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Department of Infrastructure, Transport,
Regional Development and Communications

Broadcasting Legislation Amendment (2021 Measures No.1) Bill 2021

Regulation Impact Statement for an amendment to
the *Broadcasting Services Act 1992*

March 2021



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What are the current regulations?

Amendment of the Broadcasting Services Act 1992

The *Broadcasting Services Act 1992* (BSA) is the primary legislation that sets the rules and regulations for the media industry in Australia. Part 2 of the BSA sets out the categories of broadcasting services to which the BSA relates, including national broadcasting services; commercial broadcasting services, including television and radio; community broadcasting services, including television and radio; and subscription television services.¹

This Regulation Impact Statement (RIS) assesses the regulatory impact on commercial radio licence holders (licensees) with respect to the making of population determinations by the Australian Communications and Media Authority (the ACMA) under section 30 of the BSA, which give effect to population licence areas.

Part 3, Section 30 – Population Determinations

Under section 30 of the BSA, the ACMA may, by notice in writing, determine the licence area population of a licence area,² including the populations of areas where licence areas overlap, and the total population of Australia for the purposes of the BSA. In making such a determination, the ACMA is to have regard to the most recently published census count prepared by the Australian Statistician. A determination under section 30 of the BSA is not a legislative instrument.

Once made, a section 30 determination is used by the ACMA for the exercise of any of its functions under the BSA that refer to licence area populations or the population of Australia. For example, a determination of the population figures for a licence area affects the application of the media control and diversity rules in the BSA.

The BSA currently contains a number of rules regarding the control and diversity of media ownership in Australia. These rules support the objects of the BSA to promote a diverse media sector by limiting the number of media operations that can be controlled by a person or organisation in any single licence area.

¹ Section 11 of the BSA.

² A licence area is the designated geographical area of Australia that defines where a service is authorised to be provided under a commercial or community broadcasting licence. Licence areas for broadcasting service band licences are described in a licence area plan or television area plan (section 29 of the BSA).

A 'media operation' is defined in the BSA as a commercial television broadcasting licence, a commercial radio broadcasting licence, or an associated newspaper.³ The three main rules that apply to commercial radio are:

- Section 43C – local content obligations for regional commercial radio broadcasting licenses;
- Section 54 – the two-to-a-market rule for commercial broadcasting radio licences;
- Section 61AB – the minimum voices (5/4) rule.

The BSA also places limitations on the number of directorships that a person can hold for commercial radio under section 56. Where a licensee has been affected by a change in control, including as a result of a section 30 population determination, it is referred to as a 'trigger event'.

A trigger event occurs under subsection 61CB(1) of the BSA when there is a transfer of a regional commercial radio licence. The ACMA have authority to investigate a trigger event and advise compliance action, as prescribed in the BSA and the *Australian Communications and Media Authority Act 2005*.

Part 3, Section 3 – Objects of the Act

By underpinning the media control and diversity rules in the BSA, section 30 determination supports the objects of the BSA in section 3 of the BSA, especially objects 3(1)(a), 3(1)(b), 3(1)(c), 3(1)(e), 3(1)(ea) and (g):

- (a) to promote the availability to audiences throughout Australia of a diverse range of radio and television services offering entertainment, education and information; and
- (b) to provide a regulatory environment that will facilitate the development of a broadcasting industry in Australia that is efficient, competitive and responsive to audience needs; and
- (c) to encourage diversity in control of the more influential broadcasting services; and
- (e) to promote the role of broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity;
- (ea) to promote the availability to audiences throughout Australia of television and radio programs about matters of local significance; and
- (g) to encourage providers of commercial and community broadcasting services to be responsive to the need for a fair and accurate coverage of matters of public interest and for an appropriate coverage of matters of local significance.

³ Section 61AA of the BSA

1. What is the policy problem?

There are two grandfathering provisions in the *Broadcasting Services Act 1992* (BSA) – subsection 43C(4) and section 52 – that provide protection to a broadcaster when a new population determination is made under section 30 of the BSA, by the ACMA. In making such a determination, the ACMA is required to have regard to the most recently published Census count from the Australian Bureau of Statistics. Population determinations inform a range of provisions in the BSA, including media ownership and control limits and local content obligations for regional commercial radio.

As drafted, these provisions only afford protection in relation to a *previous* population determination. If a broadcaster (i.e. a commercial broadcasting licensee) were to continue maintaining existing operations, when a new population determination takes effect, it could inadvertently breach the relevant statutory control and local content obligations, as determined by the BSA.

