2010-2011-2012-2013

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

PUBLIC INTEREST MEDIA ADVOCATE BILL 2013

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Broadband, Communications and the Digital Economy, Senator the Honourable Stephen Conroy)
This Bill, the News Media (Self-regulation) Bill 2013, the News Media (Self-regulation) (Consequential Amendments) Bill 2013, the Broadcasting Legislation Amendment (Convergence Review and Other Measures) Bill 2013, the Broadcasting Legislation Amendment (News Media Diversity) Bill 2013 and the Television Licence Fees Amendment Bill 2013 form a package of measures representing the Australian Government’s response to two independent media reviews conducted in 2011 and 2012 - the Convergence Review and the Independent Inquiry into the Media and Media Regulation.

The Public Interest Media Advocate Bill 2013 creates a new independent statutory office which will perform functions under the News Media (Self-regulation) Bill and the public interest test to be established in the new Part 5A of the Broadcasting Services Act 1992.

The News Media (Self-regulation) Bill 2013 and the News Media (Self-regulation) (Consequential Amendments) Bill 2013 respond to matters raised in the Convergence Review and the Independent Inquiry into the Media and Media Regulation relating to standards of media news and commentary.

The Broadcasting Legislation Amendment (Convergence Review and Other Measures) Bill 2013 responds to matters raised in the Convergence Review in relation to use of the sixth channel of television broadcasting spectrum, Australian content and public broadcasting, and includes certain other measures.

The Broadcasting Legislation Amendment (News Media Diversity) Bill 2013 responds to matters raised in the Convergence Review in relation to the importance of diversity of media control by introducing a public interest test for transactions involving significant news media voices.

The Television Licence Fees Amendment Bill 2013 provides for the 50 per cent reduction in the licence fees paid by commercial television broadcasters currently specified in regulations to be made permanent in legislation on an ongoing basis.

As noted above, this Bill creates a new independent statutory office which will perform functions under the News Media (Self-regulation) Bill and the public interest test to be established in the new Part 5A of the Broadcasting Services Act 1992.

The details of the powers and functions conferred on the Public Interest Media Advocate by the News Media (Self-regulation) Bill 2013 and the Broadcasting Legislation Amendment (News Media Diversity) Bill 2013 are explained in greater detail in the explanatory memoranda to those Bills.

The Public Interest Media Advocate will be appointed by the Minister but, to protect the independence and impartiality of the role, will not be subject to direction by the Minister or the Government in relation to the performance of its functions or the exercise of its powers.

Specifying that the Public Interest Media Advocate is not subject to direction assists to safeguard the independence and impartiality of the Public Interest Media Advocate’s role and enable it to operate at arm’s length from the government of the day.
FINANCIAL IMPACT STATEMENT

The measures in this Bill are not expected to have any significant impact on Commonwealth revenue or expenditure.
STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Public Interest Media Advocate Bill 2013

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

Overview of the Bill

This Bill forms part of a package of measures representing the Australian Government’s initial response to two independent media reviews conducted in 2011-12 - the Convergence Review and the Independent Inquiry into the Media and Media Regulation.

This Bill creates a new independent statutory office, known as the Public Interest Media Advocate. The Bill sets out the appointment process for the Public Interest Media Advocate, the terms and conditions of appointment and certain miscellaneous provisions. The functions of the Public Interest Media Advocate are those conferred on it by the News Media (Self-regulation) Bill 2013 and proposed new Part 5A of the Broadcasting Services Act 1992 to be inserted by the Broadcasting Legislation Amendment (News Media Diversity) Bill 2013 relating to diversity of media control through the introduction of a public interest test for transactions involving significant news media voices. Therefore, while the Bill establishes and sets out the framework within which the Public Interest Media Advocate will operate, the detail of the Public Interest Media Advocate’s primary functions is set out in the News Media (Self-regulation) Bill 2013 and the Broadcasting Legislation Amendment (News Media Diversity) Bill 2013. Accordingly, the human rights implications of those functions are considered in detail in the statement of compatibility with human rights in the explanatory memoranda to those Bills.

The Public Interest Media Advocate will perform its functions and exercise its powers independently of direction from the Minister or the Government, to ensure the independence and impartiality of the role of the Public Interest Media Advocate.

