

LIGHTS.CAMERA.ACTION: IMPLEMENTATION OF MEDIA SECTOR LAW REFORM IN AUSTRALIA

The *Broadcasting Legislation Amendment (Broadcasting Reform) Bill 2017 (Cth)* (**BSA Bill**), which will remove some of Australia's outdated media ownership laws, was passed by the Senate on 14 September 2017. The BSA Bill has now returned to the House of Representatives, where it is expected to be passed in mid-October 2017. We examine the key changes contained in the BSA Bill and the practical implications for Australia's media sector.

KEY CHANGES

The BSA Bill is a cornerstone of the Government's broader media reform package announced in May 2017. The measures in that package are intended to modernise Australia's media regulation and the package has the support of the larger Australian media organisations. As explained in our client update on media sector reforms in May 2017 ([here](#)), the most significant changes to be made by the BSA Bill are the abolition of the "75 per cent reach rule" and "the two out of three rule". These ownership rules are seen as outdated and as not reflecting Australia's contemporary digital media environment. Other ownership rules, such as the "one to a market" rule that prevents one entity or group controlling more than one commercial broadcaster in any area of Australia, will however be retained.

The immediate consequence of the abolition of these two rules is likely to be a level of consolidation in Australia's media sector. This is supported by the Government on the basis that such consolidation will allow media groups to build integrated media companies, on a larger scale. Players are continuing to position themselves, with new rumours surfacing regularly.

The BSA Bill, when considered together with the associated *Commercial Broadcasting (Tax) Bill 2017*, will also impose additional local programming obligations for regional commercial television licensees which are consolidated, replace broadcast licence fees with a new spectrum tax (which is to be re-assessed in five years) and will reduce and refine the so-called "anti-siphoning list" (which effectively prescribes events that should be available on free-to-air television). The other proposals announced as part of the Government's May 2017 media reform package, such as increasing restrictions on gambling advertising during sporting events, will be separately implemented.

Key issues

- The *Broadcasting Legislation Amendment (Broadcasting Reform) Bill 2017 (Cth)* has passed the Senate and is expected to become law once it is voted on in the House of Representatives in mid-October 2017.
- The "75 per cent reach rule" will be abolished by the Bill, allowing a commercial television broadcaster to broadcast to 100 per cent of Australia's population.
- The rule restricting one media group from controlling more than two of a commercial television station, commercial radio station and associated newspapers within any area will also be abolished.
- The Government believes these reforms will help position the Australian media industry to effectively deal with present and future challenges. It is expected the changes will facilitate significant merger activity in Australia's media sector.
- Australian media groups will however not be able to simply rely on consolidation, with other innovative strategies required to enable them to compete in the increasingly global market for the delivery of content to consumers.

The 75 per cent reach rule

The BSA Bill will remove the 75 per cent reach rule, which prohibits any commercial television broadcaster from reaching more than 75 per cent of the Australian population. The primary aim of that rule was to support diversity. This aim has not been achieved, given that – subject to existing local content requirements – the regional Australian channels largely broadcast the same programs as the metropolitan stations under affiliation or content supply agreements and also because of the Australia wide availability of metropolitan station content via streaming. The practical effect of that rule has simply been to prevent mergers between the metropolitan commercial television channels, that is, Ten, Nine and Seven, and regional channels that largely broadcast the programs of those metropolitan channels.

The Government is still concerned with diversity of content. This is demonstrated by the fact that the BSA Bill will preserve a level of diversity in commercial television via the imposition of additional regional local content requirements where consolidation occurs.

Platform empires: abolishing the two out of three rule

The BSA Bill also abolishes the "two out of three rule" which prohibits a person or media entity from controlling more than two of the three key traditional media platforms (being associated newspapers, commercial television and commercial radio) in any commercial radio licence area.

Again, the rationale for this rule was to support media diversity and, again, it is seen that this aim has not been achieved. As a result of the growth in popularity of online platforms for the consumption of content, which allows for a significant diversity of voices in all areas of Australia, the Government has taken the view that the two out of three rule is "ill-suited to a contemporary media environment"¹.

