Australian Government
Department of Communications and the Arts

Regulation Impact Statement

Media ownership and local programming obligations

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Context

Media control and ownership rules

The regulatory framework governing the control and ownership of Australia's media was developed in an analogue media environment that was dominated by three platforms: free-to-air television, free-to-air radio and print. The current control and ownership rules regulate these three platforms, and are based on a common geographical area within which diversity can be measured – the commercial radio licence area. This arrangement allowed the development of numerical tests as a proxy for diversity.

The current framework, established under Part 5 of the *Broadcasting Services Act 1992* (the BSA), is essentially comprised of five rules which limit the 'control' of commercial broadcasting services (television and radio) and newspapers associated with their licence areas.

- The media ownership and control rules are based on the concept of 'control', not ownership per se. If a person has company interests exceeding 15 per cent, they are regarded as being in a position to exercise control of the company. However, holding company interests is not the only way to be in a position to exercise control. Other examples of control are if the person: is the licensee; can control the selection or provision of a significant proportion of the licensee's programming; can control a significant proportion of the operations of the company; can appoint, secure or veto the appointment of at least half of the board of directors; or can exercise direction or restraint over any substantial issue affecting the management or affairs of the licensee or company. Similar criteria apply to newspapers, their publishers and persons exercising control of them.
- An 'associated newspaper' is one that that is 'linked' in terms of circulation with the relevant licence area. Importantly, this excludes the national newspapers, *The Australian* and the *Australian Financial Review*, and as a consequence, the ownership of these papers is not regulated through the media control rules.

'5/4' rule (the 'minimum voices rule')

- At least five independent media 'voices' must be present in metropolitan commercial radio licence areas (the mainland state capital cities), and at least four in regional commercial radio licence areas.
  - A 'voice' is a commercial television broadcasting licence, a commercial radio broadcasting licence or an associated newspaper (a 'media operation'), or a group of two or more media operations (a 'media group'). A standalone media operation and a separate media group each count for one 'point' under the 'minimum voices rule'.

'2 out of 3' rule (the 'cross-media ownership rule')

- Mergers cannot involve more than two of three regulated media platforms (commercial television, commercial radio and associated newspapers) in any commercial radio licence area.

'75 per cent audience reach' rule

- A person, either in their own right or as a director of one or more companies, must not be in a position to exercise control of commercial television broadcasting licences whose total licence area population exceeds 75 per cent of the population of Australia.

'One-to-a-market' rule

- A person, either in their own right or as a director of one or more companies, must not be able to exercise control of more than one commercial television broadcasting licence in a licence area.

'Two-to-a-market' rule

- A person, either in their own right or as a director of one or more companies, must not be able to exercise control of more than two commercial radio broadcasting licences in the same licence area.

Media transactions are also subject to other regulatory assessments in relation to competition under the *Competition and Consumer Act 2010* and foreign investment under the *Foreign Acquisitions and Takeovers Act 1975* and Australia's Foreign Investment Policy.

Local programming in regional Australia

Between 1989 and 1992 some smaller regional commercial television licence areas that had received television services from single providers were aggregated into larger areas or 'aggregated markets,' these being:

- Regional Queensland
- Northern New South Wales
- Southern New South Wales, and
- Regional Victoria.

These services were aggregated to provide three commercial television services to major regional areas in Australia so that the number of services available would be comparable to metropolitan areas, and also to promote competition and establish more viable regional television markets.

Following concerns about the level of local programming being broadcast in these aggregated markets, the *Broadcasting Services (Additional Television Licence Condition) Notice 7 April 2003* (the 2003 licence condition) was introduced by the Australian Broadcasting Authority (the industry regulator, and predecessor to the Australian Communications and Media Authority). The 2003 Licence Condition required regional commercial television broadcasting licensees to provide minimum levels of material of local significance in local areas within the four aggregated markets. Note that, 'material of local significance' (referred to hereafter as 'local programming') is defined in the relevant licence condition to be material that is broadcast to a local area if it relates directly to the local area, or the licensee's licence area.

During broader media ownership reforms in 2006, Parliament introduced section 43A into the BSA. Section 43A requires the Australian Communications and Media Authority (ACMA) to make and maintain a licence condition to require commercial regional broadcasters to provide minimum levels of local programming to local areas within licence areas in aggregated markets. The scope of the obligations was also extended to include Tasmania.

The obligations provided under section 43A currently operate as a licence condition—the *Broadcasting Services (Additional Television Licence Condition) Notice 2014* (BSN). Under the BSN, licensees in the aggregated markets and Tasmania are required to provide minimum levels of local programming to specified local areas, with the minimum required levels set by a points system. Points are accumulated by licensees through broadcasting local programming during eligible periods (6:30am to midnight Monday to Friday, and 8am to midnight on weekends) for timing periods defined in the BSN. Points are accumulated on a 'per minute' basis, i.e. 1 point for 1 minute of qualifying programming, with local news programming incentivised through being allocated 2 points per minute broadcast.

Specified licensees are required to meet minimum quotas of:

- An average of 720 points per six-week period; and
- A minimum requirement of 90 points per week.

Information supplied to the ACMA by relevant licensees up until 2014 indicates that many licensees subject to the BSN obligations significantly exceed their programming requirements, while some broadcasters operating in non-aggregated regional markets provide local programming despite there being no regulatory obligation to do so, indicating that there are commercial drivers for providing local programming in some markets. This compliance information is no longer supplied to the ACMA.

The problem

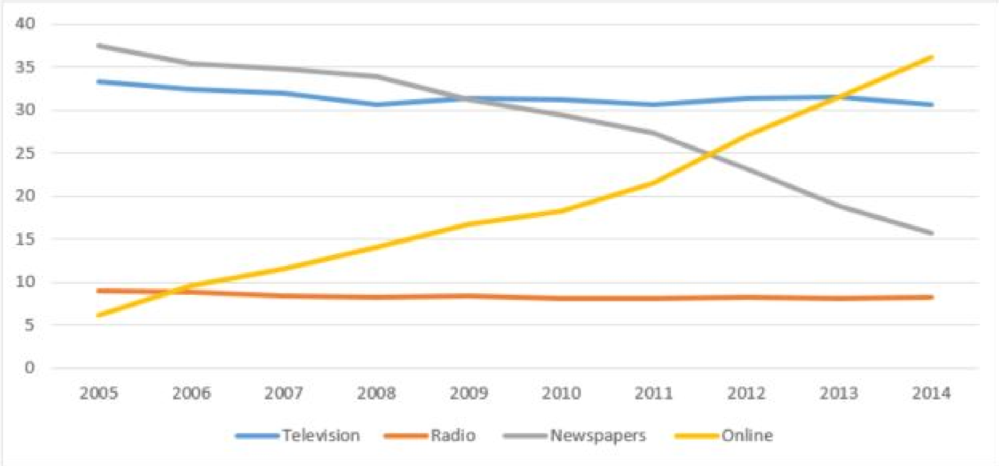
The legislative framework governing the Australian media is no longer appropriate for the modern media environment. The current media control and ownership laws were developed in the analogue era and only apply to traditional platforms, namely: commercial television, commercial radio and associated newspapers. Collectively, these rules restrict traditional media companies from optimising the scale and scope of their operations and from accessing resources, capital and management expertise available in other media sectors. Under the current rules, established media operators do not have the flexibility to respond to increasing financial pressures by adapting to the changing media landscape including through mergers with other television broadcasters or other associated newspapers or radio broadcasters.

