2003-04</b>	188	583.6	739
<b>2004-05</b>	186.6	690.9	782.2

167. Even assuming that all growth in regional television licensee sector expenditure between 2002-03 and 2004-05 is directly attributable to additional costs arising from local content licence conditions, the sector has remained strongly profitable, earning more than 20% profit on revenue, and advertising revenue has continued growing strongly, suggesting no affect on audience levels.

Option (b): to impose additional local content requirements on all regional media companies

168. As the above description of the regional radio sector indicates, the size of incumbent operators varies significantly, from the very large Macquarie Regional Radioworks to relatively small companies. The imposition of local content requirements across all regional licence areas and all forms of media would not enable a regulatory distinction between the differences between larger and smaller regional media companies, and their ability to provide local content without there being a significant impact on their economic viability.
169. A “one size fits all” approach to local content must therefore be considered carefully to ensure that the impacts on different licence areas are properly assessed. Table 2 shows profit, revenue and expenditure for larger and medium-sized regional radio broadcasters in 2004-05<sup>36</sup> (mergers in some medium-sized licence areas and most smaller regional markets will be prevented by the application of the 5/4 rule, although there may some consequential divestment).

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<sup>36</sup> ACMA Broadcasting Financial Results 2004-05.

**Table 2: Profitability of regional radio licensees**

	<b>Medium regional licence areas</b> \$m	<b>Larger regional licence areas</b> \$m
<b>Number of commercial radio licences</b>	74	77
<b>Expenditure</b>	55.8	145.6
<b>Profit</b>	16	45.9
<b>Expenditure per licence</b>	0.75	1.89
<b>Profit per licence</b>	0.22	0.58

Option (c) - to provide additional local content via non-regulatory means

170. As noted in paragraphs 3 and 4, ABC Local Radio and the community broadcasting sector also have a strong presence in regional Australia. ABC Local Radio has a strong commitment to local news and information, and is seen by regional communities as an important component in the media diversity available to them.<sup>37</sup> Community broadcasting, while reliant on networked content, and in many areas serving specialist needs such as print-handicapped and ethnic broadcasting, draws heavily on local communities for staff and content.
171. Both ABC Local Radio and community broadcasting therefore provide a mechanism for providing additional local content. The Government has previously provided additional funding for ABC local content: funding for the ABC's Regional and Local Programming initiative commenced in 2001, and will total \$125.6 million over seven years. The funding has been used to establish four new regional radio stations in Wagin (WA), Ballarat (Vic), Erina (NSW) and Katherine (NT) and these produce 8,400 additional hours per annum of local radio content and 110 hours of Australian TV content for regional areas. The Government will also provide \$7.7m to the community broadcasting sector in 2006-07.
172. An alternative to additional funding for ABC Local Radio and community broadcasting is to provide funding to commercial broadcasters directly. This has been suggested by broadcasters, primarily via a licence fee rebate mechanism that would link reductions in radio licence fees to levels of local content. Prime Television put forward this suggestion most recently in its submission to the Government's media reform discussion paper.
173. However, direct funding of further local content, either via national and community broadcasters or via subsidies to commercial broadcasters, would be inconsistent with the BSA, which clearly requires commercial broadcasters to collectively provide "an adequate and comprehensive range of broadcasting services" in the licence area in which the licensee operates. Funding would

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<sup>37</sup> Communications Law Centre, Content, Consolidation and Clout, 2006, p. xii.

therefore reward broadcasters merely for complying with basic licence conditions that have been a core requirement for the commercial broadcasting sector since the commencement of the BSA in 1992.

### **Conclusion and Recommended Option**

174. The Bill implements Option (b). The Bill provides for a licence condition on regional commercial radio broadcasting licensees, with effect from 1 January 2008, that requires the licensee to broadcast a minimum level of material of local significance during daytime hours on business days of 4.5 hours. The Bill also requires regional radio licensees undergoing mergers or otherwise transferring control of licences to retain existing levels of local presence and provide minimum levels of local news and information.
175. Critically, however, the Bill also requires a review to be undertaken to assess the impact of the local content requirements on regional radio licensees. The review will specifically address the issue of whether a “one size fits all” approach will affect the commercial viability of regional radio licensees in smaller markets. The review will also be required to recommend an alternative minimum level, which may then be implemented by disallowable instrument.

### **ASSOCIATED MEASURES**

#### *Local content plans*

176. As part of the additional local content licence condition discussed above, licensees will be required to submit a Local Content Plan (LCP). LCPs will detail how licensees propose to meet the local content licence conditions in their licence area, and would be subject to registration and approval by the ACMA in a similar manner to industry codes of practice. Issues that would be addressed in the Local Content Plan would cover:
- existing and proposed news-gathering facilities and staff in each licence area and how those resources would be maintained and employed;
  - the number and timing of proposed bulletins;
  - where bulletins will be prepared and produced;
  - non-news forms of local content (*i.e.* in addition to licence condition requirements).
177. Importantly, the LCPs would *not* be a vehicle for additional local content requirements. The Plans are intended to be purely descriptive of how licensees would meet the requirements established in the BSA.
178. LCPs would enable greater compliance with local content licence conditions by providing the regulator, audiences and other industry members with a verifiable statement of intentions on behalf of the licensee about the actions it would take to ensure it met local content licence conditions. The bulk of the compliance burden would relate to the licence condition itself and, in the event licensees were already meeting local content conditions, the LCP would in effect be a statement of current operations. Again, it should be noted that the

requirement for an LCP would only apply to licences that had undergone a change in control.

179. As part of the process of consideration and registration of LCPs, it is proposed that the Minister for Communications, Information Technology and the Arts would be given the power to direct the ACMA to take certain matters into account in considering LCPs. This will have no direct impact on licensees who become subject to local content and LCP requirements, but is intended as a “backstop” power to ensure that LCPs address emerging issues of community concern. By requiring the ACMA to take certain matters into account in considering plans, the Minister will be able to identify areas of community concern in relation to local content that the ACMA can discuss further with licensees in considering LCPs. However, crucially, the actual registration of LCPs will remain with the broadcasting regulator, ensuring an independent assessment and registration process for LCPs.
180. The Bill will also establish a “local presence requirement” for licensees that become subject to the requirement to provide Local Content Plans. However, this will not be a positive obligation in relation to establishing a presence in those areas where none currently exists. Rather, licensees that become subject to this requirement will not be permitted to materially reduce their level of production resources within a regional licence area from the level of such resources prior to the event that triggered the requirements (e.g. a merger involving that licensee, or transfer of control). The requirement is not intended to prevent *all* reductions in levels of resources, or prevent licensees from re-allocating resources across a licence area; it is intended that licensees retain flexibility to allocate resources as their commercial operations require, but that they should not significantly decrease their resources in net terms. Again, it should be noted that this requirement will only apply to regional commercial radio licences that have merged with another media company or been sold or otherwise undergone a change of control; existing licensees will not become subject to this requirement unless these events occur.

#### Cost of compliance

181. The cost of preparing and registering a LCP would depend on the current operations, and size, of licensees. If a large company such as Macquarie Regional Radioworks, undertook a cross-media merger, it would be required to prepare a LCP for each licence area in which it remained following the merger (it is likely that in such circumstances MRR would be required by the 5/4 rule to divest itself of licences in a number of licence areas). Small companies operating in a limited number of licence areas, if they became subject to the requirements, would have a correspondingly lighter burden; licensees already meeting local content requirements would be able to provide a LCP that was essentially descriptive.
182. Licensees subject to LCP requirements will be required to report annually on their compliance with their LCP, as part of their annual financial reporting to the ACMA. In the case of licensees that complied with their LCPs, such reports would form a short additional statement that the LCP had been

complied with; for licensees whom the ACMA had directed to comply with their LCP after the ACMA had determined non-compliance, such reports would need to include a statement addressing the direction and their compliance with that.

#### *Review of compliance*

183. It is also proposed to require the ACMA to assess compliance with local content licence conditions and LCPs at least every three years (in addition to annual reporting by licensees as part of their financial reporting to the ACMA as to their compliance with their LCP). Auditing of local content requirements for television has occurred three times since the commencement of the conditions since February 2004. It involves a ‘sample’ audit of regional commercial television licensees who are required to provide audiovisual copies of material of local significance broadcast in local areas in one of their licence areas, as identified by the ACMA. Monitoring and auditing of local content may thus involve some limited costs on broadcasters for the retention and storage of broadcast material (which is required separately under the BSA, for example in relation to complaints-handling).
184. The ACMA’s approach to the review of radio licensee compliance with local content licence conditions will be a matter for the regulator, and any assessment of compliance costs for licensees will depend heavily on the approach employed by the ACMA. An approach that relies on regular sampling of broadcast material would necessarily have a lower cost for licensees than a triennial audit, especially given existing BSA requirements for the retention of broadcast material.

#### *Directions power*

185. It is proposed to give the Minister an additional power to that currently provided in the BSA to issue a Direction requiring that the ACMA develop and impose licence conditions relating to levels of local content in regional licence areas. This gives effect to the Government’s concern, expressed in the media reform discussion paper, that any material reduction in local content levels would lead to consideration of extending licence conditions relating to levels of local content. The Direction will require the ACMA to consult with industry in developing licence conditions, to ensure that additional licence conditions take into account existing levels of local content.
186. It is further proposed to amend the Australian Broadcasting Authority (Revisiting Radio LAPs) Direction No.1 of 2003 (the Minister’s Direction) to require the ACMA to consider imposing further local content licence conditions on regional licensees.
187. The Minister’s Direction currently requires the ACMA to consider whether to vary a licence area plan where, within three years of a change in control, a commercial radio program format changes from one of broad appeal to one of more limited appeal, and the change results in a reduction in the number of broad appeal services in a licence area. The purpose of the Minister’s



Direction is to ensure that changes in control of commercial radio licences do not lead to reductions in the diversity or range of services available within relevant licence areas.

188. Given the lack of available spectrum, the option of allocating new commercial licences in regional areas as per the Minister's Direction is not necessarily the most practical option for addressing issues of local content and diversity. Giving the ACMA the power to require levels of local content in regional licence areas as a licence condition will ensure that regional consumers have access to local news and information without relying on the availability of spare spectrum. The ACMA will, however, retain the power to issue new commercial licences under the existing Minister's Direction.
189. Should a Direction be made under the proposed additional power, and when the *Australian Broadcasting Authority (Revisiting Radio LAPs) Direction No.1 of 2003* is remade, they will each require the development of a separate Regulation Impact Statement.

**Attachment A (to RIS Part 2)****Australian regional media companies**

The main regional media companies and their assets are:

<b>Company</b>	<b>Television assets</b>	<b>Radio assets</b>	<b>Newspaper assets</b>
<b>APN</b>	Nil	Nil	Newspapers in Qld and NSW
<b>Rural Press</b>	Nil	9 licences in Qld and SA	Newspapers in ACT, NSW, Vic & Tas
<b>WIN</b>	Nine-affiliated network in ACT, NSW, Qld, SA, Vic & Tas	1 licence in Wollongong	Nil
<b>Prime</b>	Seven-affiliated network in ACT, NSW, Qld, Vic & WA	6 licences in Qld	Nil
<b>Southern Cross Broadcasting</b>	Mostly Ten-affiliated network in ACT, NSW, NT, Qld, SA, Vic & Tas	Metro only	Nil
<b>Grant Broadcasters</b>	Nil	17 licences in NSW, NT, SA, Vic, Tas & WA	Nil
<b>West Australian Newspapers</b>	Nil	8 licences in WA only	<i>Kalgoorlie Miner</i>
<b>Broadcast Operations Group</b>	Nil	32 licences in NSW & Qld	Nil
<b>Macquarie Regional Radioworks</b>	Nil	85 licences in NSW, Qld, SA, Vic, Tas & WA	Nil

## NOTES ON CLAUSES

### **Clause 1 - Short title**

Clause 1 provides for the citation of the *Broadcasting Services Amendment (Media Ownership) Act 2006* (the Act).

### **Clause 2 - Commencement**

Clause 2 provides that the amendments made in Schedule 1 commence on 1 February 2007. This commencement date is designed to provide the Australian Communications and Media Authority (the ACMA) with an opportunity to design and establish the Register of Controlled Media Groups (new section 61AU, inserted by Item 8 of Schedule 1)

The amendments made in Schedule 2 commence on a day to be fixed by Proclamation, or on 1 January 2008 if not proclaimed earlier. It is intended that Schedule 2 will be proclaimed to commence once the process for the allocation of datacasting transmitter licences to authorise the provision of new digital services is resolved; accordingly, a specific date for commencement has not been specified.

The amendments made in Schedule 3 commence on 1 January 2009. This commencement date has been chosen to coincide with the commencement of Schedule 3 to the proposed Broadcasting Legislation Amendment (Digital Television) Bill 2006, which provides that from 1 January 2009 commercial television broadcasting licensees may provide an additional stream of programming (a “multi-channel”) in standard definition digital format (SDTV).

The remainder of the Act will commence on the day of Royal Assent.

### **Clause 3 - Schedule(s)**

By virtue of this clause, provisions of the *Broadcasting Services Act 1992* (BSA) are amended as set out in the Schedules to the Bill.

## **SCHEDULE 1—AMENDMENTS COMMENCING ON 1 FEBRUARY 2007**

Schedule 1 to the Bill amends the *Broadcasting Services Act 1992* (BSA) to:

- amend the media ownership restrictions to permit transactions involving commercial radio licensees, commercial television licensees and Associated Newspapers, including cross-media transactions, to occur subject to there remaining a minimum number of separately controlled commercial media groups in the relevant licence area, and subject to the proviso that a person may only be in control of two out of the three regulated media platforms (commercial radio, commercial free-to-air television and newspapers) in a licence area;
- provide that commercial television and radio broadcasting licensees operating outside the broadcasting services bands (BSBs) of spectrum are exempt from the media ownership and control provisions; and
- provide that cross-media mergers and acquisitions involving a commercial radio licence, a commercial television licence and an Associated Newspaper in the same licence area outside mainland State capitals are required to obtain clearance from the Australian Competition and Consumer Commission (ACCC) prior to the transaction.

### **Media diversity rules (including cross-media restrictions)**

The Bill would permit media transactions involving commercial broadcasting licensees and/or Associated Newspapers, including cross-media transactions, to proceed where:

- at least the minimum number of media groups would remain in the relevant radio licence area after the transaction completes; and
- the cross-media transaction only involves two out of the three regulated media platforms; and
- the transaction would not breach the existing licence holdings and reach limits (the statutory control rules).

The minimum number of groups for mainland metropolitan areas would be five, and for other licence areas (including regional areas) four. If a person undertakes a transaction that results in the numbers dropping below these levels, an unacceptable media diversity situation will exist. It is an offence to cause an unacceptable media diversity situation to come into existence, or to reduce the numbers in a licence area where an unacceptable media diversity situation already exists. The same conduct may also result in the imposition of a civil penalty. However, these provisions only apply in relation to transactions that take place on or after the commencement of Schedule 2 (on a date fixed by Proclamation, or on 1 February 2008 if not proclaimed earlier).

It is intended that a media group will be a grouping of one or more of a commercial radio licence, a commercial television licence and an Associated Newspaper (media operations) where there is at least one person in a position to exercise control over each of the media entities in the media group and where the media operation complies with the statutory control rules.

The number of media groups in a particular market must be calculated in accordance with the points test (new section 61AC) to ensure that overlapping licence areas and

other anomalies arising from licensing arrangements are dealt with appropriately for the purposes of the test.

Provisions in the Bill prevent one person from having control of more than two out of the three regulated media platforms in a licence area. If a person did obtain control over more than two of the platforms in a licence area, this would be an offence and a breach of a civil penalty provision.