Human Rights Implications

This Bill engages the following rights and freedoms:

- the right to a fair and public hearing under Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR)
- the right to freedom of opinion and expression under Article 19(2) of the ICCPR
- the right to freedom from arbitrary or unlawful interference with privacy under Article 17 of the ICCPR

The right to a fair and public hearing

The Bill will provide the Public Interest Media Advocate with the power to hold hearings in subclause 19(1). The hearings would be conducted to assist the Public Interest Media Advocate in performing its functions, or exercising its powers.
The Public Interest Media Advocate has no discretion under the Bill to conduct the hearings in any way that is inconsistent with current domestic laws relating to fair hearings. Consequently, the proposed framework will have no impact on the right to judicial review. Hearings will be conducted in a fair and impartial manner, consistent with the current judicial framework in Australia and consistent with both the *Judiciary Act 1903* and the *Administrative Decisions (Judicial Review) Act 1997*. The Bill is therefore consistent with Article 14(1) of the ICCPR.

Nothing in this Bill is intended to abrogate an individual’s common law privilege against self-incrimination.

**The right to freedom of opinion and expression**

The Bill in subclause 19(2) will ensure that the Public Interest Media Advocate, the Commonwealth, the Secretary of the Department, an APS employee in the Department, and a person acting with the authority of the Department would not be liable to a civil or criminal action or proceeding, with regard to the publication of a transcript of a hearing held by the Public Interest Media Advocate.

Further, at subclause 19(3) the Bill ensures that no person is liable to a civil or criminal action or proceeding, as a result of a fair and accurate report of a hearing conducted by the Public Interest Media Advocate.

In this way, the Bill engages the right to freedom of opinion and expression. The Bill is compatible with this right as it upholds and promotes this right.

**The right to freedom from arbitrary or unlawful interference with privacy**

The Bill in clause 20, will allow the disclosure of ‘authorised disclosure information’ by the Public Interest Media Advocate to a range of persons or authorities where the disclosure would enable or assist that person or authority to perform its functions or exercise its powers. Such potential disclosure of personal information engages the right to privacy in Article 17 of the ICCPR.

‘Authorised disclosure information’ is defined in the Public Interest Media Advocate Bill 2013 (clause 20) as information:

- given in confidence to the Public Interest Media Advocate in connection with the performance of the Public Interest Media Advocate’s functions or the exercise of the Public Interest Media Advocate’s powers; or
- obtained by the Public Interest Media Advocate under section #78FA of the *Broadcasting Services Act 1992* (the BSA), which is proposed to be inserted by the Broadcasting Legislation Amendment (News Media Diversity) Bill 2013 and would enable the Public Interest Media Advocate to compel the production of information or documents relevant to the operation of proposed new Part 5A.

Collecting, using, storing, disclosing or publishing personal information amounts to an interference with privacy within the meaning of the ICCPR.

In order for privacy not to be arbitrarily interfered with, any interference with privacy must be both lawful and reasonable in the particular circumstances. In this case, the interference
will not be “unlawful”, as it will be expressly authorised and regulated by the Bill. Reasonableness, in this context, incorporates notions of proportionality to the end sought and necessity in the circumstances (Toonen v Australia, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994) at 8.3).

The provisions referred to above will engage the prohibition on unlawful or arbitrary interferences with privacy to the extent that ‘authorised disclosure information’ may include personal information. However the regulatory scheme contains several safeguards to limit arbitrary interference with privacy:

- the disclosure of information by the Public Interest Media Advocate to the persons or authorities listed in clause 20 of the Bill is only authorised “if the Public Interest Media Advocate is satisfied that the information will enable or assist the person or authority to perform any of the functions, or exercise any of the powers, of the person or authority”;
- the Public Interest Media Advocate may impose conditions that must be complied with in relation to authorised disclosure information (for example, in relation to further disclosure by the receiving party).

In addition, the government bodies listed in subclause 20(2) have specifically been included because they may perform functions related to the Public Interest Media Advocate’s functions. For example, there may be close interaction between the ACMA and the Public Interest Media Advocate in relation to particular transactions, such as where the ACMA must give an opinion as to whether a person is in a position to exercise control. The Public Interest Media Advocate may need to brief the DPP in relation to particular matters under the Act. A particular transaction may be considered by other government agencies, such as the ACCC, APRA, ASIC or for foreign acquisition and takeover purposes and the agencies involved may need to share information about the transaction to ensure decision-making occurs on a consistent basis.

The safeguards outlined above, mean that there must be a real and cogent link between the disclosure of the information and the functions and powers of the person or body who receives the information. This precludes disclosure merely on the basis that the information might be of interest to the person or body who receives the information.