Current media rules are outdated

The current media ownership and control framework was set in a time when traditional media companies dominated the delivery of audio, audio visual and news content to audiences and the opportunities for advertisers to reach those audiences. Within this dynamic, predictable numerical tests (performed through the media control and ownership rules outlined above) could act as a proxy for media diversity. This is no longer the case as the modern media environment consists of more than the three regulated platforms. For example, Foxtel, Australia’s most profitable media company, is not regulated under the media ownership rules, nor are online sources of content, such as popular streaming service Netflix.

Internet platforms and services: The internet and IP-based technologies have provided opportunities for new platforms and business models, and the pressure on established operators has increased significantly. The impact of the internet can be seen in the shift of advertising revenue by platform. As shown in Figure 1, online platforms have grown from having a 6.1 per cent share of the Australian advertising ‘pie’ to achieving the largest share of advertising revenues, capturing 36.2 per cent in 2014.[i] Over the same period, television and radio shares have declined modestly (to 30.7 per cent and 8.2 per cent respectively), while newspapers have plummeted from 37.5 per cent to 15.7 per cent.

Figure 1 – Share of total advertising by media platform



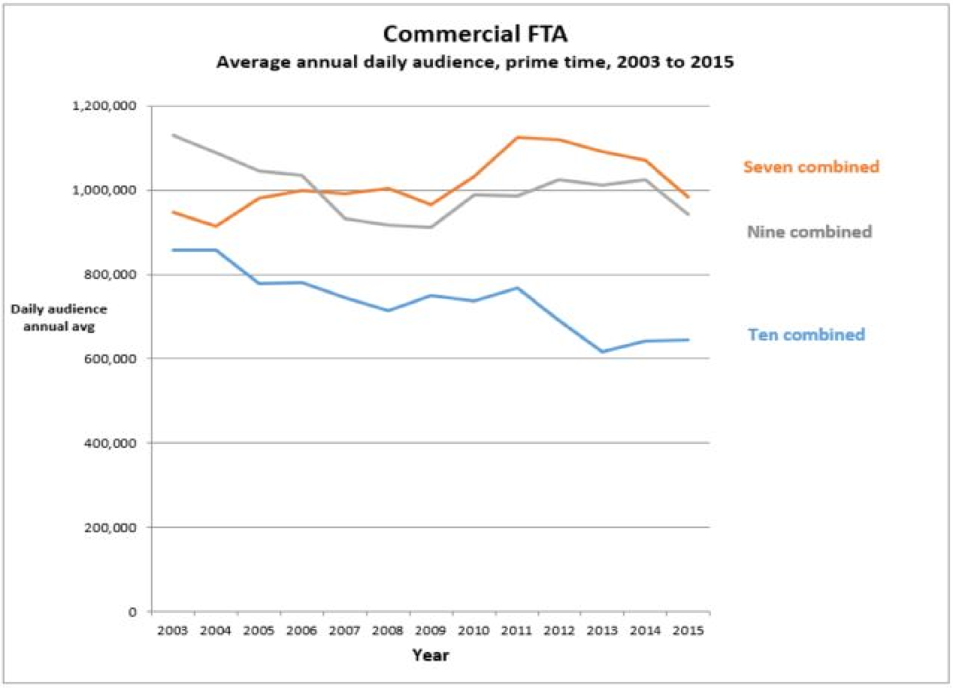
Source: Commercial Economic Advisory Service Australia, 2015

While traditional media platforms remain profitable and attract significant audiences (with some exceptions), consumers are moving to new sources of video, audio and news content. Newspaper circulations have shrunk significantly in recent years, and while digital subscriptions continue to grow, they are not replacing the hard copy readership. Weekly print readership of titles including *The Sydney Morning Herald*, *The Daily Telegraph*, *The Age* and *The Herald Sun* fell between 22 and 46 per cent between 2003 and 2014.[ii] Digital revenues remain low, making up less than 10 per cent of print revenues in 2014.[iii] Online sources of news are widespread, with consumers having access to both local and international online sources. Close to half of all Australians (44 per cent) actually identify online sources of news, including social media, as their main source of news, ahead of the more traditional platforms.[iv] Local online-only or predominantly online sources now include *The Conversation*, *Crikey, New Matilda*, *The Huffington Post*, *The Daily Mail*, *The Guardian Online* and *BuzzFeed*, and online aggregators such as *Google News* and Apple's *News* app.

The business of commercial broadcasting is hinged on the capacity to amass viewers for advertisers. At an aggregate level, the majority of viewing time remains devoted to broadcast television on in-home sets[v], and commercial television audiences have been relatively resilient over the past decade; between 2003 and 2015, the total evening audience for the metropolitan commercial free-to-air television broadcasters has declined modestly from 3.691 million to 3.386 million viewers.[vi] However, more dramatic declines were evident in 2015, with free-to-air audiences for the metropolitan broadcasters falling by 5 per cent compared with 2014,[vii] and the average number of hours of broadcast television viewed fell below 90 hours per month (or 3 hours per day) in the first quarter of that year,[viii] representing the first decline below the 90 hours per month level since television people meters were introduced in 1991.[ix]

Audience stability at the industry-wide level also masks significant divergence between the main networks, as seen in Figure 2: the Seven Network posted modest growth in its average evening audiences of 3.8 per cent over the 13 years to 2015; the Nine Network recorded a decline of 16.5 per cent over this period; while Network Ten's total evening audience has fallen by almost 25 per cent, with the primary channel audience dropping by close to 50 per cent.[x]

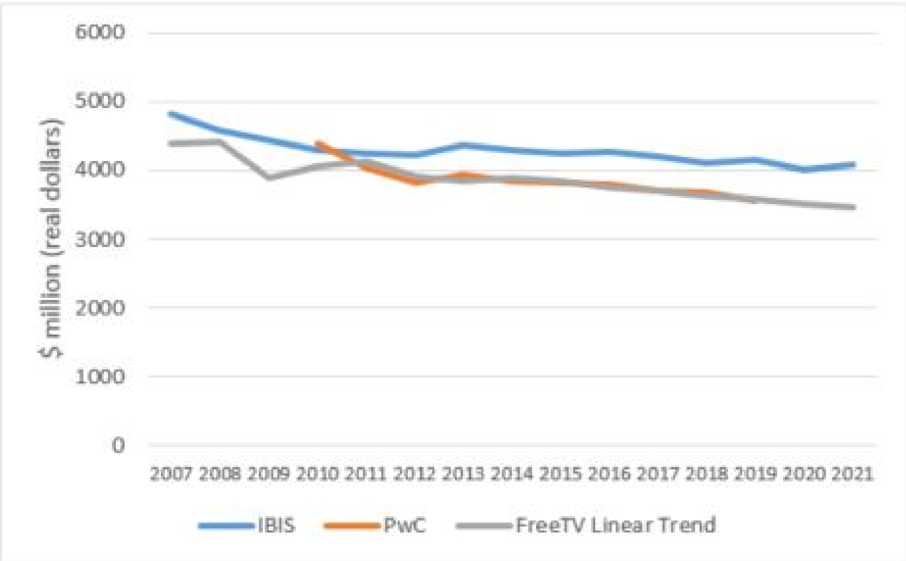
Figure 2 – Commercial free-to-air television audiences



Source: Sun-Sat 1800-2400, 5 City Metro, Wks 1-52 2003-2015, Total People, Consolidated (2003 to 2009 live only). Data © OzTAM Pty Limited 2015. The Data may not be reproduced, published or communicated (electronically or in hard copy) without the prior written consent of OzTAM.