The existing requirements in Divisions 2 and 3 of Part 5 will be the statutory control rules. To summarise, these rules are as follows:

- a person cannot control commercial television broadcasting licences with combined licence area populations exceeding 75 per cent of the population of Australia and more than one commercial television licence in the same licence area (section 53 of the BSA);
- a person must not control more than two commercial radio broadcasting licences in the same licence area (section 54 of the BSA);
- a person must not control a commercial television broadcasting licence and a datacasting transmitter licence (section 54A of the BSA);
- a person must not be a director of a company that is, or of two or more companies that are, in control of commercial television broadcasting licences whose combined licence area populations exceed 75 per cent of the population of Australia (and other similar combinations of control and directorships) (section 55 of the BSA);
- a person must not be a director of a company that is, or of two or more companies that are, in control of more than two commercial radio broadcasting licences in the same licence area (and other similar combinations of control and directorships) (section 56 of the BSA); and
- a person must not be a director of a company that controls a commercial television broadcasting licence and a director of a company that controls a datacasting transmitter licence (and other similar combinations of control and directorships) (section 56A of the BSA).

The Australian Communications and Media Authority (the ACMA) would be required to establish a Register of Controlled Media Groups (the Register). The Register would identify the ownership and control of media groups in each licence area. The Register will be a tool that may be utilised by industry to ensure their compliance with the media diversity rules in any transaction they undertake.

Responsibility for ensuring compliance with the BSA ultimately rests with industry. However, the ACMA would have a role in:

- maintaining the Register;
- monitoring industry compliance; and
- investigating and responding to any breaches of the BSA.

### **Exemption for licensees operating outside the broadcasting services bands**

It is intended that a commercial broadcasting licensee operating under a licence issued under subsection 40(1) of the BSA would not be subject to the media diversity rules, including notification requirements (sections 62-65 of the BSA), and section 40

licences would not be relevant for the purposes of assessing whether an unacceptable media diversity situation (new section 61AB of the BSA) exists in a particular market.

Licensees operating under subsection 40(1) licences use spectrum outside the BSBs. As a consequence, these services are significantly less influential than commercial broadcasting services provided using the BSBs. Accordingly, it is appropriate to exempt these services from the media diversity rules, especially given their potential to add to the range of media services available to the Australians.

### ***Broadcasting Services Act 1992***

#### **Item 1: Subsection 6(1)**

Item 1 of Schedule 1 inserts a new definition of “business day” in subsection 6(1) of the BSA. This amendment is consequential to Item 8.

#### **Item 2: Subsection 6(1)**

Item 1 of Schedule 1 inserts a new definition of “constitutional corporation” in subsection 6(1) of the BSA. This amendment is consequential to Item 4.

#### **Item 3: Before section 50**

Item 3 of Schedule 1 inserts new section 50A of the BSA.

New section 50A of the BSA provides that Part 5 of the BSA (which relates to ownership and control) does not apply in relation to licences issued under subsection 40(1) of the BSA. Currently Part 5 of the BSA applies to commercial television broadcasting licences and commercial radio broadcasting licences generally (i.e. both to licences issued in accordance with a price based allocation system determined under section 36, and to licences issued on application under subsection 40(1)).

Subsection 40(1) of BSA provides for the allocation of commercial television broadcasting licences for use outside of the BSBs. These licences do not include any access to spectrum or other carriage rights. The licensee must arrange separately for the carriage of the service on a platform outside of the BSB (e.g. the licensee must obtain an appropriate transmitter licence under the *Radiocommunications Act 1992* if the service is to be made available using radiocommunications transmitters). Services provided in accordance with licences issued under subsection 40(1) of the BSA are less accessible to Australian audiences due to their carriage on platforms outside the BSBs (e.g. standard television reception equipment would not receive subsection 40(1) television services). Consequently, these services are likely to have less influence on the Australian public.

It is intended that a licensee operating under a licence issued under subsection 40(1) would not be subject to the media diversity rules, including notification requirements (sections 62-65 of the BSA), and section 40 licences would not be relevant for the purposes of assessing whether an unacceptable media diversity situation (new section 61AB of the BSA) exists in a particular market.

**Item 4: At the end of Division 1 of Part 5**

Item 4 of Schedule 1 inserts new section 52A of the BSA.

The media diversity rules are supported by the communications power in the Constitution (paragraph 51(v)). New section 52A provides that the measures in the Bill relating to newspapers are supported by a combination of constitutional powers, in addition to the communications power:

- the corporations power, where the publisher of a newspaper is a corporation (paragraph 51(xx));
- the trade and commerce power, where at least part of the circulation of the newspaper is in two or more States (paragraph 51(i));
- the Territories power, where at least part of the circulation of the newspaper is in a Territory (section 122); and
- the external affairs power, where at least part of the circulation of the newspaper is in a foreign country (paragraph 51(xxix)).

This provision indicates additional constitutional powers that supplement the constitutional basis for the media diversity rules more broadly.

**Item 5: After subsection 59(4B)**

Item 5 of Schedule 1 inserts new subsections 59(4C) and (4D) of the BSA.

Section 59 requires the ACMA to maintain an Associated Newspaper Register. An associated newspaper is a newspaper that is associated with a licence area as a consequence of circulation levels of the newspaper within the licence area (subsections 59(2), (3), (4), (4A), and (4B) of the BSA).

New subsection 59(4C) provides that if the ACMA is satisfied that a person carried out a scheme to publish a newspaper for the sole or dominant purpose of ensuring that the number of separate media groups (points) in a licence area would increase or would be maintained, the ACMA may refuse to enter the name of the newspaper on the Register.

Similarly, new subsection 59(4D) provides that the ACMA may remove the name of a newspaper for the same reason.

These provisions are designed to prevent newspapers from being established simply to avoid the effective operation of the media diversity rules. For example, assume that a person intended to acquire an interest in a commercial radio licence in a regional radio licence area, but to do so would reduce the number of points below four. The person could not make an arrangement with an associate to establish a nominal newspaper in that licence area for the purpose of increasing the number of points in the licence area to facilitate the acquisition of the radio interests.

**Item 6: Subsections 59(5) and (6)**

Item 6 of Schedule 1 repeals subsections 59(5) and (6) of the BSA and substitutes new subsections 59(5) and (6).

Subsection 59(5) provides that the Associated Newspaper Register must be available for public inspection and a person is entitled to obtain extracts of the entries. The ACMA may also charge fees for inspections of the Register (subsection 59(6)).

New subsections 59(5) and (6) update these provisions so that the ACMA may maintain the Associated Newspaper Register by electronic means (new subsection 59(5)). The ACMA will be required to make the Associated Newspaper Register available on the Internet (new subsection 59(6)). These new provisions reflect current practice, as the ACMA makes the Associated Newspaper Register accessible on the Internet and does not charge users for access to the relevant website.

**Item 7: At the end of section 59**

Item 7 of Schedule 1 inserts new subsection 59(8), which inserts new definitions required as a consequence of Item 5 of Schedule 1.

**Item: 8 After Division 5 of Part 5**

Item 8 of Schedule 1 inserts new Division 5A of Part 5 of the BSA, which inserts new media diversity protections. New Division 5A addresses media diversity through:

- a prohibition on transactions that result in an “unacceptable media diversity situation” (subdivision B of new Division 5A);
- a prohibition on transactions that result in an “unacceptable 3-way control situation” (subdivision BA);
- permitting the ACMA to:
  - issue remedial directions (subdivision C); and
  - accept enforceable undertakings (subdivision D);
- requiring the ACMA to maintain a Register of Controlled Media Groups (subdivision E).

New section 61AA provides definitions of terms used in new Division 5A.

**Unacceptable media diversity situation**

New section 61AB of the BSA establishes a new concept of an “unacceptable media diversity situation.” An unacceptable media diversity situation exists in the following circumstances:

- where the number of “points” in a metropolitan radio licence area is less than five; or
- the number of “points” in a regional radio licence area is less than four.

A regional licence area is a licence area that is not a metropolitan licence area. For these purposes, the metropolitan licence areas are those licence areas in which are situated the General Post Offices of the mainland state capital cities, as well as the licence area known as Western Sydney RA1. (The inclusion of this particular licence area reflects the fact that, although the Western Sydney licence area does not incorporate the Sydney GPO, the Western Sydney licence predominantly serves the western suburbs of the city of Sydney, and that the licensee operating in Western Sydney is significantly different in its programming and intended audience from the regional radio licensees to which Division 5A is intended to apply.)



The effect of the definitions of “regional licence area” and “metropolitan licence area” is that the requirements relating to regional commercial radio broadcasting licences will apply to all commercial radio broadcasting licensees other than those in the mainland state capital cities.

The number of points in a radio licence area is calculated in accordance with the rules in new section 61AC. Broadly, a “point” is a separately controlled media group. In general, a media group will be a grouping of one or more of a commercial radio licence, a commercial television licence and an associated newspaper (“media operations”) where there is at least one person in a position to exercise control over each of the media entities in the media group and where the media operation complies with the statutory control rules. However, the test in new section 61AC makes special provision for overlapping licence areas and shared content, so that anomalies arising from licensing and programming arrangements are dealt with appropriately for the purposes of the test.

The applicable number of points is calculated using the relevant commercial radio broadcasting licence area because such licence areas will more closely reflect the influence of relevant radio services or newspapers in a community than a television licence area (which may be very large and highly geographically diverse).

New subsection 61AC(1) provides a table to be used to work out the number of points in the licence area of a commercial radio broadcasting licence.

- Item 1 of the table provides that a group of two or more media operations controlled by the same person count for one point.
- Items 2, 3 and 5 of the table provide that a commercial radio broadcasting licence, an associated newspaper and a commercial television broadcasting licence, respectively, that are not part of a commonly controlled media group (covered by Item 1), each count for one point. This ensures that the constituent parts of a group under Item 1 do not get counted twice. Where a commonly owned media group counts for one point, the media operations that make up that group do not themselves count as a point.
- Item 4 of the table provides a special rule for two commercial television broadcasting licences that broadcast into one commercial radio licence area to count as only one point, where the two core commercial services broadcast under those licences are substantially the same and the shared content test is met. This is to ensure the appropriate operation of the minimum number of media groups test in areas where television licence areas overlap, or where the characteristics of television transmission and reception in a radio licence area mean that what is effectively the same service may be received via two television broadcast licences. In such cases, these services only count as one point for the purposes of the test. The “shared content test” is set out in new section 61AE of the BSA.
- In relation to each Item of the table, for a point to be counted the statutory control rules must be met. The statutory control rules are only met if no person is in breach of a prohibition in Division 2 or 3 of Part 5 that relates directly or indirectly to the media operation (new section 61AD).

New subsection 61AC(2) provides that if the same media operations are in more than one group of media operations (ie. if there is more than one person in control of the same group of media operations for Item 1 of the table), then only one of those groups

(the one with the largest number of media operations) should count for the calculation of the number of points. All the component media groups would be entered into the Register (as each is a registrable media group). However, it is intended that the ACMA would include explanatory notes to indicate which group is to be counted for the purposes of the test (see new section 61AW). For example, the Register might include a heading for a group, and then under that heading there would also be headings for individual groups that are also part of that larger group.

New section 61AF provides that section 51, which provides that two overlapping licence areas are to be treated as one in certain circumstances, does not apply for the purposes of new Division 5A. This ensures that the media diversity rules can operate effectively in relation to individual radio licence areas.

### **Prohibition on transactions resulting in an unacceptable media diversity situation**

New section 61AG provides that a person commits an offence if the person is party to one or more transactions, or was in a position to control the transactions, that occur after the commencement day, and the transactions either:

- cause an unacceptable media diversity situation to come into existence in the licence area; or
- if an unacceptable media diversity situation already exists; there is a reduction in the number of points in the licence area.

The maximum penalty for an offence under new section 61AG is 20,000 penalty units for a natural person, or 100,000 penalty units for a body corporate (section 4B of the *Crimes Act 1914*).

A person can only commit an offence in relation to a transaction that takes place after the “commencement day”. The commencement day is the day on which Schedule 2 to the Act commences (new section 61AA of the BSA). Schedule 2 will commence either on Proclamation, or on 1 January 2008 if the Act is not proclaimed earlier (clause 2 of the Bill).

Further, a person will not have committed an offence if the ACMA gave prior approval for the transactions under new section 61AJ.

New section 61AH provides that the same conduct also constitutes a contravention of a civil penalty provision. Under the proposed Communications Legislation Amendment (Enforcement Powers) Bill 2006 (CLAB), the ACMA may apply to the Federal Court for a civil penalty order for a contravention of a civil penalty provision (new subsection 205F(1), Item 48 of CLAB).

The maximum pecuniary penalty that may be payable for a civil penalty contravention is the same as the maximum penalty for the equivalent criminal offence (new subsection 205F(4), Item 48 of CLAB).

### **Prior approval of transactions (unacceptable media diversity situation)**

New subsection 61AJ(1) provides that a person may, before the transaction takes place, make an application to the ACMA for prior approval of a transaction that

would result in an unacceptable media diversity situation, or a reduction in the number of points if an unacceptable media diversity situation already exists. This new provision is similar to existing section 67 of the BSA, which enables the ACMA to grant prior approval for transactions that would breach the current cross-media rules or the statutory control rules. This new provision will operate alongside section 67 as consequentially amended (Items 13 and 14 of Schedule 2).

If the ACMA is satisfied that:

- the transaction would place the person in breach of new section 61AG or 61AH; and
- either the applicant or a third party will take action within two years to ensure that either the unacceptable media diversity situation does not eventuate, or the number of points in the licence area will not reduce if there is an existing unacceptable media diversity situation;

the ACMA may approve the transaction (new subsection 61AJ(4)).

The ACMA may seek further information from the applicant before making a decision (new subsection 61AJ(3)). In deciding whether to approve the transaction, the ACMA must consider all relevant matters, including any relevant undertakings given by a third party under new section 61AS.

If the ACMA approves a transaction on the basis that the applicant itself will take the necessary action, the ACMA must specify a time period during which the action to prevent or alleviate the unacceptable media diversity situation must be taken (new paragraph 61AJ(4)(d)). The period specified must be at least one month, and it can be no longer than two years (new subsection 61AJ(5)).

If the ACMA approves a transaction on the basis that a third party will take the necessary action, the ACMA must inform the applicant accordingly (new paragraph 61AJ(4)(e)).

The ACMA may specify in the notice the action that the applicant is to take (new subsection 61AJ(6)). For example, the ACMA may approve the transaction subject to the person divesting their interests in a specific media operation.

New subsection 61AJ(9) provides that the ACMA must deal with applications for prior approval of transactions that are made under new subsection 61AJ(1) in the order in which it receives those applications, to enable orderly processing of two or more applications that affect the same licence area. New subsection 61AJ(10) provides that the ACMA must use its best endeavours to deal with an application for prior approval within 45 days of its receipt.

### **Extension of time for compliance with prior approval notice (unacceptable media diversity situation)**

If the ACMA approves the transaction, the person may seek an extension of time for compliance (new subsection 61AK(1)). The ACMA may seek further information from the applicant before making a decision in relation to a request for an extension (new subsection 61AK(3)).

The ACMA has the discretion to grant an extension in appropriate circumstances (new subsection 61AK(2)). For example, the ACMA may consider it very likely that the actions of a third party will result in the number of points in the relevant licence area increasing within 3 months. In such a case, the ACMA might consider it appropriate to grant an extension for 3 months.

In deciding whether to grant an extension, the ACMA must have regard to:

- the endeavours the applicant has made to comply with the notice; and
- any difficulties the applicant has experienced in attempting to comply with the notice (new subsection 61AK(5)).

However, the ACMA must not have regard to any financial disadvantage that may be suffered by the applicant. For example, the fact that the price of shares has recently dropped is not a relevant consideration.

Any extension granted by the ACMA can be for no longer than either the original period specified in the notice, or one year, whichever is the shorter period (new subsection 61AK(4)).

If the ACMA does not make a decision within 45 days of receiving the applicant, or of receiving additional information if this was requested, the ACMA is deemed to have decided to extend the period for compliance by the period specified in the notice, or one year, whichever is the shorter period (new subsection 61AK(6)).