The Public Interest Media Advocate may only disclose authorised disclosure information to the Minister if the information relates to the performance of the Public Interest Media Advocate’s functions or the exercise of its powers. Disclosure of such information to authorised Department officials may only be made by the Public Interest Media Advocate for the purpose of advising the Minister.

Information collected would potentially be subject to existing legislative and common law safeguards preventing unauthorised disclosure (such as the Information Privacy Principles under section 14 of the Privacy Act 1988; section 70 of the Crimes Act 1901; and the APS Values and Code of Conduct under the Public Service Act 1999, where applicable). For example, the Information Privacy Principles govern all stages of the processing of personal information, setting out standards for the collection, storage, security, use, disclosure and quality of personal information.

These limitations on the compulsory collection and use of information guard against arbitrary interference with privacy.
Conclusion

The Bill is compatible with human rights for two reasons. First, it upholds the right to freedom of opinion or expression and promotes this right. Secondly, to the extent that the Bill may limit human rights with regard to privacy, those limitations are reasonable, necessary and proportionate to ensure the Public Interest Media Advocate can execute its intended powers and functions.

This Bill together with the News Media (Self-regulation) Bill 2013 and the News Media (Self-regulation) (Consequential Amendments) Bill 2013 and the Broadcasting Legislation Amendment (News Media Diversity) Bill 2013 form a suite of Bills in which human rights have been engaged. These rights have been addressed in the Statement of Compatibility with Human Rights for the respective Bills to which they relate.
ABBREVIATIONS

ACCC – Australian Competition and Consumer Commission
ACMA – Australian Communications and Media Authority
APRA – Australian Prudential Regulation Authority
ASIC – Australian Securities and Investments Commission
BSA – Broadcasting Services Act 1992
Department – Department of Broadband, Communications and the Digital Economy
DPP – Commonwealth Director of Public Prosecutions
Minister – Minister for Broadband, Communications and the Digital Economy
PIMA – Public Interest Media Advocate
The Act – Public Interest Media Advocate Act 2013
The Bill – Public Interest Media Advocate Bill 2013
NOTES ON CLAUSES

Part 1 – Preliminary

Clause 1 – Short title

Clause 1 is a formal provision specifying the short title for the Act. When enacted, the Bill is to be cited as the Public Interest Media Advocate Act 2013.

Clause 2 – Commencement

Clause 2 sets out when the provisions of the Act commence. The provisions specified in column 1 of the table will commence, or will be taken to have commenced, on the day specified in accordance with column 2 of the table.

The covering clauses (sections 1 and 2) and anything not elsewhere covered by the table commence on the day the Act receives the Royal Assent.

Clauses 3 to 23 commence on a day to be fixed by proclamation or, if they do not commence within six months from the Royal Assent, they commence on the day after the end of that period.

Clause 3 – Simplified outline

Clause 3 provides a simplified outline of the Bill, designed to assist the reader.

Clause 4 – Definitions

Clause 4 sets out definitions of key terms used in the Bill.

Clause 5 – Extension to external Territories

Clause 5 extends the Act to all of the external Territories.

Part 2 – Public Interest Media Advocate

Division 1 – Establishment and functions

Clause 6 – Public Interest Media Advocate

Clause 6 formally establishes the office of Public Interest Media Advocate.

Clause 7 – Functions of the PIMA

The functions of the Public Interest Media Advocate are to be the functions conferred on the Public Interest Media Advocate by the News Media (Self-regulation) Act 2013 and the BSA and anything incidental to or conducive to the performance of those functions.
In summary, the principal functions to be conferred on the Public Interest Media Advocate by the amendments to the BSA in the Broadcasting Legislation Amendment (News Media Diversity) Bill 2013 are to:

- consider and determine applications for approval of transactions that result in a control event (proposed section 78CB);
- consider proposed undertakings in relation to such applications (including proposals to vary or withdraw them) (proposed sections 78DA, 78DB and 78DC);
- issue remedial directions in respect of unapproved transactions (proposed sections 78EA, 78EB and 78EC); and
- gather relevant information (proposed section 78FA).

The principal functions conferred on the Public Interest Media Advocate by the proposed News Media (Self-regulation) Act 2013 relate to the making and revoking of a declaration of a specified body corporate as a “news media self-regulation body” (see Part 2 of the proposed Act).

