

## Three broadcasting reform proposals

### Context of the inquiry

- 1.1 The operations of Australian media have been the subject of recent government-established reviews and policy deliberations, as well as debates in the wider community. Two major reviews and the introduction of a package of legislation form the context for current parliamentary attention. A brief overview of these inquiries, and the government's response (in the form of the introduction of legislation and the establishment of this committee), is provided below.

### Convergence review (2012)

- 1.2 On 14 December 2010, the Government announced the Convergence review, chaired by Glen Boreham, 'to examine the policy and regulatory frameworks that apply to the converged media and communications landscape in Australia.' During the review period, a range of discussion papers were released, and an interim report was released in December 2011.<sup>1</sup>
- 1.3 Among its findings in its March 2012 final report, the Convergence review committee recommended making any new policy framework technology-neutral; removing barriers to entry for the supply of content or communications services, except in relation to a finite resource such as spectrum; and establishing a new communications regulator that can certify whether industry self-regulation meets best practice.<sup>2</sup>

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1 [http://www.dbcde.gov.au/digital\\_economy/convergence\\_review](http://www.dbcde.gov.au/digital_economy/convergence_review), viewed on 5 May 2013.

2 *Convergence Review Final Report*, Department of Broadband, Communications and the Digital Economy, March 2012, p. xvii.

## Finkelstein review (2012)

- 1.4 The Independent Inquiry into Media and Media Regulation was established in September 2011. The review, led by former Justice of the Federal Court, Mr Ray Finkelstein QC, was asked to examine current media codes of practice and how they related to technological convergence and the production of quality news. It also examined how to strengthen the independence and effectiveness of the Australian Press Council.
- 1.5 Recommendations in the February 2012 report of the Finkelstein review included: establishing a statutory News Media Council to set journalism standards and handle complaints in relation to breaches; the Productivity Commission inquiring into the health of the news industry; and the Government inquiring into the health of the regional and local news industry.<sup>3</sup>

## Government response and parliamentary consideration

- 1.6 In November 2012, the Minister for Broadband, Communications and the Digital Economy, Senator the Hon Stephen Conroy, announced the Government's initial response to the Convergence review. The measures included:
- introducing a multichannel Australian content requirement for each commercial broadcaster;
  - retaining the 55 per cent transmission quota of Australian programming for the commercial television broadcasters' primary channels;
  - not making spectrum or broadcast licences available for a fourth free-to-air television network; and
  - investigating the removal of the 75 per cent reach rule.<sup>4</sup>
- 1.7 On 12 March 2013, Minister Conroy announced the formal response to both the Finkelstein and Convergence reviews, referring to a series of proposed reforms, and a parliamentary committee which would be established to consider three further areas of potential reform.<sup>5</sup> A package

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3 The Hon. R. Finkelstein Q.C. and Prof. M. Ricketson, *Report of the Independent Inquiry into Media and Media Regulation*, February 2012, pp. 7-11.

4 Senator the Hon Stephen Conroy, Minister for Broadband, Communications and the Digital Economy, 'Government moves to ensure quality Australian content stays on Australian television,' *Media Release*, 30 November 2012.

5 Senator the Hon Stephen Conroy, Minister for Broadband, Communications and the Digital Economy, 'Government response to Convergence Review and Finkelstein Inquiry,' *Media Release*, 12 March 2013.

of six bills was introduced on 14 March 2013, and the Joint Select Committee on Broadcasting Legislation was appointed by resolution of the House and Senate on 13 and 14 March respectively, with terms of reference to investigate three additional areas of reform:

- the abolition of the 75 per cent rule, particularly in relation to regional and local news;
- whether the Australian Communications and Media Authority (ACMA) should be required to examine program supply agreements for news and current affairs when determining whether a person is in control of a commercial television broadcasting service; and
- on-air reporting of ACMA findings regarding broadcasting regulation breaches.<sup>6</sup>

1.8 Following their introduction, the bills were referred to committees in the House and Senate. The Senate Environment and Communications (Legislation) Committee held public hearings on 18 and 19 March, and reported on 20 March.<sup>7</sup> The Chair of the House Committee on Infrastructure and Communications, in a statement to the House on 18 March, noted that other inquiries into the issues were underway, and referred to the comprehensive inquiry program which had been proposed by the Senate Committee.<sup>8</sup>

## Role of this Committee

1.9 Following its appointment, this Committee held its first meeting on 15 March to determine the scope of its inquiry and how it could best conduct its investigations, noting that these would occur in an environment where reviews and debates into the legislation were already in progress, and an extensive level of public debate was underway. In light of this, and the Minister's remarks if the Committee were to 'come up with a quick resolution on the 75 per cent rule, the Government would include this amendment in the general package'<sup>9</sup>, submissions were invited on this area of proposed reform. Following a public hearing on

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6 Joint Standing Committee on Broadcasting Legislation, *Resolution of Appointment*, House Votes and Proceedings, No. 155 – 13 March 2013, p. 2139; Senate, *Journals of the Senate*, No. 139 – 14 March 2013, p. 3767.

7 [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Committees?url=ec\\_ctte/media\\_reform\\_bills/index.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=ec_ctte/media_reform_bills/index.htm), viewed on 5 May 2013.

8 [http://www.aph.gov.au/Parliamentary\\_Business/Committees/House\\_of\\_Representatives/Committees?url=ic/broadcasting\\_leg/index.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives/Committees?url=ic/broadcasting_leg/index.htm), viewed on 5 May 2013.