If a person breaches a notice issued under new section 61AJ, the person is guilty of an offence (new subsection 61AL(1)). A person commits a separate offence for each day during which a contravention of the notice continues (new subsection 61AL(2)).

The maximum penalty for an offence under new subsection 61AL(1) is 20,000 penalty units for a natural person, or 100,000 penalty units for a body corporate (section 4B of the *Crimes Act 1914*).

New section 61AM provides that the same conduct also constitutes a contravention of a civil penalty provision. Under the proposed Communications Legislation Amendment (Enforcement Powers) Bill 2006 (CLAB), the ACMA may apply to the Federal Court for a civil penalty order for a contravention of a civil penalty provision (new subsection 205F(1), Item 48 of CLAB). A person commits a separate civil penalty contravention for each day during which a contravention of the notice continues (new subsection 61AM(2)).

The maximum pecuniary penalty that may be payable for a civil penalty contravention is the same as the maximum penalty for the equivalent criminal offence (new subsection 205F(4), Item 48 of CLAB).

### **Remedial directions (unacceptable media diversity situation)**

If, on or after the commencement day, the ACMA is satisfied that an unacceptable media diversity situation exists in relation to a regional radio licence area, the ACMA may give a person a remedial direction for the purpose of ensuring that the situation ceases to exist (new subsection 61AN(1)). Such a notice must specify a particular timeframe within which the action must be taken (new subsection 61AN(5)).

The types of directions that the ACMA might give include:

- a direction requiring a person to dispose of shares or interests in shares; and
- a direction restraining a person from exercising any rights attached to shares (new subsections 61AN(2) and (3)).

The ACMA may only give a remedial direction to a person after the “commencement day”. The commencement day is the day on which Schedule 2 to the Act commences (new section 61AA of the BSA). Schedule 2 will commence either on Proclamation, or on 1 January 2008 if the Act is not proclaimed earlier (clause 2 of the Bill).

Importantly, the ACMA cannot give a remedial direction to a registered controller of a registered media group (new subsection 61AN(4)). This limitation is essential to the effective operation of the new Register (new section 61AU).

Once added to the Register, the media group would be able to continue to be subject to common control (even if the mechanism achieving that common control changes) for so long as that common control remains (new section 61AX). This would be the case even if the number of separate media groups in the relevant licence area falls below the threshold through the actions of a third party. For example, person X is in control of both a radio broadcasting licence and a television broadcasting licence in a regional radio licence area. The number of points in that licence area drops below four, but the interest of person X (and all other registered controllers) is protected. The ACMA cannot issue a remedial direction in relation to the drop in the number of points. Person X can sell her interests to person Y, and person Y is similarly protected.

The intention is that all registered controllers of the radio licence and the television licence shall be protected, notwithstanding any subsequent movements in the market, provided the radio and television licences remain a single registered media group. Any transaction that would result in the radio licence and the television licence no longer being a single media group would not be protected. The reason for this protection is that grandfathering the media group ensures that the group retains commercial value.

New subsections 61AN(4A)-(4C) provide exceptions to the general rule in new subsection 61AN(4) that the ACMA must not issue a remedial direction to a registered controller of a registered media group that would have the effect of requiring that registered controller to divest their controlling interest in any of the media operations that are in the registered group. New subsections 61AN(4A)-(4C) provide that the ACMA may issue remedial directions that would have that effect in certain limited circumstances, as explained below.

The first circumstance (set out in new subsection 61AN(4A)) is where:

- the ACMA has given prior approval to the registered controller under section 61AJ for a transaction that would result in an unacceptable media diversity situation, or in a reduction in the number of points if an unacceptable media diversity situation already exists; and
- the ACMA’s notice specified action that it required the registered controller to take to ensure within a specified time that the unacceptable media diversity situation ceases to exist or to ensure that there is not a reduction in the number of points; and

- the registered controller has failed to comply with that notice in the specified time.

The second circumstance (set out in new subsection 61AN(4B)) is where:

- the ACMA has given prior approval to the registered controller under section 61AJ for a transaction that would result in an unacceptable media diversity situation, or in a reduction in the number of points if an unacceptable media diversity situation already exists; and
- the ACMA gave approval under section 61AJ on the basis that third party would, within a specified period, take action that relates to the media operation (see new subsection 61AJ(4), as amended by amendment (2)); and
- that third party has failed to comply with that notice in the specified time.

These exceptions to the general rule in subsection 61AN(4) are intended to permit the ACMA to effectively implement its system of prior approvals under section 61AJ. Where the ACMA gives its prior approval on the basis of anticipated action by the registered controller of a third party, and those actions do not eventuate, it is appropriate that the ACMA should have the power to direct a person who has benefited from that prior approval to divest their controlling interest in a media operation in the relevant registered group.

The third circumstance is set out in new subsection 61AN(4C) and relates to reconsideration by the ACMA, or review by the Administrative Appeals Tribunal (AAT), or consideration by a court, of certain decisions that can be made by the ACMA relating to the entry of registrable media groups in the Register. The decisions to which subsection 61AN(4C) relates are listed at paragraphs 61AN(4C)(a)(i)-(iv) and are:

- (i) a decision to enter a registrable media group in the Register;
- (ii) a decision to confirm the entry of a registrable media group in the Register;
- (iii) a decision affirming a decision to confirm the entry of a registrable media group in the Register;
- (iv) a decision revoking a decision to cancel the entry of a registrable media group in the Register.

A person may apply to the ACMA for reconsideration of a decision of the type described at paragraph (ii) (see section 61AZF). A person may apply to the AAT for a review of a decision of the type described at paragraphs (iii) and (iv) (see section 204 as amended by item 18 of Schedule 1 of the Bill). In relation to any of the decisions described at paragraphs (i)-(iv), a person may apply to a court for an order of review, a writ of mandamus or prohibition, or an injunction (under section 39B of the *Judiciary Act 1903* and paragraph 75(v) of the *Constitution*).

Subsection 61AN(4C) deals with the situation where the ACMA has made a decision, and where a person has applied to the ACMA for reconsideration of the review, or has applied to the AAT for a review of the decision, or to a court for review or consideration of that decision, and as a result of that reconsideration or review the original decision is set aside, but is subsequently reinstated (eg. on further appeal).

During the intervening period (between the original decision being set aside and reinstated), the ACMA may make decisions in relation to the inclusion of other registrable media groups in the Register. Subsection 61AN(4C) provides an

exception to the general rule in subsection 61AN(4) that the ACMA must not issue a remedial direction to a registered controller of a registered media group that would have the effect of requiring that registered controller to divest their controlling interest in any of the media operations that are in the registered group.

The effect of subsection 61AN(4C) is that where the ACMA has included another registrable media group in the Register (the second media group), and that media group relates to the same commercial radio broadcasting licence area as the media group to which the initial decision relates (the first media group)), the ACMA may issue a direction to a registered controller of the second media group that would have the effect of requiring that controller to cease to be in control of a media operation in the second media group.

This is intended to ensure that the Register operates effectively by ensuring that the first media group is not required to divest or otherwise take action to address an unacceptable media diversity situation because of transactions carried out by other parties during the period in which judicial review takes place. This amendment operates together with new subsections 61AZ(5)-(12), which provide for the Register to be 'frozen' while AAT or court proceedings are pending in relation to a decision of the ACMA in connection with a registrable media group.

If the ACMA issues a remedial direction, the notice must specify a period during which the required action must be taken (new subsection 61AN(5)). The period specified must be no longer than two years (new subsection 61AN(6)). However, if the person acted in good faith, took reasonable precautions and exercised due diligence to avoid an unacceptable media diversity situation developing or the number of points reducing, the person will be entitled to a two-year period (new subsection 61AN(7)). For example, a person must have taken into account unconfirmed entries on the Register before transacting to have acted in good faith. A person who chooses to undertake a transaction based on the chance that an unconfirmed entry may be removed from the Register by the ACMA later will not have acted in good faith. Similarly, the person should be able to demonstrate that he or she regularly checked the Register before transacting in order to be afforded the maximum period of time in order to correct the situation. For example, if the person subscribed to an electronic alert system provided by the ACMA to notify users about notifications to the Register the person would be considered to have checked the Register regularly.

The intention behind this provision is that, in circumstances where several parties may be undertaking transactions within a single licence area at approximately the same time, a person who innocently breaches the prohibition through the actions of a third party in the market would be subject to the maximum permitted period for correcting the situation. For example, if person A regularly checks the Register and relies on the entries on the Register (including any unconfirmed entries) in deciding to transact, but at the last moment person B completes an independent transaction and notifies the ACMA before party A completes, party B would be protected from any remedial direction. However, while party A could be subject to a remedial direction, party A would have the benefit of a full two years in which to take the required action.

New subsection 61AN(6A) provides that where the ACMA issues a direction under new subsection 61AN(4C) that would have the effect of requiring the registered

controller of a registered media group to divest control in a media operation in that group, the direction must provide that the registered controller has a period of two years within which to comply with the direction (unless the ACMA is satisfied that the registered controller acted flagrantly in breach of section 61AG or 61AH – see new subsection 61AN(8)).

New subsection 61AN(6A) mirrors new subsection 61AN(7) in relation to directions issued by the ACMA under new subsection 61AN(4C). New subsection 61AN(6A), like new subsection 61AN(7), is intended to ensure that a registered controller of a registrable media group that acts with in good faith, is included on the Register and is then directed by the ACMA to divest control of a media operation in that group is given the full two-year period to divest their interest as directed.

In contrast, if the ACMA considers that a person acted flagrantly in breach of section 61AG or AH, the ACMA must specify a period of only one month (new subsection 61AN(8)). For example, if person C ignored the Register and completed their transaction, notwithstanding that the number of points in the relevant metropolitan market was five, person C would be subject to a remedial direction that specified a period of only one month in which to take the specified action. This requirement is notwithstanding the fact that a requirement to take action within one month may be financially disadvantageous for the person concerned (e.g. if the share market is at a low point) (new subsection 61AN(9)).

A person who is subject to a remedial direction may generally apply to the ACMA for an extension of time for compliance, but not if the person was subject to a one month period for compliance (subsections 61AP(1) and (2)). The ACMA may seek further information from the applicant before making a decision (new subsection 61AP(4)).

The ACMA has discretion to grant an extension if:

- the ACMA considers it likely that the actions of a third party will result in the number of points in the relevant licence area increasing within 3 months; and
- the person acted in good faith; and
- the extension is appropriate in all the circumstances (new subsection 61AP(3)).

The ACMA cannot grant an extension for a period of more than 3 months, and only one extension may be granted (new subsection 61AP(5)).

In deciding whether to grant an extension, the ACMA must have regard to:

- the endeavours the applicant has made to comply with the notice;
- any difficulties the applicant has experienced in attempting to comply with the notice; and
- the seriousness of the situation giving rise to the notice (new subsection 61AP(6)).

However, the ACMA must not have regard to any financial disadvantage that may be suffered by the applicant. For example, the fact that the price of shares has recently dropped is not a relevant consideration. If the ACMA does not make a decision within 45 days of receiving the application, or of receiving additional information if this was requested, the ACMA is deemed to have decided to extend the period for three months (new subsection 61AP(7)).



If a person breaches a remedial direction issued under new section 61AN, the person is guilty of an offence (new subsection 61AQ(1)). A person commits a separate offence for each day during which a contravention of the notice continues (new subsection 61AQ(2)).

The maximum penalty for an offence under new subsection 61AQ(1) is 20,000 penalty units for a natural person, or 100,000 penalty units for a body corporate (section 4B of the *Crimes Act 1914*).

New section 61AR provides that the same conduct also constitutes a contravention of a civil penalty provision. Under the proposed Communications Legislation Amendment (Enforcement Powers) Bill 2006 (CLAB), the ACMA may apply to the Federal Court for a civil penalty order for a contravention of a civil penalty provision (new subsection 205F(1), Item 48 of CLAB). A person commits a separate civil penalty contravention for each day during which a contravention of the notice continues (new subsection 61AR(2)).

The maximum pecuniary penalty that may be payable for a civil penalty contravention is the same as the maximum penalty for the equivalent criminal offence (new subsection 205F(4), Item 48 of CLAB).

### **Unacceptable 3-way control situation**

New section 61AEA defines the term “unacceptable 3-way control situation” for the purpose of Division 5A of Part 5 of the BSA.

An unacceptable 3-way control situation exists in relation to a licence area of a commercial radio licence (first radio licence area) where a person is in a position to exercise control of:

- (a) a commercial television broadcasting licence (where more than 50% of the licence area population of the first radio licence area is attributable to the licence area of the commercial television broadcasting licence); and
- (b) a commercial radio broadcasting licence (where the commercial radio broadcasting licence area is, or is the same as, the first radio licence area; and
- (c) a newspaper that is associated with the first radio licence area.

The definition of “unacceptable 3-way control situation” uses the relevant commercial radio broadcasting licence area because such licence areas will more closely reflect the influence of relevant radio services or newspapers in a community than a television licence area (which may be very large and highly geographically diverse).

An “unacceptable 3-way control situation” will exist where a person, who is in a commercial radio licence area (first radio licence area), is in a position to exercise control of a commercial radio broadcasting licence in the first radio licence area, a newspaper that is associated with the first radio licence area and a commercial television broadcasting licence, the licence area of which has more than half of the population of the first radio licence area.

The effect of this amendment is that a person cannot own more than two regulated media platforms in a licence area.

### **Prohibition on transactions resulting in an unacceptable 3-way control situation**

New section 61AMA provides that a person commits an offence if the person is party to one or more transactions, or was in a position to control the transactions, that occur after the commencement day, and the transactions cause an unacceptable 3-way control situation to come into existence in the licence area of a commercial radio broadcasting licence.

The maximum penalty for an offence under new section 61AMA is 20,000 penalty units for a natural person, or 100,000 penalty units for a body corporate (section 4B of the *Crimes Act 1914*).

A person can only commit an offence in relation to a transaction that takes place after the “commencement day”. The commencement day is the day on which Schedule 2 to the Act commences (new section 61AA of the BSA). Schedule 2 will commence either on Proclamation, or on 1 January 2008 if the Act is not proclaimed earlier (clause 2 of the Bill).

Further, a person will not have committed an offence if the ACMA gave prior approval for the transactions under new section 61AMC.

New section 61AMB provides that the same conduct also constitutes a contravention of a civil penalty provision. Under the proposed Communications Legislation Amendment (Enforcement Powers) Bill 2006 (CLAB), the ACMA may apply to the Federal Court for a civil penalty order for a contravention of a civil penalty provision (new subsection 205F(1), Item 48 of CLAB).

The maximum pecuniary penalty that may be payable for a civil penalty contravention is the same as the maximum penalty for the equivalent criminal offence (new subsection 205F(4), Item 48 of CLAB).

### **Prior approval of transactions (unacceptable 3-way control situation)**

New subsection 61AMC(1) provides that a person may, before the transaction takes place, make an application to the ACMA for prior approval of a transaction that would result in an unacceptable 3-way control situation. This new provision is similar to existing section 67 of the BSA, which enables the ACMA to grant prior approval for transactions that would breach the current cross-media rules or the statutory control rules. This new provision will operate alongside section 67 as consequentially amended (Items 13 and 14 of Schedule 2 of the Bill).

The application is to be made in accordance with a form approved in writing by the ACMA (new subsection 61AMC(2)).

If the ACMA is satisfied that:

- the transaction would place the person in breach of new section 61AMA or 61AMB; and
  - either the applicant or a third party will take action within 12 months to ensure that the unacceptable 3-way control situation does not eventuate;
- the ACMA may approve the transaction (new subsection 61AMC(4)).

The ACMA may seek further information from the applicant before making a decision (new subsection 61AMC(3)). In deciding whether to approve the transaction, the ACMA must consider all relevant matters, including any relevant undertakings given by a third party under new section 61AS (new subsection 61AMC(7)).