Furthermore, industry analysts IBISWorld and PricewaterhouseCoopers (PWC) are predicting a decline in revenue for free-to-air television in real terms, which is consistent with a linear trend analysis of Free TV Australia revenue data, as shown in Figure 3.

Figure 3 – Free-to-air commercial television advertising revenue projections



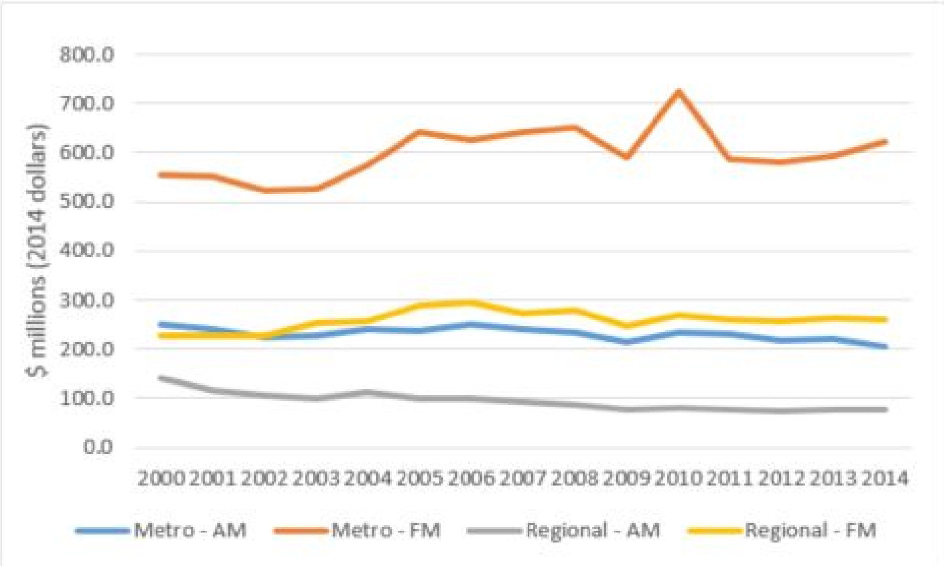
Source: IBISWorld industry report, PWC media outlook 2015-2019, FreeTV BFR data

Note: figures adjusted for inflation using the GDP Implicit price deflator produced by the ABS. Forecast figures adjusted for inflation IBISWorld figures adjusted to remove government revenues. FreeTV data analysis based on a line of best fit (least squares) linear regression.

Radio audiences have also been relatively stable over recent years, although this does not necessarily translate to revenue. Metropolitan commercial radio audiences grew by between 1 and 3 per cent per annum from 2009 to 2013,[xi] and 6.2 per cent from 2013 to 2015.[xii] However, audience growth has also been strong online. Research from Nielsen indicates that Australians are already listening to more online audio content (8.2 hours) than terrestrial radio (8.0 hours) per week.[xiii]

There is also significant fragmentation within the radio sector. Metropolitan commercial radio services attract larger audiences than their regional counterparts simply due to the differences in market size. However, in all areas, there is a stark divide between AM and FM stations. Consistent with generally poor ratings, regional AM revenues have dropped 46.1 per cent in real terms between 2000 and 2014 (4.3 per cent per annum), while revenues for the metropolitan AM broadcasters have declined 18.8 per cent over the same period (1.5 per cent per annum). At the same time, FM broadcasters – metropolitan and regional – have increased revenues at close to 1 per cent per annum. This is demonstrated in Figure 4.

Figure 4 – Free-to-air commercial radio revenue by modulation



Source: ACMA Broadcast Financial Results, various years
Notes: Figures are adjusted for inflation using the GDP implicit price deflator. Based on service revenue (which includes advertising revenue, other licence fee revenue and other revenue)

In the audio visual market, the changing dynamic is centred on the proliferation of video and audio on demand and streaming services, most notably the Australian launch and rapid consumer take-up of US-based streaming service Netflix in March 2015. As at October 2015, 2.68 million Australians aged over 14, or 11.4 per cent of Australian households, had access to a Netflix subscription.[xiv] Pay-based television services more broadly are also growing, with 3.1 million Australian households subscribing to one or more services as at 30 June 2015.[xv] This includes Foxtel, as well as new Subscription Video On Demand (SVOD) services (such as Netflix, Stan and Presto) and IPTV providers such as Fetch TV. A similar situation exists in the audio market, where ad-supported and subscription audio services are available to Australians from Spotify, iTunes Radio and Pandora, among others, for relatively low cost ($10 to $12 per month). Spotify has over 15 million paying subscribers and more than 60 million active users across 56 markets worldwide, including Australia.[xvi] With so many market players, audiences have an unprecedented variety to choose from for accessing news and entertainment.

Free-to-air television and radio broadcasters have not been standing still amidst these changes and have sought out new revenue streams.

- SVOD: two on-demand streaming services involving free-to-air television broadcasters were launched in early 2015: Stan (a joint venture with Nine Entertainment and Fairfax Media) and Presto (a joint-venture between Seven West Media and Foxtel)
- Catch-up: All of the free-to-air television networks have online catch-up services, where audiences can watch video content online after its initial broadcast on television: *PLUS7* (Seven Network), *9Now* (Nine Network) *TENplay* (Network Ten), *iView* (ABC) and *SBS on Demand* (SBS).
- Streaming: Seven West Media and Nine Entertainment Co have either commenced or intend to commence live-streaming of their television channels (Seven Network and Nine Network respectively),[xvii,xviii] while many commercial radio broadcasters stream their terrestrial services. Australian Radio Network (ARN) operates iHeartRadio, which allows listeners to access any of network's stations or create customised stations.[xix]

Although these developments are notable, the likelihood that broadcasters will be able to successfully diversify into the new media space and compete with online providers remains unclear.