9 Senator the Hon Stephen Conroy, Minister for Broadband, Communications and the Digital Economy, media release, 15 March 2013.

18 March 2013 and subsequent deliberations, the Committee announced the following day that it had not reached an agreed position on the 75 per cent reach rule, and that it would therefore continue to take evidence on this and the other two terms of reference. Further submissions were invited.<sup>10</sup>

## Status of legislation and impact on this report

1.10 During this period, the package of legislation provoked heated debate in the Parliament and the wider community. Following negotiations, two of the six bills in the package passed the House on 19 March 2013 and the Senate on 20 March 2013:

- the Broadcasting Legislation Amendment (Convergence Review and Other Measures) Bill 2013, which covered the announced Australian content and spectrum changes, updated the ABC and SBS charters for digital content, and ensured that the SBS board has an Indigenous member in recognition of the SBS providing a National Indigenous Television service; and
- the Television Licence Fees Amendment Bill 2013, which permanently reduced the annual commercial television broadcast licence fee.

1.11 The remaining four bills were discharged from the Notice Paper on 21 March 2013:

- the Broadcasting Legislation Amendment (News Media Diversity) Bill 2013, which sought to introduce a public interest test on the merger of news organisations to ensure sufficient diversity in news and current affairs;
- the News Media (Self-regulation) Bill 2013, to allow the new Public Interest Media Advocate to approve an industry self-regulatory body and recognise a news media self-regulation scheme;
- the News Media (Self-regulation) (Consequential Amendments) Bill 2013, to amend the *Privacy Act 1998* consequential to the above Bill; and
- the Public Interest Media Advocate Bill 2013, which sought to establish the Advocate as a statutory officer to implement the self-regulation and diversity schemes.

1.12 The Committee, having agreed to investigate in more detail the two other areas it had been invited to consider, continued to follow up matters

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<sup>10</sup> [http://www.aph.gov.au/Parliamentary\\_Business/Committees/House\\_of\\_Representatives\\_Committees?url=jscbl/media.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jscbl/media.htm), viewed on 5 May 2013.

raised in evidence received and discussed at the public hearing held on 18 March. Although intensive debate on the proposed reforms had initially occurred in Parliament, the Committee received few additional submissions. Therefore, the Committee decided to present its observations on the three areas outlined in its resolution of appointment, in order to provide a report reflecting the status of views in industry and the community at this point in time. These areas are discussed below.

- 1.13 Submissions received and witnesses who provided evidence at the 18 March public hearing are listed at Appendices A and B respectively. A transcript of the hearing is available on the Committee's website.<sup>11</sup>

## The 75 per cent audience reach rule

- 1.14 Section 53 (1) of the *Broadcasting Services Act 1992* specifies that, 'A person must not be in a position to exercise control of commercial television broadcasting licences whose combined licence area populations exceed 75% of the population of Australia.' The Act makes the Australian Communications and Media Authority (ACMA) responsible for determining licence area populations, and s.53(3) of the Act requires ACMA to have regard to the most recently published census in making this determination.

## History of the rule and regional markets

- 1.15 Until 1987, the limit on television broadcast licences had been that no person could control more than two stations Australia-wide. In recognition of the potential economies of scale from larger operations, and to complement new rules on cross-media ownership, this limit was changed to a 60 per cent audience reach rule (that is, the combined licence area populations could not exceed 60 per cent of Australia's total population). The reach rule was expanded to 75 per cent in 1992.<sup>12</sup>
- 1.16 In its 2000 report, the Productivity Commission stated that the rule prevented metropolitan networks from expanding into regional Australia and allowed the establishment of smaller regional networks. The Commission also stated that the reach rule appears to have been intended to make room for regional operators and underpin local program production.<sup>13</sup>

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11 <[www.aph.gov.au/jschl](http://www.aph.gov.au/jschl)>.

12 Productivity Commission, *Broadcasting: Inquiry Report*, March 2000, Report No. 11, p. 368.

13 Productivity Commission, *Broadcasting: Inquiry Report*, March 2000, Report No. 11, p. 368.

- 1.17 Regional services were also affected by regional-specific regulation. Until 1989, most regional areas had just one commercial station that could select programming from the main metropolitan stations. Their monopoly position made them very profitable. From 1989, the Commonwealth Government introduced regional television aggregation, where two additional stations were introduced into each regional market. Profitability was reduced, but viewers had a wider range of programs.<sup>14</sup>
- 1.18 Aggregation led to regional television stations affiliating with one of the three metropolitan networks. Affiliation agreements gave the regional stations access to the larger network's programming for a fee which is typically based on the regional station's gross revenue.<sup>15</sup>

### The current audience reach rule

- 1.19 The current audience reach percentages are in the table below. The table demonstrates that the television market in Australia has split into two segments, with three larger networks focussing on major centres and three smaller networks focussing on regional centres.

Table 1.1 Commercial television broadcasting licensees – current holdings of 'regulated media assets'

Controller	TV audience reach (%)	TV licences	Radio licences	Associated newspapers
Seven West Media	73.8	6	9	2
Nine Entertainment Co.	59.4	6	-	-
Ten Network	66.7	5	-	-
Prime Media Group	24.4	13	10	-
WIN Corporation	38.9	23	2	-
Southern Cross	34.1	19	80	-

Source DBCDE, *Submission 7*, p. [2].