If the ACMA approves a transaction on the basis that the applicant itself will take certain action, the ACMA must specify a time period during which the action to prevent or alleviate the unacceptable 3-way control situation must be taken. The period specified must be at least one month, and it can be no longer than 12 months (new subsection 61AMC(5)).

The ACMA may specify in the notice the action that the applicant is to take (new subsection 61AMC(6)). For example, the ACMA may approve the transaction subject to the person divesting their interests in a specific media operation.

If the ACMA approves a transaction on the basis that a third party will take certain action, the ACMA must notify the applicant accordingly.

If the ACMA refuses to approve a transaction, the ACMA must give written notice of the refusal to the applicant (new subsection 61AMC(8)).

New subsection 61AMC(9) provides that the ACMA must deal with application for prior approval in order of receipt. The ACMA must use its best endeavours to deal with an application it receives for prior approval within 45 days of receipt (new subsection 61AMC(10)).

### **Extension of time for compliance with prior approval notice (unacceptable 3-way control situation)**

If the ACMA approves the transaction, the applicant may seek an extension of time for compliance (new subsection 61AMD(1)). The ACMA may seek further information from the applicant before making a decision in relation to a request for an extension (new subsection 61AMD(3)).

The ACMA has the discretion to grant an extension in appropriate circumstances (new subsection 61AMD(2)). For example, the ACMA may consider it very likely that the applicant will divest an interest in a media operation within three months, thereby resolving the unacceptable 3-way control situation. In such a case, the ACMA might consider it appropriate to grant an extension for three months.

In deciding whether to grant an extension, the ACMA must have regard to:

- the endeavours the applicant has made to comply with the notice; and
- any difficulties the applicant has experienced in attempting to comply with the notice (new subsection 61AMD(5)).

However, the ACMA must not have regard to any financial disadvantage that may be suffered by the applicant. For example, the fact that the price of shares has recently dropped is not a relevant consideration.

Any extension granted by the ACMA can be for no longer than either the original period specified in the notice, or six months, whichever is the shorter period (new subsection 61AMD(4)).

If the ACMA does not make a decision within 45 days of receiving the applicant, or of receiving additional information if this was requested, the ACMA is deemed to have decided to extend the period for compliance by the period specified in the notice, or six months, whichever is the shorter period (new subsection 61AMD(6)).

If the ACMA refuses to approve an application, the ACMA must give written notice of the refusal to the applicant (new subsection 61AMD(7)).

### **Breach of prior approval notice – offence (unacceptable 3-way control situation)**

If a person breaches a notice issued under new section 61AMC, the person is guilty of an offence (new subsection 61AME(1)). A person commits a separate offence for each day during which a contravention of the notice continues (new subsection 61AME(2)).

The maximum penalty for an offence under new subsection 61AME(1) is 20,000 penalty units for a natural person, or 100,000 penalty units for a body corporate (section 4B of the *Crimes Act 1914*).

### **Breach of prior approval notice – civil penalty (unacceptable 3-way control situation)**

New section 61AMF provides that the same conduct also constitutes a contravention of a civil penalty provision (new subsections 61AMF(1) and (2)). Under the proposed CLAB Bill, the ACMA may apply to the Federal Court for a civil penalty order for a contravention of a civil penalty provision (new subsection 205F(1), Item 48 of CLAB). A person commits a separate civil penalty contravention for each day during which a contravention of the notice continues (new subsection 61AMF(3)).

The maximum pecuniary penalty that may be payable for a civil penalty contravention is the same as the maximum penalty for the equivalent criminal offence (new subsection 205F(4), Item 48 of CLAB).

### **Remedial directions (unacceptable 3-way control situation)**

If, on or after the commencement day, the ACMA is satisfied that an unacceptable 3-way control situation exists, the ACMA may give a person a remedial direction for the purpose of ensuring that the situation ceases to exist (new subsection 61ANA(1)). Such a notice must specify a particular timeframe within which the action must be taken (new subsection 61ANA(4)).

The types of directions that the ACMA might give include:

- a direction requiring a person to dispose of shares or interests in shares; and
- a direction restraining a person from exercising any rights attached to shares (new subsections 61ANA(2) and (3)).

The ACMA may only give a remedial direction to a person after the “commencement day”. The commencement day is the day on which Schedule 2 to the Act commences

(new section 61AA of the BSA). Schedule 2 will commence either on Proclamation, or on 1 January 2008 if the Act is not proclaimed earlier (clause 2 of the Bill).

If the ACMA issues a remedial direction, the notice must specify a period during which the required action must be taken (new subsection 61ANA(4)). The period specified must be no longer than 12 months (new subsection 61ANA(5)). However, if the person acted in good faith, took reasonable precautions and exercised due diligence to avoid an unacceptable 3-way control situation developing, the person will be entitled to a 12 month period (new subsection 61ANA(6)).

In contrast, if the ACMA considers that a person acted flagrantly in breach of section 61AMA or 61AMB, the ACMA must specify a period of only one month (new subsection 61ANA(7)). This requirement is notwithstanding the fact that a requirement to take action within one month may be financially disadvantageous for the person concerned (e.g. if the share market is at a low point) (new subsection 61ANA(8)).

A person who is subject to a remedial direction may generally apply to the ACMA for an extension of time for compliance, but not if the person was subject to a one month period for compliance (subsections 61AP(1) and (2)). The ACMA may seek further information from the applicant before making a decision (new subsection 61AP(4)).

The ACMA has discretion to grant an extension if:

- an unacceptable 3-way control situation is likely to cease to exist within 3 months; and
- the person acted in good faith; and
- the extension is appropriate in all the circumstances (new subsection 61AP(3A)).

The ACMA cannot grant an extension for a period of more than 3 months, and only one extension may be granted (new subsection 61AP(5)).

In deciding whether to grant an extension, the ACMA must have regard to:

- the endeavours the applicant has made to comply with the notice;
- any difficulties the applicant has experienced in attempting to comply with the notice; and
- the seriousness of the situation giving rise to the notice (new subsection 61AP(6)).

However, the ACMA must not have regard to any financial disadvantage that may be suffered by the applicant. For example, the fact that the price of shares has recently dropped is not a relevant consideration. If the ACMA does not make a decision within 45 days of receiving the application, or of receiving additional information if this was requested, the ACMA is deemed to have decided to extend the period for three months (new subsection 61AP(7)).

If a person breaches a remedial direction issued under new section 61AN, the person is guilty of an offence (new subsection 61AQ(1)). A person commits a separate offence for each day during which a contravention of the notice continues (new subsection 61AQ(2)).

The maximum penalty for an offence under new subsection 61AQ(1) is 20,000 penalty units for a natural person, or 100,000 penalty units for a body corporate (section 4B of the *Crimes Act 1914*).

New section 61AR provides that the same conduct also constitutes a contravention of a civil penalty provision. Under the proposed Communications Legislation Amendment (Enforcement Powers) Bill 2006 (CLAB), the ACMA may apply to the Federal Court for a civil penalty order for a contravention of a civil penalty provision (new subsection 205F(1), Item 48 of CLAB). A person commits a separate civil penalty contravention for each day during which a contravention of the notice continues (new subsection 61AR(2)).

The maximum pecuniary penalty that may be payable for a civil penalty contravention is the same as the maximum penalty for the equivalent criminal offence (new subsection 205F(4), Item 48 of CLAB).

### **Enforceable undertakings**

New section 61AS gives the ACMA the ability to accept undertakings offered by a person to the effect that:

- the person will take specified action to ensure that an unacceptable media diversity situation does not exist (new paragraph 61AS(10)(a)); or
- if an unacceptable media diversity situation already exists, the person will take specified action to ensure that there is not a reduction in the number of points in the licence area (new paragraph 61AS(1)(b));
- the person will take specified action to ensure that an unacceptable 3-way control situation does not exist (new paragraph 61AS(1)(c)).

Once accepted by the ACMA, undertakings would be enforceable by the Federal Court.

A person may offer an enforceable undertaking to support an application made by another person in the market for a prior approval of a transaction (new sections 61AJ and 61AMC).

A person who gives an enforceable undertaking may only withdraw or vary the undertaking with the ACMA's consent (new subsection 61AS(3)). The ACMA would be able to cancel an undertaking at any time by giving a written notice to the person (new subsection 61AS(4)). The ACMA may publish an enforceable undertaking on its Internet site (new subsection 61AS(5)).

New section 61AT provides that undertakings under new section 61AS are enforceable in the Federal Court. New subsection 61AT(1) provides that the ACMA may apply to the Federal Court for an order if a person has given the ACMA an enforceable undertaking and the ACMA considers that the person has breached the undertaking.

New subsection 61AT(2) provides for the sorts of orders that the Federal Court may make in relation to an application by the ACMA under new subsection 61AT(1). If the Federal Court is satisfied that the person has breached the undertaking, it may make any or all of the following orders:

- an order directing the person to comply with the undertaking;
- an order directing the person to pay to the ACMA, on behalf of the Commonwealth, an amount up to the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach;
- any order that the Court considers appropriate directing the person to compensate any other person who has suffered loss or damage as a result of the breach; or
- any other order that the Court considers appropriate.

These enforceable undertaking provisions are consistent with the general enforceable undertaking provisions introduced by the CLAB.

### **Register of Controlled Media Groups**

New section 61AU requires the ACMA to establish a Register of Controlled Media Groups (the Register) (new subsection 61AU(1)). The Register is to be maintained electronically and is to be publicly accessible on the Internet (new subsection 61AU(2) and (3)). It is intended that the Register would be an interactive database and that information could be extracted in a number of ways. For example, a person could search the Register for entries which list a particular controller, or the person could search for registered media groups in a particular radio licence area.

The Register would identify both the separate media groups in each licence area and the controller or controllers of each of the media operations in the group (new subsection 61AV(1)). Industry would be able to assess the number of separate media groups in a particular licence area by reviewing the Register. The Register is a tool which may be utilised by industry to ensure their compliance with the media diversity rules in any transaction they undertake.

Under this model, responsibility for ensuring compliance with the BSA would rest with industry. The ACMA's primary responsibilities would be:

- maintaining the Register;
- monitoring industry compliance; and
- investigating and responding to any breaches of the BSA.

The onus would be on prospective purchasers to check the Register to ascertain whether there is scope at that time within the affected licence area(s) for the proposed transaction to proceed.

New subsection 61AU(4) provides that the Register is not a legislative instrument. This statement is intended to assist users by confirming that the Register is not a legislative instrument, and is for clarity only.

The ACMA may include explanatory notes in the Register (new section 61AX). For example, the ACMA may include explanatory notes regarding the following:

- media groups that form part of a larger media group, where only the larger media group is to be counted for the purposes of the points test;
- a media group and/or controllers that have been registered on the basis of a prior approval;

- entries on the register that are subject to review (e.g. merits review in the Administrative Appeals Tribunal); and
- additional information about media groups or controllers (eg. the current licensee company).

### **Establishment of the Register**

The ACMA must establish the Register as soon as practicable after 1 February 2007 (new subsection 61AU(5)). Where the ACMA is satisfied that, at 1 February 2007 a registrable media group exists, the ACMA must enter that media group in the Register on an unconfirmed basis (new subsections 61AY(1) and (4)).

In formulating the Register, the ACMA may rely solely upon notifications received in accordance with the reporting obligations in new section 65 (Item 17 of Schedule 1). The ACMA need not investigate the notifications (e.g. to confirm that control has shifted as reported) before entering the media groups in the Register on an unconfirmed basis. Where the ACMA relies upon a notification under Division 6 of Part 5, the ACMA must update the Register within 2 business days of receiving the notification (new subsection 61AY(3)). It is intended that the Register is to be updated in the order of receipt of notifications.

Importantly, for the purposes of establishing the Register, the ACMA need not have regard to whether or not an unacceptable media diversity situation exists in the relevant radio licence area. If, at the time the Register is established, there are fewer than the required number of points in a particular licence area, the controllers of these media groups would still be able to enter their interests on the Register. The reason for this concession is that, if these media groups could not be entered on the Register, this would have an unfair impact upon the controllers of the groups as the commercial value of the group would be reduced. The intention is that the interests of existing controllers should not be unduly affected by the establishment of the Register and the new concept of an unacceptable media diversity situation.

For example, in regional markets it is common for two radio licences (one AM, one FM) to be commonly owned. If the licences were required to be sold separately due to the number of other media groups in the market, this would be likely to diminish the value of the AM licence considerably. New section 61AY allows for the interests held by the controllers of media groups in these types of markets to be entered on the Register, and these media groups would be able to remain in the market (e.g. the interests could be transferred or sold) provided the media group remains commonly controlled and there is no further reduction in the number of separate media groups in the market as a consequence of a transaction relating to the media group concerned (new section 61AX).

### **Registration of new media groups**

Where a new media group is formed after the Register is established, the ACMA may enter the new group on the Register if the ACMA is satisfied that the creation of the media group has not resulted in either:

- a new unacceptable media diversity situation; or
- a reduction in the number of points in the licence area where an unacceptable media diversity situation already exists (new subsection 61AZ(1)).



If the ACMA enters a new group on the Register, the entry is initially unconfirmed (new subsection 61AZ(4)).

In deciding whether to update the Register to reflect the creation of a new media group, the ACMA may rely solely upon notifications received in accordance with the reporting obligations in sections 62-64 of the BSA or the reporting obligations in new section 65 (Item 17 of Schedule 1). The ACMA need not investigate the notification (e.g. to confirm that control has shifted as reported) before entering the media group in the Register on an unconfirmed basis. Where the ACMA relies upon a notification under Division 6 of Part 5, the ACMA must update the Register within 2 business days of receiving the notification (new subsection 61AZ(3)).

However, the ACMA will only update the Register in relation to a merger involving all three regulated media platforms (i.e. commercial television, commercial radio and Associated Newspapers) in regional licence areas where a statement was obtained from the ACCC prior to the transaction to the effect that the ACCC is of the opinion that the transactions would not result in a contravention of section 50 of the TPA (paragraph 61AZ(1)(c)).

New subsections 61AZ(5)-(12) provide that the Register is to be ‘frozen’ while AAT or court proceedings are pending in relation to a decision of the ACMA in connection with a registrable media group, or while the ACMA is reconsidering a decision. The reason for this amendment is to ensure that, where the ACMA makes a decision in relation to a registrable media group, and because of reconsideration of that decision by the ACMA itself, or because of proceedings that are taken in the AAT or in a court, that decision is not finalised, another registrable media group does not have the opportunity to be included on the Register until that first decision is finalised if the inclusion of that second registrable media group would result in a new unacceptable media diversity situation in the relevant licence area, or a reduction in the number of points in the licence area if an unacceptable media diversity situation already exists.

A person may apply to the ACMA for reconsideration of a decision under new subsection 61AZE (1) (see section 61AZF). A person may apply to the AAT for a review of a decision made by the ACMA under new section 61AZF (see section 204 as amended by item 18 of Schedule 1 of the Bill). In relation to both these decisions and other decisions made by the ACMA in connection with a registrable media group, a person may apply to a court for an order of review, a writ of mandamus or prohibition, or an injunction (under section 39B of the *Judiciary Act 1903* and paragraph 75(v) of the *Constitution*).

New subsection 61AZ(5) provides that where the ACMA makes a decision in relation to a registrable media group (the first media group) and a person applies to the ACMA for reconsideration of the decision, or to the AAT for review of the decision, or to a court for review or consideration of the decision, then during the period when that application is not finalised the ACMA must not enter any other registrable media group (the second media group) in the Register, unless the ACMA is satisfied that, assuming the ACMA’s original decision in relation to the first media group is upheld, the inclusion of the second media group in the Register would not have the result that:

- a new unacceptable media diversity situation comes into existence in the relevant licence area; or

- if an unacceptable media diversity situation already exists in that licence area, there would be a reduction in the number of points in the licence area.