- While Stan and Presto launched in Australia at approximately the same time as Netflix, they have been taken up by viewers in less than 1 per cent of Australian homes, compared with over 11 per cent for Netflix.[xx] Broadcasters are clearly seeing these services as complementary rather than as profit drivers. David Gyngell, former CEO of Nine, stated it would remain to be seen whether Stan would turn a profit, and that rather than being a "saviour" of the company, Stan is "an adjunct to content acquisition and original content deals."[xxi]
- Radio broadcasters looking to develop audio streaming services face a crowded market, with competition from international players such as Spotify, Apple and Google. Consolidation is the overwhelming trend as smaller players are absorbed, a recent example being Nova's exit from its joint-venture in streaming service Rdio shortly before Rdio declared bankruptcy and had its assets acquired by US-based internet radio service Pandora.[xxii]
- The experience in overseas markets, where subscription video and audio streaming services are more mature, suggests that online only providers have the capacity to rapidly gain a dominant market position. For example, in the United States, Netflix had 42 million subscribers as of July 2015[xxiii] and accounted for 37 per cent of internet traffic, [xxiv] and its growth has exacerbated the 'cord cutting' or cancellation of traditional cable television services by consumers.[xxv]

It is clear that free-to-air commercial television and radio broadcasters and print newspapers are under increasing and unprecedented commercial pressure. Their operating environment has changed substantially, and is likely to continue to do so over the coming 5 to 10 years. The current media control and ownership rules constrain the capacity of Australian media operators to optimally structure their businesses to deal with change underway in the industry, through increasing the scale of their operations and providing new opportunities for growth and diversification into new services.

Availability of local programming

Local programming is valued by regional Australians and provides them with access to news, information and commentary relevant to them and the areas in which they live. It also supports jobs and investment in regional communities, particularly where such programming is produced locally. While there are clear benefits associated with services that provide local programming, there are also significant costs and investment outlays associated with it, and market forces alone may not ensure that local programming is provided at optimal levels. In particular, local programming may be at risk where regional television broadcasters merge with metropolitan operations and there are strong expectations of cost savings from the merger or acquisition.

Increasingly, domestic businesses are placed at risk by their inability to compete with unregulated media businesses, and regulatory frameworks originally designed to protect diversity are now impeding the capacity of local businesses to continue to provide quality professional journalism and reporting. The drive for efficiencies within the constraints of regulation has been seen with the closures of news rooms and cessation of local news bulletins by regional commercial television. In 2015 WIN closed TV newsrooms in Mackay and Mildura, and this was followed by job losses from Prime7 in Wagga Wagga and Tamworth as that organisation also rationalised its operations.

As noted above, many regional commercial television broadcasting licensees subject to the local programming obligations significantly exceed their programming requirements, while some broadcasters operating in non-aggregated regional markets provide local programming despite there being no regulatory obligation to do so. This suggests that there are commercial drivers for providing local programming in some markets, and that the pressure to realise efficiencies may not result in cuts to local production and content provision.

However, the high costs of providing local programming relative to other programming (outlined in the options section below) suggest there is a clear risk that the drive for rationalisation of local programming and facilities will be a reality for commercial broadcasters in smaller markets. This local programming is valued by local audiences. While emerging services and platforms are offering regional Australians new, additional means of accessing news and information, the value of television compared to other media has been described by the ACMA as being unique in providing moving visual images of people and events in local communities with accompanying audio, compared to other platforms. For instance, the ACMA note that some competing services provide audio only (e.g. radio), some services are not as efficient in providing up-to-date information (e.g. newspapers), and some do not provide a significant amount of local programming (e.g. online/streaming services).[xxvi]

In addition to being valued by audiences, local programming provision by traditional media outlets also has an economic role. The administration and production facilities of commercial broadcasters provide employment and opportunities for Australians living in these areas: the WIN Network claims to employ over 1400 staff across six states of Australia and the ACT, [xxvii] while Prime Media Group states that it is *a significant employer of regional Australians with offices stretching from the Gold Coast, throughout many major cities and towns in regional NSW and Victoria, and across Western Australia to Geraldton*.[xxviii]

Local advertising also has a role in facilitating economic activity more broadly in regional markets, enabling local businesses to reach their local customers and stimulate sales. Although advertising revenues for commercial television broadcasting has declined in real terms over recent years, it remains significant, with industry body Free TV Australia reporting over $423 million earned by regional commercial broadcasters for the July – December 2015 period.[xxix]

While there are clear, identifiable benefits associated with services that provide local programming, market forces alone may not ensure that such programming is provided at optimal levels. The availability of local programming will be under pressure in smaller or more geographically-dispersed regional markets in particular.

The need for government action

There is a clear need for government action to address the problems outlined above, comprised of two key parts:

Repeal of regulatory impediments to business: Aspects of the existing regulatory framework are out-dated and are preventing regional television broadcasters from restructuring and rescaling their operations to better address competition from unregulated platforms, particularly over the Internet. Repeal of these regulatory impediments will help modernise the media ownership and control framework, and will provide businesses with opportunities to strengthen their businesses, with likely flow-on benefits for consumers in the form of higher-quality services being available to them.

Establishment of effective support for regional Australians' access to the local programming they value, where the market fails to deliver this: Providing local television programming is a high cost activity and will not always be commercially feasible for regional broadcasters on their own to pursue, particularly in large geographic areas with relatively dispersed populations. Subsequently, while regional Australians value programming relevant to them and the areas in which they live, in the absence of regulation the market will not always be an effective mechanism for providing it. The significant scale and efficiency benefits available through mergers with metropolitan broadcasters will better position regional broadcasters to sustainably supply local programming and ensure a return to local communities from the repeal of the 75% audience reach rule.

As these obligations are based in legislation Government action is required to deliver the intended reforms.

As articulated above, the current rules constrain the capacity of Australian media operators to optimally structure their businesses to deal with change underway in the industry and increase the scale of their operations. These constraints on scale and structure are not an anomaly or by-product of the rules but are, in fact, an explicit aim: they operate to stop consolidation beyond certain limits within and across the traditional media platforms of commercial broadcasting and certain newspapers.

Increasingly, domestic businesses are placed at risk by their inability to compete on a level playing field, and regulatory frameworks originally designed to protect diversity are now impeding the capacity of local businesses to continue to provide quality professional journalism and reporting. Regional commercial television broadcasters face particular challenges, for two reasons:

- Their lack of bargaining power for content. Regional broadcasters enter into programme affiliation agreements with metropolitan networks that require significant affiliation fees in return (between 32 and 39 per cent of their revenues). In late 2015, WIN television risked 'going black' over its affiliation agreement with the Nine network, with reports that Nine was increasing affiliation fees from 39 per cent to 55 per cent of revenue. While the issue was temporarily resolved on 31 December 2015, this interim arrangement is due to expire on 30 June 2016.
- Moves by the metropolitan networks – including Seven and Nine – to provide live online streaming of their content, which effectively allows them to penetrate regional licence areas. Over time, this is likely to result in the erosion of regional audiences and advertising revenue. It is

notable that in February 2016 WIN launched legal action against Nine in relation to its live streaming service, indicating the significance of such services to the players involved.