### Local content rules

- 1.20 Approximately 10 years after aggregation, some regional networks closed down news offices. Prime Television closed offices in Canberra, Newcastle and Wollongong in June 2001 and Southern Cross closed offices in Canberra, Cairns, Townsville, Darwin and Alice Springs in November that year. The networks stated they did so due to high costs and low ratings.<sup>16</sup>

<sup>14</sup> SCA, *Submission 3*, p. [2].

<sup>15</sup> SCA, *Submission 3*, p. [3].

<sup>16</sup> ABA, *Adequacy of Local News and Information Programs on Commercial Television Services in Regional Queensland, Northern NSW, Southern NSW and Regional Victoria (Aggregated Markets A, B, C and D)*, August 2002, p. 9.

- 1.21 In response, the then Australian Broadcasting Authority (ABA)<sup>17</sup> commenced an investigation into the adequacy of local news on commercial television in four markets: Regional Queensland, Northern NSW, Southern NSW and Regional Victoria. It found that aggregation had increased the quantity of local news broadcast, but that there had been less competition in sourcing news since the mid-1990s. It also found that since aggregation there had been a 'significant decline' in local programs other than news. The ABA concluded that the objects of the *Broadcasting Services Act 1992* in relation to the following were not being achieved:
- diversity;
  - fostering competition; and
  - industry responsiveness to audience needs in relation to material of local significance.<sup>18</sup>
- 1.22 The ABA implemented a new licence condition to support local content in these four aggregated markets, which commenced in February 2004. This condition was extended to the Tasmanian market in January 2008.<sup>19</sup>
- 1.23 In 2004, the ABA released a report on the remaining regional and rural licence areas. It concluded that these areas were fundamentally different because of their smaller populations and larger areas. It declined to apply an additional licence condition for these markets, but noted that at least one commercial service was providing local news and information in each area.<sup>20</sup>
- 1.24 In evidence, the Department suggested that a population of 500,000 tended to be the minimum for local content rules due to the costs of developing programs:
- But they are really around areas where the population is above 500,000. That is not a hard-and-fast rule, but that is certainly the way the licence condition has been applied mainly because there was a recognition by the ABA at the time it introduced the licence area ... that some of these licence areas are very small and it may be an unreasonable impost to put upon these licence areas the

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17 The ABA was merged with the Australian Communications Authority in 2005 to become ACMA.

18 ABA, *Adequacy of Local News and Information Programs on Commercial Television Services in Regional Queensland, Northern NSW, Southern NSW and Regional Victoria (Aggregated Markets A, B, C and D)*, August 2002, pp. 10-11.

19 ACMA, 'Local content: Local content conditions on regional commercial television broadcasters,' viewed on 8 April 2013 at <[http://www.acma.gov.au/WEB/STANDARD/pc=PC\\_91817](http://www.acma.gov.au/WEB/STANDARD/pc=PC_91817)>.

20 ABA, *Adequacy of Local News and Information Programs on Commercial Television Broadcasting Services in Regional and Rural Australia*, June 2004, pp. 2-3.

provision of local news or materials of local significance given that is much more expensive to produce than programming that is purchased and just provided.<sup>21</sup>

- 1.25 The current local content rules refer to two types of area: the full licence area, and within each of these, between four and seven local areas. The exception is Tasmania, which is one local area only. Material of local significance must relate directly to either the local area or the licence area. Broadcasters receive points for material of local significance in line with the table below.

Table 1.2 Points for each minute of material of local significance

Material	Points
Material not broadcast during an eligible period (overrides entries below)	0
Material (other than a community service announcement) that has been previously broadcast to a local area (overrides entries below)	0
News that relates directly to the local area	2
Other material that relates directly to the local area	1
News that relates directly to the licence area	1
Other material that relates directly to the licence area	1

Source *Item 2.3 of the Broadcasting Services (Additional Television Licence Condition) Notice, 8 November 2007*

- 1.26 Eligible periods are between 6.30 am and 12 midnight during the week and from 8 am to 12 midnight on weekends. Licensees are required to accumulate 90 points a week and at least 720 points in a timing period (usually six weeks). There are limits on the number of times a community service announcement can generate points and no more than 50 per cent of points can be from other material that relates directly to the licence area.<sup>22</sup>
- 1.27 In summary, the system encourages news and local content. However, nothing in the rules stipulate the quality of the material, such as whether it includes relevant footage or interviews.

21 Ms Nerida O'Loughlin, DBCDE, *Committee Hansard*, 18 March 2012, pp. 6-7.

22 Schedule 2 of the Broadcasting Services (Additional Television Licence Condition) Notice, 8 November 2007.



## Other ownership rules

1.28 There are other ownership rules that apply to the commercial media that are designed to support diversity. They are summarised in the table below:

Table 1.3 Commercial media ownership rules

Rule	Media	Detail
4/5 rule (minimum number of voices)	Television, radio and newspaper	No fewer than five independent and separately controlled media operators or groups in a metropolitan commercial radio licence area, and at least four in a regional area
2 out of 3 rule	Television, radio and newspaper	A person cannot control more than two out of three media platforms in a commercial radio licence area
One to a market rule	Television	A person may not exercise control of more than one television licence in a licence area, except for satellite licences issued under section 38C of the Act
Two to a market rule	Radio	A person may not exercise control of more than two radio licences in a licence area (with an exception for supplementary licences issued under section 40 of the Act)

Source *Convergence Review Final Report, Department of Broadband, Communications and the Digital Economy, March 2012, p. 19.*

1.29 In addition to these rules, media companies are subject to the *Competition and Consumer Act 2010*, in particular its restrictions against mergers that would substantially lessen competition.

