



# Précis Paper

## Media Law

This is the first time Dr Wilding has presented for Benchmark. The discussion is very interesting and important in these changing times. It is highly recommended.

### **Discussion Includes**

- What are the current laws regarding cross media ownership?
- How have internet services such as Netflix, Stan and Presto changed the situation?
- What proposals for change have been made?
- What problematic issues are there with the proposed repeal of the 2 out of 3 rule?
- What is proposed regarding local content in regional areas?

# Précis Paper

## Media Law

1. In this edition of BenchTV, Dr Derek Wilding (Professor) and Ian Benson (Solicitor) discuss reform of Australia's media ownership laws. Dr Wilding is a Professor in the Faculty of Law at the University of Technology, Sydney, teaching media and communication law.
2. Dr Wilding notes that the current environment, in which print media and regional media sources are struggling, presents significant impetus for reform and in this presentation he considers whether the [Broadcasting Legislation Amendment \(Media Reform\) Bill 2016 \(Cth\)](#) meets these challenges.

### The Principle Act & Application

3. There are five principle media ownership laws that operate in Australia. The first two relate to media diversity and are set out in Part 5, Division 5A of the *Broadcasting Services Act 1992* (Cth) ('the Act') and the other three "statutory control rules" are set out in ss 53 and 54 of the Act.
4. These laws only apply to 3 broad platforms: commercial free to air television, commercial radio and some associated newspapers (regional newspapers, distributed regularly). This excludes national newspapers, pay TV or news streaming services.

### Cross Media Rule ('The 2 out of 3 Rule')

5. The cross media rule depends upon the concept of an "unacceptable 3 way control situation" which is defined in s 61AEA:

#### **SECTION 61AEA:**

#### ***Unacceptable 3-way control situation***

*For the purposes of this Division, an unacceptable 3-way control situation exists in relation to the licence area of a commercial radio broadcasting licence (the first radio licence area) if a person is in a position to exercise control of:*

- (a) *a commercial television broadcasting licence, where more than 50% of the licence area population of the first radio licence area is attributable to the licence area of the commercial television broadcasting licence; and*
- (b) *a commercial radio broadcasting licence, where the licence area of the commercial radio broadcasting licence is, or is the same as, the first radio licence area; and*
- (c) *a newspaper that is associated with the first radio licence area.*

6. Accordingly, the cross media rule prohibits a single person or company from exercising control of a commercial TV licence, a radio licence and a newspaper, all in the same licence area.
7. There is a civil penalty provision and an offence if a transaction takes place and the person was a party to the transaction or was in a position to prevent the transaction from taking place. The prohibition is in s 61AMA:

**SECTION 61AMA:**

***Prohibition of transactions that result in an unacceptable 3-way control situation coming into existence—offence***

*A person commits an offence if:*

- (a) *one or more transactions take place on or after the commencement day; and*
- (b) *the transactions have the result that an unacceptable 3-way control situation comes into existence in relation to the licence area of a commercial radio broadcasting licence; and*
- (c) *the person was:*
  - (i) *a party to the transactions; or*
  - (ii) *in a position to prevent the transactions taking place; and*
- (d) *the ACMA has not approved the transactions under section 61AMC.*

Diversity Test ('The 5/4 Minimum Voices Rule')

8. The second rule proposes a diversity test known as the '5/4 minimum voices test'. This rule similarly depends upon a transaction taking place and a person being a party to it or being in a position to prevent it from happening. The rule is found in s 61AG and prohibits an "unacceptable media diversity situation":

**SECTION 61AG:**

***Prohibition of transactions that result in an unacceptable media diversity situation coming into existence—offence***

*A person commits an offence if:*

- (a) *one or more transactions take place on or after the commencement day; and*
- (b) *the transactions have the result that:*
  - (i) *an unacceptable media diversity situation comes into existence in relation to the licence area of a commercial radio broadcasting licence; or*
  - (ii) *if an unacceptable media diversity situation already exists in relation to the licence area of a commercial radio broadcasting licence--there is a reduction in the number of points in the licence area; and*

- (c) *the person was:*
    - (i) *a party to the transactions; or*
    - (ii) *in a position to prevent the transactions taking place; and*
  - (d) *the ACMA has not approved the transactions under section 61AJ.*
9. An unacceptable media diversity situation arises when the number of points in a licensing area falls below a given level and the assigned level differs according to whether the area is regional or metropolitan (see ss 61AB & 61AC for an explanation of the points system). Essentially this rule ensures there are a certain number of differently controlled media operations in a given licence area.

#### Cap on Commercial Television and Radio Licences

10. The third and fourth rules are caps on the number of television and radio licences any person can hold in the same area. These rules are contained in ss 53(2) and 54:

##### **SECTION 53:**

##### ***Limitation on control of commercial television broadcasting licences***

...

- (2) *A person must not be in a position to exercise control of more than one commercial television broadcasting licence in the same licence area.*

##### **SECTION 54:**

##### ***Limitation on control of commercial radio broadcasting licences***

*A person must not be in a position to exercise control of more than 2 commercial radio broadcasting licences in the same licence area.*

11. Essentially, a person can only hold one television licence and can only hold 2 radio licences in the same licence area. Again, this rule is designed to ensure no person can exercise control of those mediums in a given area.

#### National Audience Reach Rule

12. The final rule is the 'national audience reach rule' contained in s 53(1) which provides that no person can control television licences that reach more than 75% of the population:

### **SECTION 53:**

#### ***Limitation on control of commercial television broadcasting licences***

(1) *A person must not be in a position to exercise control of commercial television broadcasting licences whose combined licence area populations exceed 75% of the population of Australia.*

13. Effectively, this rule stops national networking and means that there are metropolitan commercial television networks and, quite separately, regional commercial television networks.

