

Register of Foreign Owners of Media Assets

Regulation Impact Statement

Final Assessment Second Pass

30 November 2017

Background

The Government encourages foreign investment in Australia as it plays an important and beneficial role in the Australian economy. Foreign investment represents a critical source of funding for industry, and allows Australian companies to invest in their businesses and compete effectively in global markets. There is, however, a need to ensure that foreign investment is consistent with Australia's national interests, and that the community understands and retains confidence in the benefits of foreign investment.

Foreign ownership is a common feature of the Australian media industry, and most large media organisations have some degree of foreign investment. Despite it being a common feature of the Australian media landscape, there are limited avenues through which foreign ownership is disclosed. It is important that the Australian public has a level of transparency regarding the levels and sources of foreign ownership in Australian media companies, given the importance of the media in informing and shaping community views. There is a strong policy case to ensure the levels and source of foreign investment in the Australian media industry are broadly known and understood.

Current reporting framework

Foreign ownership and investment in the Australian media industry is not explicitly or separately reported through any public regulatory process. Other than through the *Foreign Acquisitions and Takeovers Act 1975* (FATA, discussed below), there are no limits or restrictions on foreign ownership in the media, as previous restrictions were removed from the *Broadcasting Services Act 1992* (BSA) and the then Foreign Investment Policy in 2006.

The FATA and FATA Regulations

Under the FATA, certain actions to acquire interests in securities, assets or Australian land, and actions taken in relation to entities (being corporations and unit trusts) and businesses that have a connection to Australia, are defined as 'significant actions'. Some significant actions, called 'notifiable actions', must also be notified to the Treasurer before the proposed actions can be taken.

In respect of the acquisition of media interests, section 55 of the *Foreign Acquisitions and Takeovers Regulation 2015* (FATA Regulations) provides that an action is a 'significant action' and a 'notifiable action' if the action is a foreign person acquiring an interest of at least five per cent in an entity or business that wholly or partly carries on an Australian media business. In effect, this means that investments by foreign persons in excess of five per cent in an Australian media business must be notified to, and approved by, the Treasurer.

A 'foreign person' is defined in section 4 of the FATA, and means:

- (a) an individual not ordinarily resident in Australia; or
- (b) a corporation in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest; or

- (c) a corporation in which two or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, hold an aggregate substantial interest; or
- (d) the trustee of a trust in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government holds a substantial interest; or
- (e) the trustee of a trust in which two or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, hold an aggregate substantial interest; or
- (f) a foreign government; or
- (g) any other person, or any other person that meets the conditions, prescribed by the regulations.

'Interest' and 'aggregated interest' are defined in section 17 of the FATA. Subsection 17(1) defines as interest as the situation where:

- (1) A person holds an interest of a specified percentage in an entity if the person, alone or together with one or more associates of the person:
 - (a) is in a position to control at least that percentage of the voting power or potential voting power in the entity; or
 - (b) holds interests in at least that percentage of the issued securities in the entity; or
 - (c) would hold interests in at least that percentage of the issued securities in the entity if securities in the entity were issued or transferred as the result of the exercise of rights of a kind mentioned in (b) or (c) above.

Aggregate interest is similarly defined in subsection 17(2) to capture collective holdings with reference to two or more persons who are not associates of each other.

Under section 4 of the FATA, a person holds a substantial interest in an entity or trust if:

- (a) for an entity—the person holds an interest of at least 20 per cent in the entity; or
- (b) for a trust (including a unit trust)—the person, together with any one or more associates, holds a beneficial interest in at least 20 per cent of the income or property of the trust.

The BSA

The BSA contains notification provisions in relation to the control and ownership framework of regulated media assets (a regulated media asset is a commercial television broadcasting licence, a commercial radio broadcasting licence or an associated newspaper). These are currently contained in sections 63 and 64. The Government is proposing to repeal section 64 (which imposes a notification obligation on an incoming controller of a 'regulated media asset') by the *Communications Legislation Amendment (Deregulation and Other Measures) Bill 2017*, which is currently before the Senate. The repeal is proposed as section 64 is considered unnecessarily duplicative. The Australian Communications and Media Authority (ACMA) would continue to be notified of the change in control by the relevant licensee or publisher of the asset in accordance with the requirements of section 63.