## Previous reviews on the audience reach and local content rules

1.30 As part of media reforms conducted in 2006, the review's discussion paper supported the continuation of the reach rule, although it was not specifically examined.<sup>23</sup> The discussion paper also supported local content rules in the four aggregated markets in which they were operating. The Government proposed two reforms: extending the local content rules to Tasmania; and legislating to require the imposition of licence conditions involving material of local significance in these markets. Both of these were implemented.

1.31 The discussion paper also considered other regional markets and stated that the Government would continue to monitor local content levels in them. It left open the option of extending local content licence conditions to these markets if 'local content levels decline materially.'<sup>24</sup> However, the Government also noted that local content adds to the costs of regional

23 DCITA, *Meeting the Digital Challenge: Reforming Australia's media in the digital age*, March 2006, pp. 41-42. Up until this time the local content rules were administratively imposed by ACMA.

24 DCITA, *Meeting the Digital Challenge: Reforming Australia's media in the digital age*, March 2006, p. 42.

broadcasters and that any moves to extend local content rules would need to be subject to a cost-benefit analysis.<sup>25</sup>

- 1.32 The 2012 Convergence review specifically discussed media ownership laws. In two submissions from Free TV Australia, representing all the commercial television broadcasters, the removal of the 75 per cent rule was supported. The second submission noted that the reach rule 'is increasingly anomalous in a borderless media environment.'<sup>26</sup>
- 1.33 Free TV Australia also commented on the regulation of media ownership. In its first submission, it supported the existing media diversity rules. But in its response to the interim report, Free TV Australia argued that the current media ownership rules worked to the disadvantage of regional media and regional communities:

Existing regulation of media ownership imposes particular burdens on the regional media sector, stifling growth and denying regional media consumers access to the benefits of investment in the regional media industry ...

It is arguable the 'voices' regime, ostensibly enacted to protect diversity and preserve localism, could in fact have the opposite effect.<sup>27</sup>

- 1.34 The Convergence review found that technological change is breaking down the differences between various media types. Australians are still sourcing news, information and entertainment from the same organisations, but the internet has reduced the relevance of the 75 per cent reach rule:

Geographic markets are still relevant for maintaining an adequate level of access to local news and commentary. However, the internet has also made national media outlets accessible across the whole country. Media and communications are increasingly viewed nationally, with catch-up television services and online news websites allowing programming beyond 75 per cent of the population and bypassing geographic borders. The increase in nationally networked content has also diminished the effectiveness of the 75 per cent rule.<sup>28</sup>

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25 DCITA, *Meeting the Digital Challenge: Reforming Australia's media in the digital age*, March 2006, p. 42.

26 Free TV Australia, *Submission to the Convergence Review*, October 2011, p. 49; Free TV Australia, *Submission to the Convergence Review's Interim Report*, February 2012, p. 16.

27 Free TV Australia, *Submission to the Convergence Review*, October 2011, p. 48; Free TV Australia, *Submission to the Convergence Review's Interim Report*, February 2012, p. 16.

28 *Convergence Review Final Report*, Department of Broadband, Communications and the Digital Economy, March 2012, p. 26.

- 1.35 The Convergence review recommended that all the media ownership rules be removed, including the audience reach rule, apart from a rule stipulating the minimum number of owners (the 4/5 rule). In their place would be a public interest test for transfers of ownership of media companies.<sup>29</sup>
- 1.36 The Convergence review also discussed local content rules and recommended that the compliance regime should be more flexible. It did not make substantive comment about the requirements themselves, apart from noting that commercial radio and television licensees should continue to meet minimum requirements for local content, which would be reviewed and amended from time to time by future regulators.<sup>30</sup>

### Industry views during the inquiry

- 1.37 At the hearing, the Committee heard from all six major television networks. The Committee was aware of media reports of a possible merger between Nine and Southern Cross. The latter has an affiliate agreement with Network Ten. Abolishing the reach rule would allow such a merger to proceed, without any divestiture of television assets. Most, but not all, of the networks represented at the hearing were in favour of abolishing the reach rule. Their individual positions were:
- WIN opposed removing the rule because it would lead to a reduction of regional news and regional commitment;<sup>31</sup>
  - Prime supported removal because it, ‘quarantines regional broadcasting to the past’;<sup>32</sup>
  - Southern Cross supported removal because it, ‘belongs to a different era’;<sup>33</sup>
  - Ten opposed removal in the context of the legislation before the Parliament at the time, noting that the other ownership rule changes recommended in the Convergence review were not included in the legislative package;<sup>34</sup>

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29 *Convergence Review Final Report*, Department of Broadband, Communications and the Digital Economy, March 2012, p. 18.

30 *Convergence Review Final Report*, Department of Broadband, Communications and the Digital Economy, March 2012, pp. 79-83.