It is doubtful whether this targeting of the traditional media is sustainable given the financial pressures being brought to bear on these operators as a result of audience fragmentation and increasing competition for viewers and audience. While there is no case for shielding incumbent media operators from competitive disruption, it is important to ensure that regulatory frameworks are not impeding their capacity to compete effectively in the global media market place against media firms that, in many instances, are not regulated to the same extent as commercial broadcasters.

However, any reform of the control and ownership rules to permit greater scale and efficiencies in the operations of transitional media companies will need to balance these benefits with the policy objectives of media diversity and the provision of local programming. The Government has and will continue to have a role in this regard, as broadcasters may not otherwise provide the level of local programming that is optimal for local communities. As noted above, the high costs of local programming production and the structural changes underway in the media more broadly will continue to create incentives for broadcasters to achieve further efficiencies, placing pressure on the continued supply of local television at current levels.

Options and Analysis

Option 1: No change

Description

Leave existing media ownership and control rules and local programming provisions unchanged.

Analysis

In the current media environment, as described above, the control rules are hindering competition by preventing traditional media companies from adapting to the changing nature of the industry and building scale to compete with unregulated media companies. No new or additional regulatory requirements would apply to industry under this option. The costings for this option are zero.

Option 1: Average annual regulatory costs (from business as usual)

Change in costs ($ million)	Business	Community organisations	Individuals	Total change in costs
Total, by sector	$ 0	$ 0	$ 0	$ 0

Assessment

There are significant short-comings to a ‘do-nothing’ option. The current rules are no longer relevant in the contemporary media environment and unnecessarily constrain the capacity of regulated Australian media operators to optimally structure their businesses to deal with change underway in the industry. Without reform, financial pressures being brought to bear on traditional media operators as a result of audience fragmentation and increasing competition for viewers and audience will continue to mount. The regulatory framework will become increasingly antiquated and impede media companies’ capacity to compete effectively in the global media market place.

Option 2: Repeal outdated media ownership rules, while leaving existing local television programming rules unchanged.

Description

Repeal the '75 per cent audience reach' rule and the '2 out of 3' rule, while leaving the existing local television programming rules provided at section 43A of the BSA unchanged.

Analysis

Retention of '75 per cent audience reach' rule and the '2 out of 3' rule is increasingly difficult to justify when consumers are using online sources of news as often if not more than traditional platforms, and where there are no media-specific restrictions on consolidation or industry structure of online media, beyond general competition laws. The implications of removing these rules are outlined below.

The '75 per cent audience reach' rule

- This rule effectively prevents the owners or controllers of any one of the major metropolitan commercial networks (Seven, Nine and Ten) from gaining control of (or merging with) any one of the regional commercial networks (Prime, WIN and Southern Cross Austereo), as the metropolitan networks are currently close to the permitted maximum reach of 75 per cent of the Australian population. Removal of this rule will allow consolidation of control between metropolitan and regional broadcasters – noting that a range of possible scenarios could occur depending on commercial considerations.
    - One such example of a consolidation, which has been the subject of media speculation, could be Nine Entertainment Co. acquiring the assets of Southern Cross Austereo.
- In a practical sense, the rule is redundant as viewers in regional areas already receive the same number of commercial television services, and substantially the same commercial television programming, as their metropolitan counterparts due to affiliation agreements, including many news services. If consolidation occurs, local advertising arrangements would be expected to be maintained because it supports local markets (and local revenue sources).
- Any mergers between metropolitan and regional broadcasters would be unlikely to result in a reduction in the diversity or number of voices in the affected markets. On a practical level, programming provided within a licence area that was involved in a merger or acquisition would be unlikely to change, at least in the short term. This is because any such merger or acquisition activity will generally involve the replacement of one voice with another, because metropolitan and regional networks for the most part operate in separate licence areas.

The '2 out of 3' rule

- This rule assists in maintaining media diversity by preventing a person that controls two regulated media platforms in a licence area from acquiring control of a third platform in the same licence area.
    - For example, Fairfax Media cannot currently control a commercial television licence in Sydney or Melbourne unless it divests its commercial radio or associated newspaper holding in the relevant licence area. Without this rule, Fairfax Media would be allowed to control a television, radio and associated newspaper licence in the Sydney and/or Melbourne licence area.
- In most licence areas, the 2 out of 3 rule is not in play as no single entity controls media assets from two of the three regulated platforms in these areas. If the rule is removed, the great majority of regional and remote licence areas of Australia would see little change as the retention of the 5/4 minimum voices rule would ensure preservation of existing levels of media diversity. Given the greater number of media outlets and levels of media diversity in metropolitan areas, consolidation in these larger markets may not raise particular diversity concerns.

- Even if potential transactions complied with the proposed revised media ownership and control rules, they may not proceed for other reasons: the Australian Competition and Consumer Commission (ACCC) may prohibit mergers that substantially lessen competition under the *Competition and Consumer Act 2010* (the proposed reforms will not alter the ACCC's role); or they may not have sufficient commercial merit and industry participants may opt not to acquire additional media assets.

From a costing perspective, the repeal of the '2 out of 3' and '75 per cent audience reach' rule would have a zero regulatory cost (and deregulatory cost). These measures are deregulatory in nature, removing current constraints on media market corporate activity, in relation to mergers and audience reach. The repeal of the '2 out of 3' rule will provide the possibility for media operations in certain markets to merge, which may provide economies of scale in their operations. There are no new reporting or administrative obligations arising from this proposal, and there is no removal of administrative overhead associated with existing arrangements.

Option 2: Average annual regulatory costs (from business as usual)

Change in costs ($ million)	Business	Community organisations	Individuals	Total change in costs
Total, by sector	$ 0	$ 0	$ 0	$ 0

Assessment

Removal of the '75 per cent audience reach' rule and the '2 out of 3' rule would be effective in modernising the media control and ownership framework and allowing media companies to compete in the current media environment. This option would also involve retention of existing regulated amounts of local programming in aggregated markets, ensuring a minimum requirement is maintained regardless of control changes in the television industry.

However, there could be expected to be changes in the actual amounts of local programming in regional areas. Where changes in control of an organisation lead to the business rationalising its operations, there is a possibility that this may involve a reduction in the amount of local programming to the minimum levels required by the current obligations in relevant licence areas. Regional advocates have expressed concerns that mergers or other consolidation in this sector may result in reduced local programming being available in regional areas, particularly in markets not currently subject to local television programming obligations. As such, this is not the preferred option for reform as it does not strike the right balance between giving media companies the freedom they need to remain competitive and ensuring the provision of local programming.

Option 3: Repeal outdated media ownership rules, while updating local television programming rules

Repeal outdated media ownership rules to facilitate a more competitive media sector, while establishing a new framework to support the continued availability of minimum levels of local television programming in regional Australia, particularly when changes of control occur.

Description

Remove the '75 per cent audience reach' rule and the '2 out of 3' rule, and introduce local programming obligations for certain commercial regional broadcasters.

