2016-2017

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

BROADCASTING LEGISLATION AMENDMENT (FOREIGN MEDIA OWNERSHIP AND COMMUNITY RADIO) BILL 2017

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Communications
Senator the Honourable Mitch Fifield)

BROADCASTING LEGISLATION AMENDMENT (FOREIGN MEDIA OWNERSHIP AND COMMUNITY RADIO) BILL 2017

OUTLINE

The *Broadcasting Legislation Amendment (Foreign Media Ownership and Community Radio) Bill 2017* (Bill) forms part of the Government's Broadcasting and Content Reform Package. The measures implemented by this Bill are designed to improve transparency in the levels and sources of foreign investment in Australian media companies, and strengthen localism in community radio broadcasting. The two measures will be implemented by amending the *Broadcasting Services Act 1992* (BSA), with a minor amendment to the *Australian Communications and Media Authority Act 2005* (ACMA Act).

The first measure is the establishment of a Register of Foreign Ownership of Media Assets (Register), to be overseen and administered by the Australian Communications and Media Authority (ACMA). Foreign persons would be required to register information about their company interests in Australian media companies, where the company interests exceed a specified threshold (two and a half per cent). The Register allows increased scrutiny of foreign investment in Australian media companies and increased transparency on the levels and sources of foreign investment in such companies.

The second measure relates to applications for, and renewals of, community radio broadcasting licences. Community radio services play an important role in informing local communities and providing community members with the opportunity to have their views heard. The Bill would adjust the criteria against which licence applications and renewals are assessed to match community expectations of their local community radio services. The amendment would encourage community radio broadcasters to provide greater coverage of local issues, and to provide greater opportunities for local participation in producing and hosting radio programs.

The amendment would require the ACMA, in assessing licence applications, to consider the extent to which proposed services will provide 'material of local significance'. Material of local significance would be defined as material that is produced in, hosted in, or relates to, the licence area of the proposed licence. This new criterion would have the same priority as the existing criteria in subsection 84(2) of the BSA, and would apply to licence renewals in the same way.

FINANCIAL IMPACT STATEMENT

The measures in this Bill are expected to have no financial impact.

REGULATION IMPACT STATEMENT

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 is 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 disclosure holdings of two and a half 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.

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

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

    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).

<u>Benefits</u>

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.

<u>Costs</u>

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			
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 below). 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 ($)	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 likely 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.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Broadcasting Legislation Amendment (Foreign Media Ownership and Community Radio) Bill 2017

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

The Bill would amend the *Broadcasting Services Act 1992* (BSA), and make a minor amendment to the *Australia Communications and Media Authority Act 2005* (ACMA Act), implementing the following two measures:

- the establishment of a Register of Foreign Ownership of Media Assets (Register) (Schedule 1); and
- the insertion of a new assessment criterion for the applications for, and renewals of, community radio broadcasting licences relating to material of local significance (Schedule 2).

Register of Foreign Owners of Media Assets

Schedule 1 to the Bill would insert a new division into the BSA (Division 10A) and make minor consequential amendments to the ACMA Act. Under the new Division 10A, the Register is to be overseen and maintained by the ACMA. The Register will include information about the interests held by foreign persons in Australian media companies, being:

- companies which hold a commercial television broadcasting licence;
- companies which hold a commercial radio broadcasting licence; or
- companies which are publishers of a newspaper that is associated with the licence area of a commercial television or radio broadcasting licence and are constitutional corporations.

The Register is designed to promote increased scrutiny of foreign investment in Australian media companies, and increase transparency of the levels and sources of foreign ownership in these companies. There will be five circumstances under which a foreign person would be required to disclose information to the ACMA (four are ongoing and one is a once-off), and fines are payable for non-compliance.

The ACMA will be able to utilise a range of sources of information for populating and updating the Register, including public information and information given by any person. However, it is anticipated that the main source of information will be the notification information given by foreign persons in accordance with the reporting obligations.

Foreign persons (which would have the same meaning as under the *Foreign Acquisitions and Takeovers Act 1975* (FATA)) would be required to provide the ACMA with information about their company interests where the interests exceed a threshold of two and a half per cent.