31 Mr Andrew Lancaster, WIN Network, *Committee Hansard*, Canberra, 18 March 2013, pp. 10-11.

32 Mr Ian Audsley, Prime Media Group, *Committee Hansard*, Canberra, 18 March 2013, p. 19.

33 Mr Rhys Holleran, SCA, *Committee Hansard*, Canberra, 18 March 2013, p. 24.

34 Ms Annabelle Herd, Network Ten, *Committee Hansard*, Canberra, 18 March 2013, p. 28.

- Nine supported removal because the rule was, ‘an out of date and irrelevant barrier that prevents our industry from investing in and delivering more local content’;<sup>35</sup>
- Seven expected that the reach rule would be eventually abolished, but did not support removal now because there had not been sufficient consideration of the mergers that would most likely occur.<sup>36</sup>

1.38 The Committee sought at the hearing an explanation for the apparent breakdown in consensus between the Free TV Australia submissions and the views expressed by individual networks during the inquiry. Network Ten stated that the reach rule was not considered a priority issue in developing the Free TV submission and that the views it expressed were in part driven by a desire to achieve consensus:

Network Ten, as Network Ten, has never said a single word in favour of lifting the reach rule. In any meetings that we have had with the government, with cabinet, with ministers, with any politician or the bureaucracy or the Convergence Review, Channel 10 has never sought to lift the reach rule. There were 24 words in a Free TV submission to the Convergence Review out of 8,600 words which mentioned the reach rule and said that perhaps it was time to look at getting rid of it. Free TV is a consensus based organisation and in the cut and thrust of getting consensus, you often let things go through.<sup>37</sup>

1.39 Seven West Media confirmed this general approach at the hearing.<sup>38</sup>

## Benefits of removing the rule

1.40 The Committee received evidence at the hearing about two clear benefits from removing the rule. The first is that the regional networks would most likely merge with metropolitan networks, increasing efficiency and economies of scale.<sup>39</sup> Nine advised the Committee that the regional networks’ corporate and operational headquarters are based in major centres, in particular Sydney, Melbourne and Wollongong. These are the likely sites of duplication and are where the most efficiencies would be

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35 Mr David Gyngell, NEC, *Committee Hansard*, Canberra, 18 March 2013, p. 40.

36 Mr Kerry Stokes, Seven West Media, *Committee Hansard*, Canberra, 18 March 2013, p. 48.

37 Ms Annabelle Herd, Network Ten, *Committee Hansard*, Canberra, 18 March 2013, p. 28.

38 Ms Bridget Fair, Seven West Media, *Committee Hansard*, Canberra, 18 March 2013, p. 48.

39 Mr Ian Audsley, Prime Media Group, *Committee Hansard*, Canberra, 18 March 2013, p. 17;  
Mr Kerry Stokes, Seven West Media, *Committee Hansard*, Canberra, 18 March 2013, p. 51.

found. Regional staff are mainly involved in sales and news gathering, which would not be duplicated with a metropolitan network.<sup>40</sup>

- 1.41 The second benefit is that regulation would be more consistent with converging technology and media. For example, some of the most popular online news sites in Australia in June 2012 were run by television broadcasters: ninemsn Nine News was ranked first and Yahoo!7 News was ranked third.<sup>41</sup> Online media is the growth sector for advertising expenditure, increasing its market share from 15 per cent in June 2009 to 24 per cent in June 2012.<sup>42</sup> In June 2012, 1.6 million people streamed a television program and 1.2 million people downloaded a television program.<sup>43</sup>

### The market for local news in regional areas

- 1.42 The Committee was particularly concerned with any effect the removal of the audience reach rule may have on local news in regional areas. Mr Ian Audsley, from Prime Media Group, described Nine's purchase of NBN Television, which had a high rating local news service in Newcastle. The service was retained and continues to rate well. Mr Audsley explained that:

In a former life I was at the Nine network. In that time we acquired NBN Television, which is the Nine affiliate in northern New South Wales. The task fell upon me to integrate NBN into the Nine network. That was in about 2006 or 2007. Today, in 2013, NBN news is still in place. It is still delivering audiences – somewhere around 50 per cent of the audience – between six and seven o'clock ... I just emphasise that it is not demonstrated anywhere that networks will collapse local news infrastructure and centralise it to Sydney or Melbourne.<sup>44</sup>

- 1.43 If the experience with NBN Television is a useful guide, then abolishing the 75 per cent reach rule is unlikely to put at risk local news programs which attract large audiences.
- 1.44 The great majority of the evidence to the Committee suggested that there is a substantial demand for local news in many regional markets, which means that some networks are offering much more local news than they are required under the local content rules. Prime stated that they make a

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40 NEC, Submission 5.2, pp. 8-9.

41 DBCDE, *Submission 7*, p. [38].

42 DBCDE, *Submission 7*, p. [37].

43 DBCDE, *Submission 7*, p. [41].

44 Mr Ian Audsley, Prime Media Group, *Committee Hansard*, Canberra, 18 March 2013, pp. 21-22.

large investment in local news and that it generates substantial commercial returns, both directly and indirectly:

... we produce six local half-hour news bulletins for the areas we broadcast to, which is far in excess of what the requirement is under legislation, and we do about 140 local news and local weather updates per day. We do not believe that local news will disappear with changing the 75 per cent reach rule. The reality is that local news services deliver audiences well in excess of 40 per cent and 50 per cent of the total audience, and any broadcaster that took the blade to local news services would suffer from an audience point of view. Whether the revenue comes directly into local news programs or other parts of the schedule is really irrelevant because it is a bit like the AFL: you get a halo effect in revenue and audience from having local news.<sup>45</sup>