The ACMA is due to update the existing population determination, under section 30 of the BSA, to have regard to the 2016 Census results. The existing population determination was made in April 2016 and is based on the 2011 Census figures. The ACMA has delayed the making of a new determination following the 2016 Census, pending the resolution of the media control and local content obligations matters outlined below. As the 2021 Census approaches, the urgency for the ACMA to make a new section 30 Determination increases. The ACMA has advised that the next section 30 determination based on the 2016 Census figures, as it will:

1. Change the overlaps in two regional commercial radio licences to more than 30 per cent, meaning the two licence areas will be treated as one licence area (section 51 of the BSA refers). The current population for these two regional license areas are 69,899 and 60,088 respectively. The overlap of these two population areas is 18,311. This will put a commercial radio broadcaster in breach of the two-to-a-market radio rule, unless it surrenders two of its licences.
 - The two-to-a-market rule of section 54 of the BSA stipulates that no person can be in a position to exercise control of more than one commercial radio broadcasting licence in the same licence area.
 - A breach to this rule will require the licensee to divest its assets (two radio businesses) in order to revoke two licenses and avoid a penalty of 2000 penalty units costing \$444,000. Further information on the costs is provided at [Question 4](#).
2. Increase local content obligations for regional commercial radio licence holders from 30 minutes to 3 hours per business day (section 43C of the BSA refers). This will put a commercial television broadcaster in breach of its local content obligations in this licence area, unless it increases its broadcast of eligible local content to meet the new obligation.

- The ACMA understands that the licensee for both regional licences in this scenario provides close to the minimum level of local content (30 minutes per business day), and would be required to meet the costs of increasing this six-fold to meet the new requirement of 3 hours of local content each business day. The cost of this requirement is discussed at [Question 4](#).
- The current population for this regional licence area is 33,262.

2. Why is Government action needed?

The reported changes to existing statutory control and local content rules, resulting from a new population determination, cannot be anticipated by broadcasters. Consequently, broadcasters cannot plan for this risk event nor be expected to immediately comply with new requirements, without the ACMA applying a level of regulatory forbearance. While regulatory forbearance is an option for the ACMA, it is not a long-term or permanent measure, and would not provide sufficient regulatory certainty to stakeholders, including the affected licensees. The ACMA could exercise regulatory forbearance on a temporary basis, and offer provisional guidance and assistance to the sector to meet their obligations, while a more robust approach to support industry compliance is developed. In addition, the cost of compliance for broadcasters may be disproportionately high, depending on the type and level of a breach. Further detail on the implications of ACMA's regulatory actions, and the cost of compliance is provided at [Question 4](#).

The Government is able to minimise the regulatory risk to businesses, through a variation to the BSA that enables a retrospective application of grandfathering powers to protect broadcasters – that is with regard to the 'most recent determination for which a licensee was not in breach of the condition', upon the making of population determinations under section 30 of the BSA. Further, a time-limited application of the amended grandfathering powers (i.e. through a sunset provision of 5 years, commencing in 2021), would clearly signal to licensees the Government's commitment to review the state of the market and their provision of services in relation to these provisions. While it is important to support broadcasters meet their requirements through the proposed deregulatory measures, it must be balanced with respect to net population movements that affect licence population areas (as per section 30 determinations); and have regard to market conditions that support competition and low barriers for new licensees.

3. What policy options are you considering?

Option 1: *Status quo – retain existing regulation*

Make no changes to subsection 43C(4) and section 52 of the BSA. This option would require the ACMA to exercise regulatory forbearance for affected licensees in the short-term, if licensees were assessed to be in breach of media ownership and control limits and local content obligations under the BSA, (as the protection would no longer be operational). However, noting the significant cost to industry to meet compliance requirements (see Question 4), there is likely to be significant resistance from the sector and the potential for reputational risk to the Government, if more flexible options, including new legislative arrangements were not considered.

Option 2: *Modify existing regulation and reduce regulatory burden to licensees over a five-year period*

Amend subsection 43C(4) and section 52 of the BSA in order to reinstate grandfathering powers with respect to the making of future population determinations (under section 30). These amendments would provide protection to impacted licensees on a ***time-limited and retrospective basis***, where there have been no changes other than to the determination of new population figures. This option would provide sufficient regulatory certainty to stakeholders, including licensees, within a five year period (from the passage of the new legislation), as well as an opportunity for legislative review, triggered by proposed sunseting of the legislation.