Section 63 of the BSA relevantly provides that:

- (1) If a commercial television broadcasting licensee, commercial radio broadcasting licensee or datacasting transmitter licensee becomes aware that:

- (a) a person who was not in a position to exercise control of the licence has become in a position to exercise control of the licence; or
- (b) a person who was in a position to control the licence has ceased to be in that position;

the licensee must, within 10 business days after becoming so aware, notify the ACMA in writing of that event.

...

(3) If the publisher of a newspaper that is associated with the licence area of a commercial television broadcasting licence or a commercial radio broadcasting licence becomes aware that:

- (a) a person who was not in a position to exercise control of the newspaper has become in a position to exercise control of the newspaper; or
- (b) a person who was in a position to control the newspaper has ceased to be in that position;

the publisher of the newspaper must, within 10 business days after becoming so aware, notify the ACMA in writing of that event.

The ASX

The *Corporations Act 2001* (Corporations Act) sets out the disclosure requirements for interests held in listed entities. Relevantly, a person who, either alone or together with their associates, has relevant interests in voting shares representing five per cent or more of the votes in a listed company, body or listed registered managed investment scheme, must disclose to the Australian Securities Exchange (ASX) the details of their relevant interest. There are also ongoing disclosure requirements which are triggered where a person's substantial holding changes by one per cent, they cease to have a substantial holding, or they make a takeover bid.

The problem

While foreign investment in the Australian media is relatively commonplace, there is a lack of transparency in relation to the levels and sources of such investment. Transparency is underpinned by two main concepts: the availability of relevant information; and the ability of the public to readily access and understand such information.

As noted above, no existing regulatory or other framework explicitly collates and discloses the levels and sources of foreign investment in the Australian media.

- Under the FATA, while investments of more than five per cent by foreign persons in the Australian media industry are assessed with regard to Australia's national interest, the details of the proposed or actual investments, or the foreign persons involved, are generally not publicly disclosed.
- Under the ASX, disclosures of relevant interests in listed entities above five per cent are made public, but they don't indicate whether the shareholder is a foreign person.
- Under the BSA, the reporting regime requires disclosure when a person comes into a position to control, or ceases to be in a position to control, a regulated media asset. However, these disclosures don't specifically identify foreign persons, and generally wouldn't require disclosure of interests of less than 15 per cent.

While these regulatory frameworks serve particular purposes, they do not provide the public with information as to the levels and sources of foreign investment in Australian media companies, nor is the information that is available in a form that members of the public can easily compile and understand. Information regarding the top 20 and substantial shareholders in Australian media companies that are publicly listed is available through the ASX and company annual reports, as well as commercial investment services (usually through the payment of subscription fees).

However, this information sheds little light on whether those persons or entities are foreign investors, as such information essentially only discloses the legal entity holding such interest and the extent of that interest. The identity of investors is further distorted by the fact that international capital is typically invested through complex corporate and other structures, with little clarity on the ultimate sources of the funds. This is the case even in circumstances where the vehicle making the investment in a media company is located and incorporated in Australia. In addition, there is no public information available on the levels of sources of foreign investment in privately held media companies.

Finally, there is no public source of information for foreign investment in media assets below the five per cent reporting threshold under the ASX or the FATA. This represents a significant information gap. As discussed in the evaluation section, interests of less than five per cent can still be material in assessing the extent to which foreign persons may have the capacity to influence or affect the operations of Australian media companies.

In considering the extent of the problem, it is important to factor into this consideration whether such information is in a form that can be readily accessed and understood by ordinary members of the public. This is fundamental to ensuring that there are sufficient levels of transparency. While there are no specific market barriers preventing the public from accessing relevant information, the effort and costs in accessing and compiling the information from existing reporting frameworks are likely to be prohibitive for most Australians, and certainly those operating outside the media industry.

The Government's view is that the public has a right to information about the levels and sources of foreign investment in Australian media companies. Australia's Foreign Investment Policy currently states that the Government current "*recognises community concerns about foreign ownership of certain Australian assets*", and the media industry is considered to be a "sensitive business".