In deciding whether to update the Register to reflect the creation of a new media group, the ACMA may rely solely upon notifications received in accordance with the reporting obligations in sections 62-64 of the BSA or the reporting obligations in new section 65 (Item 17 of Schedule 1 of the Bill). The ACMA need not investigate the notification (e.g. to confirm that control has shifted as reported) before entering the media group in the Register on an unconfirmed basis.

New subsection 61AZ(3) provides that, where the ACMA relies upon a notification under Division 6 of Part 5, the ACMA must update the Register within two business days of receiving the notification. New subparagraph 61AZ(5)(d) deals with the operation of new subsection 61AZ(3) where the ACMA is satisfied that another media group has come into existence during the period ('the pending period') when that application has not been finalised. It provides that new subsection 61AZ(3) operates as if the notification were received on the first day after the pending period.

New subsections 61AZ(6)-(10) specify what is meant by "the period when that application has not been finalised" in new subsection 61AZ(5):

- Where a person applies to the ACMA for reconsideration of a decision under new subsection 61AZE(1), the application is taken not to have been finalised during the 28-day period beginning on the day when the decision on the reconsideration is notified, or the day when the decision is deemed to have been made under new subsection 61AZF(9) (new subsection 61AZ(6)). (Amendment (11) makes a change to new subsection 61AZF(9) to specify that where the ACMA has not made a decision on an application for reconsideration of a decision within 28 days of receiving the application, or within 28 days of receiving further information if it has asked for such, then the ACMA is taken to have made a decision at the end of that 28-day period affirming the original decision.)
- Where a person has applied to the AAT for a review of a decision, and the AAT makes a decision on the application, the application is taken not to have been finalised during the 28-day period beginning on the day on which the decision is made by the AAT (new subsection 61AZ(7)).
- Where a person has applied to the AAT for a review of a decision and the AAT has made a decision on the application, and the person appeals from the decision of the AAT to the Federal Court, and the Federal Court makes a decision on the appeal, the application is taken not to have been finalised during the 28-day period beginning on the day on which the decision is made by the Federal Court (new subsection 61AZ(8)).
- Where a person has applied to a court for an order of review, a writ of mandamus or prohibition, or an injunction, in relation to a decision made by the ACMA, and the court makes a decision on the application, the application is taken not to have been finalised during the 28-day period beginning on the day on which the decision is made by the court (new subsection 61AZ(9)).
- Where a person has applied to a court for an order of review, a writ of mandamus or prohibition, or an injunction, in relation to a decision made by the ACMA, and the court makes a decision on the application, and the decision made by the court becomes the subject of an appeal, and the court or

another court makes a decision on the appeal, the application is taken not to have been finalised during the 28-day period beginning on the day on which the last-mentioned decision is made (new subsection 61AZ(10)).

The effect of these provisions is to provide that the Register is to be ‘frozen’ for the period that the ACMA takes to consider an application for reconsideration, or the period taken by the AAT or a court to consider an application, and that the Register is to remain ‘frozen’ for a period of 28 days after a decision is made on that application, to enable the affected person to take further steps to appeal the decision should they wish to.

For instance, if a person makes an application to the AAT for a review of a decision made by the ACMA under new section 61AZF, the Register is to be ‘frozen’ while the AAT considers that application, and remains frozen for a period of 28 days after the AAT makes its decision on the application. During that 28-day period the person may wish to appeal from the decision of the AAT to the Federal Court. If they do so, the Register remains ‘frozen’ until the Federal Court makes a decision on the appeal, and then remains ‘frozen’ for a further period of 28 days after that.

In addition, new subsection 61AZ(11) provides that the regulations may further elaborate on when an application is taken not to have been finalised for the purposes of new subsection 61AZ(5). The regulations may also extend the 28-day period that is mentioned in new subsections 61AZ(6)-(10) (new subsection 61AZ(12)).

### **De-registration of a media group**

If the ACMA is satisfied that a registered media group has ceased to exist, the ACMA may remove the media group from the Register on an unconfirmed basis (new subsections 61AZA(1) and (3)).

In deciding whether to remove a registered media group from the Register, the ACMA may rely solely upon notifications received in accordance with the reporting obligations in sections 62-64 of the BSA or the reporting obligations in new section 65 (Item 17 of Schedule 1). The ACMA need not investigate the notification (e.g. to confirm that control has shifted as reported) before removing a media group from the Register on an unconfirmed basis. Where the ACMA relies upon a notification under Division 6 of Part 5, the ACMA must update the Register within 2 business days of receiving the notification (new subsections 61AZA(2) and (3)).

### **Registration of a change of controller**

If the ACMA is satisfied that there has been a change of controller of a registered media group, the ACMA must update the Register on an unconfirmed basis (new subsections 61AZB(1) and (4)). It is not necessary for the ACMA to consider whether an unacceptable media diversity situation has arisen because a change in controller does not affect the continuity of an existing registered media group (new section 61AX).

In deciding whether to update the Register, the ACMA may rely solely upon notifications received in accordance with the reporting obligations in sections 62-64 of the BSA or the reporting obligations in new section 65 (Item 17 of Schedule 1).

The ACMA need not investigate the notification (e.g. to confirm that control has shifted as reported) before registering a change of controller on an unconfirmed basis. Where the ACMA relies upon a notification under Division 6 of Part 5, the ACMA must update the Register within 2 business days of receiving the notification (new subsections 61AZB(2) and (3)).

### **Registration of a change of composition of media group**

If the ACMA is satisfied that the composition of a registered media group has changed, and the ACMA is satisfied that the change does not result in:

- an unacceptable media diversity situation coming into existence; or
- if an unacceptable media diversity situation already exists, a reduction in the number of points in the licence area;

the ACMA must update the Register on an unconfirmed basis (new subsections 61AZC(1) and (4)).

In deciding whether to update the Register, the ACMA may rely solely upon notifications received in accordance with the reporting obligations in sections 62-64 of the BSA or the reporting obligations in new section 65 (Item 17 of Schedule 1). The ACMA need not investigate the notification (e.g. to confirm that control has shifted as reported) before registering a change of composition of a media group on an unconfirmed basis. Where the ACMA relies upon a notification under Division 6 of Part 5, the ACMA must update the Register within 2 business days of receiving the notification (new subsections 61AZC(2) and (3)).

### **Notifications to be dealt with in order of receipt**

New section 61AZCA provides that for the purposes of certain provisions of the BSA, the ACMA must deal with notifications given under Division 6 of Part 5 of the BSA in order of receipt. Division 6 deals with requirements to notify the ACMA of matters such as control and directorships, changes in control, obtaining control of a licence, and newspaper interests. Division 6 is central to the operation of the Register.

The relevant provisions are:

- new section 61AY (which deals with the initial registration of media groups);
- new section 61AZ (which deals with the registration of newly-formed media groups);
- new section 61AZA (which deals with the deregistration of a media group that has ceased to exist);
- new section 61AZB (which deals with the registration of the change of controller of a registered media group);
- new section 61AZC (which deals with the registration of a change of composition of a registered media group).

In circumstances where two or more applications that affect the same licence area are notified to ACMA for registration, this provision will ensure that the transaction first notified to ACMA will be considered ahead of a later transaction, should both transactions lead to an unacceptable media diversity situation.

## **Conditional transactions**

It is a common commercial practice to specify that a particular transaction does not complete until necessary regulatory clearances have been obtained (e.g. informal clearance by the ACCC, clearance by the Foreign Investment Review Board, etc.). That is, transactions are commonly made conditional on regulatory approval.

Generally a transaction must be complete before the ACMA will make an entry on the Register. However, if a transaction is ready to complete, and the only remaining obstacle before completion is entry on the Register, the ACMA may update the Register on an unconfirmed basis to reflect that transaction (new section 61AZD). The ACMA will only update the Register in such circumstances if the parties are behaving in good faith and the ACMA is satisfied that the transaction will be completed within 5 business days of its registration.

This qualification to the general rule is designed to facilitate the continuation of established commercial practices which would not undermine the effective operation of the Register.

Generally, as a matter of commercial practice, the parties will be under a mutual obligation to complete once the conditions to a merger are satisfied. However, if the parties do not complete the transaction for whatever reason (whether by consent or a party's default), the ACMA would rectify the Register once it became aware of the non-completion.

It will be incumbent upon parties to such transactions to notify the ACMA of the completion of such a transaction as, if the ACMA is not satisfied that the transaction has completed, the ACMA is required to cancel, alter and/or remove entries from the Register accordingly (new subsections 61AZE(7) and (8)).

## **Review and confirmation of entries and alterations**

New section 61AZE provides that the ACMA is required to review unconfirmed entries which:

- register a new media group on an unconfirmed basis;
- de-register a media group on an unconfirmed basis; or
- alter details of media group's controllers or composition (new subsection 61AZE(1)).

Upon reconsidering an entry, the ACMA may choose to either confirm the original decision or cancel the entry. If the ACMA confirms the entry, the ACMA must remove the note from the Register indicating that the entry is unconfirmed (new subsection 61AZE(2)). If the ACMA cancels an entry, the relevant entry or entries on the Register would be updated accordingly (new subsections 61AZE(3), (4) and (5)).

In considering whether to confirm an entry, the ACMA may choose to rely on notifications under Division 6 of Part 5. However, the ACMA is not required to rely solely on notifications (new subsection 61AZE(6)). For example, the ACMA may conduct an investigation into control arrangements in a particular market, and during the course of that investigation the ACMA may have obtained a large amount of

information about market activity. The ACMA may consider information from sources other than notifications when reconsidering its decisions.

If the ACMA updated the Register on the assumption that a transaction would complete within 5 business days, and the transaction does not complete within that timeframe, the ACMA must cancel the relevant entry and make other necessary consequential changes to the Register (new subsections 61AZE(7) and (8)).

The ACMA may request additional information from a person for the purpose of making a decision in relation to an unconfirmed entry. Such a request must be made in writing within 14 days of the entry being added to the Register (new subsection 61AZE(9)).

If the ACMA does not make a decision within 28 days of updating the Register on an unconfirmed basis, or of receiving additional information (if this was requested), the ACMA is deemed to have decided to confirm the entry, and is taken to have done so at the end of that 28-day period (new subsection AZE(10)).

### **Reconsideration**

New section 61AZF provides that a person whose interests are affected by a decision made by the ACMA under new section 61AZE, either to confirm or cancel an entry, may apply to the ACMA for reconsideration of the decision (new subsection 61AZE(1)). An application for reconsideration must be made within 7 days after the Register was updated, and it must be accompanied by reasons (new subsections 61AZF(2) and (3)).

Upon reconsidering an entry, the ACMA may choose to either confirm the original decision or revoke the decision (new subsection 61AZF(5)). A decision made by the ACMA in relation to a request for reconsideration is deemed to have been made under new section 61AZE.

If the ACMA considers that additional information is required before the ACMA can make a decision in relation to an application for reconsideration, the ACMA may request additional information from the applicant or another person (new subsection 61AZF(8)).

If the ACMA does not make a decision within 28 days of receiving the application, or of receiving additional information (if this was requested), the ACMA is deemed to have decided to confirm the entry, and is taken to have done so at the end of that 28-day period (new subsection 61AZF(9)).

The ACMA is also empowered to reconsider decisions at any time. Such a reconsideration can be at the ACMA's own initiative, rather than in response to a complaint (new subsection 61AZF(10)). For example, if the ACMA considered that a registered media group might no longer be commonly controlled, the ACMA might investigate the control arrangements in that media group under section 170 of the BSA. As a consequence of the conclusions drawn in that investigation, the ACMA might decide that its decision to confirm certain entries was in error and it would update the Register accordingly.

## **Corrections of clerical errors and defects**

If the ACMA identifies an obvious defect or clerical error on the Register, the ACMA may alter the Register accordingly (new section 61AZG).

## **Regulations**

New section 61AZH provides a power for regulations to be made making further provision in relation to the operation of the Register.

### **Item 9: Section 62 (penalty)**

Item 9 of Schedule 1 makes a technical amendment that is consequential to Item 10 of Schedule 1.

### **Item 10: At the end of section 62**

For the Register to operate effectively, it will be crucially important that the ACMA is notified promptly of changes in control. As the current notification provisions only extend to radio and television licensees, it is necessary to extend the notification requirements to Associated Newspapers.

Item 10 of Schedule 1 extends the operation of section 62 of the BSA. Section 62 provides that commercial television broadcasting licensees, commercial radio licensees and datacasting transmitter licensees are required to report to the ACMA on an annual basis in relation to:

- persons who were in a position to exercise control of the licence at the end of the financial year; and
- the directors of the licensee company (subsections 62(1) and (2) of the BSA).

Item 10 inserts new subsections 62(3) and (4), which provide that a newspaper publisher must report to the ACMA in relation to both directors and controllers at the end of the financial year. This provides a comparable reporting obligation for newspaper publishers to that currently imposed on licensees.

If a licensee or newspaper publisher fails to notify the ACMA in accordance section 62 as amended, the licensee or publisher will have committed an offence (new subsection 62(5)).

The maximum penalty for an offence by a newspaper publisher under section 62 as amended would be 500 penalty units for a natural person, or 2,500 penalty units for a body corporate (section 4B of the *Crimes Act 1914*).

An offence under section 62 will be an offence of strict liability (new section 65A, inserted by new Item 11 of Schedule 1 to the CLAB).

### **Item 11: Subsection 63(1)**

Item 11 of Schedule 1 amends section 63 to reduce the reporting period that applies when a change of control occurs from 7 days to 5 days. This amendment is related to Item 8, as the timely notification of changes in control is crucial to the effective operation of the Register.

**Item 12: Section 63 (penalty)**

Item 12 of Schedule 1 makes a technical amendment that is consequential to Item 13 of Schedule 1.

**Item 13: At the end of section 63**

Item 13 of Schedule 1 extends the operation of section 63 of the BSA. Section 63 provides that commercial television broadcasting licensees, commercial radio licensees and datacasting transmitter licensees are required to report changes of control to the ACMA within a specified period of becoming aware of the change (subsections 63(1) and (2) of the BSA).

Item 13 inserts new subsections 63(3) and (4), which provide that a newspaper publisher must report changes in control to the ACMA within the same specified period. This provides a comparable reporting obligation for newspaper publishers to that currently imposed on licensees.

If a licensee or newspaper publisher fails to notify the ACMA in accordance with section 63 as amended, the licensee or publisher will have committed an offence (new subsection 63(5)).

The maximum penalty for an offence by a newspaper publisher under section 62 as amended would be 500 penalty units for a natural person, or 2,500 penalty units for a body corporate (section 4B of the *Crimes Act 1914*).

An offence under section 63 will be an offence of strict liability (new section 65A, inserted by new Item 11 of Schedule 1 to the CLAB).

**Item 14: Subsection 64(1)**

Item 14 of Schedule 1 amends section 64 to reduce the reporting period that applies when a change of control occurs from seven days to five days. This amendment is related to Item 8, as the timely notification of changes in control is important to the effective operation of the Register.

**Item 15: Section 64 (penalty)**

Item 15 of Schedule 1 makes a technical amendment that is consequential to Item 16 of Schedule 1.

**Item 16: At the end of section 64**

Item 16 of Schedule 1 extends the operation of section 64 of the BSA. Section 64 provides that person who obtains control of a commercial television broadcasting licence, commercial radio licence or a datacasting transmitter licence must notify the ACMA within a specified period of becoming aware of the change (subsections 64(1) and (2) of the BSA).

Item 16 inserts new subsections 63(3) and (4), which provide that a person who obtains control of an associated newspaper must notify the ACMA within the same



specified period. This provides a comparable reporting obligation for newspaper publishers to that currently imposed on licensees.

If a person fails to notify the ACMA in accordance with this requirement, the person will have committed an offence (new subsection 63(5)).

The maximum penalty for an offence by a person who has failed to notify the ACMA regarding control of a newspaper would be 500 penalty units for a natural person, or 2,500 penalty units for a body corporate (section 4B of the *Crimes Act 1914*).