Option 3: *Modify existing regulation and reduce regulatory burden to licensees indefinitely*

Amend subsection 43C(4) and section 52 of the BSA in order to reinstate grandfathering powers of a ***permanent and ongoing nature***, with respect to the making of future population determinations (under section 30). These amendments would provide protection to impacted licensees on an ***indefinite and retrospective basis***, where there have been no changes other than to the determination of new population figures. This option would provide absolute regulatory certainty to stakeholders, including licensees, with respect to long-term changes in population figures and would ensure these protections remain operational for an indefinite period.

4. What is the likely net benefit of each option?

Option 1: Status quo – retain existing regulation – more than minor regulatory impact

The Media Control Radio Licence Scenario

If this option were chosen, it would result in a breach. A broadcaster in a regional licence area would be in breach of the two-to-a-market rule (section 54) and another broadcaster in a regional licence area would be in breach of its local content obligations (section 43C). The net costs and benefits pertaining to these breaches are discussed below.

Regulatory action by the ACMA

In respect of the overlaps of two commercial radio licences, the ACMA may give notice under section 70 of the BSA to the licensee and to the relevant directors to take action so that they are no longer in breach. This may require the licensee to divest itself of 2 radio licences in the regional licence area.

Net cost of breach for the licensee:

If the regional licensee does not divest, as an action required to address this breach, they would be guilty of an offence under section 72 (failure to comply with a notice) which carries a penalty of **2,000 penalty units** with an estimated cost of **\$444,000**. This compliance burden could possibly be delayed by a period of regulatory forbearance to allow the licensees reasonable time to make the necessary changes to their operations before subjecting them to the appropriate compliance action.

Net costs to the licensee, consisting of the loss of future revenue:

The net costs to the licensee, with respect to divesting the asset, would be partly be offset by the price received for the radio licence as an asset. Although any sale prompted by the threat of regulatory compliance action would place a downward pressure on price, as would a sale in the current post-COVID-19 market.

Other costs include, the cost of disentangling two radio businesses from the greater business and preparing them to be viable, standalone businesses (e.g. disentangling costs of common contracts, employment, shared assets etc.), as well as the costs of a change to the existing business strategy and business model to the business owner.

Neutral cost/benefit to the community:

Community costs are difficult to quantify because, assuming that the existing licensee would take the highest value option of selling two licences in one licence area, rather than one licence in each licence area, the potential benefit of diversity in ownership caused by a new owner would only apply to the population in the overlap area of the two regional licences (which would receive programming from all four services).

In the licence area where the businesses are sold, outside the overlap, one licensee would be replaced with another. Additionally, even assuming that the licences were purchased by an experienced broadcaster (i.e. an existing network) it is not certain that the quality of service would be improved, as two networked services would be likely to be replaced with another. On this basis, the benefits and costs to the community are likely to cancel out.

Regional Radio Local Content Scenario

Regulatory action by the ACMA

The ACMA understands (but cannot confirm) that the licensee for both regional licences in this scenario provide close to the minimum level of local content (30 minutes per business day). Under this option, the licensee would be required to broadcast 3 hours of local content – **six times the current requirement**.

With respect to compliance with local content rules for this scenario, the ACMA may take compliance action if it were made aware of non-compliance by the licensee with respect to the licences in that area (for example, from a listener complaint). Failure to broadcast the applicable number of hours of material of local significance, as required by section 8 of the *Broadcasting Services (Regional Commercial Radio — Material of Local Significance) Licence Condition 2014* (the local content licence condition) is a breach of a licence condition.

Where it is satisfied that a licence has breached or is breaching a licence condition, the ACMA may issue a remedial direction to the licensee in accordance with subsection 141(1) of the BSA to require it to take specified action within a prescribed time so that the person/licensee does not breach, or is unlikely to breach the relevant provision in the future. If the ACMA issued a remedial direction to the licensee for breaching the local content licence condition and the licensee breached the direction – it would be guilty of an offence under subsection 142(3) of the BSA (breaches of a remedial direction). This carries a **penalty of 500 penalty units** with an estimated cost of up to **\$111,000**. A contravention of this kind is a separate offence in respect of each day during which the contravention continues.

- A breach of a remedial direction is alternatively subject to civil penalties ordered by the Federal Court in respect of each day during which the contravention continues.
- As part of the ACMA's graduated and strategic risk-based approach to compliance and enforcement, continued breaches of the licence condition could eventually be enforced with the suspension of or cancellation of the broadcasting services licence (section 143 of the BSA). However, this would be a response of last resort and the risk of this occurring is considered very low.