The lack of transparency about foreign investment in the media industry is a significant issue. The media holds an important position in Australian society due to its ability to set news agendas and the context in which public policy issues are analysed and discussed. In turn, this allows the media to inform and shape community views on a number of critical social, economic, and political issues. While there may be additional means by which community views can be guided and influenced, the media still retains a unique ability to inform and shape such views. There is a strong policy case to ensure that the levels and sources of foreign investment in the Australian media are broadly understood and known.

The Government's policy objectives

The key policy objective in relation to foreign investment reporting is to ensure that the Australian public is able to easily access information regarding the levels and sources of foreign investment in mainstream media outlets. An ancillary or secondary objective is to ensure that consideration of media policy issues by Government is informed by an accurate and up-to-date assessment of the levels and sources of foreign ownership of the Australian media. The achievement of these objectives will ultimately require the balancing of competing factors, primarily the benefits of the proposed register in terms of transparency versus the impost of a disclosure obligation on industry.

The Government's objectives in relation to the abovementioned problem are consistent with its approach in other industries. There are certain industries that are fundamental to Australian society and have historically been subject to higher levels of regulatory scrutiny. These include the agricultural industry, the media industry, the telecommunications industry, and the transport industry.¹

The Government has also previously introduced a register of foreign ownership relating to agricultural land and water entitlements, and is currently considering implementing a reporting framework for interests in critical infrastructure assets. The proposed reforms will ensure that foreign investment in the media industry is scrutinised in the same manner as in other industries of similar importance.

Options

On 15 August 2017, the Minister for Communications, the Senator the Hon Mitch Fifield, announced the Government's decision to implement a register of foreign-owned media assets. The stated objective of the register would be to increase transparency of regulated media assets (commercial television broadcasting licences, commercial radio broadcasting licences and associated newspapers). The announcement indicated that foreign persons – as defined in the FATA – would be required to disclose holdings of 2.5 per cent or higher of these regulated media assets. In light of this decision, this RIS focuses on the alternative implementation options that are consistent with the Government's policy approach.

A register

The following options have been considered in addressing the problem of disclosure of foreign interests in the Australian media and achieving the Government's policy objectives.

1. **No change** – this option would see no change in the disclosure of information in relation to foreign ownership in regulated media assets.
2. **Establish a register** – this option would see the establishment of a Register of Foreign Ownership of Media Assets which would require the disclosure of information in relation to foreign ownership in regulated media assets.

Implementation of a register

In relation to Option 2 (establishing a register), a number of sub-issues are examined, along with various options and their estimated costs. These are:

3. **Method of implementing the register** – there are a number of options in terms of how the register could be established:
 - a. Stand-alone register – implement a register through stand-alone legislation.
 - b. BSA register – implement a register through an amendment to the BSA.
 - c. FATA register – implement a register through an amendment to the FATA.
4. **Reporting threshold** – the level of ownership that would trigger a requirement for foreign persons to disclose information to the regulator:
 - a. at or exceeding two and a half per cent

¹ These are the industries for which more stringent foreign investment requirements apply under the FATA and FATA Regulations.

- b. at or exceeding five per cent
 - c. at or exceeding 15 per cent
5. **Reporting frequency** – the points in time at which foreign persons would be required to disclose information to the regulator:
- a. continuous disclosure for every change to their company interests provided that the foreign person still satisfies the reporting threshold
 - b. disclosure bi-annually
 - c. disclosure at the end of the financial year and if the foreign person's company interest changes so that they meet / no longer meet, the reporting threshold.

Analysis – a register

As noted above, the Government has committed to the implementation of a register. This decision point– whether or not to implement a register – is included for the sake of completeness. A third option was not considered feasible in light of the Government's commitment to implement this change.

Option 1 – No change

This option would preserve the status quo and would not require any regulatory change.

Benefits

Under this option, there would be no additional regulatory impact on foreign investors, regulated media assets, or the regulator. The current arrangements for reporting and seeking approval of foreign investments in regulated media assets under the FATA and the FATA Regulations, together with the notification provisions in the BSA, would not change. However, this option would not meet the Government's policy objective of increasing transparency of the level and source of foreign ownership in Australian regulated media assets, as the information gap that currently exists would remain.

Costs

There would be no change in costs under this option.

Option 2 – establish a register

This option would involve the establishment of a register.