The type of information that would need to be notified to the ACMA, includes:

- for natural persons – the person's date of birth, and the country in which the person is ordinarily resident;
- for corporations – the country in which the corporation was formed;
- for trustees – the name of the trust, and the country in which the trust was established;
- for foreign government investors to a separate government entity of a foreign country or a part of a foreign country – the foreign country or the part of the foreign country; and
- for foreign government investors – the foreign government.

A natural person's date of birth and contact details will only be collected by the ACMA for identification purposes and will not be published on the Register. There is also additional scope for the ACMA not to publish confidential information where its publication would be prejudicial to the commercial interests of the person and not in the public interest.

To determine whether a person is a foreign person for the purposes of the Register, company interests of 20 per cent or more are traced up through the chain of entities and a foreign person's associates, so entities will be characterised as foreign persons if there are sufficient upstream foreign holders or associates. This is the same approach set out in the FATA for calculating a person's 'aggregate interest' through the use of the tracing provisions in section 19 of the FATA. To take an example, assume that Company A is a foreign person and controls 25 per cent of the voting power of a downstream company, Company B. In turn, Company B has a 40 per cent holding in Company C. Under section 19, Company B and C would be considered to be foreign persons even if they were incorporated in Australia, because they are held by Company A. If Company B acquired a 4 per cent share in an Australian media company, then Company B would be required to notify the ACMA of this under the new register provisions.

The ACMA would be required to maintain the Register and make it available on its website. Using the information that it has obtained, the ACMA will also be required to present an annual report to the Minister outlining the company interests in Australian media companies that were held by foreign stakeholders at the end of the relevant financial year. This report may include the ACMA's observations about trends relating to the company interests in Australian media companies that are held by foreign stakeholders.

The Register measure contained in Schedule 1 to the Bill engages the following human rights and freedoms:

- the right to protection from unlawful or arbitrary interferences with an individual's privacy;
- the right to freedom of expression; and
- the right to be free from discrimination.

Right to privacy

Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits unlawful or arbitrary interferences with a person's privacy, family, home or correspondence. It also provides that everyone has the right to the protection of the law against such interference or attacks. The Human Rights Committee has interpreted the term 'unlawful' to

mean that no interference can take place except in cases envisaged by law, which itself must comply with the provisions, aims and objectives of the ICCPR. The Human Rights Committee has also indicated that interference will not be considered 'arbitrary' if it is provided for by law, is in accordance with the provisions, aims and objectives of the ICCPR, and is reasonable in the particular circumstances.

Privacy is a concept which is broad in scope and includes a right to information privacy. The Bill directly engages the right to privacy under Article 17 of the ICCPR because it requires the provision of information by, and authorises the use and disclosure of certain information about individuals, for inclusion in the new Register. Specifically, under the new Division 10A, there would be five circumstances under which foreign persons, who hold company interests in an Australian media company of two and a half per cent or more, would be required to disclose information to the ACMA:

- when the person becomes a foreign stakeholder in an Australian media company (within 30 days of coming into such a position) (proposed section 74E);
- when the person ceases to be a foreign stakeholder in an Australian media company (within 30 days of coming into such a position) (proposed section 74F);
- at the end of each financial year, by the foreign stakeholders (within 30 days of the end of the financial year) (proposed section 74G);
- at the commencement of Division 10A (within a six month period known as the 'initial disclosure period') (proposed section 74H);
- at any time requested by the ACMA by written notice (proposed section 74HAA).

'Company interest' is defined in section 6 of the BSA, and means, in relation to a person who has a shareholding interest, a voting interest, a dividend interest or a winding-up interest in a company, means the percentage of that interest or, if the person has two or more of those interests, whichever of those interests has the greater or greatest percentage. The Bill adopts the meaning of 'company interest' as set out in the BSA.

It is anticipated that the ACMA would create forms for the notification by foreign persons. If a foreign person fails to comply with the notification obligations under the new Division 10A, the person may be liable for an administrative penalty (the maximum penalty for a body corporate is 300 penalty units, and the maximum for other persons is 60 penalty units). Infringement notices may also be issued, with reduced penalty amounts (60 penalty units for body corporates, and 10 penalty units for any other person).