Net costs to the licensee, consisting of the loss of future revenue:

The Government is aware that the commercial radio broadcasting sector has previously noted the difficulty to meet local content obligations in 52 weeks of the year in its advice to the ACMA, as well as its formal submission to the Productivity Commission, in its *Annual Review on the Regulatory Burdens on Business* released in September 2009. The Productivity Commission report noted that the objective of the regulatory provisions was to ensure a minimum amount of material of local significance is broadcast on regional commercial radio. However, it found that the obligations to meet the required level of local content are rigid and do not allow radio stations to tailor their local content to meet listener expectations. The Productivity Commission's report also noted that the reporting framework for regional commercial radio broadcasters was onerous.

In its submission to the Productivity Commission, Commercial Radio Australia, the national peak organisation representing radio broadcasters, noted that the estimated annual legal costs of complying with the local content requirements was **\$25,000 per regional radio station, and \$50,000 for radio stations required to comply with the trigger event related reporting requirements**. The ACMA reported in its Local Content Levels Investigation Report of 2007 (page 4 of the report) that "the cost of complying with a requirement to broadcast 12.5 minutes of local news each business day is estimated at **\$12,000 – \$60,000 per annum**, representing as much as **15–26 per cent of the profit of some licences**". The Department considers that the requirement for a six-fold increase to meet local content requirements in this scenario, which is compounded by the economic downturn and loss of advertising revenue to the sector during the COVID-19 pandemic, could be untenable and undermine the viability of the regional licensee in question, under the current economic conditions.

While the ACMA cannot uncover the actual net cost to the licensee in this scenario at present, in 2014, it estimated that the burden of regulation associated with obligations relating to material of local significance were estimated at **\$10.9 million** for the industry at large, inclusive of 210 regional radio licences.

A net benefit to the community

The six-fold increase in local Australian content that is available to consumers under this option has the potential to improve the state of media diversity in this regional license area. Given the known challenges to retaining traditional local media sources and local content production/distribution in the move towards digital platforms, particular types of local content could deliver greater socio-economic benefits to consumers and communities. Benefits to be realised may include greater civic participation and an increase in production of public interest journalism – both of which are integral to a healthy functioning democracy. It could also provide for more tangible benefits from increased business activity, including new employment and greater supply chain opportunities for local/regional businesses. While there are expected benefits in this scenario, it would arguably offset a minor portion of the costs required by the regional licensee to meet their local content obligations.

The administrative cost to the ACMA for the application of regulatory forbearance (to minimise cost to licensees)

In addition, there are two alternative options the ACMA could take with respect to section 30 population determinations. The ACMA have provided advice on the associated costs and benefits of implementing these options below:

1. Exercise indefinite regulatory forbearance for the affected commercial radio licensees, by making the section 30 determination and allowing affected licensees to operate in a business-as-usual fashion, without taking any action against them, despite being in breach of the statutory control rules and local content rules for commercial radio, the ACMA arguably has a discretion not to give a notice under section 70.

This is not an option that the ACMA would be likely to agree to. While regulatory forbearance is an option for the ACMA in certain circumstances, it is usually limited in time and generally not considered appropriate to be used as a long-term or permanent measure. It would not provide any regulatory certainty or stability to stakeholders (including the affected licensees). The ACMA would generally exercise regulatory forbearance on a temporary basis while in the process of implementing a more permanent solution is pursued – for example, legislative change. If long-term or indefinite forbearance was adopted, the ACMA would be regarded as sanctioning the ongoing breaches.

2. Withhold section 30 determinations to prevent the cost to commercial broadcasting licensees that, through no action on their part, would otherwise be placed in breach of the statutory control rules and local content rules for commercial radio if they maintained their existing operations.

The ACMA does not recommend withholding the making of the section 30 determination for the foreseeable future. Although section 30 is worded in discretionary terms (i.e. the ACMA ‘may’ make the determination), in practice the ACMA makes section 30 determinations based on each Census in order to promote the objects of the BSA (including the planning functions set out in Part 3) and to facilitate the operation of other provisions in the BSA. In addition, it is the expectation of industry stakeholders that the ACMA updates the determination after every Census. The ACMA has already delayed the making of a new determination following the 2016 Census, pending the resolution of this matter, but does not consider an indefinite delay to be a solution to this issue due to the flow-on impacts of other areas of the BSA (e.g. to planning powers in Part 3 of the BSA etc.), and would only consider a further delay for the time necessary to resolve the current issue via another means (e.g. legislative amendment). Note that as the 2021 Census approaches, the urgency for the ACMA to make a section 30 Determination increases.