Benefits

The approach would provide the community with increased levels of transparency as to the level and source of foreign investment in Australian media companies, meet the Government's policy objectives (stated above), and assist in eliminating the information gap that currently exists.

Costs

The establishment of a register will result in the imposition of some costs for foreign persons required to disclose information to a regulator, and for the Commonwealth in establishing and maintaining a register. It is not possible to estimate these costs without also considering some of the key elements of a register, namely: the choice of legislative vehicle and

regulator; the frequency of disclosure by foreign persons; and form of disclosure by foreign persons. These are considered in more detail in the analysis section.

Analysis – implementing a register

Option 3a – Stand-alone register

This option would see the establishment of a stand-alone Commonwealth administered register for foreign investment in regulated media assets, similar to the way that a stand-alone register has been established for the Register of Foreign Ownership of Agricultural Land and Water Entitlements, established under the *Register of Foreign Ownership of Agricultural Land Act 2015*. The logical choice of a regulator to oversee a stand-alone register would be the Australian Tax Office (ATO).

Option 3b – BSA register

This option would see the register established by amending the BSA, and the register would be administered by the ACMA.

Option 3c – FATA register

This option would see the register established by amending the FATA and the FATA Regulations, and the register would be administered by Treasury / Foreign Investment Review Board (FIRB).

Benefits

The benefits of each option are expected to be broadly similar. Each would result in the establishment of a register, enhancing transparency regarding the level and source of foreign investment in Australian media companies, and thus fulfilling the Government's objective of ensuring the Australian public has easy access to such information. It is not possible to quantify these benefits. It is unlikely that stakeholders (other than the Government) would experience any difference in impact from how the register is implemented and who administers the disclosure of information. Nor would the information be more or less accessible to the public under one form of register over another. As is alluded to below, the choice of register and who administers the reporting requirements is primarily relevant in relation to the costs borne by the Government in establishing the register.

Costs

Each option will involve the establishment of a register and, in broad terms, follow a similar process for develop and ongoing administration:

- Development and passage of enabling legislation.
- Establishment by the regulator of information technology and other systems to accept disclosures by foreign persons and publish the relevant information as a register.
- Initial compliance costs for a foreign person, both to ascertain whether they are a foreign person with a relevant company interest in a regulated Australian media company, and to then disclose that information to the regulator.
- Ongoing compliance costs for foreign persons to update their details on the register, which in turn will depend on factors such as the reporting threshold and the frequency of such disclosures.

- Ongoing costs for the regulator to update and maintain the register, and satisfy any reporting requirements.

The impact of these costs on foreign persons (estimated below) is expected to be broadly similar for each of the sub-options being considered. The key point of difference in relation to these options concerns the costs of establishing a register by the regulator. These estimated costs are outlined in Table 1.

Table 1 – Average establishment costs – regulator			
Change in costs (\$)	Stand-alone register	BSA register	FATA register
Administration (regulator)	\$481,200	\$180,600	\$430,900

The costs shown in Table 1 relate to staff costs, information technology costs and consultant costs likely to be associated with establishing a register. For all options considered, these costs are relatively modest (less than half a million in the first year). However, the lowest estimated costs are those for option 3b, involving amendments to the BSA with administration of the register by the ACMA. This reflects the fact that the ACMA already has in place systems that collate information disclosed to them regarding the control of regulated media assets under Part 5 of the BSA. This includes the legislated requirement to establish and maintain a Register of Controlled Media Groups. In contrast, the implementation of a register through a stand-alone legislative framework, or through the FATA, are expected to be somewhat higher costs, reflecting the fact that the ATO and Treasury / FIRB have no direct experience with regulated media assets, or with establishing and maintaining registers involving these media outlets.

Analysis – Option 4 - reporting threshold

The choice of reporting threshold will have a direct impact on the extent to which foreign persons would be required to disclosure relevant interests to the regulator. The lower the reporting threshold, the greater the number of entities and transactions that may be captured under the reporting framework (and higher relative impacts on industry), and greater transparency regarding the levels of foreign ownership in the Australian media.