An offence under section 64 will be an offence of strict liability (new section 65A, inserted by new Item 11 of Schedule 1 to the CLAB).

### **Item 17: Section 65**

Item 17 of Schedule 1 repeals section 65 of the BSA and substitutes a new section. Section 65 currently requires each person in a position to exercise control of a commercial television or commercial radio licence to notify the ACMA annually regarding any interests the person holds in newspaper. This provision is no longer required as a consequence of the new reporting obligations in relation to Associated Newspapers (Items 9-16 of Schedule 1).

New subsections 65(1) and (2) impose an obligation on commercial television broadcasting licensees and commercial radio licensees to notify the ACMA of details regarding persons who control the licence at 1 February 2007. This new requirement is designed to facilitate the establishment of the Register by the ACMA. By providing the ACMA with up-to-date information about control arrangements, when the Register is established by the ACMA after 1 February 2007 the information will be accurate and reliable for industry.

New subsections 65(3) and (4) impose equivalent obligations on the publishers of newspapers.

New subsections 65(6) and (7) provide that a person in a position to exercise control of a commercial television broadcasting licence, a commercial radio broadcasting licence or an associated newspaper at 1 February 2007 must notify the ACMA within five days.

It is an offence to fail to comply with the notification requirements under new section 65 (new subsection 65(7)).

The maximum penalty for offences in relation to commercial television broadcasting licences and Associated Newspapers is 500 penalty units for a natural person, or 2,500 penalty units for a body corporate (section 4B of the *Crimes Act 1914*). For offences in relation to commercial radio, the maximum penalty is 50 penalty units for a natural person, or 250 penalty units for a body corporate.

An offence under section 63 will be an offence of strict liability (new section 65A, inserted by new Item 11 of Schedule 1 to the CLAB).

**Item 18: Section 204 (after table item dealing with subsection 59(4B))**

Item 18 of Schedule 1 provides rights for specified persons to seek merits review of certain decisions made by the ACMA in the Administrative Appeals Tribunal (AAT).

Additional provision for merits review in the AAT is made for the following circumstances:

- where the ACMA has refused to approve a transaction that would breach the prohibition on unacceptable media diversity situations or the prohibition on unacceptable 3-way control situations, the applicant for the approval may apply for review (new sections 61AJ and 61AMC);
- similarly, the applicant for an approval may seek review of the period determined by the ACMA if the approval is granted (new sections 61AJ and AMC);
- where the ACMA has approved a transaction, or has issued a remedial direction, and has refused an application for an extension of time to comply (new sections 61AK, 61AMD, and 61AP), the applicant for the extension may apply for review;
- where the ACMA has reconsidered a decision in relation to entries on the Register (new section 61AZF), a person with an interest in the decision may apply for review.

**Item 18A: At the end of section 205PA****Item 18B: Section 205Q****Item 18BA: Section 205Q**

Items 18A, 18B and 18BA will amend new sections 205PA and 205Q of the BSA, which are inserted into that Act by CLAB.

Those new sections enable the Federal Court to grant injunctions in relation to contraventions or proposed contraventions of the provisions in the BSA which deal with unlicensed broadcasting.

The effect of these items is that the ACMA may also seek injunctions in the Federal Court where a person has engaged, is engaging, or is proposing to engage in conduct in contravention of:

- the prohibition on transactions that result in an unacceptable media diversity situation coming into existence; or
- the prohibition on transactions that result in an unacceptable 3-way control situation coming into existence.

New section 205PA provides a simplified outline of Part 5 to assist readers. This section is amended to reflect the amendment made to new section 205Q.

New section 205Q (as inserted by CLAB) provides that if a person has engaged, is engaging or is proposing to engage, in any conduct in contravention of new subsection 121FG(3) or new sections 136A, 136B, 136C, 136D or 136E of the BSA (the new civil prohibitions on providing unlicensed broadcasting services), the ACMA will be able to apply to the Federal Court for an injunction to restrain the person from engaging in the conduct. If, in the Federal Court's opinion, it is desirable

to do so, the Court will also be able to require the person to do something (new paragraph (205Q(b))).

Items 18B and 18BA amend new section 205Q to include reference to conduct in contravention of new section 61AH and new section 61AMB, respectively.

New section 61AG provides that a person commits an offence if the person is party to one or more transactions, or was in a position to control the transactions, that occur after the commencement day, and the transactions either:

- cause an unacceptable media diversity situation to come into existence in the licence area; or
- if an unacceptable media diversity situation already exists; there is a reduction in the number of points in the licence area.

New section 61AH provides that the same conduct also constitutes a contravention of a civil penalty provision.

New section 61AMA provides that a person commits an offence if the person is party to one or more transactions, or was in a position to control the transactions, that occur after the commencement day, and the transactions cause an unacceptable 3-way control situation to come into existence in the licence area.

New section 61AMB provides that the same conduct also constitutes a contravention of a civil penalty provision.

### **Item 18C: At the end of clause 2 of Schedule 1**

Item 18C inserts a new subclause into clause 2 of Schedule 1 to the BSA, which relates to control and ownership of company interests. Clause 2 of that Schedule includes provisions that specify when a person is in a position to exercise control of a licensee or company, for the purposes of the provisions of the BSA that relate to ownership and control of commercial broadcasting licences, subscription broadcasting licences, international broadcasting licences, datacasting transmitter licences, associated newspapers and companies.

New subclause 2(5) of Schedule 1 (inserted by item 18C) provides a list of examples of situations that may be relevant (depending on the circumstances in an individual case) in determining whether a person is in a position to exercise control of two or more licences. Those examples are where:

- (a) the licensees share equipment, studios, other production facilities, transmission facilities, human resources or other resources; or
- (b) where the program content broadcast under one licence is substantially the same as the program content broadcast under the other licence or licences;
- (c) the licensees have financial relationships with each other;
- (d) the person is in a position to exercise control of one or more of the licences, and has a financial relationship with another person who is in a position to exercise control of one or more of the licences.

Item 19: Clause 43 of Schedule 4 (definition of *business day*)

**Item 20: Clause 3 of Schedule 5 (definition of *business day*)**

Items 9 and 15 of Schedule 1 make technical amendments that are consequential to Item 1 of Schedule 1.

## SCHEDULE 2—AMENDMENTS COMMENCING ON PROCLAMATION

Schedule 2 to the Bill amends the *Broadcasting Services Act 1992* (BSA) in the following ways:

- all provisions in the BSA that restrict foreign ownership of commercial television and subscription television interests are removed;
- commercial television and radio licensees and newspaper publishers with cross-media interests will be subject to disclosure obligations (new Division 5B of Part 5 to the BSA);
- the Australian Communications and Media Authority (the ACMA) will be required to impose licence conditions on commercial television licensees in regional Queensland, NSW, Victoria and Tasmania to provide minimum levels of content on matters of local significance (new section 43A of the BSA);
- the ACMA will be required to impose licence conditions on regional commercial radio licensees that require licensees to maintain existing levels of local presence if the licence is transferred to a third party, if a new commonly-controlled media group is created or if control over the licence otherwise shifts (a trigger event) (new section 43B); and
- the ACMA will be required to impose licence conditions on regional commercial radio licensees that require licensees to broadcast a minimum level of material of local significance during daytime hours on business days (new section 43C);
- regional commercial radio licensees will be subject to further local content obligations if a trigger event occurs (new Division 5C of Part 5 of the BSA)

### Foreign ownership

The effect of removing all restrictions on foreign ownership from the BSA is that foreign ownership of commercial and subscription television interests will be regulated only by the Government's Foreign Investment Policy under the *Foreign Acquisitions and Takeovers Act 1975* (FATA). That is, the situation in relation to commercial and subscription television interests will be the same as for commercial radio and newspapers.

Schedule 2 to the Bill does not affect the requirement that a commercial or subscription television broadcasting licensee must be a company formed in Australia (see sections 37 and 95 of the BSA respectively). A foreign owner would therefore need to establish an Australian subsidiary to be the licensee company.

### Cross-media disclosure obligations

Schedule 2 to the Bill imposes a general obligation to disclose a cross-media relationship on commercial television and radio licensees and newspaper publishers (new Division 5B of Part 5 to the BSA).

There are two methods of disclosure:

- the 'business affairs' model, which will apply to commercial television broadcasters and newspaper publishers, and which will be the default disclosure model for commercial radio broadcasters; and
- an alternative 'regular disclosure' model which will only be available to commercial radio broadcasters, if they choose to adopt this option.

The business affairs model requires that media outlets disclose a cross-media relationship at the time that they broadcast or publish matter, other than advertising matter, that is wholly or partly about the business affairs of a cross-controlled media organisation. This includes the promotion of specific matter broadcast or published by a cross-controlled media organisation.

Commercial radio broadcasters may adopt the regular disclosure method. This method requires a radio outlet covered by a certificate to regularly disclose a cross-media relationship in such a way and with such frequency that the prime-time audience of the commercial radio broadcaster would be reasonably likely to be aware of the cross-media relationship. The intended effect is to establish a general level of audience and reader awareness about the cross-media relationship.

Compliance with the disclosure requirement will be a licence condition for television and radio licences. As newspapers are not subject to the licensing scheme in the BSA, enforcement of the disclosure requirement for newspapers is by way of a criminal offence.

### **Local content obligations for regional aggregated television markets**

Schedule 2 to the Bill inserts a new provision requiring the ACMA to impose licence conditions that require all commercial television broadcasters in the regional aggregated commercial markets of Northern New South Wales, Southern New South Wales, Regional Victoria, Regional Queensland and Tasmania to broadcast minimum levels of material of local significance.

### **Local presence obligations for regional radio**

Schedule 2 to the Bill inserts a new provision requiring the ACMA to impose licence conditions to maintain existing levels of local presence if a trigger event occurs. These licence conditions will operate alongside the local content licence conditions imposed under new Division 5C of Part 5 to the BSA, and the obligations in relation to Local Content Plans (LCPs).

### **Material of local significance obligations for regional radio**

Schedule 2 to the Bill inserts a new provision requiring the ACMA to impose, from 1 January 2008, a licence condition on each regional commercial radio broadcasting licensee that has the effect of requiring that licensee to broadcast a “minimum level of material of local significance”, during daytime hours on business days. The ACMA must determine in the licence condition what is meant by “minimum level of material of local significance”. The provisions require the Minister to cause to be conducted, by 30 June 2007, a review into the appropriate minimum level that is to be imposed on licensees. The review will also consider whether different levels should apply to different classes of regional commercial radio broadcasting licensees (e.g. small markets).

### **Local content obligations for regional radio**

Schedule 2 to the Bill requires regional commercial radio broadcasters to provide a prescribed minimum level of local news and information services if the licence has

been transferred to a third party or a new commonly controlled media group has been created (new Division 5C of Part 5 to the BSA). The prescribed minimum level of local news and information services comprises minimum standards in relation to the broadcast of local news and weather bulletins, local community service announcements and emergency warnings.

Compliance with the minimum level of local news and information services will be a licence condition. If the licence condition is not complied with, the ACMA may take enforcement action under the BSA, such as issuing a notice under section 141 of the BSA.

Licensees will also be required to submit LCPs to the ACMA for consideration and approval. An LCP must specify how a licensee will meet the local content licence conditions.

### ***Broadcasting Services Act 1992***

#### **Item 1: Paragraph 3(1)(d)**

Item 1 of Schedule 2 repeals the object of the BSA relating to Australians having effective control of the more influential broadcasting services, as a consequence of the repeal of the foreign ownership restrictions by Items 4 and 17 of Schedule 2.

#### **Item 1A: After paragraph 3(1)(e)**

Item 1A inserts a new paragraph (ea) into subsection 3(1) of the BSA, which provides for the objects of the Act. New paragraph 3(1)(ea) provides that it is an object of the BSA to promote the availability to audiences throughout Australia of television and radio programs about matters of local significance.

#### **Item 2: Subsection 6(1) (definition of *foreign person*)**

Item 2 of Schedule 2 repeals the definition of foreign person from the interpretation provision, as a consequence of the repeal of the foreign ownership restrictions by Items 4 and 15 of Schedule 2.

#### **Item 3: After section 43**

Item 3 of Schedule 2 inserts new sections 43A, 43B and 43C into Part 4 of the BSA.

#### **New section 43A**

New section 43A requires the ACMA to impose licence conditions that require all commercial television broadcasters in regional aggregated markets to broadcast a minimum amount of material of local significance.

For the purposes of new section 43A, regional aggregated commercial television markets include those markets examined in the-then Australian Broadcasting Authority's investigation of the adequacy of local news and information programs on commercial television services in regional areas in 2002. The investigation related to defined licence areas in New South Wales, Victoria and Queensland. However, the licence condition is to now also apply to Tasmania.

New section 43A requires the ACMA to ensure that the relevant licence condition is in force at all times from 1 January 2008.

### **New section 43B**

New section 43B requires the ACMA to impose licence conditions under section 43 of the BSA on commercial radio broadcasting licensees to maintain at least the existing level of local presence where a “trigger event” occurs (new subsection 43B(1)).

A trigger event occurs where:

- the commercial radio licence is transferred to a third party;
- a new media group is brought into existence; or
- there is a change in controller of a media group, of which the commercial radio licence is a part (new section 61CB(3), inserted by Item 7 of Schedule 2).

The ACMA is to define “existing level of local presence” in the licence condition, and this must include staffing levels (including both employees and independent contractors) and production facilities (e.g. studios) (new subsections 43B(2) and (3)).

The Minister may give the ACMA a written direction about the licence conditions to be imposed under subsection 43B(1), and the ACMA must comply with such a direction (new subsections 43B(8) and (9)).

### **New section 43C**

New section 43C requires the ACMA to ensure that at all times on and after 1 January 2008 there is in force under section 43 of the BSA a licence condition that requires the licensee of a regional commercial radio broadcasting licence to broadcast a minimum level of material of local significance during daytime hours on business days.

A “regional commercial radio broadcasting licence” is a commercial radio broadcasting licence that has a regional licence area. A regional licence area is a licence area that is not a metropolitan licence area (see new subsection 43C(8)). The effect of the definitions of “regional licence area” and “metropolitan licence area” is that the requirements of new section 43C will apply to all radio broadcasting licensees other than those in the mainland state capital cities.

The minimum level of material of local significance to be broadcast by regional commercial radio broadcasting licensees is set at 4.5 hours (see new subsection 43C(3)). The Minister for Communications, Information Technology and the Arts may increase or decrease this figure by specifying a new minimum level in a disallowable instrument (new paragraph 43C(3)(b)).

The Minister may also specify that differing minimum levels of material of local significance apply to differing classes of regional commercial radio broadcasting licensees (new paragraph 43C(3)(c)). This is intended to recognise the diversity in regional commercial radio broadcasting, and to provide suitable flexibility in the requirement for regional radio broadcasters to provide a minimum level of material of local significance. The effect of this provision is to permit the Minister to specify differing minimum levels of material of local significance for differing types of



licensees, so that, for instance, one minimum level may apply to those licensees with a small licence area, and another minimum level may apply to other licensees.

New subsection 43C(4) provides that, before 30 June 2007, the Minister must cause to be conducted a review into:

- whether the Minister should declare a new figure to be the minimum level of material of local significance required to be broadcast by regional commercial radio broadcasting licensees under these provisions, and if so what that new level should be; and
- whether the Minister should specify that different minimum levels are to apply to different classes of regional commercial radio broadcasting licensees, and if so what those different classes should be, and what the respective minimum levels should be.

Within 15 sitting days of the review report being completed, the Minister will be required to table both:

- the report of the review conducted in accordance with new subsection 43(4) (new subsection 43C(4B)): and
- one or more legislative instruments under paragraph 43C(3)(b) or (c) specifying a new minimum level(s) (new subsection 43C(4C)).

These provisions are intended to ensure that the minimum level of material of local significance that is required to be broadcast by regional commercial radio broadcasters is set at the appropriate amount.