Current operation of grandfathering provisions to protect commercial radio licenses

With respect to section 52 of the BSA, the ACMA understands that when this section was originally enacted in 1992, it was intended to be ongoing. The explanatory memorandum to the original Bill sets out that, as a grandfathering provision, it was intended that licensees were not to be put in breach of audience reach limits in the (now repealed) sections 53(1), 55(1) and 55(2) by reason of a new section 30 determination. Further, the explanatory memorandum sets out the specific circumstances when this grandfathering rule was to no longer apply, which did not include reference to a sunseting intention:

It should be noted that the protection afforded by this grandfathering does not extend to any transactions made by the licensee after such a [section 30] determination, whereby the licensee would be put in breach of [the reach rule]. The grandfathering also does not apply to any person who may subsequently acquire the licence.

When this provision was amended in 2015, the ACMA's understanding was that the amendments simply extended the operation of the original provision to cover the application of section 30 determinations the 'one-to-a-market' television rule and the 'two-to-a-market' radio rule, as per the explanatory memorandum to the *Broadcasting and Other Legislation Amendment (Deregulation) Bill 2014*:

Item 2 extends existing grandfathering arrangements to prevent commercial radio or television broadcasting licensees from being adversely affected in relation to the statutory control rules as a result of the making population determinations by the ACMA.

Although the grandfathering arrangements introduced by subsection 43C(4) was a new provision, the ACMA understood that the same reasoning applied as for the section 52 amendments. The explanatory memorandum the *Broadcasting and Other Legislation Amendment (Deregulation) Bill 2014* suggests that the arrangements are intended to be ongoing, noting that:

The effect of this amendment is to prevent regional commercial radio broadcasting licensees from having to meet a higher regulatory burden arising from factors beyond their control (changes in the population of licence areas).

There is no indication of any expectation that population changes would ever be in the control of a licensee warranting the non-application of the grandfathering arrangements over time.

Overall, to prevent the cost to the affected commercial licensees, the ACMA could make licence area variations to change the borders of the affected licence areas, so that the licensees in question would not be in breach (in accordance with subsection 30(4), this would then require a new determination to be made for those licence areas). This is also not a preferred course of action by the ACMA, as it is unlikely to be a reasonable exercise of the ACMA's power; may be contrary to the objects of the BSA; and would be a time-consuming process with resourcing implications for the ACMA.

Assessment: an overall net cost to industry (more than minor regulatory impact)

Overall, Option 1 consists of the highest net cost to industry and the lowest benefit with regard to both commercial licensees' scenarios (i.e. media control and regional local content scenarios).

In the first scenario, there is a significant net cost to the licensee to comply with the two-to-a-market rule (s54 of the BSA), which would involve divestment of two radio businesses, including administrative costs of settling the assets, a potential restructure to the company's business and operating model, and the cost of common contracts for shared assets and employment. If the divestment of the licences secures the transfer of the business to a new licence holder, there is still no guarantee of a tenable media diversity situation or net benefit to the community, particularly if the buyer is part of the existing network.

With respect to the second scenario, the licensee would also incur a significant cost to broadcast local content at six times the current level in order to comply with local content obligations (section 43C of the BSA). A portion of this cost could be offset by the qualitative benefits to the community, including increased access to local content and other positive externalities, given local news and content is inherently a public good. However, overall the intangible benefits resulting from an increase in access to local content in the second scenario, does not offset the significant costs to revoking two licences associated with the first scenario.

This option will therefore have ***more than a minor regulatory impact*** and will not deliver a net benefit to the industry or the community.

Option 2: Modify existing regulation and reduce regulatory burden to licensees over a five-year period – minor regulatory impact

If this option is chosen, the licensees would not be found to be in breach of the statutory control and local content rules of the BSA.

A net positive benefit to the industry and the Australian community:

This option will not impose any additional regulatory burden on licensees beyond what is already required until the sunseting of the proposed grandfathering amendments (i.e. in mid to late 2026). The sunseting of the grandfathering provisions (subsection 43C(4) and section 52 of the BSA) would commit the Government to a review of the legislation commencing from five years at the time of passage for this amendment bill. The review presents the Department and the Government with an opportunity to assess the impact of future changes to population licence areas on industry, consumers and the broader community. The Government's assessment of the impact could lead to further legislative changes, if required, in order to uphold the objects of the BSA that underpin section 30 determinations. This means that the Government can account for the conditions that enable the news and media market to remain accessible and competitive with low barriers to entry in the long-term, while providing consumers with access to diverse and good quality news and media content, as required within the relevant statutory media control and local content rules. This opportunity presented through the legislative review mechanism may represent a high net benefit to the Australian community and the industry, with respect to supporting a robust and sustainable news and media market.

