

Submission to the Senate Environment and Communications Legislation Committee inquiry into the provisions of the Broadcasting Legislation Amendment (Media Reform Bill) 2016

Executive Summary

The *Broadcasting Legislation Amendment (Media Reform Bill) 2016* (the Bill) is incorrectly titled, because what is offered is not media reform.

The Australian media, especially the print media, habitually abuses the journalism exemption from the *Privacy Act*. No reform Bill should be progressed that does not address this issue.

A change to the 75 per cent reach rule is being proposed without the 'thorough, consultative process' that the Prime Minister and Deputy Prime Minister argued in 2013 was required prior to its review. Notwithstanding this concern abolition of the rule should be proceeded with subject to the qualification above.

The change to the '2-out-of-3' rule cannot be supported by merely suggesting that the ACCC should incorporate media diversity in its merger guidelines. There is no legislative basis for the ACCC to deny a merger unless it substantially lessens competition in a market; diversity of opinion is not a case of competition in a market. The proposal should be rejected until a legislative power to consider diversity in media mergers is provided to the ACCC.

Finally the local programming rules are ineffective as are all rules that mandate compliance. The only alternative is to continue to do what Government has historically done; invest in the regional capabilities of the ABC. This requires not only reversing the funding cuts imposed on the ABC, but increasing its funding for regional and digital services.

Background

This submission is made to the Senate Environment and Communications Legislation Committee (the Committee) inquiry into the provisions of the *Broadcasting Legislation Amendment (Media Reform Bill) 2016* (the Bill). The submission is made by DigEcon research which is not representing the interests of any third party in doing so.

Submissions have been called for by the Committee with a closing date of 21 March 2016. This late submission is being made because since the closure date Prime Minister Malcolm Turnbull has described the proposed media reform as one of the points of distinction between his Government and that of his predecessor Mr Abbott. Mr Turnbull said:

*Media ownership reform, kicked into the long grass, never to be seen again, apparently; taken out. It is now the Government's policy and we'll be proceeding to bring our media ownership laws into the 21st Century.*¹

This was said on the same day that the Prime Minister unleashed the second part of his strategy for re-election; recalling Parliament with the intention of dissolving both houses on 11 May. The Committee is not due to report on the Bill till 12 May – a day after the dissolution.

If the Prime Minister were genuine in believing this was an important and significant reform he might be expected to want to see it make its way to debate.

He perhaps remembers what happened to the last Prime Minister who introduced media reform in March 2013. Bob Carr asserts in his diary that this one act was the point at which he changed his support from Ms Gillard to Mr Rudd.²

While that attempt at reform is remembered for the failure to gain sufficient cross-bench support for changes to ownership laws and journalistic standards, other matters were progressed successfully and others referred for further inquiry.³

Outside of the package of reforms introduced the Government also referred the question of privacy in the digital age to the Australian Law Reform Commission. The inquiry report was published in September 2014 and recommended that any statutory cause of action for serious invasion of privacy should be enacted by the Commonwealth, in a Commonwealth Act (the Act).⁴

This submission contends that the Bill is insufficient to be titled "reform" and does nothing more than support the craven interests of owners of existing media organisations who want to be able to further concentrate Australia's media industry.

The three main provisions of the Bill are discussed in separate sections; 75 per cent reach rule, '2-out-of-3' rule, and local programming. Following these is an additional section outlining the additional provisions that should be incorporated in genuine media reform.

75 per cent reach rule

The rule that limits a single owner to television licences covering no more than 75% of the population is, of course, a consequence of a Labor Government reform, because only Labor governments have instituted meaningful reform in the last fifty years of Australian politics.