1.45 WIN stated the opposite. Despite its large investment in news, on a similar scale to Prime, WIN stated that there is no profit from its local news:

... WIN spends probably three to four times the amount of revenue it actually generates to produce those news services. There is no commercial gain for WIN in producing so many news services.<sup>46</sup>

1.46 The Committee notes that WIN's viewpoint is different to that of other networks. Nine stated that there is a demand for local news and that an evening bulletin will give a network 'the platform to launch your primetime schedule.'<sup>47</sup> Southern Cross said that it collects footage and news in some regional markets where it can generate sufficient ratings, such as the Spencer Gulf.<sup>48</sup>

1.47 While the Committee is aware that broadcasters often generate a commercial return from an investment in local news, it is not guaranteed. Southern Cross stated that it has tried to improve its market share in some markets, but that it is difficult to break into a market. Southern Cross attributed this to the size of regional markets:

I think part of it is to do with the size of the markets themselves. If you have the first mover advantage ... and you are first in the market then you certainly have a big advantage, and it is very difficult for an operator confined with the style of programming

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45 Mr Ian Audsley, Prime Media Group, *Committee Hansard*, Canberra, 18 March 2013, p. 17.

46 Mr Andrew Lancaster, WIN Network, *Committee Hansard*, Canberra, 18 March 2013, p. 11.

47 Mr David Gyngell, NEC, *Committee Hansard*, Canberra, 18 March 2013, p. 41.

48 Mr Rhys Holleran, SCA, *Committee Hansard*, Canberra, 18 March 2013, p. 25.

we have as well. But principally I do think it is a market size issue more than anything else.<sup>49</sup>

- 1.48 Seven West Media agreed, noting that in most regional markets there is not room for three networks specialising in local news. They commented, 'There will only be room for first mover advantage and maybe another one.'<sup>50</sup>
- 1.49 If a market is sufficiently small, then it may not be able to commercially support any substantial investment in local news. The then Government made this point in its discussion paper for its 2006 reforms, where it declined to extend local content requirements, other than to Tasmania. The Committee heard in evidence that WIN shut down its news service in the Riverland and Mount Gambier in South Australia partly due to the small size of the market.<sup>51</sup> This region has 120,000 people, compared with the benchmark for local content requirements of 500,000 suggested by the Department in evidence.<sup>52</sup>
- 1.50 Based on these views, it may be expected that an established local news service in a large regional market will maintain market share and revenues, at least for the time being. The Committee notes the view of Professor Fraser, from the Communications Law Centre, who advised that commercial broadcasters would only continue to provide local news if it remained profitable.<sup>53</sup> Given the current growth in online content and its potential to disrupt the broadcasting industry, the Committee is aware that profitability of local news may not be able to be guaranteed in the medium to long term.
- 1.51 Regulation would be a way of managing this uncertainty. Nine stated at the hearing that it would be willing to provide an enforceable undertaking to achieve a required level of local content and tabled draft provisions.<sup>54</sup> Later in the day, Seven West Media queried whether enforceable undertakings would be effective if a broadcaster was not profitable.<sup>55</sup> After the hearing, Nine made a supplementary submission where it proposed that additional local news requirements be included in the

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49 Mr Rhys Holleran, SCA, *Committee Hansard*, Canberra, 18 March 2013, p. 23.

50 Mr Kerry Stokes, Seven West Media, *Committee Hansard*, Canberra, 18 March 2013, p. 48.

51 Mr Andrew Lancaster, WIN Network, *Committee Hansard*, Canberra, 18 March 2013, p. 15.

52 Mr Andrew Lancaster, WIN Network, *Committee Hansard*, Canberra, 18 March 2013, p. 15; Ms Nerida O'Loughlin, DBCDE, *Committee Hansard*, Canberra, 18 March 2013, pp. 6-7.

53 Professor Michael Fraser, CLC, *Committee Hansard*, Canberra, 18 March 2013, p. 37.

54 Mr David Gyngell, NEC, *Committee Hansard*, Canberra, 18 March 2013, pp. 42-44; NEC, *Submission 5*, pp. 6-7.

55 Mr Kerry Stokes, Seven West Media, *Committee Hansard*, Canberra, 18 March 2013, p. 51.

*Broadcasting Services Act 1992*. The new provisions would be targeted at broadcasters who reach more than 75 per cent of the audience:

... Nine proposes that a requirement applicable only to broadcasters who control licences that exceed more than 75% of the population be developed. Under this proposal those broadcasters would be required to produce 30 minute regional news bulletins each week day in all local licence areas owned by that broadcaster. This requirement will mean every local area that currently gets its own news service will continue to do so. It is a legislative safeguard that will mean the types of news services currently provided in regional markets today will continue. The requirement would form part of a broadcaster's licence conditions and would be enforced by the ACMA.<sup>56</sup>

- 1.52 The Committee notes that there is a range of regulatory options available and expects that it would be possible to safeguard local news, especially if industry were consulted during the development of any new arrangements.