Three reporting thresholds have been considered:

- Option 4a – two and a half per cent reporting threshold
- Option 4b – five per cent reporting threshold
- Option 4c – 15 per cent reporting threshold

Benefits

Option 4a (two and a half per cent) represents the lowest of the reporting thresholds considered, and would provide the highest level of disclosure, and therefore the greatest degree of transparency, regarding foreign ownership of regulated Australian media assets. Options 4b (five per cent) and 4c (15 per cent) would result in relatively fewer foreign persons and / or fewer potential transactions triggering the disclosure requirements. Transparency would be lower, although the impact on industry would also be commensurately lower. Option 4b also has the advantage of the fact that the five per cent threshold is used for disclosure purposes under the FATA and the Corporations Act.

Costs

The estimated impacts of the three reporting thresholds are outlined in Table 2 below. For simplicity, these costs assume an annual reporting obligation (frequency of disclosure is examined in more detail in Section 9). These costs are based on:

- the estimated number of foreign persons per annum that are likely to be required to notify the regulator of their interests
- the estimated time it would take for the foreign person to complete the necessary notification requirements each year
- the estimated number of company interests that the regulator receives for a given year that would require an update to the register
- the likely time taken by the regulator to update the register each year.

The following points can be noted from Tables 2 and 3:

- The impacts on community organisations are nil.
- The impacts for foreign persons (in terms of their disclosure obligations) are modest – \$24,700 per annum for Option 4a (at a two and a half per cent disclosure threshold) falling to \$6,600 per annum for Option 4c (at a 15 per cent disclosure threshold).
- The bulk of the estimated total ongoing costs for each option are incurred by the regulator in administering the register. These range from just under \$50,000 per annum for option 4a to \$12,500 per annum for option 4c.
- By way of comparison, the Regulation Impact Statement prepared for the Register of Foreign Ownership of Water Entitlements estimated the cost imposed foreign persons to update their water entitlements to be \$73,000 per annum, on average.

Table 2 – Average ongoing costs (reporting thresholds): businesses and individuals			
Costs (\$)	2.5 per cent	5 per cent	15 per cent
Businesses and individuals (foreign persons)	\$24,700	\$20,200	\$6,600
Community organisations	nil	nil	nil

Table 3 – Average ongoing costs (reporting thresholds): regulator			
Costs (\$)	2.5 per cent	5 per cent	15 per cent
Administration (regulator)	\$49,000	\$39,900	\$12,500

In determining the quantum of costs, it is estimated that:

- around 60 foreign investors will be affected at a reporting threshold of two and a half per cent, around 45 foreign investors at a reporting threshold of five per cent, and around 20 foreign investors at a reporting threshold of 15 per cent; and
- each foreign investor will hold three company interests at a reporting threshold of two and a half per cent and at five per cent, and two company interests at a reporting threshold at 15 per cent.

These estimates are based on an analysis of publicly available information although, as noted in the problem section, this information is partial and incomplete.

Analysis – Option 5 - reporting frequency

As with the reporting threshold, the choice of reporting frequency will influence the extent of any impact of the Register on foreign persons and the regulator. The more frequent the reporting threshold, the greater the regulatory burden imposed, and vice versa. However, more frequent reporting will enhance the currency of the Register at any point in time. Three reporting frequencies have been considered:

- Option 5a – continuous disclosure
- Option 5b – biannual disclosure
- Option 5c – annual disclosure

Benefits

Option 5a (continuous disclosure) represents the most frequent reporting threshold. This would provide the highest level of currency for the register, as it would be continually updated. However, continuous reporting is also likely to impose the highest regulatory burden on foreign persons and the regulator due to the costs involved in reporting company interests and updating the register. Option 5b (biannual disclosure) and option 5c (annual disclosure) would see the register being updated less frequently and while this would reduce the currency of the register, it would lower the regulatory impost.

Costs

The estimated costs of each of the reporting frequencies are outlined at Table 3 below. For simplicity, these costs assume a reporting threshold of two and a half per cent. These costs are based on similar drivers as outlined above.

The following points can be noted from Table 3.

- The impacts on community organisations are nil.
- The total costs of continuous disclosure (Option 5a) are estimated to be in the order of \$143,000 per annum, with approximately two thirds of these costs (\$95,200) incurred by the regulator.
- In contrast, annual disclosure (Option 5c) would result in an estimated cost burden of \$73,700 per annum, again with around two thirds of these ongoing compliance costs incurred by the regulator.