It as a part of the reforms championed by then Treasurer Paul Keating which he famously described that proprietors had to choose between being 'princes of print, queens of the screen or rajahs of radio.'⁵

For television this replaced the previous limitation of an owner to two licences, irrespective of the size of market. Keating wanted no limit, but cabinet colleagues settled on 75%.⁶

The abolition of the 75 per cent reach rule was an element of the Labor package in March 2013. It was referred to a Joint Select Committee which reported on 4 June 2013.⁷ The committee recommended that:

The Australian Government introduce legislation to abolish the 75 per cent audience reach rule, provided there is legislation or legally enforceable undertakings to safeguard local content in regional Australia. Prior to the introduction of the legislation, a clear definition of local content needs to be established which ensures regional viewers have access to appropriate levels of high quality, locally devised, and locally presented programming.

Coalition members provided additional comments:

While the first recommendation of the Committee does refer to local content and the definition of clear local content standards being a prerequisite to any removal of the reach rule, the Coalition members wish to emphasise that unless and until there is a clear and precise definition of local content obligations, set out in legislation, then any relaxation of the reach rule should not be entertained. Determining that definition will not be easy - everyone will have a different view of what it should entail. But there should be a thorough, consultative process which reviews the

existing content rules and the geographic areas to which they apply. Following that process, new legislative standards on local content would be enacted.

That having been done, then and only then should the relaxation of the reach rule be considered by the Parliament.

The Bill before the Parliament includes a provision for local content as noted. It has **not** been preceded by the “thorough, consultative process which reviews the existing content rules and the geographic areas to which they apply” that the Coalition members recommended.

Two of the Coalition members of the Select Committee were the current Prime Minister and Deputy Prime Minister.

In the second reading speech to introduce the Bill Paul Fletcher, Minister for Major Projects, Territories and Local Government, said:

The government has carefully listened to stakeholders and parliamentary colleagues who have expressed their concern that television sector consolidation could lead to reductions in local programming. This bill therefore includes a package of measures which will ensure the availability of local content in most regional areas and strengthen links between local content and the communities to which it is broadcast.⁸

Nothing in the legislation, second reading speech or Minister’s media release makes any reference to the consultative process the Prime Minister and Deputy Prime Minister thought so important. Instead we are just told the “government has carefully listened.”

The Department of Communications in March 2015 published a report *Review of Local Content and Local Presence requirements on regional commercial radio broadcasters*. This was a report required by the statute. There was no matching or equivalent report for television.

There is no doubt that the abolition of the 75% reach rule is long overdue. It was probably premature in 1987. However, under the last Labor government television equalisation across Australia was finally achieved.

It is now not only possible to abolish the reach rule without disadvantaging any communities, it is a reform that should be embraced in the interests of spectrum reform. Operating as three single national broadcasters the networks spectrum requirements can be further reduced making a further reallocation of sub 1GHz spectrum available for mobile operators.

The issue of “local content rules” remains a fig-leaf by which Parliamentarians who claim to represent regional communities try to appear to be genuinely concerned. Mandating content quotas can never provide **quality** content. More will be said under the content rules.

‘2-out-of-3’ rule

The ‘2-out-of-3’ rule was a Howard era amendment to the original Keating ‘1-out-of-3’ rule.

A lot of this debate hinges on the idea that there is some mechanism by which “new technology” makes “a thousand flowers bloom” in the field of content.

This may be the case if YouTube content is equated to studio produced linear television. It may be the case if you count walled-garden sports content to subscribers of specific data networks.

But it is not the case in news and current affairs. Thousands of people thumping out 140 character messages during QandA doesn't constitute an alternative news source.

The most recent data that the author can find is the March 2014 Nielsen Online Ratings. These are presented below⁹ and demonstrate the low penetration of new titles "MailOnline" and "The Guardian." The MailOnline is regularly accused of simply repeating the content from other outlets.¹⁰

TOP NEWS WEBSITES BY UNIQUE AUSTRALIAN AUDIENCE – MARCH 2014

Name	Unique Audience (000)	Page Views Per Person	Sessions Per Person	Time Per Person (hh:mm:ss)
news.com.au	3,717	63	13.86	01:43:39
smh.com.au	3,609	39	11.27	01:12:05
ninemsn News Websites	3,602	28	11.78	00:47:14
Yahoo!7 News Websites	3,113	16	7.23	00:27:21
ABC News Websites	2,667	30	10.47	00:43:48
MailOnline	2,077	16	5.57	00:41:55
The Age	2,020	44	12.09	01:23:35
Herald Sun	1,860	31	9.86	00:59:30
The Guardian	1,696	15	5.28	00:27:02
BBC	1,681	32	7.85	01:00:15

Source: Nielsen Online Ratings, Hybrid data, March 2014

No matter how much policy makers might wish it was so that new media sources were making significant entry into the news and current affairs markets, but it is simply not so.