**Division 2 – Appointment**

**Clause 8 – Appointment of PIMA**

Subclauses 8(1) and (5) empower the Minister to appoint a person to the office of Public Interest Media Advocate (by written instrument), on a part-time basis. The legislative note under subclause 8(1) directs the reader to the Acts Interpretation Act 1901 which deals with reappointment (section 33AA of that Act provides that a power to appoint includes the power to reappoint).

Subclause 8(2) sets out the qualifications to be eligible for appointment. To be eligible, a person must have substantial experience or knowledge, and significant standing, in one or more of the following areas:

- the media industry;
- law;
- business or financial management;
- public administration;
- economics.

Subclause 8(3) requires the Minister, before appointing a person as the Public Interest Media Advocate, to consult the ACMA, the ACCC and such media industry bodies as the Minister considers appropriate.

Subclause 8(4) makes it clear that this provision does not prevent the Minister from consulting other bodies and persons. In practice, it is expected that the Minister would consult the Opposition of the day.

**Clause 9 – Period of appointment**

Under clause 9, the Minister is to set the period of appointment in the instrument of appointment. The period must not exceed 5 years. The legislative note under clause 9 directs
the reader to the *Acts Interpretation Act 1901* with respect to reappointment (see clause 8 above).

**Clause 10 – Acting PIMA**

Under clause 10, the Minister may appoint an acting Public Interest Media Advocate, during a vacancy in the office, or when the incumbent is absent from Australia, or if the Public Interest Media Advocate is for any reason unable to perform the duties of the office.

The Minister cannot appoint a person to act as the Public Interest Media Advocate unless that person is eligible for appointment under subclause 8(2).

**Division 3 – Terms and Conditions**

**Clause 11 – Remuneration**

The Remuneration Tribunal is to determine the Public Interest Media Advocate’s remuneration in accordance with the *Remuneration Tribunal Act 1973*. For clarity, in the *Remuneration Tribunal Act 1973*, remuneration includes annual allowances (see subsection 3(2) of that Act), but not travelling allowance, and extends to remuneration payable on other than an annual basis (e.g. daily sitting fees).

If no remuneration determination is in force, the Public Interest Media Advocate is to be paid the remuneration prescribed in the regulations (subclause 11(1)).

The *Remuneration Tribunal Act 1973* also empowers the Remuneration Tribunal to determine any matter that is significantly related to remuneration, such as travelling or other allowances that are not annual allowances (e.g. daily sitting fees). As the Remuneration Tribunal is not required to make additional determinations in relation to other allowances, these allowances may be prescribed in the regulations (subclause 11(2) refers).

**Clause 12 – Disclosure of interests to the Minister**

Under clause 12, the Public Interest Media Advocate must give written notice to the Minister of pecuniary and other interests that conflict or could conflict with the proper performance of the Public Interest Media Advocate’s functions. This requirement is a continuous disclosure requirement, in that it extends to interests that the Public Interest Media Advocate may acquire while holding office.

**Clause 13 – Outside employment**

Clause 13 provides that the Public Interest Media Advocate must not engage in any paid employment that conflicts, or may conflict, with the proper performance of the duties of the office. Since the Public Interest Media Advocate is a part-time appointment, this section does not prohibit outside employment absolutely, or otherwise make outside employment subject to the Minister’s approval. Rather, the Public Interest Media Advocate is free to engage in outside employment provided there is no actual or perceived conflict of duties (and that any conflict of interest is disclosed in accordance with clause 12).

An actual or perceived conflict of duties is a ground for the Minister to terminate the appointment (see paragraph 16(2)(b), noted below).
Clause 14 – Leave of absence

Clause 14 enables the Minister to give leave of absence to the Public Interest Media Advocate on terms and conditions determined by the Minister.

Clause 15 – Resignation

Under clause 15, the Public Interest Media Advocate may resign the office by giving the Minister a written resignation. The resignation takes effect on the day it is received by the Minister, unless a later day is specified in the resignation.

Clause 16 – Termination of appointment

Clause 16 sets out the grounds on which the Minister may terminate the Public Interest Media Advocate’s appointment.

The Minister has the discretion to terminate the Public Interest Media Advocate’s appointment on the grounds of misbehaviour. The Minister may also terminate the appointment due to the PIMA’s physical or mental incapacity if, as a consequence of that incapacity, the PIMA is unable to perform the duties of his or her office.