New subsection 43C(1) requires the ACMA to have licence conditions in force on and after 1 January 2008. This date has been chosen because this amendment is made to Schedule 2 of the Bill, which commences on 1 January 2008, or earlier if an earlier date is fixed by Proclamation.

New subsection 43C(2) provide that the ACMA will be required to define the term “material of local significance” for the purposes of the licence condition to be imposed on a licensee as a result of new subsection 43C(1). This is intended to permit ACMA to exercise judgment in the scope of material that may be broadcast by a regional commercial radio broadcasting licensee in order to satisfy the requirement of the licence condition, and mirrors the operation of new subsection 43A.

New subsection 43C(2) clarifies that the definition of the term “material of local significance” must be broad enough to cover material that is broadcast by a licensee in order to comply with any obligation to which the licensee is subject under new section 61CD (inserted into the BSA by the Bill). That section (as amended) requires that, where a “trigger event” occurs in relation to a regional commercial radio broadcasting licensee, the licensee to meet minimum service standards for local news, local weather, local community service announcements, emergency warnings, and designated local content programs. As a result of new subsection 43C(2), where a licensee is subject to the requirements of new section 61CD the material that the licensee broadcasts to comply with that section will count towards the minimum level of material of local significance required to be broadcast by that licensee under new section 43C.

“Daytime hours” is defined in new subsection 43C. The effect of this definition is that the broadcast of material of local significance must occur between 6.00am and 6.00pm each business day, or between such other times as are prescribed in the Regulations for the purpose of this provision.

A definition of the term “business day” is inserted into subsection 6(1) of the BSA by item 1 of Schedule 1 of the Bill. That term is defined to mean a day that is not a Saturday, Sunday or a public holiday in the place concerned. For the purpose of this amendment, a regional commercial radio broadcasting licensee will be required to broadcast a minimum level of material of local significance on each weekday, except those days that are public holidays within the licensee’s licence area.

New section 43C includes subsections to clarify the interaction of this new section with the existing provisions of section 43 of the BSA:

- New subsection 43C(5) clarifies that, to avoid doubt, new section 43C does not create any obligations under subsection 43(2) that would not exist apart from this new section. Subsection 43(2) requires the ACMA to give licensees notice of its intention to vary or revoke a condition, or to impose a new condition, to permit the licensee to make representations to the ACMA, and to publish the proposed changes in the Gazette.
- New subsection 43C(6) provides that subsection 43(5) does not apply to conditions made as a result of new section 43C. Subsection 43(5) provides that conditions made by the ACMA under subsection 43(1) must not be inconsistent with determinations made under section 19 or with conditions set out in Part 3 or 4 of Schedule 2.
- New subsection 43C(7) provides that new section 43C does not limit the powers conferred on the ACMA by section 43 to impose, revoke or vary other conditions.

#### **Item 4: Division 4 of Part 5**

Item 4 of Schedule 2 repeals Division 4 of Part 5 of the BSA (sections 57 and 58). Section 57 currently prevents foreign persons from controlling a commercial television broadcasting licence, and section 58 currently imposes limitations on foreign directorships of a commercial television broadcasting licensee.

#### **Item 5: Division 5 of Part 5 (heading)**

Item 5 of Schedule 2 makes a technical amendment consequential to Item 6 of Schedule 2 and Item 8 of Schedule 1.

#### **Item 6: Sections 60 and 61**

Item 6 of Schedule 2 repeals sections 60 and 61 of the BSA.

Section 60 currently provides that a person cannot control the following two licences/holdings within the same licence area:

- (i) a commercial television licence and commercial radio licence;
- (ii) a commercial television licence and associated newspaper; or
- (iii) a commercial radio licence and associated newspaper.

Section 61 of the BSA currently provides that a person must not be a director or in a position of control of any of the combinations of commercial television, radio and associated newspaper holdings outlined in section 60 in the same licence area.

Sections 60 and 61 are no longer required because Item 8 of Schedule 1 to the Bill inserts new Part 5A of the BSA, which inserts new provisions to protect media diversity.

### **Item 7: After Division 5A of Part 5**

Item 7 of Schedule 2 inserts new Division 5B of the BSA, which relates to the disclosure of cross-media relationships, and new Division 5C, which relates to local news and information requirements for regional commercial radio broadcasting licensees.

### **Division 5B – Disclosure of cross-media relationships**

Subdivision 5B establishes requirements for media entities covered by a cross-media exemption certificate to disclose the cross-media relationship to their audience or readership.

Subdivision 5B establishes two alternative methods of disclosure:

- the default ‘business affairs’ model (see new sections 61BB, 61BD and 61BF respectively for commercial television licensees, commercial radio licensees and newspaper publishers); and
- an alternative ‘regular disclosure’ model which a radio licensee may choose to adopt by written notice to the ACMA (see new sections 61BC and 61BE).

### **Disclosure of cross-media relationship by commercial television broadcasting licensee**

New section 61BB is the disclosure requirement for commercial television broadcasters.

New section 61BB will apply where a person is in a position to exercise control over a set of media operations, and the set includes a commercial television licence (see new paragraphs 61BB(1)(a) and (b)). A set of media operations is any of the following:

- a commercial television broadcasting licence and a commercial radio broadcasting licence that have the same licence area;
- a commercial television broadcasting licence and a newspaper that is associated with the licence area of the licence;
- a commercial radio broadcasting licence and a newspaper that is associated with the licence area of the licence (new section 61BA).

The trigger for a disclosure under section 61BB is the broadcast by the licensee of matter that is wholly or partly about the business affairs of another media entity in that set of media operations (see new paragraph 61BB(1)(c)). “Business affairs” is defined in section 61BH.

The business affairs disclosure requirement is that every time any material about the business affairs of a cross-controlled media entity is broadcast, the licensee must also

broadcast a statement describing (in summary form or otherwise) the relationship between the licensee and the other media entity (new subsections 61BB(2), (3), (4) and (5)). The description of the relationship may be a simple statement to the effect that there is a cross-media relationship between the commercial television licensee and the other media entity.

A disclosure statement under subsection 61BB(2) or (4) must be broadcast in a way that will adequately bring it to the attention of a reasonable viewer of the trigger broadcast referred to in subsection (1) (see new subsection 61BB(6)).

New subsection 61BB(5) will allow regulations to specify alternative requirements which will satisfy new subsection 61BB(6).

Compliance with the disclosure requirement will be a condition of each licence (see Item 23 below, which amends subclause 7(1) of Schedule 2 to the BSA).

Failure to comply with this licence condition is a criminal offence (section 139). The ACMA will also be able to issue notice under section 141 requiring compliance with the disclosure requirement in the future. Failure to comply with a section 141 notice is a criminal offence (see section 142).

The licence suspension and cancellation provisions in Division 3 of Part 10 will also be available, as will the complaint provisions in Division 1 of Part 11.

### **Choice of disclosure method – commercial radio broadcasting licensee**

A commercial radio licensee may notify the ACMA in writing that they will adopt the ‘regular disclosure’ method from a Sunday specified in the notice (see new subsections 61BC(1) and (3)). A notice must be given to the ACMA at least 5 business days before the nominated Sunday (new subsection 61BC(2)). A business day is a weekday which is not a public holiday.

A notice continues in force until it is revoked (new subsection 61BC(3)). A licensee may give the ACMA a written notice of revocation, with effect from the end of the Saturday nominated in the notice (new subsection 61BC(4)). A revocation notice must be given to the ACMA at least 5 business days before the nominated Saturday (new subsection 61BC(5)).

If a notice is not in force under section 61BB, the ‘business affairs’ provisions will apply (see new paragraph 61BD(1)(d)). These notice provisions are necessary to ensure that compliance with the disclosure requirements can be adequately monitored by the ACMA and enforced. The ACMA must make notices which are in force available for inspection on the Internet (new subsection 61BC(6)).

New section 61BD is the (default) business affairs disclosure method for commercial radio broadcasters, and corresponds to section 61BB above for commercial television broadcasters.

New section 61BD will apply to any commercial radio licensee in a registered media group. As the default method, section 61BD will apply unless the licensee has chosen (via a notice under new subsection 61BC(1)) the regular disclosure method in new section 61BE (see new paragraphs 61BD(1)(a), (b) and (d)).

As for section 61BB, the trigger for a disclosure under section 61BD is the broadcast by the licensee of matter that is wholly or partly about the business affairs of another media entity in the group covered by the certificate (see new paragraph 61BD(1)(c)).

Compliance with the disclosure requirement will be a condition of each licence (see Item 24 of Schedule 2). The enforcement and complaint provisions outlined above in relation to section 61BB will therefore apply.

New section 61BE is the (optional) regular disclosure method for commercial radio broadcasters. New section 61BE will only apply if the licensee has chosen this method via a notice under new subsection 61BC(1) (see new subsection 61BE(1)). The alternative regular disclosure model is provided as an option only in the case of radio as commentary on radio is generally unscripted and the radio broadcasting companies typically vary greatly in size and resources.

As there is no trigger broadcast in the regular disclosure method, the obligation here is to *regularly* broadcast a statement describing (in summary form or otherwise) the relationship between the licensee and the other media entity (new subsections 61BE(2), (3), (4) and (5)). The description of the relationship may be a simple statement to the effect that there is a cross-media relationship between the commercial radio licensee and the other media entity.

The substance of the required statement is thus the same as for the standard disclosure provisions in new sections 61BB, 61BD and 61BF.

A disclosure statement under new subsection 61BE(2) or (4) must be broadcast in a way, and with a frequency, that is reasonably likely to ensure that the prime-time audience of the service is aware of the cross-media relationship (see new subsection 61BE(6)).

New subsection 61BE(7) provides that new subsection 61BE(6) is satisfied if a licensee broadcasts the statement:

- (a) at least once each day during prime-time; and
- (b) in a way that will adequately bring it to the attention of a reasonable person who listens to the statement.

New subsection 61BE(8) will allow regulations to specify alternative manner and timing requirements which will satisfy new subsection 61BE(6). The reference to timing here is intended to give sufficient flexibility so that regulations may specify, for example, how often a statement must be broadcast, and/or the period of the day during which the statement must be broadcast.

Compliance with the disclosure requirement will be a condition of each licence (see Item 24 of Schedule 2). The enforcement and complaint provisions outlined above in relation to section 61BB will therefore apply.

### **Disclosure of cross-media relationship by publisher of newspaper**

New section 61BF is the disclosure requirement for newspaper publishers.

The trigger for a disclosure under new section 61BF is the publication in a particular edition of the newspaper of material that is wholly or partly about the business affairs of another media entity in the media set (see new paragraph 61BF(1)(c))

The disclosure requirement is that every time any material about the business affairs of a cross-controlled media entity is published in the newspaper, a disclosure statement must be published in the same edition of the newspaper (new subsections 61BF(2), (3), (4) and (5)). An edition may be made available in hard-copy print or on the Internet (or both).

The content of the required statement is essentially the same as the statement required of broadcasters under new sections 61BB, 61BD and 61BE. In other words, it would be sufficient for the newspaper to publish a statement describing (in summary form or otherwise) the relationship between the newspaper's publisher and the other media entity. The description of the relationship may be a simple statement to the effect that there is a cross-media relationship between the newspaper's publisher and the other media entity.

A disclosure statement under new subsection 61BF(2) or (4) must be published in a way that will adequately bring it to the attention of a reasonable reader of the trigger material referred to in subsection (1) (see new subsection 61BF(6)).

As for other provisions, new subsection 61BF(7) will allow regulations to specify alternative requirements which will satisfy new subsection 61BF(6).

As newspapers are not subject to the licensing regime in the BSA, enforcement of the disclosure requirement is by way of a criminal offence, rather than through a licence condition as for broadcasters (new subsection 61BF(8)).

The maximum penalty for a newspaper publisher is the same as that applicable to a commercial television licensee for the offence of breach of a licence condition, i.e. 2,000 penalty units (see existing subsection 139(1) of the BSA). This reflects the significant influence that newspapers exert on public opinion.

### **Exception – political communication**

New section 61BG is designed to allow the disclosure requirements in new Division 5B to be read down in the event that any of the provisions were found by the High Court to infringe the constitutional doctrine of implied freedom of political communication.

### **Matter or material about the business affairs of a broadcasting licensee or newspaper publisher**

The disclosure provisions for television and newspapers (new sections 61BB and 61BF), and the default disclosure provisions for radio (new section 61BD), are triggered when there is a broadcast or publication of material by a licensee or publisher that is wholly or partly about the business affairs of another media entity included in the set of media operations covered by the same exemption certificate as the licensee or publisher.

Section 61BH elaborates the concept of material which is wholly or partly about the business affairs of a media entity. It does not limit the ordinary meaning of the concept, but provides clarification in areas of uncertainty.

New paragraph 61BH(1)(a) provides that material about business affairs includes material that, considering the nature of the material and the way in which it is presented, could reasonably be considered to be at least partly broadcast or published with the aim of:

- promoting any material which is (or will be in the future) broadcast by the licensee or published in the newspaper; or
- otherwise influencing the public to view, listen to or read any material which is (or will be in the future) broadcast by the licensee or published in the newspaper.

New paragraph 61BH(1)(b) excludes the following categories of material:

- (i) a journalistic acknowledgment of a program or article as the source of particular information (e.g. an acknowledgment in a newspaper of a quotation from an interview broadcast on radio or television);
- (ii) advertising material, provided that it is clearly identifiable as such (see also subsection 61BH(7), which ensures that this provision does not affect the meaning of ‘advertising’ elsewhere in the BSA);
- (iii) a program guide (as defined in new subsection 61BH(2)); and
- (iv) material covered by a determination made by the Minister, by way of legislative instrument (see new subsections 61BH(4), (5) and (6)).

A “program guide” is defined as a schedule of programs provided by television or radio broadcasters. The schedule may be accompanied by brief factual information or comment about particular programs, but no particular service (i.e. no particular television or radio station or network) may be singled out for special promotion (new subsections 61BH(2) and (3)).

The Minister may make a written determination, by way of legislative instrument, that specifies types of material which are excluded from the concept of material about business affairs (subsections 61BH(4), (5) and (6)). This is intended to cover situations where the breadth of the business affairs definition means that the disclosure requirement is triggered in a manner inconsistent with the objects of the Bill.

### **Division 5C – Local news and information requirements for regional commercial radio broadcasting licensees**

New Division 5C (new sections 61CA-61CR) provides for minimum local news and information requirements to be imposed on non-metropolitan commercial radio broadcasting licensees where a “trigger event” occurs. A trigger event occurs where:

- the commercial radio licence is transferred to a third party;
- a new media group is brought into existence;
- there is a change in controller of a media group, of which the commercial radio licence is a part (new section 61CB).

New section 61CD provides that, if a trigger event occurs, a commercial radio broadcasting licensee must meet:

- minimum service standards for local news,

- minimum service standards for local weather;
- minimum service standards for local community service announcements;
- minimum service standards for emergency warnings; and
- minimum service standards for designated local content programs (if a determination has been made by the Minister).

If a trigger event occurs, the requirements are enforceable as a licence condition (see Item 25 of Schedule 2).

### **Local news**

New subsection 61CE(1) provides that the “minimum service standards for local news” are met during a particular week if during that week the licensee broadcasts the required number of eligible local news bulletins. For a local news bulletin to be eligible, it must meet the following requirements:

- bulletins must be broadcast on at least five days of the week;
- bulletins must have a duration of at least 12.5 minutes per day;
- bulletins must be broadcast during prime-time hours (between 6am and 10am, unless different times are prescribed by regulation); and
- bulletins must adequately reflect matters of local significance.

In addition, none of the bulletins must consist wholly of material that has previously been broadcast.

These measures are intended to ensure that the minimum service standards for local news result in provision of news services that are comprehensive, up-to-date and relevant.

The number of required bulletins is either the local news target, or if the broadcaster provides a greater number of bulletins than the local news target on average, the greater number. The local news target is five bulletins, unless the Minister determines a higher number by legislative instrument (new subsection 61CE(2)).