In the media release accompanying the introduction of the bill, the Minister Senator Fifield said, "The Australian Competition and Consumer Commission will retain its powers to scrutinise mergers and acquisitions and will be asked to update its media merger guidance accordingly."¹¹

This repeats an error of interpretation of the ACCC's powers under section 50 of the *Competition and Consumer Act*. The ACCC's merger guidelines have absolutely no status under the law, the only thing that matters is the statutory interpretation of the Act. The Act only deals with the substantial lessening of competition in a market, and there is no "market" for news content and "diversity" is not "competition."

So no matter how much the Chair of the ACCC Rod Sims might participate in the charade in his public statements¹², the facts remain as they are in the existing guidelines:

A key purpose of the Act is to protect competition in markets in Australia, including media markets. Media diversity is primarily protected by the restrictions on cross-media mergers in the Broadcasting Services Act¹³.

The only way the ACCC can consider diversity is if the *Broadcasting Services Act* empowers it to.

The intent of the Labor diversity legislation in 2013 was to do just that. The legislation would still make an excellent substitute for the '2-out-of-3' rule with the provision that the diversity test be applied by the ACCC as part of its merger assessment and that the merger can only proceed if the ACCC does not rule that the merger will lessen diversity.

Local programming

Specifying quantities of local programming cannot guarantee quality. Unless there is a commercial imperative, in common with every other obligation on corporations imposed by regulation compliance will be realised by adopting the least cost route.

If a Liberal Government that believes in the disciplinary principles of a competitive market doesn't expect the industry structure to provide competition to deliver local services it needs to invest in those local services itself.

For many years local programming has been the *forte* of the ABC. The innovative ABC Local program took that to another level, encouraging community generated content for publication on ABC platforms. The ABC's digital platforms are a critical channel for the dissemination of this material. ABC local radio provides real local content on an ongoing basis.

Better funding the ABC to provide local content in regional areas is a preferable policy tool to ineffective content regulation of commercial providers. Indeed, this should be the policy position across all content regulation (except for self-regulated classification) in the radio and television markets.

Anything that is dependent, like the local content rules, on both rule making and enforcement by the Australian Communications and Media Authority should, on the basis of experience, be discounted as being effectively worthless.

This is particularly true since the Department of Communications has been conducting a review of the ACMA with the intention of gutting it and transferring as many powers and functions as possible back to the Department.

The ABC could also provide a greater role in creating opportunities for new media content. The ABC should be required to curate an online resource of all the original digital material its news crews capture so that third parties can use the video or audio to make their own content. This should be made available under a variant of a creative commons licence.

Other reforms

If the Prime Minister wants to be taken seriously on media reform he would deal with the single biggest problem in our media today – the unrestrained invasion of privacy that is perpetrated by our media, especially the News Corp tabloids.

The Privacy Act provides an exemption for journalism provided that the media organisation is “publicly committed to observe standards that deal with privacy.” (Section 7B(4))¹⁴

The conduct of the print media makes it clear that this exemption is being systematically abused. Addressing this abuse was the intent of the media standards bills introduced as part of Labor’s package. They also motivated the reference to the ALRC referred to above.

Serious media reform needs to address the issue of serious invasion of privacy in the digital era. The Committee should recommend that, irrespective of improvements being made to the diversity sections of the Bill, that the Bill be rejected until it is accompanied by action on media abuse of privacy.

¹ Prime Minister Malcolm Turnbull interviewed on ABC 7:30 21 March 2016.