The Minister may also terminate the Public Interest Media Advocate’s appointment on insolvency grounds, including if the PIMA becomes bankrupt, applies for relief from bankruptcy, enters into an arrangement with creditors regarding the payment of his or her debts or assigns all or part of his or her remuneration for the benefit of creditors (paragraph 16(2)(a)).

The Minister may also terminate the appointment of the Public Interest Media Advocate if the PIMA engages in paid outside employment that is contrary to clause 13 (paragraph 16(2)(b)), or fails to disclose his or her conflicts of interests as required by clause 12 (paragraph 16(2)(c)).

Clause 17 – Other terms and conditions

Clause 17 provides that the Public Interest Media Advocate holds office on terms and conditions in relation to matters not covered by the Act that are determined by the Minister.

Part 3 – Miscellaneous

Clause 18 – Assistance to the PIMA

Clause 18 enables assistance to be given to the Public Interest Media Advocate by Commonwealth agencies, including the Department, the ACMA and the ACCC.

The assistance given may include the provision of information, the provision of advice, and the making available of resources and facilities (including secretariat services and clerical assistance).
Clause 19 – PIMA may hold hearings

Clause 19 enables the Public Interest Media Advocate to hold hearings for the purposes of the performance of the PIMA’s functions or the exercise of his or her powers.

Subclause 19(2) provides certain parties (the Public Interest Media Advocate; the Commonwealth; the Secretary and APS employees of the Department; and any person acting with the authority of the PIMA) with immunity from an action or proceeding, whether civil or criminal, in respect of the publication of a transcript of proceedings at a hearing held by the PIMA. Similarly, subclause 19(3) provides such immunity to any person, in respect of the publication of a report of proceedings at a hearing held by the Public Interest Media Advocate, provided the report is fair and accurate.

Subclause 19(2) provides a similar protection to that available in relation to ACMA hearings under section 203 of the BSA.

Clause 20 – Disclosure of information by the PIMA

Clause 20 enables the Public Interest Media Advocate to disclose certain information (defined in subclause 20(1) as *authorised disclosure information*) in circumstances where the PIMA is satisfied that the information will enable or assist a person or authority to perform any of the functions or exercise any of the powers of that person or authority (see subclause 20(2)).

The government bodies listed in subclause 20(2) have specifically been included because they may perform functions related to the Public Interest Media Advocate’s functions. For example, there may be close interaction between the ACMA and the PIMA in relation to particular transactions, such as where the ACMA must give an opinion as to whether a person is in a position to exercise control. The PIMA may need to brief the DPP in relation to particular matters under the Act. A particular transaction may be considered by other government agencies, such as the ACCC, APRA, ASIC or for foreign acquisition and takeover purposes and the agencies involved may need to share information about the transaction to ensure decision-making occurs on a consistent basis.

This authorised disclosure information may be subject to conditions made by the Public Interest Media Advocate in writing (subclause 20(3)). An authorisation instrument that imposes conditions in relation to a particular disclosure is not a legislative instrument, as it only applies to a particular case (see subclause 20(4)). Where subclause 20(4) does not apply, an authorisation instrument will be a legislative instrument (subclause 20(5)). Subclauses 20(4) and 20(5) are declaratory of the existing law and are not intended to create exceptions to the operation of the *Legislative Instruments Act 2003*.

The Public Interest Media Advocate may disclose information to the Minister and to authorised Department officials for the purpose of advising the Minister (subclauses 20(6) and (7)).

Clause 21 – PIMA not subject to direction by the Minister

Clause 21 provides that the Public Interest Media Advocate is not subject to direction by the Minister, or by or on behalf of the Commonwealth Government, in relation to the performance of its functions or the exercise of its powers. Clause 21 is designed to protect the Public Interest Media Advocate’s independence. The Public Interest Media Advocate
will be equipped to apply specialised knowledge and expertise to its role without being subject to direction by the executive.

Clause 22 – Annual report

This clause requires the Public Interest Media Advocate to prepare and give to the Minister, for presentation to Parliament, an annual report on the PIMA’s activities during the financial year and on such matters as the PIMA considers should be included in the report in relation to the operation of the provisions of the News Media (Self-regulation) Act 2013; Part 5A of the Broadcasting Services Act 1992; and the remaining provisions of the Broadcasting Services Act 1992 so far as they relate to Part 5A of that Act.

Clause 23 – Regulations

Clause 23 provides the Governor-General with the power to make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.