The information collected by the ACMA may only be used or disclosed for the purposes of the Register and the preparation of the related annual report which is to be presented to the Minister. The circumstances in which information may be collected and used are clearly defined by the Bill and are therefore a lawful interference with the right to privacy. Moreover, as it would not be possible to achieve the objectives of the proposed measure without collecting some information about identifiable individuals, these limitations on the right to privacy are reasonable in the circumstances. They do not interfere with the right to privacy of those individuals more than is necessary to achieve the legitimate objective of ensuring the Australian public is able to easily access information regarding the levels and sources of foreign investment in Australian media outlets.

Right to freedom of expression

Paragraph 2 of Article 19 of the ICCPR requires States Parties to guarantee the right of everyone to freedom of expression, including the 'freedom to seek, receive and impart information and ideas of all kinds'. The right to freedom of expression includes the right not to impart information.

Schedule 1 to the Bill engages paragraph 2 of Article 19 of the ICCPR because it requires foreign individuals to provide information such as their names, date of birth, contact address, email address, telephone number, and country of residence, and some of this information (not all) could be published on the Register. There are no less restrictive means of achieving the legitimate purpose the limitation created by the new notification obligations under Schedule 1 to the Bill seeks to achieve. Moreover, to the extent the Bill interferes with the right to freedom of expression, the interference is relatively minor and has a clear legal basis. These limitations are therefore considered to be reasonable, necessary and proportionate.

Right to be free from discrimination

Schedule 2 to the Bill also engages Article 26 of the ICCPR, which recognises that all persons are equal before the law and are entitled without discrimination to the equal protection of the law. While the ICCPR does not define the term 'discrimination' (nor does it indicate what constitutes discrimination), the Human Rights Committee considers that in the context of the ICCPR, it should be understood to imply any distinction, exclusion, restriction, or preference which is based on a range of things, including national origin, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

The Bill also generally engages the rights protected by the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICFRD Convention). Paragraph 1 of Article 1 of the ICFRD Convention defines the term 'racial discrimination' to mean 'any distinction, exclusion, restriction or preference based on race, colour descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural, or any other field of public life'. Under Article 5 of the ICFRD Convention, State Parties undertake to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to matters such as national origin, to equality before the law in the enjoyment of civil, political, economic, social and cultural rights.

Schedule 1 to the Bill limits Article 26 of the ICCPR and Articles 2 and 5 of the ICFRD Convention because the core obligations imposed by the Bill only apply to a 'foreign person', which includes an individual not ordinarily resident in Australia. While an Australian citizen who is not ordinarily resident in Australia may be a 'foreign person' for the purposes of Schedule 1 to the Bill, it is anticipated that the majority of individuals who are directly affected by this Bill will not be Australian citizens.

While the Bill, once enacted, will primarily affect individuals who are citizens of countries other than Australia, there is not a less restrictive way of achieving the objectives of Schedule 1 to the Bill. Given it only requires individuals who are foreign persons to provide certain information, and the Bill does not interfere with the rights of citizens from countries other than Australia more than to the extent possible to achieve the objective of the Bill, these limitations are considered reasonable and proportionate.

Community Radio Measure

Under this measure, a new assessment criterion would be inserted into subsection 84(2) of the BSA. The effect of the new criterion would be that the ACMA would be required to consider the extent to which the proposed service or services would provide material of local significance when assessing applications for community radio broadcasting licences. The new criterion would also be relevant to the renewal of existing community radio broadcasting licences, in the same way as the other criteria. This measure is intended to encourage local participation and the provision of locally relevant content, in recognition of the important role that community radio broadcasters have in providing a voice to local communities and informing local communities through coverage of the issues that affect them.

Schedule 2 also contains two application provisions which have the effect of ensuring that the new criterion only applies to decisions relating to community radio broadcasting licence applications and renewals made after the commencement of the Bill.