<http://www.abc.net.au/7.30/content/2015/s4429301.htm>

² Troy Bramston ‘Media ‘war’ drove Bob Carr to Kevin Rudd’ *The Australian* 10 April 2014

<http://www.theaustralian.com.au/national-affairs/foreign-affairs/media-war-drove-bob-carr-to-kevin-rudd/story-fn59nm2j-1226879399181?login=1>

³ See the Parliamentary Library report ‘Media reform: in shallows and miseries’ 23 October 2013

http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1314/MediaReform

⁴ Australian Law Reform Commission *Serious Invasions of Privacy in the Digital Era* ALRC Report 123

<http://www.alrc.gov.au/publications/serious-invasions-privacy-digital-era-alrc-report-123>

⁵ Foley, Bridget *Changing Stations: The Story of Australian Commercial Radio* UNSW Press 2009 P. 92

⁶ Westfield, Mark *The Gatekeepers: The Global Media Battle to Control Australia’s Pay TV* Pluto Press 2000 P.41

⁷ Joint Select Committee on Broadcasting Legislation *Three broadcasting reform proposals* 4 June 2013

<file:///C:/Data/DigEcon/Media%20Reform/http---www.aphref.aph.gov.au-house-committee-jscbl-report-finalreport.pdf>

⁸ Paul Fletcher Second Reading Speech House of Representatives 2 March 2016.

⁹ <http://www.nielsen.com/au/en/insights/news/2014/online-news-in-march-a-story-of-tragedy-and-tabloids.html>

¹⁰ See <http://www.crikey.com.au/2014/09/25/news-corp-and-daily-mail-both-claim-victory-but-no-money-changes-hands/> and <http://www.mediaweek.com.au/peter-holder-responds-to-news-corps-plagiarism-allegations/>

¹¹ Senator Mitch Fifield, Minister for Communications Media Release ‘Local content safeguards a feature of media reform package’ 1 March 2016

http://www.minister.communications.gov.au/mitch_fifield/news/local_content_safeguards_a_feature_of_media_reform_package#.VvkfSfl97IU

¹² Michael Roddam ‘Diversity key in mergers clearance: ACCC’ *The Australian* 25 November 2015.

¹³ ACCC *Media Mergers* August 2006 <https://www.accc.gov.au/system/files/Media%20Mergers%20-%202011.pdf>

¹⁴ Privacy Act 1988 http://www.austlii.edu.au/au/legis/cth/consol_act/pa1988108/s7b.html

About DigEcon Research

Purpose

DigEcon Research is a stand alone research body (owned by Havyatt Associates Pty/Ltd). Ultimately, its pursuit is policy research, the focus of which is the meaning and significance of the Digital Economy. This policy research encompasses both economic and social research.

Researching the significance of the Digital Economy

DigEcon Research focuses on the analysis of social and economic change rather than an analysis of a notionally static "Digital Economy". Analysis of the change as it occurs should highlight those areas where there is genuine policy choice rather than merely a need to adapt policy to changes that have already occurred.

Before Thomas Kuhn popularised the idea of "paradigms" J.K.Galbraith railed against the "conventional wisdom". There is no denying that what Kuhn called "normal science" or the repeated application of existing theory to new problems results in most practical developments. It is equally true that the application of existing theory to problems they were not designed for results in, at best, vacuous solutions and, at worst, wildly dangerous outcomes.

The Digital Economy challenges the fundamental concepts of neo-classical economics. It also challenges most of the precepts of how societies are organised. In this context policy research needs to focus on what is different, not on what is the same. The Digital Economy is not just a matter of means of production but about the fundamental structures of social organisation.

Work program

This research is designed both to inform policy makers and to assist those who would seek to influence policy makers or to make business decisions. DigEcon Research however does not provide strategy recommendations nor undertake policy advocacy on behalf of any party.

A key element of the research relates to the direct regulation of the converging industries of telecommunications, media, consumer electronics and information technology. However, the agenda encompasses the wider economic and social policy issues.