Local programming obligations

- To support the proposed media ownership and control reforms outlined above, it is proposed that new obligations be established in conjunction with the proposed media ownership reforms, so as to support the availability of minimum levels of local programming on regional commercial television.
- As noted previously, the majority of commercial television licensees in aggregated markets and Tasmania are currently required to meet local programming obligations under section 43A of the BSA. The aggregated markets include much of regional New South Wales, Queensland and Victoria, and licensees in these markets and in Tasmania must provide between 60 and 120 minutes of local programming (such as news) per week. In all other regional and remote licence areas, there is no obligation to provide local programming (though some is provided in some areas).
- The proposed local programming obligations described below would be linked specifically to business activities which result in certain changes of control. They would apply to regional commercial television licences forming part of a commonly-controlled group of licences that collectively reach more than 75 per cent of the Australian population as a result in a change in control of one or more of those licences (a '*trigger event*' for the new obligations).

An approach to implementing local programming obligations in regional areas is outlined in below.

New programming obligations for regional commercial broadcasters – basic outline

The most effective approach to establishing programming obligations for regional commercial broadcasters is to establish a new, tailored framework that requires commercial regional broadcasters to meet enhanced local programming obligations where a 'trigger-event' occurs.

Benefits	***Shortcomings***
• Design would be tailored to problem. • Flexibility for different broadcasters and licence areas would be provided. • Would ensure minimum levels of local programmes are available across regional Australia. • New regulatory requirements would only apply to licensees as a trade-off for the opportunity to exploit new opportunities and improve the efficiency of their operations.	• Some broadcasters may incur additional costs as a result of the proposal.

Analysis

As discussed in Option 2, retention of the '75 per cent audience reach' and '2 out of 3' rules is increasingly difficult to justify. Option 3 is to remove these outdated rules (for the reasons outlined in option 2), while revisiting local television programming rules to ensure the availability of valued television programming.

The element of Option 3 which proposes to strengthen obligations for the minimum levels of local programming in regional Australia will have a moderate cost impact on industry. These costs will be incurred by licensees in both aggregated and non-aggregated regional licence areas, and the costs will vary significantly between broadcasters and licence areas. However, as outlined earlier, these costs would only arise when a trigger event has occurred, and any decision to undertake such a transaction (and trigger additional local programming obligations) is solely a commercial judgement for free-to-air broadcasters.

It is reasonable to assume that any decision by broadcasters to change control of one or more commercial television licences would take all factors into account and determine it was in the interests of their shareholders. The deregulatory benefits of any such mergers (such as economies of scale in programming, marketing and distribution) do not fall within the scope of the Regulatory Burden Measurement (RBM) framework. However it is expected that these benefits would materially outweigh any costs that fall within the scope of the RBM. For this reason it is important to put the RBM costs in context and note that Option 3 remains deregulatory in net terms.

In estimating costs under the RBM the Department has used a variety of information sources.

This includes:

- • Compliance data about the levels of content currently provided in aggregated licence areas
- • Assumes three mergers will occur over a five year period if the proposal was to come into effect
- • Research and analysis on the costs of providing local programming
- • An analysis of the business as usual costs to acquire content (in the absence of a regulatory obligation).

Option 3: Average annual regulatory costs (from business as usual)

Change in costs ($ million)	Business	Community organisations	Individuals	Total change in costs
Total, by sector	$ 3.51 mil (regulatory)	$ 0	$ 0	$ 3.51 mil (regulatory)

Assessment

Removing the '75 per cent audience reach' and '2 out of 3' rules, while establishing a new framework to support the availability of local television programming in regional Australia is considered to be the optimal option for achieving the intended objectives. In regards to supporting the availability of local television programming in regional areas, the option described above removes out-dated media ownership rules while ensuring continued diversity in the ownership and control of media services in Australia. Additionally, it ensures that where the repeal of current media ownership rules results in significant changes to the scale and structure of some media organisations' business operations, this will not be at the expense of regional communities and their ability to access the local programming that these communities value.

Essentially this option is about finding a balance which continues to benefit local communities, but which is not overly burdensome for business, and only occurs when the benefits of business consolidation become available for broadcasters.

While there are costs for broadcasters associated with the local television programming obligations element of the proposal, the obligations are only triggered for commercial television broadcasting licensees where they become part of a group of licences that reach more than 75 per cent of the population. Media organisations will choose to become subject to the obligations because there is greater benefit or opportunity for them doing so than there is cost incurred by the additional obligations.

Additionally, while producing local programming comes at a financial cost to broadcasters, there is also an associated financial and reputational return. Broadcasters in some regional areas not subject to existing local programming obligations already provide local television programming in the absence of any obligation to do so – while the extent may vary, there are clearly some commercial or other less tangible incentives for providing local programming.

Description of preferred option

New local television programming requirements for regional commercial television licensees

As noted above, the preferred approach to supporting the availability of local television programming in regional Australia is establishing a new framework. This framework would be established through legislation that amends the BSA to remove the existing s43A arrangements and provide for new, tailored local programming obligations.

The key features of this approach to implementing new local programming obligations for regional commercial television licensees is described below. Obligations would apply to regional commercial television licences forming part of a group of commercial television licences whose combined licence area populations exceed 75 per cent of the Australian population, as a result of a merger, acquisition or other change in control.

The obligations specified under these arrangements would not apply to commercial television broadcasts to remote areas of Australia, or to holders of section 38A and 38B commercial television licences. Section 38A and 38B licences are allocated by the ACMA to existing licensees to ensure that regional audiences receive all three main television networks, where there are less than three broadcasters in the licence area. To place local programming obligations on section 38A and 38B licences would represent an unrealistic financial burden on the original 'parent' broadcaster/s in each regional licence area. Similarly, broadcasts to remote areas of Australia will be excluded from the new local programming obligations as their diverse, sparse populations dispersed over a large geographical area mean that local programming is economically unsustainable.

Regional aggregated markets and Tasmania

- New legislation would set a minimum amount of local programming per week which must be broadcast by licensees to applicable local programming areas.
- Where there is no trigger event this would be the same as the existing amounts specified in the *Broadcasting Services (Additional Television Licence Condition) Notice 2014* which is an average of 120 minutes per week over a six week period, and a minimum of 90 minutes per week over the same period.
- Where a trigger event occurs these amounts would increase to 150 minutes on average over a six week period with a minimum of 120 minutes per week. The increased amount reflects the greater resources available to broadcast groups with the scale to reach over 75 per cent of the population.
- The increased local programming obligation for aggregated markets and Tasmania equates to 900 points under the current system in the *Broadcasting Services (Additional Television Licence Condition) Notice 2014*. Analysis indicates that some, but not all, licensees already provide a quantity of local programming that is commensurate or above the proposed quantity to be provided under the new obligations.

Non-aggregated markets

- In the case of regional non-aggregated markets, certain licensees (section 36 licensees[xxx]) that become subject to a trigger event would be required to broadcast an average of 60 minutes of local programming per week over a six week period, with a minimum of 45 minutes per week over the same period.
- Local television programming is already provided in some non-aggregated markets despite no existing regulatory obligations to do so. Analysis indicates that some, but not all, licensees in these areas already provide a quantity of local programming that is commensurate with or above the quantity to be provided under the proposed new obligations.