Zero net cost to the industry over the next 5 years

Although this option would not impose any additional costs to licensees over the next five years, the opportunity costs associated with the qualitative benefits to the community in the regional local content scenario outlined in Option 1, wherein the licensee would be required to deliver a six-fold increase in local content distribution, would not be fully realised under this option. This opportunity cost has not been quantified in the context of this RIS, but given the scope for a legislative and policy review in 2026, any losses incurred would be minimised or offset in the long-term. This is because a future review would ensure support for the long-term sustainability and diversity the news and media market with respect to future changes to population figures.

Assessment: an overall net benefit to industry

Overall this option presents ***the highest benefit to the industry in the prescribed period*** (five years from the passage of the legislation) with no additional compliance cost; and ***the greatest long-term benefits to both the industry and the Australian community*** based on the policy intent underpinning the proposed legislative review (triggered by the sunseting provisions).

Any further compliance risks and costs to the industry can be captured in the review period and appropriately accounted for with respect to changing population figures (i.e. from 2026 onwards).

Option 3: *Modify existing regulation and reduce regulatory burden to licensees indefinitely - more than a minor regulatory impact*

This option is determined to have more than minor regulatory impact due to the permanent and ongoing nature of the protections afforded to the licensees. The application of grandfathering arrangements on an ‘indefinite’ basis, means that there would not be no additional compliance costs to the industry to what is required at present (as the licensees would be afforded permanent protection, inclusive of the most recent population determination broadcasters have complied with). However, there would be greater opportunity costs to the market and the Australian community overall (listed below). This elevates the regulatory risk to **‘more than a minor regulatory impact’**.

Opportunity costs:

If grandfathering arrangements were to apply indefinitely, there would be a clear risk to the media diversity situation for radio media and less local content being produce over time. It would also raise barriers for new market entrants, as they would be required to service different and potentially larger populations in both metropolitan and regional licence areas, with respect to their statutory obligations, and accrue greater regulatory burden from existing licensees. This would generate unfair market conditions, decrease competition and would also impose challenges to existing broadcasters from adequately servicing future media markets. Ultimately, this option puts into question the relevancy and integrity of section 30 determinations with respect to changes in population figures and population licence area populations, and how they interact with the objects of the BSA (page 4 of the RIS refers). Further detail on opportunity costs relating to this regional licence area can also be found under Option 1 – status quo.

Zero net benefit – media diversity

With respect to the divestment of two licenses in the regional population licence area (i.e. the media control scenario), the ACMA does not have confidence in any direct improvement of the media diversity situation resulting from a section 30 determination, if it were to result in a change to the ownership of the licences. The replacement from one licence holder to another within one licence population area does not guarantee improvements to the quality of the service and content, particularly if it is an existing broadcasting network. The ACMA is not aware of any expectation from these communities that a section 30 determination should cause either the uncertain benefits of changes of ownership (i.e. media control scenario) or the benefits of increase local content (regional local content scenario).

Assessment: a net cost to industry

Overall, this option has a **more than minor regulatory impact** on industry, with high costs and limited benefit to the industry or the Australian community in the long-term. For this reason, Option 2 is preferred, whereby a legislative review of grandfathering rights to licensees would provide for long-term benefits, with suitable deregulatory measures that can be aligned with future population figures.

5. Who did you consult and how did you incorporate their feedback?

In early 2020, the Department and the ACMA agreed to amend the grandfathering arrangements for subsections 34C(4) and section 52 of the BSA, noting that the current version of the provisions, as per the 2015 amendment to the BSA, will not continue beyond the making of the next section 30 Determination by the ACMA. Both agencies agreed that in order for the provisions to remain operative and to reinstate grandfathering rights under section 52, which was rendered in-operative due to a drafting error in the 2015 amendments, protections would need to be afforded, on an ongoing basis, where there have been no changes, other than to the determination of new population figures. The explanatory memorandum to the 2015 amendments states that: '[The amended provision] will prevent broadcasting licensees being adversely affected as a result of factors that are entirely beyond their control (i.e. changes in the population of licence areas).