### Committee comment

- 1.53 The Committee considers that, in the larger regional markets, there is sufficient demand to ensure news services of a certain quality from one or two broadcasters. The local content standards do not seem to be of practical relevance to the leading news broadcasters in each regional market, and it is unlikely that the provision of news services is being driven by the reach rule alone. This has been demonstrated where metropolitan networks own regional licences but still invest in local news programs.
- 1.54 The Committee notes concerns that more thought should be given to the effects of mergers that are likely to eventuate if the reach rule is abolished. This includes possible adverse effects on regional areas because of losses of local staff, content of local significance such as local news, and advertising. The Committee received little specific evidence as to the overall consequences for regional communities caused by likely mergers, but is aware of views of some regional advocates that the impacts could be serious. Therefore, the Committee supports the removal of the reach rule, provided there are safeguards in place to deliver appropriate local content to the regions either by legislation or by legally enforceable undertakings by the relevant broadcaster, and subject to the issues raised in Recommendation 1.

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56 NEC, *Submission 5.2*, p. 10.



## Recommendation 1

1.55 **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.**

## Program supply agreements

### Background

1.56 Control of broadcasters is defined in Schedule 1 of the *Broadcasting Services Act 1992*. Broadly, for a person to have control of a licence or company, the legislation requires a much greater relationship than the provision of a program or a small number of programs. Sub-paragraph 2(1)(b)(ii) of the Schedule states that a person is in a position to exercise control of a licence or a company if:

... the person, either alone or together with an associate of the person, is in a position to exercise (whether directly or indirectly) control of the selection or provision of a significant proportion of the programs broadcast by the licensee;

1.57 Subclause 2(2) of the Schedule specifically excludes program supply agreements from the question of control if they only relate to the programs or their promotion.

1.58 On 25 February 2013, during Senate Question Time, the Leader of the Greens, Senator Christine Milne, asked the Minister for Broadband, Communications and the Digital Economy about the relationship between News Limited and Channel Ten, through the former producing the latter's current affairs program, *Meet the Press*.<sup>57</sup> In its submission to this inquiry, Ten responded that it retains editorial control and general oversight of the program's production in line with its licence obligations.<sup>58</sup>

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57 Senator Christine Milne, Leader of the Australian Greens, *Senate Hansard*, 25 February 2013, pp. 696-97.

58 Network Ten, *Submission 4.1*, p. 3.

## Industry views

1.59 In considering this issue, the Committee notes that industry unanimously opposed widening the definition of control to include the provision of particular programs; no other views were received.<sup>59</sup> Industry gave two main reasons for its position, the first of which was that journalists have long crossed-over between different media outlets. The Australian Subscription Television and Radio Association (ASTRA), the peak body representing the subscription television industry, stated:

Involvement by journalists and commentators from one media entity with the news or current affairs programs or content produced or provided by another media entity is not new or novel – it has been common practice for decades. For example, journalists and commentators from Fairfax, News Ltd and other media entities regularly appear across a range of Sky News programs, just as they might appear on the ABC's *Insiders*.<sup>60</sup>

1.60 The second reason given was that regulators have in the past used the Act to prevent certain relationships between broadcasters. As an example, Seven West Media described an occasion where program supply agreements went beyond programming:

For example, in the 1999 ABA investigation into the possible breach of any provision of Part 5 of the Broadcasting Services Act 1992 by Prime Television Limited (Prime Investigation) the ACMA took the preliminary view that Prime was in a position to exercise control of Canberra FM and Radio Newcastle, as a result of arrangements between Prime and Austereo that Prime would provide news services to Canberra FM and Radio Newcastle in return for the radio stations promoting Prime on the radio, and acknowledging Prime as the source of the news. *Footnote* - It was not necessary for the ACMA to reach a final decision on this matter as the parties amended the relevant agreements.<sup>61</sup>

1.61 Seven West Media also noted that the ACMA has published a list of factors that it takes into account when determining who is in a position to exercise control of a 'significant proportion' of programs. These include:

- scheduling decisions;
- decisions to either commence or cease broadcasting a program; and

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59 For example, ASTRA, *Submission 12*, p. 3; News Ltd, *Submission 11*, p. 1; Seven West Media, *Submission 6.2*, p. [4].

60 ASTRA, *Submission 12*, p. 3.

61 Seven West Media, *Submission 6.2*, p. [6].

- decisions on which programs to purchase and from whom.<sup>62</sup>

## Committee comment

1.62 The Committee does not believe that it is worth specifically including program supply agreements in the control provisions of the Act at this point in time. Most importantly, the Committee received no submissions in favour of the proposal. Further, the broadcasting regulators have enforced the control provisions in the past. While control provisions may require amendment at some point, at this stage the Committee makes no specific recommendations on this issue.

## On-air reporting of ACMA findings

### Background

- 1.63 ACMA currently has a broad suite of enforcement powers. Up until 2006, a number of reviews found that ACMA, and its predecessor the ABA, had limited mid-range enforcement powers, especially in relation to breaches of codes of practice. In the words of the Productivity Commission, 'a licensee is unlikely to face a sanction for breaching a code of practice.'<sup>63</sup>
- 1.64 The impetus for reform appears to have been Professor Ian Ramsey's report in 2005, which he prepared at the request of the ABA. The report recommended such enforcement powers as enforceable undertakings, injunctive relief and civil monetary penalties.<sup>64</sup> In September 2006, the then Government introduced legislation that gave ACMA many of these powers.<sup>65</sup>
- 1.65 ACMA's enforcement powers now include the following:
- *administrative action* – infringement notices, enforceable undertakings, giving a remedial direction, and suspending or cancelling licences;
  - *civil litigation* – injunctions, an order to cease, civil penalty orders, and enforcement of compliance with an enforceable undertaking; and

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62 Seven West Media, *Submission 6.2*, pp. [5-6].