Incentivising local production

- As noted above it is important to ensure a strong relationship between the local programming and the local area it is intended to serve. Where amended media ownership and control rules facilitate consolidation across media enterprises and services, the resulting potential for centralisation of business operations may be expected to weaken the link between broadcasters and the regional areas they serve. As such it is proposed that the local programming obligations include a mechanism to provide an incentive for local programming to be filmed within the local area it is relevant to.
- This incentive would be built into the points system that broadcasters will be subject to in meeting their local programming obligations under the new framework. Under the proposed arrangements,
  - each minute of the legislated amount of local programming that relates to the licence area would accumulate one point
  - each minute of local programming that comprises news specific to the local area would accumulate two points, and
  - each minute of local programming that both comprises news specific to the local area, and is filmed within the local area, would accumulate three points.
- An illustration of how the proposed points system would work follows:

Local production and points framework

Content type	**Points**	**Examples**
License area content	1	• A show about fishing on Fraser Island broadcast anywhere in the Regional Queensland Licence Area. • A news story about a car accident on the Sunshine Coast broadcast in Cairns.
Local area news	2	• A news story about a car accident on the Sunshine Coast broadcast into the Sunshine Coast.
Locally produced local area news	3	• A news story about a car accident on the Sunshine Coast broadcast into the Sunshine Coast that features vision gathered from the Sunshine Coast (eg footage of the aftermath of the accident, interviews on camera with eye-witnesses and police).

- The proposed points system is the most straightforward method of incorporating an incentive for filming in local areas into the local programming obligations, and is based on the similar points system that commercial broadcasters in aggregated markets are already familiar with.
- The proposed arrangements would also mitigate against overly centralised approaches to local news, for example news broadcasts being filmed out of central locations without significant engagement with the local area in which it is broadcast.
- The legislation would require the ACMA to determine a definition of 'filmed in the local or licence area', however at a minimum the definition would include within its scope both pre-recorded footage and live broadcasts or 'crosses' to the local programming or licence area. The ACMA would need to consider how 'file footage' should be treated, for example reusing the same footage of local schools or the main street.
- The legislation would require regional commercial broadcasting licensees to provide reports on their compliance with the obligations twelve months after a 'trigger event', and at yearly intervals for two years after this.

Role of the ACMA

Under this proposal the ACMA would determine a new Local Programming Notice which includes the following elements:

- Identifies the local programming licence areas for aggregated markets, and the number of local programming areas served within each licence area;
- Defines, 'material of local significance', and 'filmed within the local or licence area';
- Sets the hours, if any, during which the material of local significance must be broadcast;
- Sets other limits, for example limiting repeats, community service announcements;
- Sets the 48 week timeframe during which the material of local significance must be broadcast, including sub periods (e.g. 6 week reporting periods);
- Compliance and reporting requirements, and
- Provide interpretative guidance as required.

The ACMA would also be required to review the operation of the local programming provisions within two years following its commencement, or as otherwise directed by the Minister in accordance with below.

Minister's reserve powers

It is proposed that the legislation specifically empower the Minister to give directions to the ACMA in relation to its powers under the new provisions. This could include aspects of the local programming notice, or to direct the ACMA to undertake a review of the provisions earlier than the two year timeframe set out above. This is designed to allow the ACMA to determine key parameters and specifics of the local programming arrangements whilst at the same time preserving a level of control for the Minister. A similar provision exists in section 121G of the BSA in relation to Australian programming obligations.

Commencement

The new local programming provisions would commence six months following Royal Assent to the amending legislation and after the commencement of legislation which repeals the '75 per cent audience reach' rule and the '2 out of 3' rule.

The delayed commencement will allow the ACMA sufficient time to make the new local programming notice before the commencement of the new obligations. Existing obligations for aggregated markets and Tasmania would continue until the new local television programming obligations commence ensuring that there is no reduction in local programming obligations for these markets.

It is important to note that licensees would not be required to meet local programming obligations until six months following a trigger event, regardless of the commencement provisions associated with Royal Assent. This will allow affected licensees to undertake the necessary preparatory activity and investment in order to meet the obligations.

Benefit of preferred approach

This approach to establishing local programming obligations is the most effective and efficient way of addressing the key problems associated with minimum levels of local programming being available to regional Australians, as described earlier in this paper. This approach is the most effective way of providing for regional Australians to share in the benefits of improvements in the way media businesses operate, and strikes the right balance between business and consumer objectives. Additionally, the approach is flexible for broadcasters and effective for consumers in achieving the intended outcomes. This approach provides that the design of new obligations will be tailored to the problems identified, including that:

- minimum levels of local programming will be required to ensure regional Australians have access to the programming that they value
- these obligations would be linked to changes of control, allowing businesses to capture the benefits of the more flexible media ownership rules
- the amount of local programming required will vary between areas and will have regard to different broadcasters' circumstances, but will also reflect the increased scale and efficiency of broadcasters afforded by ownership and control rule changes, and
- a strong link between local programming and the area it serves will be incentivised through the points system that will underpin broadcasters' compliance with their local programme obligations, with more points allocated per minute for programming filmed in the local area than for other programming.

The new regulatory requirements will only apply to licensees as a trade-off for the opportunity to exploit new opportunities and improve the efficiency of their operations.

Consultation

The Minister for Communications has engaged in extensive consultations directly with industry stakeholders, including regional and metropolitan broadcasters amongst other industry participants, continuing conversations begun by the former Minister for Communications in 2014. These consultations have identified that there will be some level of support for the proposals, though the nature of support will vary in relation to different elements of the proposals, and may vary between stakeholders.

Consultations with stakeholders in relation to repealing the 2 out of 3 rule indicated that Nine Entertainment Co, Ten Network Holdings, Prime Media Group, Southern Cross Austereo, WIN and Fairfax Media were strongly supportive of its repeal. APN News and Media were also supportive. Seven West Media were indifferent and opposed to 'standalone' repeals without broader media reform. Similarly Foxtel and News Corp Australia were opposed to the repeal of any media control rules in isolation.

Consultations with stakeholders in relation to repealing the 75 per cent reach rule indicated that Nine Entertainment Co, Ten Network Holdings, Prime Media Group, Southern Cross Austereo, WIN and

Fairfax Media were strongly supportive of the proposal. Seven West Media was indifferent and opposed to 'standalone' repeals and argued that this repeal would in fact reduce local content in the regions. Foxtel and News Corp were again opposed to the repeal of any control rules in isolation.

In relation to the proposed additional local content obligations, stakeholder consultation indicated mixed views. Prime Media Group, Southern Cross Austereo and WIN indicated their support for the local content and local filming proposal as long as they are contingent on a trigger event. Seven West Media, Ten Network Holdings, Foxtel, News Corp, Fairfax Media Limited and APN News and Media did not make their views on this measure known, noting that Seven and Nine already provide local content in some of their markets and Ten does not own a regional licence.