Abolition of the two out of three rule has been the most controversial element of the BSA Bill. The major opposition party (Labor), as well as the Greens, opposed abolishing this rule. This resulted in significant delays in the passage of the Bill through the Parliament. As the Government does not have a majority in the Senate, ultimately, passage was only secured with the support of two smaller parties, that is, the One Nation Party and Nick Xenophon Party, and independent Senators.

Reform package anticipated to precipitate merger activity

As mentioned previously, it is anticipated that this reform package will create a number of opportunities for consolidation across platforms and geographic markets that will enable Australian media groups to more readily implement strategic initiatives to strengthen their offerings.

It should be remembered that although the BSA Bill will facilitate merger activity, any acquisitions will remain subject to the *Competition and Consumer Act 2010 (Cth) (CCA)* and, where relevant, the *Foreign Acquisitions and Takeovers Act 1975 (Cth)*. Under the latter Act foreign investment approval is required for the acquisition by a foreign person of more than a 5 per cent interest in an Australian media business.

¹ Explanatory Memorandum for the BSA Bill (http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r5907_ems_978e8b30-1d13-4ced-bfc2-428f25095021/upload_pdf/636053.pdf;fileType=application%2Fpdf) at page 4.

Section 50 of the CCA prohibits any acquisition that has the effect, or is likely to have the effect, of substantially lessening competition in any relevant market in Australia. In anticipation of the media ownership reforms, to provide guidance as to how it will approach media mergers, the Australian Competition & Consumer Commission (**ACCC**) released draft media merger guidelines on 26 August 2016. These guidelines seek to provide some guidance as to how issues such as access to key content, two-sided markets and network effects, bundling and foreclosure and minority shareholdings will be considered by the ACCC when assessing media acquisitions under section 50. The draft guidelines have not been finalised by the ACCC to date, though it is assumed this will now occur.

ADDITIONAL CONDITIONS IMPOSED BY THE SENATE

The support of the Senate minor parties for the BSA Bill came at a cost, with each of those parties imposing conditions on their consent to the BSA Bill. For example, the Nick Xenophon Party required the establishment of a A\$50 million "Regional and Small Publishers Innovation Fund" and a A\$10 million "Regional and Small Publishers Cadetship Program" and the One Nation Party has persuaded the Government to agree to introduce a bill to amend the enabling legislation for the national broadcaster, the ABC, to require that it is "fair" and "balanced".

Another condition required by the Nick Xenophon Party involves a competition review. The Government has struck a deal to direct the ACCC to launch some form of market or competition study into the activities of Google and Facebook in Australia. Although the terms and scope of the study have not yet been detailed by the Government, it could potentially consider the conduct of a number of large online media businesses in relation to advertising, content creation and distribution and the use of data. That type of study would be in a similar vein to reviews undertaken in Europe in recent years.

Google and Facebook (and other online platforms) may well feel these issues are being fully considered in the ongoing Senate Committee inquiry on the future of public interest journalism, which is due to report in early December 2017. Both Google and Facebook have appeared before that Senate Committee which, amongst other matters, will consider the adequacy of current competition and consumer laws to deal with the market power and practices of search engines, social media and content aggregators and their impact on the Australian media landscape.

THE FUTURE AUSTRALIAN MEDIA LANDSCAPE

Australian media companies are facing challenges. This is a direct result of the changing viewing habits of Australian consumers. As consumer tastes change, traditional media companies have seen declining audiences and have therefore also seen their main source of revenue, advertising, decline. As noted in the Explanatory Memorandum for the BSA Bill, over the 10 year period to 2015 the share of Australian advertising for online platforms has grown from 6.1 per cent to 42.5 per cent². This reflects that advertisers are seeking to reach the widest audience possible and so are shifting their advertising spend to online platforms.

² Explanatory Memorandum for BSA Bill (http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r5907_ems_978e8b30-1d13-4ced-bfc2-428f25095021/upload_pdf/636053.pdf;fileType=application%2Fpdf) at page 23.

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C H A N C E

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The changes to the media ownership laws, helpful though they may be, will not arrest the decline in audience numbers for traditional media platforms. However, the Government hopes that these changes will allow Australian media companies to compete on a more level playing field and develop innovative models of content delivery that are attractive to consumers. Only time will tell if the changes have the desired effect.

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