63 Productivity Commission, *Broadcasting: Inquiry Report*, March 2000, Report No. 11, p. 477. See also ABA, *Commercial Radio Inquiry, Final Report of the Australian Broadcasting Authority*, August 2000, pp. 5-6; Ramsey references DCITA, *Final Report of the Australian Broadcasting Authority's Commercial Radio Inquiry: Proposed Options for Legislative Reform and Related Issues*, 2001 (at p. 6).

64 ACMA, *Reform of the broadcasting regulator's enforcement powers: A report prepared by Professor Ian Ramsey*, November 2005, pp. 10-12.

65 Communications Legislation Amendment (Enforcement Powers) Act 2006.

- *criminal proceedings* – referral to the Director of Public Prosecutions in relation to a criminal offence.<sup>66</sup>

1.66 The broadcasting of regulatory findings was raised and recommended in all of these reviews, and was also raised and recommended in the recent Convergence and Finkelstein reviews. The difference between the two latter reports was that the Convergence review recommended that a content regulator should have the power to order the publication or broadcast of regulatory findings on the relevant media platform, for news and commentary programs only.<sup>67</sup>

1.67 In its submission, ACMA argued that it did not have a sufficient range of mid-tier powers. For example, a broadcaster needs to offer an enforceable undertaking; ACMA cannot impose one on a broadcaster. The alternative for ACMA when a broadcaster does not wish to offer an enforceable undertaking is to impose a licence condition. However, ACMA views this as a ‘serious outcome that is best suited to high-end breaches or to damaging, repetitive conduct.’ The Administrative Appeals Tribunal agrees that imposing a licence condition is a serious matter.<sup>68</sup>

## Industry views

- 1.68 Industry unanimously opposed the proposal.<sup>69</sup> The reasons given by Commercial Radio Australia, which were mirrored in some other submissions, included that:
- ACMA already publicises the findings of its investigations, which includes press releases, its website and social media;
  - broadcasters already play advertisements publicising the codes of practice and their operation;
  - broadcasters have already paid for the use of spectrum and it would not be appropriate, ‘to be forced to provide valuable airtime, free of charge,’ for this purpose;
  - it could breach the implied constitutional protection of political communication;<sup>70</sup> and

66 ACMA, *Broadcasting Services Act 1992 – Enforcement Guidelines of the ACMA*, 2011, cl. 5.2.

67 The Hon. R. Finkelstein Q.C. and Prof. M. Ricketson, *Report of the Independent Inquiry into Media and Media Regulation*, February 2012, pp. 176-80; *Convergence Review Final Report*, Department of Broadband, Communications and the Digital Economy, March 2012, pp. 42-51.

68 ACMA, *Submission 13*, pp. 4-5.

69 For example, ASTRA, *Submission 12*, pp. 3-5; Seven West Media, *Submission 6.2*, pp. 6-7; Network Ten, *Submission 4.1*, p. 5.

70 *Australian Capital Television v Commonwealth* [1992] HCA 1.

- it could erode the laws of natural justice, in particular the right to a fair hearing where a licensee has appealed ACMA's decision.<sup>71</sup>

## Committee comment

- 1.69 The Committee notes concerns raised in other forums about how complaints are resolved, and that expert reviews have consistently recommended changes. The Committee also notes that industry arguments against the proposal may be countered with views such as:
- increased publicity may be appropriate in more serious breaches of codes of practice;
  - the current television advertisements on the codes of practice do not discuss enforcement action or ACMA and could be modified to do so, even to the extent of briefly referring to recent investigations;<sup>72</sup>
  - the licence fee could be reduced by a small amount in recognition of licensees allocating a small amount of airtime to publicising enforcement action;
  - the court case in question referred to political communication during an election period, which may well be different to compliance with an industry code of practice more generally; and
  - when a legal matter is under appeal, it is normal practice for this to be included in news reports, which could also be done if a licensee broadcasts an ACMA finding.
- 1.70 The Committee accepts that ACMA has a broader range of enforcement powers following the reforms in 2006. However, ACMA has demonstrated that there are mid-level situations where it cannot impose an appropriate sanction. In particular, enforceable undertakings must be offered by the broadcaster and the Administrative Appeals Tribunal has declared that imposing a licence condition is a serious matter. There is a gap in between these penalties.
- 1.71 On balance, the Committee agrees that ACMA should be given the power to require the broadcasting of its regulatory findings. The Committee considers that industry concerns, such as those expressed by Commercial Radio Australia, are not sufficient to prevent the proposal from proceeding, but should be taken into account in consultations to ensure that any power would be fairly exercised, subject to the issues raised in Recommendation 2.

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71 Commercial Radio Australia, *Submission 10*, p. 2.

72 Free TV Australia, '30 Second TVC - Free TV Australia - Code of Practice (2011),' Youtube, <<http://www.youtube.com/watch?v=zGIYZWxQKW8>> viewed 22 April 2013.

**Recommendation 2**

- 1.72 **The Australian Government, following consultation with industry, introduce legislation to give the Australian Communications and Media Authority the power to require on-air corrections, clarifications and directions based on its findings.**

Senator Doug Cameron  
Chair  
19 June 2013