Table 4 – Average ongoing costs (reporting thresholds): businesses and individuals			
Costs (\$)	2.5 per cent	5 per cent	15 per cent
Businesses and individuals (foreign persons)	\$47,800	\$36,300	\$24,700
Community organisations	nil	nil	nil

Table 5 – Average ongoing costs (reporting thresholds): regulator			
Costs (\$ million)	2.5 per cent	5 per cent	15 per cent
Administration (regulator)	\$95,200	\$72,100	\$49,000

Evaluation and preferred option

The analysis in this RIS highlights that the key decision point for the implementation of a Register relates to administration: the legislative vehicle for implementing the register and, more specifically, the regulator itself.

Under all options considered, around two thirds of all estimated ongoing costs would be incurred by the regulator. Those costs – both in terms of establishing the register and ongoing administration – are estimated to be lowest where the register is implemented through the BSA and administered by the ACMA (Option 3b). This reflects that fact that the register would build on and extend the ACMA’s existing functions in relation to media control and ownership, and utilise (to the extent possible) its existing systems and processes.

The final two decision points for the register relate to the reporting threshold and the reporting frequency. In this respect, options 4a (a two and a half per cent reporting threshold) and 5c (annual reporting) are the preferred options.

- While resulting in a higher burden on foreign persons, the value of a reporting threshold of two and a half per cent will maximise the transparency of foreign investment in the Australian media.
- This impact will be counterbalanced by annual reporting, rather than continuous.
- The two and a half per cent reporting threshold will also support the achievement of the ancillary objective of ensuring that consideration of media policy issues by Government is informed by an accurate and up-to-date assessment of the levels and sources of foreign ownership of the Australian media.

Importantly, the estimated impact of these proposed options on foreign persons – those parties that would need to disclose information to the ACMA – is minimal. In total, these costs are estimated to be \$24,700 per annum for all foreign persons who are expected to have to disclose information under the Register, or around \$400 per annum for each foreign person (assuming just under 60 foreign persons would be required to report under the register in any given year). In the context of the value of foreign capital invested in the Australian media, and the investors involved, this is a negligible cost.

It is also important to note that beyond the estimated annual cost of around \$400, there will be no other fees payable by foreign persons to report their interests. Given the relatively low regulatory burden imposed on foreign persons, it is unlikely that the proposed reforms would materially detract from Australia’s attractiveness as a destination for foreign investment. To

the contrary, the proposed reforms would enhance public confidence in Australia's foreign investment framework.

There will also be protections in relation to personal information and commercially sensitive information.

- The information collected will predominantly be of a factual nature, and the register won't require the disclosure of commercially sensitive information. To this end, the regulator will be prohibited from publishing any such information, should it inadvertently be disclosed, where its publication would materially affect the commercial interests of a foreign person.
- There will also be safeguards to ensure that the collection, use and disclosure of any personal information is consistent with the *Privacy Act 1988* and the Australian Privacy Principles.

In summary, the recommended approach is for the Government to implement a register (Option 2), via the BSA (Option 3b), to require disclosure of interests in regulated media companies in excess of two and a half per cent (Option 4a), and for foreign persons to report annually or when their status changes (Option 5c). These recommendations are expected to result in the highest likely net benefit.

Consultation

The Government undertook extensive consultations in developing the Broadcasting and Content Reform Package to which this measure relates. The bills implementing elements of that Package – the Broadcasting Legislation Amendment (Broadcasting Reform) Bill 2017 and the Commercial Broadcasting (Tax) Bill 2017 – passed the Parliament and is commencing in October 2017. The development of this register involved consultations with the Department of Foreign Affairs and Trade, the Attorney-General's Department, the Treasury, and the ACMA as to any issues that might arise through the implementation of a Register. However, the consultation did not extend to the decision to implement the register given the Government's decision to do so.

Implementation

Amendments would be required to the BSA and may also be required for the *Australian Communications and Media Authority Act 2005*. These amendments would commence once the amending Bill has passed both houses of Parliament and has received Royal Assent.

The Bill implementing the register will include provision for a statutory review after three years. This will provide for the operation of the register and its effectiveness in achieving its objectives to be assessed. The Government will also monitor the operation of the register on an ongoing basis to ensure that it continues to meet the Government's policy objectives.