A news bulletin means a regularly scheduled news bulletin (see new section 61CA). It is intended that a “local news bulletin” may be a bulletin that incorporates news other than local news.

### **Local weather**

New subsections 61CE(2A) and (2B) provide for “minimum service standards for local weather”. A commercial radio broadcasting licensee meets those minimum standards if the number of eligible local weather bulletins it broadcasts is at least the local weather target number (new subsection 61CE(2A)). The local weather target number is five bulletins, unless the Minister determines a higher number by legislative instrument (new subsection 61CE(2B)). Eligible local weather bulletins are bulletins that are broadcast on at least five days of the week and are broadcast during prime-time hours (see new section 61CA).

A “weather bulletin” means a regularly scheduled weather bulletin, and in addition, provides that a weather bulletin may either be transmitted as a stand-alone bulletin or in conjunction with a news bulletin (see new section 61CA). This provision is



intended to acknowledge the common practice of providing weather information together with the news.

### **What is “local”?**

In new Division 5C (other than sections 61CR and CS), “local” has a meaning affected by new section 61CC (which provides for the ACMA to define the term “local” by legislative instrument).

- New section 61CR provides that the Minister may give the ACMA a written direction requiring the ACMA to conduct an investigation under section 170 into whether the ACMA should exercise its powers under section 43 to impose licence conditions on regional commercial radio broadcasting licences requiring the relevant licensees to broadcast matters of local significance, and if so, the content of those conditions.
- New section 61CS provides that the Minister may give the ACMA a written direction requiring the ACMA to exercise its powers under section 43 to impose licence conditions on regional commercial radio broadcasting licences requiring the relevant licensees to broadcast matters of local significance.

As these sections relate to directions that the Minister would issue to the ACMA, the use of the term “local” in this section is not to be affected by an instrument made by the ACMA under new subsection 61CC. .

### **Local community service announcements**

New subsection 61CE(3) provides that the “minimum service standards for local community service announcements” are met during a particular week if, during that week, the licensee broadcasts at least the community service target number.

The community service target number is one, unless a greater number is determined by the Minister by legislative instrument (new subsection 61CE(4)).

### **Emergency warnings**

New subsection 61CE(5) provides that the “minimum service standards for emergency warnings” are met during a particular week if, during that week:

- (a) on one or more occasions the licensee was asked by an emergency service agency to broadcast emergency warnings, and the licensee broadcast those warnings as and when asked to do so by those emergency agencies; or
- (b) there was no time during the week when an emergency service agency asked the licensee to broadcast an emergency warning.

### **Designated local content programs**

New subsection 61CE(6) provides that the Minister may, by legislative instrument, declare that minimum service standards for designated local content programs must be met. The legislative instrument would set out the requirements in relation to designated local content programs, including the types of programs that must be broadcast and targets to be met.

### **Local content plans**

New Subdivision C specifies obligations on regional commercial radio licensees in relation to Local Content Plans (LCPs). To strengthen the licence conditions in relation to local news and other types of content, where a trigger event occurs the new licensee for the regional radio licence will need to register with the ACMA an LCP that will address how the licensee intends to meet their local content requirements and what resources they will use in each licence area in order to do so.

Licensees will be required to submit LCPs to the ACMA for consideration, approval and registration. In order to ensure that such documents have substance, the ACMA will be given the power to decline to register an LCP and impose its own, if it is dissatisfied with the LCP presented by the licensee. The ACMA will also be empowered to impose an LCP if there was no registered LCP in force.

New subsection 61CF(1) provides that a licensee must submit an LCP, and a statement setting out additional information required by the ACMA, within 90 days after a trigger event. It is intended that the additional information required by ACMA may include details regarding the current resources the licensee employs in the licence area and their current level of local presence.

If a licensee fails to comply with these requirements, the ACMA may determine an LCP for that licensee by legislative instrument (new subsection 61CF(2)). If a trigger event occurs after the submission of a draft LCP, the licensee would be required to submit a new draft LCP. Again, if the licensee failed to comply with the requirement, the ACMA could impose a plan on the licensee.

A draft LCP must specify how a licensee will comply with the local content licence conditions in new section 61CE (new section 61CG).

Upon receipt of a draft LCP, the ACMA must either approve the plan or refuse to approve the plan (new subsection 61CH(1)). In making this decision, the ACMA must consider all relevant matters, including whether the plan is adequate, whether it is sufficiently detailed (i.e. to facilitate compliance) and relevant matter contained in the additional statement accompanying the draft LCP (new subsection 61CH(2)). The ACMA must give the licensee written notice of its decision (new subsections 61CH(4) and (6)).

If the ACMA refuses to approve the draft LCP, the ACMA may determine a plan for the licensee by legislative instrument (new subsection 61CH(5)).

New subsection 61CH(7) deals with the situation where a further trigger event occurs in relation to a licensee after the licensee has submitted a draft LCP but before the ACMA has had a chance to approve or refuse to approve it. New subsection 61CH(7) provides that where a licensee has given the ACMA a draft LCP after a trigger event occurs, and another trigger event occurs before the ACMA has made a decision under new subsection 61CH(1), the ACMA is taken to have refused to approve the plan. In this case the licensee would need to submit a new draft LCP (taking account of the new trigger event).

New subsections 61CH(5) and (6) will not apply in the case of a refusal under new subsection 61CH(7).

The ACMA must maintain a register of approved LCPs (new subsection 61CJ(1)). The register must be publicly accessible on the Internet (new subsection 61CJ(2) and (3)).

If the Minister was to make a legislative instrument increasing the minimum standards for local content required under new section 61CE after an LCP was approved, the licensee would be required to submit a draft variation to the LCP and an additional statement setting out information required by the ACMA within 90 days (new subsections 61CK(1) and (2)). The ACMA may vary the LCP by legislative instrument if the licensee fails to comply with this requirement (new subsection 61CK(3)).

The licensee may also voluntarily submit a variation to the LCP to the ACMA for consideration and approval (new subsection 61CL). The ACMA must either approve or refuse to approve the variation, and in making that decision the ACMA must consider the same factors as those considered in assessing an initial draft plan (new subsections 61CM(1) and (2)). If the variation is approved, the LCP is varied accordingly (new subsection 61CM(3)). If the ACMA refuses to approve the variation, the ACMA may vary the plan by legislative instrument (new subsection 61CM(6)). Where a licensee submits a draft variation of an approved LCP, and another trigger event occurs before the ACMA has made a decision under new subsection 61CM(1) to approve or refuse to approve the draft variation, the ACMA is taken to have refused to approve the draft variation (new subsection 61CM(7)). In this case the licensee would need to submit a new draft LCP (see new section 61CF).

New section 61CP provides that a licensee is required to take all reasonable steps to comply with the approved LCP. Compliance with an approved LCP is a licence condition (see Item 25 of Schedule 2).

### **Reporting on compliance with LCPs**

New section 61CPA provides that where an approved LCP is in force for a regional commercial radio broadcasting licence during a financial year, the licensee of that licence must give the ACMA a report about the licensee's compliance with the approved LCP during that financial year. The ACMA can set out a form which licensees must use for the provision of annual compliance reports for LCPs, and the ACMA may specify the information that the ACMA requires to be included in such reports (new subsection 61CPA(3)). The licensee must provide this report to the ACMA within three months of the end of the financial year (new subsection 61CPA(2)).

### **Review**

The ACMA may review the content of LCPs at any time, and the ACMA is required to review each LCP at least once every three years (new subsection 61CN(1)). After conducting such a review, the ACMA may vary an LCP by legislative instrument to reflect the conclusions drawn in the review (new subsection 61CN(2)).

### **Directions by the Minister**

The Minister may give the ACMA a written direction about the exercise of the ACMA's powers in relation to LCPs (new subsection 61CQ(1)).

The Minister may also direct the ACMA to conduct an investigation into whether additional licence conditions should be imposed on regional radio broadcasting licensees in relation to local content (new subsection 61CR(1)). A direction to conduct an investigation about local content licence conditions does not limit the ACMA's powers to conduct investigations under section 170 of the BSA of its own volition, or to impose licence conditions it considers appropriate under section 43 of the BSA (new subsection 61CR(3)). It is intended that such an investigation might inform the Minister's decision whether to impose additional local content obligations under new subsection 61CE(6).

The ACMA is required to comply with directions given by the Minister under new Division 5C (new subsections 61CQ(2) and 61CR(2)).

New section 61CR does not affect the operation of new section 61CS (new subsection 61CR(4)).

New section 61CS provides that the Minister may give the ACMA a written direction requiring the ACMA to exercise its powers under section 43 to impose licence conditions on regional commercial radio broadcasting licences requiring the relevant licensees to broadcast matters of local significance. New subsections 61CS(2)-(4) provide that the Minister may give the ACMA specific directions in this respect.

### **Regular reviews of local content requirements**

New section 61CT provides that the Minister must cause to be conducted regular reviews of the local content requirements as specified in paragraphs 61CT(1)(a)-(f). The ACMA must make available information about regional commercial radio broadcasting licensees' compliance with licence conditions, as specified in paragraphs 61CT(2)(a)-(d). In addition, the Minister may direct the ACMA to make available additional specified information for them purposes of conducting the reviews (new subsection 61CT(3)). The reviews must be conducted at least every three years (new subsection 61CT(1)). The Minister must cause to be prepared a report of a review prepared in accordance with this new provision (new subsection 61CT(5)), and that report is required to be laid before each House of Parliament (new subsection 61CT(6)).

**Item 8: Paragraph 62(1)(b)**

**Item 9: Paragraph 62(1)(c)**

Items 8 and 9 of Schedule 2 remove the requirement for commercial television broadcasting licensees to notify the ACMA of the name of each foreign director. These amendments are a consequence of the repeal of Division 4 of Part 5 by Item 4 of Schedule 4.

**Item 10: Paragraphs 66(1)(a) and (b)**

- Item 11: Paragraph 66(1)(d)**
- Item 12: Subsections 66(1A) and (2)**
- Item 13: Subsection 67(1)**
- Item 14: Paragraph 67(4)(a)**
- Item 15: Subsection 70(1)**

Items 10-15 of Schedule 2 delete references to the provisions of Divisions 4 and 5 of Part 5 from sections 66, 67 and 70, as a consequence of the repeal of Division 4 by Item 4 of Schedule 2 and the repeal of sections 60 and 61 by Item 6 of Schedule 2.

**Item 16: Section 96A**

Item 16 of Schedule 2 repeals section 96A of the BSA.

Section 96A requires the ACMA, in consultation with the Australian Competition and Consumer Commission (ACCC), to monitor cross-media ownership of subscription television broadcasting licences and report to the Minister. The repeal of section 96A is thus consequential to the repeal of the spent cross-media rules for subscription television by Item 17 of Schedule 2.

**Item 17: Divisions 3, 4 and 5 of Part 7**

Item 17 of Schedule 2 repeals all remaining restrictions on foreign ownership and control of subscription television broadcasting licences in Divisions 3, 4 and 5 of Part 7 of the BSA (sections 104-110, 111 and 112 respectively):

Section 109 is the only provision of Division 3 that is currently in force. All other provisions of Division 3 ceased to have effect on 1 July 1997 (see section 104). Accordingly, Division 3 is repealed in its entirety.

Division 4, which provides offences for breaches of Division 3, becomes redundant as a consequence of the repeal of Division 3, and is therefore repealed in its entirety.

Subsections 112(6) and (7) are the only provisions of Division 5 that are currently in force (see subsection 112(8)). Subsections 112(6) and (7) also become redundant as a consequence of the repeal of Division 3. Division 5 is therefore repealed in its entirety.

- Item 18: Section 204 (table item dealing with subsection 58(2))**
- Item 19: Section 204 (table item dealing with subsection 105(2))**
- Item 20: Section 204 (table item dealing with subsection 105(3))**

Items 17, 18 and 19 repeal table rows from section 204 (the Administrative Appeals Tribunal review provision), as a consequence of the repeal of the foreign ownership provisions by Items 4 and 17 of Schedule 2.

**Item 21: Subparagraph 7(1)(c)(iv) of Schedule 2****Item 22: Subparagraph 7(1)(c)(v) of Schedule 2**

Items 21 and 22 of Schedule 2 repeal the commercial television broadcasting licence condition preventing any election to the board of directors that would result in more than 20 per cent of the directors being foreign persons. These amendments are consequential to Items 4 and 17 of Schedule 2.

**Item 23: At the end of subclause 7(1) of Schedule 2**

Item 23 of Schedule 2 adds a new standard condition to subclause 7(1) of Schedule 2, applying to all commercial television broadcasting licences. The new licence conditions are that the licensee will comply with the disclosure requirement in section 61BB (see new paragraph 7(1)(pa)).

This new licence condition is added to subclause 7(1), rather than subclause 7(2), because compliance will be a simple matter for the licensee. Accordingly, breach of this condition will be an offence under subsection 139(1), without the need for the ACMA to issue a notice under section 141.

The licence suspension and cancellation provisions in Division 3 of Part 10 will also be available, as will the complaint provisions in Division 1 of Part 11.

**Item 24: At the end of subclause 8(1) of Schedule 2**

Item 24 of Schedule 2 adds a new standard condition to subclause 8(1) of Schedule 2, applying to all commercial radio broadcasting licences. The new licence condition is that the licensee will comply with the disclosure requirement in section 61BD or 61BE.

These new licence conditions are added to subclause 8(1), rather than subclause 8(2), because compliance will be a simple matter for the licensee. Accordingly, breach of one of these conditions will be an offence under subsection 139(1), without the need for the ACMA to issue a notice under section 141.

The licence suspension and cancellation provisions in Division 3 of Part 10 will also be available, as will the complaint provisions in Division 1 of Part 11.

**Item 25: At the end of subclause 8(2) of Schedule 2**

Item 25 of Schedule 2 adds a new standard condition to subclause 8(2) of Schedule 2, applying to all commercial radio broadcasting licences. The new licence condition is that the licensee will comply with local news and information requirements under new Division 5C. These local content obligations apply only where a trigger event occurs, which means that the regional radio licence must have been transferred or a new media group must have been formed. Item 25 is thus related to Item 7 of Schedule 2.

These new licence conditions are added to subclause 8(2), rather than subclause 8(1), to ensure that the ACMA would be required to issue a notice under section 141 requiring the licensee to comply with the requirement in the future, and that notice

would need to have been breached, before an offence would be committed by the licensee (section 142 of the BSA).

The licence suspension and cancellation provisions in Division 3 of Part 10 will also be available, as will the complaint provisions in Division 1 of Part 11.

**Item 26: Paragraph 10(1)(c) of Schedule 2**

Item 26 of Schedule 2 repeals paragraph 10(1)(c) of Schedule 2.

Paragraph 10(1)(c) of Schedule 2 to the BSA requires the articles of association (now called the company constitution) of a subscription television broadcasting licensee to contain certain provisions. These provisions were designed to assist enforcement of the foreign ownership rules.

Item 26 of Schedule 2 is consequential to the repeal of the foreign ownership restrictions for subscription television by Item 17 of Schedule 2.

**SCHEDULE 3—AMENDMENTS COMMENCING ON 1 JANUARY 2009***Broadcasting Services Act 1992***Item 1: Section 61AA****Item 2: Section 61AA**

Items 1 and 2 of Schedule 3 amend section 61AA of the BSA as a consequence of Item 3 of Schedule 3.

**Item 3: Subsection 61AC(1) (paragraph (c) of item 4 of the table)**

Item 3 of Schedule 3 makes a minor technical amendment to item 4 of the table in subsection 61AC(1) as a consequence of amendments made in Schedule 3 to the proposed Broadcasting Legislation Amendment (Digital Television) Bill 2006 (the Digital TV Bill). Schedule 3 to the Digital TV Bill provides that from 1 January 2009 commercial television broadcasting licensees may provide an additional stream of programming (a “multi-channel”) in standard definition digital format (SDTV).