The respective agencies agreed that the legislation, as drafted, solely applies with respect to **previous determinations**, presenting significant compliance risks to licensees. An amendment to this legislation would ensure the existing provisions are consistent with the policy intention. In addition, there are no immediate costs to industry to reinstate grandfathering rights to licensees in the short-term. If there is potential for only minor costs in the longer-term, the Department expects broad support from industry on this proposal.

The ACMA have advised there has been no formal consultation for the present proposal (inclusive of all options). The ACMA considers that the proposed grandfathering amendments will support the objects of the BSA and is consistent with the policy decision dating from 2015 when the provisions were last amended. In the case of section 52, it was understood that the existing grandfathering arrangements for the 75% 'reach' rule were ongoing, and that these would be extended to cover the television and radio control rules. When the policy was implemented in 2015, the ACMA's understanding was that without ongoing grandfathering arrangements, these issues would re-occur at every new section 30 determination, which was seen as a problem to be avoided. At the time when the amendments to section 43C and 52 were proposed, these measures were included as part of the general industry consultation about potential 'Spring 2014 repeal day' measures undertaken by the Department. As part of the *Broadcasting and Other Legislation Amendment (Deregulation) Bill 2014* the amendments were scrutinised by the Environment and Communications Legislation Committee. It is understood that no objections from the broadcasting sector were raised with the amendments as this was a proposal to avoid a regulatory impost.

The ACMA notes that no RIS was conducted at that time and costings do not appear to have been undertaken. Consequently, it suggests that, as this is settled policy, a different approach is not warranted on this occasion.

Industry concerns:

Licensees concerns about the operation of the provisions relating to local content obligations (section 43C) were considered as part of the ACMA's Local Content Levels Investigation Report (2007). In submissions to the review, a number of regional broadcasters commented that the compliance burden for the local content and local presence provisions was considerable and affected the ability of operators to do core functions such as programming, engineering, sales and

administration. Many of the submissions called for greater flexibility in meeting the requirements for ‘material of local significance’ and argued that the requirement to broadcast local content for all 52 weeks of the year did not take into account factors such as annual leave for staff. A number of submissions called for local content broadcast on weekends to contribute to their minimum requirement. However, this has the potential to reduce local content levels on weekdays. The current provisions do not prevent broadcasters from providing local content on weekends.

6. What is the best option from those you have considered?

Option 2 is the preferred option. The reinstatement of grandfathering rights to licensees on a time-limited and retrospective basis, through a legislative amendment to subsection 43C(4) and section 52, would provide a legally effective approach to implementing the policy objective for these measures – that is to afford ongoing protection to licensees with respect to the most recent determination they were compliant with, when a new population determination is made over a period of five years. This addresses the lack of certainty of protections under current arrangements, which has regard to ‘previous determinations’.

This option would enable the ACMA to make a new population determination before the proposed amendments come into effect (i.e. with respect to the 2016 Census population figure), as the grandfathering rights would be restored to protect licensees in relation to ‘the most current determination’ (i.e. 2011 Census population figure). Overall, there are no identified risks to the ACMA’s implementation of section 30 determinations, as a result of these amendments.

The Department considers this option to have **a net benefit to the Australian community** and with a **minor regulatory impact** to industry, given it is deregulatory in nature, and minimises compliance requirements for licensees over the defined five-year period, where there have been no changes other than to the determination of new population figures.

7. How will you implement and evaluate your chosen option?

The passage of the Broadcasting Legislative Amendment Bill 2021, including Option 2, is expected by mid to late 2021. The operative measures, (proposed for subsection 43C(4) and section 52) would sunset after five years of enactment (approx. until mid-late 2026). At this point, the legislation would trigger a review, in which case subsection 43C(4) and section 52 would be examined by the Department for relevancy, effectiveness and continuity with respect to future population figures and their impact on population licence areas – and with a view to support a competitive market to minimise economic and regulatory barriers for current and new licensees. Where there is a relevant cause or precedent for an alternate operative measure, these amendments could be repealed or removed. Overall, the proposed sunset of this legislation presents less regulatory risk for licensees, compared to an administrative review process that is not legally binding, and would rely on the commitment of a future elected Government.

Appendix A:

Local Content and Local Presence Requirements for Regional Commercial Radio

The local content and local presence requirements for regional commercial radio licenses were introduced as part of the Government's media reform package in 2006. The provisions aimed to ensure that commercial radio services in regional areas continued to provide local content and maintain a local presence in the event that control of a licence changed. Additional reporting requirements were introduced to enable the Australian Communications and Media Authority (ACMA) to monitor the levels of local content and ensure that licensees met their obligations to maintain a local presence following a trigger event.