The possibility and effects of changes to media control and ownership rules have been a significant subject of discussion in the media in recent times. Media analysis and stakeholder input to that discussion has been extensive, with the feasibility and appropriateness of various reform options for media ownership reform having been the subject of significant analysis.

Regional Australians' views on local programming have been considered as part of a local content investigation undertaken by the ACMA in 2013. As noted previous, research that informed the investigation suggests that regional Australians are likely to be strongly supportive of any measure that facilitates their access to local television programming and services. Such programming is highly valued in these areas. The closure of WIN's Mildura and Mackay newsrooms in 2015 provoked 'shock and disappointment'[1] from local communities. Ten staff news staff were impacted in Mackay[2] with Mildura news staff advised to apply for vacancies at other WIN bureaus in regional Victoria[3]. Further, in Mildura, sixty locals set up the 'Save Sunraysia TV News' group aimed at examining alternatives to receiving regional news, including surveying local businesses to establish what their advertising spend is in order to entice another provider of local news into the region.[4]

Status of the Regulation Impact Statement

A Regulation Impact Statement (RIS) was prepared before early decisions were taken. The RIS passed through final assessment by the Office of Best Practice Regulation before final decisions were taken.

Conclusion

The current media control and ownership laws were developed in the analogue era and only apply to traditional platforms such as commercial television, radio and some newspapers. Collectively, these rules restrict traditional media companies from optimising the scale and scope of their operations and from accessing resources, capital and management expertise available in other media sectors. Financial pressures on established media operators continue to build and they must have the flexibility to compete and adapt in the changing media landscape if they are to continue to play a significant role in Australian society and communities in the future.

Removing the '2 out of 3' and '75 per cent audience reach' rules would reduce the regulatory burden on the media industry and enable them to better compete in the modern media environment.

To ensure local programming continues to be provided in regional Australia, new programming obligations for commercial regional television broadcasters will avoid problems associated with creating

[1] www.sunraysiadaily.com.au/story/3097986/sad-news-shock-aired-online/?cs=1511
[2] www.tvtonight.com.au/2015/05/win-tv-mackay-mildura-in-shock-closures.html
[3] www.sunraysiadaily.com.au/story/3097916/an-era-ends-win-tv-signs-off-mildura-news-bulletin/
[4] www.abc.net.au/local/photos/2015/06/02/4247047.htm

complex, unwieldy rules through amending the existing framework. This approach will facilitate the design of an appropriate framework that is tailored to the problem and to the different needs of affected stakeholders.

The approach described above directly responds to potential effects of the proposed media ownership and control reforms discussed above, and takes into account that the effects of those changes might be different in different licence areas. The arrangements are flexible for licensees, and proportional to the different areas in which they operate. Importantly, it will ensure that a minimum level of local programming will be available to regional areas.

It is expected that there will be costs for broadcasters associated with the local programming obligations element of the proposal, however the obligations are only triggered for regional commercial television broadcasting licensees where they have selected to consolidate or restructure their operations. Media organisations will choose to become subject to the obligations because there is greater benefit to them doing so than there is cost incurred by local programming obligations. Additionally, while producing local programming comes at a financial cost to broadcasters, there is also an associated financial return. Broadcasters in some regional areas already provide local programming in the absence of any obligation to do so – while the extent may vary, there is clearly some commercial incentive for providing local programming.

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[i] Advertising across all media sectors had a value of $12.8 billion in 2014. Commercial Economic Advisory Service Australia, 2015.
[ii] Derived from Roy Morgan Single Source Australia 2014, *Cross-platform and print individual breakdown report (2010-2014)*, commissioned research.
[iii] Drawn from figures in CEASA 2015, *Advertising Expenditure in Main Media, Year ended 31 December 2014*, Table 2014-2, p. 9.
[iv] Reuters Institute for the Study of Journalism 2015, *Reuters Institute Digital News Report 2015*, pp. 10-11.
[v] Nielsen 2015, *Australian Multi-Screen Report, Quarter 2 2015*, p. 2.
[vi] OzTAM 2015, Primetime Audience for the Free to Air channels Wks 1-52 2003-2015, Sun-Sat 1800-2400, 5 City Metro, Total People, Consolidated (2003 to 2009 live only), Commissioned research. May not be reproduced, published or communicated (electronically or in hard copy) without the prior written consent of OzTAM.
[vii] Ibid.
[viii] Nielsen 2015, *Australian Multi-Screen Report, Quarter 1 2015*.
[ix] Australian Financial review 2015, *The Sharp Threat to Foxtel*, 10 August.
[x] OzTAM 2015, Primetime Audience for the Free to Air channels Wks 1-52 2003-2015, Sun-Sat 1800-2400, 5 City Metro, Total People, Consolidated (2003 to 2009 live only), Commissioned research. May not be reproduced, published or communicated (electronically or in hard copy) without the prior written consent of OzTAM.
[xi] Budde Communications, *Australia – Broadcasting, Pay TV, IPTV, Mobile TV*, p. 134 (May 2014)
[xii] Commercial Radio Australia, *Record numbers tune into commercial radio in 2015*, 01 February 2015.
[xiii] Nielsen 2015, *Australian Connected Consumers 2014*, p. 134.
[xiv] Roy Morgan 2015, *2.7 million Australians have Netflix as subscriptions surpass one million homes*, 12 November, press release.
[xv] Roy Morgan 2015, *Netflix reaches 1.89 million Australians. Foxtel loses share (but not size) as Netflix expands pay and subscription TV market*, 11 August 2015, press release.
[xvi] Spotify, *Fast facts*, https://press.spotify.com/au/ (accessed 20 May 2015).
[xvii] Seven West Media 2015, *Melbourne Cup Carnival LIVE on Seven*, press release, 26 October.
[xviii] Sydney Morning Herald 2015, *Nine to stream all channels live online*, 26 October.
[xix] ARN, *iHeartRadio*, hwww.arn.com.au/brands/iheartradio/iheartradio/ (accessed 20 May 2015).
[xx] Roy Morgan 2015, *Netflix reaches 2.2 million Australians*, 8 September, press release.
[xxi] Business Insider Australia, *Nine boss David Gyngell says it will take time to see if Stan can be a 'profitable' Netflix alternative*, 27 August.
[xxii] PriceWaterhouseCoopers 2015, *Outlook: Australian Entertainment and Media 2015-19*, Radio segment
[xxiii] fortune.com/2015/07/15/netflix-q2-earnings-2015/
[xxiv] variety.com/2015/digital/news/netflix-bandwidth-usage-internet-traffic-1201507187/
[xxv] Research from Futuresource Consulting, reported in Digital TV Europe, *UK SVoD subscriptions to double by 2019*, June 18, 2015.
[xxvi] See the ACMA website, p29.
[xxvii] See www.wintv.com.au/page/about-us

[xxviii] See www.primemedia.com.au/company-profile
[xxix] Free TV 2016, 'Advertising revenue for commercial television networks July to December 2015', *press release,* 28 January.
[xxx] Section 36, Broadcasting Services Act 1992, licences allocated under a price based system.