#### Additional Rules

14. There is a prohibition on being a director of a company that controls more than one commercial television licence. Moreover, you cannot be a director of a company that controls one television licence and also be personally able to exercise control in relation to another television licence holder, in the same area.
15. There are also various notification rules that require persons to notify the regulator (the Australian Communications and Media Authority) about changes in control.

#### Notion of 'Deemed Control'

16. The notion of 'control' permeates much of media law and has been mentioned above.
17. Schedule 1 to the Act deems that a person who has interests (exceeding 15%) in a company is in a position to control the company.
18. Additionally, the regulator can actually look beyond deemed control to 'actual control' and see whether there is some other mechanism by which one person is exercising control.

#### Netflix and Stan

19. The Act and all the regulations only apply to "broadcasting services" and media broadcast over the internet does not fall within this category according to a ministerial decision. Therefore, a person does not need a licence to broadcast over the internet.
20. One consequence of the media laws lack of application to online streaming service is that commercial free to air television licence holders can stream their media online in order to avoid the application of many of the laws discussed above. Dr Wilding recalls that this

situation played out in a recent Federal Court case in which WIN television (a regional television licence holder) alleged Channel Nine were breaching various contractual obligations by streaming their programs into regional areas notwithstanding not having licences for those regions.

21. Dr Wilding argues that there needs to be a comprehensive analysis of the complex system of obligations and privileges that underpins the licensing of traditional media before a similar licensing situation is imposed on internet media.

#### Broadcasting Legislation Amendment (Media Reform) Bill 2016 Explanatory Memoranda

22. The proposed reforms to the media ownership laws in the 2016 Bill target 3 areas. It is proposed that the 75% audience reach rule and the 2 out of 3 rule be removed and that there be the introduction of some new content obligations for regional television services.
23. There is bipartisan support for the repeal of the 75% audience reach rule. However, there is no agreement on the repeal of the 2 out of 3 rule. As yet, there has been no definitive response on the subject from the ALP although the Greens have said they oppose the change.
24. The Greens are of the view that the repeal of the 2 out of 3 rule would inappropriately affect diversity levels, particularly in regional Australia.
25. Dr Wilding considers that the impact of this change would not be significant because there has only been very few persons controlling 2 different media platforms in a licence area and because there are also reasonably few areas with associated newspapers. He also notes that the maintenance of the minimum voices rule and its point system will ensure that a reasonable degree of media diversity continues regardless. Furthermore, the Competition and Consumer Act 2010 (Cth) would also apply to media mergers and this may limit the effect of these changes (see [ACCC on media mergers](#)).
26. That is not to say that the repeal of the 2 out of 3 rule would be meaningless because it would allow Channel 7 to merge with Fairfax, for example. However, Dr Wilding considers that the repeal of the 75% audience reach rule could potentially be more significant. As explained above, that rule ensures that regional and metropolitan media sources are not controlled by the same person. The change would allow Prime television and the 7 network to merge and that could be quite a significant structural and licensing development although it may not affect the content provided to consumers all that much.
27. The repeal of the 75% audience reach rule has bipartisan support because it is considered that the rationale for the rule no longer applies. The rationale had been to ensure that regional communities received programming relevant to them however it is now possible to

achieve that end through other means, such as content quotas (which have been proposed alongside the repeal).

28. Dr Wilding's submissions on the Bill can be found [here](#) at submission 17.
29. The current status of the Bill is unclear as it has lapsed since Parliament was prorogued. Dr Wilding understands that if and when the Bill is introduced it might be alongside Spectrum reforms (see [here](#)) and reforms aimed at changing aspects of the regulator's operations ([ACMA review](#)).

#### Other Reforms

30. Dr Wilding notes that if many of the structural obligations in the Act are being stripped away, government has to be confident that content obligations remain strict to ensure accuracy, privacy and fairness.
31. Another possible reform might be shifting the regulator from a statutory, government body to an independent, industry body. This might be beneficial in order to more appropriately deal with online content.
32. Finally, the presenters argue that it should never be the case that there are no laws regulating the media. On a practical level, regulation of radio spectrums is necessary because it avoids interference. However, regulation is also necessary, particularly in relation to news and current affairs, because media play such an important accountability function in our democratic society.

## **BIOGRAPHY**

### Dr Derek Wilding

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Derek works across the Faculty of Law and the Faculty of Arts and Social Sciences at the University of Technology Sydney.

Before moving to UTS in late 2014, Derek was the Executive Director of the independent, industry-based Australian Press Council. Derek joined the Press Council after five years with the government regulator, the Australian Communications and Media Authority. At the ACMA he managed the implementation of the federal government's 2006 media ownership reform package and resulting commercial transactions. Derek has also worked as a Principal Policy Officer with the Office of Film and Literature Classification and was the Director of the Communications Law Centre at UNSW. He has worked for the Media, Entertainment and Arts Alliance and Queensland University of Technology. He has a law degree from the University of Queensland and a PhD in media studies from QUT.

### Ian Benson

Ian Benson is a solicitor at AR Conolly and Company and holds a First Class Honours degree in law.

## **BIBLIOGRAPHY**

### Focus Act

*Broadcasting Services Act 1992* (Cth)

### Further References

[The Broadcasting Legislation Amendment \(Media Reform Bill\) 2016](#)

[Environment and Communications Legislation Committee Transcript](#)

[Senate Committee Report](#)

[Submissions to the Senate Committee](#)

[ACMA on media diversity](#)