Section 43C of the BSA requires the ACMA to make and maintain a licence condition requiring all regional commercial radio licensees to broadcast, between 5am and 8pm each business day, a specified minimum level of material of local significance. That level has been set at 3 hours for the majority of licensees and 30 minutes for licensees in small towns. The ACMA has defined 'material of local significance' as material that is hosted in, produced in, or relates to a regional commercial radio licensee's licence area.

To ensure compliance with these requirements, regional commercial radio licensees must compile a local content statement setting out how these minimum levels will be provided each business day.

In addition, the BSA includes rules for licensees that have been subject to a 'trigger event' (the transfer of a licence, formation of a new cross-media group or a change of controller for a cross-media group). Section 43B of the BSA requires the ACMA to make and maintain a licence condition requiring each trigger event-affected licensee to maintain the local presence (the employment of local staff and the use of local studios and production facilities) for a licence at the same levels that existed in the 3-month period before the trigger event for a 2-year period.

Division 5C of Part 5 of the BSA requires trigger event-affected licensees to meet minimum standards for local news and information by providing specific levels of news and information content each week.

These broadcasters must also provide:

- at least 62.5 minutes of local news bulletins per week, consisting of a minimum number of local news bulletins per business day (either one per business day, or the average number of local news bulletins broadcast under the licence on per business day during the year before the trigger event, whichever is greater);
- one local weather bulletin per business day;
- one community service announcement per week;
- emergency warnings as required; and

The local content that is broadcast to fulfil this requirement can be counted towards to the material of local significance requirements for all regional commercial radio licensees in the licence condition made by the ACMA in accordance with section 43C of the BSA.

The ACMA has advised that the commercial radio industry has expressed concern about the burden that the provisions place on regional commercial radio broadcasters.

The ACMA has advised that 151 regional commercial radio broadcasting licences have been affected by at least one trigger event since 4 April 2007 (when the provision was introduced). 41 licensees have been affected by a single trigger event and 110 licensees have been subject to multiple trigger events.

The Productivity Commission report stated that these obligations can seriously affect the operation of regional radio stations, preventing them from responding to changes in technology, local labour markets and product market conditions. In its annual review report, the Productivity Commission also asserted “stations subject to this trigger event provision are likely to be at increased risk of business failure because of the constraints of their ability to respond to changing circumstances” (page 167 of the report refers).

The perceived value of local content

The objectives of the BSA include the provision of “appropriate coverage of matters of local significance” (subsection 3(1)(g)) and promoting “the availability to audiences throughout Australia of a diverse range of radio and television services” (subsection 3(1)(a)). These requirements are not met purely through the provision of commercial radio services, but through a range of broadcasting services available to regional communities, including those provided by the community and national broadcasting sectors of the industry.

There is evidence to suggest that local content is valued by regional audiences. The level of local content in regional media services has been reviewed a number of times, including by House of Representatives and Senate standing and legislative committees and by the ACMA⁴. Parliamentary inquiries have identified concerns arising from levels of consolidation of ownership in the regional radio industry, the loss of independently owned local stations and an increase in networked, pre-recorded, automated and syndicated programming.

In 2017 the ACMA’s *Local Content in Regional Australia – 2017 report* found that 89 per cent of regional Australians consider local content important and 86 per cent consider local news important.

⁴ Investigations into local content in regional areas conducted by the ACMA include: *Investigation into Local Content on Regional Commercial Radio – Trigger Events* (March 2007); *Local Content Levels Investigation* (June 2007); *2009 Regional Radio Local Content Report* (November 2009); *2012 Regional Radio Local Content Report* (November 2012); *Regional Television Local Content Investigation* (December 2013); and *Local Content in Regional Australia – 2017 report* (May 2017).

It has been a Government priority to ensure that the liberalisation of the media regulatory framework did not lead to further reductions in local content on commercial television or commercial radio and that, where possible, concerns about diminishing levels of local content were addressed within a flexible regulatory framework. When introducing the media ownership changes in 2006, the Government intended to ensure that, should cross-media regional media companies emerge following the removal of cross-media restrictions, such companies, which would be operating across a number of markets and multiple media, continued to provide adequate local services to each licence area in which they operate. The Government considered the continued provision of these services was necessary on the basis of equity to ensure that regional and rural Australians received local content which reflected local identity and culture and was comparable to the services received in metropolitan areas.