Schedule 2 to the Bill does not directly engage any applicable human rights or freedoms. In coming to this conclusion, specific consideration was given to the following human rights relevant to broadcasting:

- the right of all people to take part in cultural life. (Article 15 of the ICCPR);
- the right to freedom of expression (Article 19 of the ICCPR);
- the right of ethnic, religious or linguistic minorities to enjoy their own culture (Article 27 of the ICCPR);
- the right of all persons with disabilities to freedom of expression (Article 21 of the Convention on the Rights of Persons with Disabilities (CRPD)); and
- the right of all persons with disabilities to participate in cultural life (Article 30 of the CRPD).

The measures contained in Schedule 2 to the Bill relate to community radio broadcasting licensees, which are corporations, rather than individuals. Accordingly, the Bill’s amendments to the BSA do not have a direct impact on human rights. However, it is noted that the effect of the new assessment criterion on community radio broadcasting licensees will assist with providing a voice to local communities in shaping the services that they receive and informing communities through locally relevant information. In this sense, the measure indirectly assists with promoting the rights under Articles 15, 19, 21 and 30 of the ICCPR, and Article 21 of the CRPD.

The new localism assessment criterion would have the same priority as the current criteria, including the extent to which the proposed services would meet the needs of the community within the licence area, and the diversity of interests of that community. This ensures that community radio services targeted to particular ethnic, religious or linguistic minorities are not disadvantaged, consistent with Article 27 of the ICCPR.

Conclusion

The Bill is compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

ABBREVIATIONS

The following abbreviations are used in this explanatory memorandum:

ACMA	Australian Communications and Media Authority
ACMA Act	*Australian Communications and Media Authority Act 2005*
ASX	Australian Securities Exchange
BSA	*Broadcasting Services Act 1992*
Bill	*Broadcasting Legislation Amendment (Foreign Media Ownership and Community Radio) Bill 2017*
Department	Department of Communications and the Arts
FATA	*Foreign Acquisitions and Takeovers Act 1975*
FATA Regulations	*Foreign Acquisitions and Takeovers Regulation 2015*
Register	Register of Foreign Ownership of Media Assets

NOTES ON CLAUSES

Clause 1 – Short title

Clause 1 provides that the Bill, when enacted, may be cited as the *Broadcasting Legislation Amendment (Foreign Media Ownership and Community Radio) Bill 2017*.

Clause 2 – Commencement

Clause 2 provides for the commencement of the Bill. The Bill would commence on the day after the Bill received the Royal Assent.

Clause 3 – Schedules

Clause 3 provides that legislation that is specified in a Schedule to the Bill is amended or repealed as set out in the applicable items in that Schedule, and any other item in a Schedule has effect according to its terms.

There are two Schedules to the Bill.

SCHEDULE 1— FOREIGN MEDIA OWNERSHIP

Schedule 1 to the Bill establishes a Register of Foreign Owners of Media Assets to be administered by the ACMA. The Register will include information about the company interests held by foreign persons in Australian media companies. Australian media companies are companies which:

- hold a commercial television broadcasting licence;
- hold a commercial radio broadcasting licence; or
- are publishers of a newspaper that is associated with the licence area of a commercial television or radio broadcasting licence and are a constitutional corporation.

The expression, 'company interest' is defined in section 6 of the BSA, and means, in relation to a person who has a shareholding interest, a voting interest, a dividend interest or a winding-up interest in a company, the percentage of that interest or, if the person has two or more of those interests, whichever of those interests has the greater or greatest percentage.

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

- Under the FATA, while an assessment is made that the proposed investment is not contrary to Australia's national interest, the details of the investment, or the fact that a proposed investment has been approved, are not typically made publicly available.
- Under the ASX, disclosure is made in respect of listed entities above a five per cent threshold. However, these disclosures don't explicitly state whether the investing person 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, an Australian media company. However, these disclosures don't specifically identify foreign persons, and generally wouldn't require disclosure for holdings of less than 15 per cent.

It is important that the Australian public has transparent information 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 of foreign investment in the Australian media are broadly understood and known. The implementation of the Register provides an effective solution to the identified information gap by complementing existing reporting frameworks by compiling, and making publicly available, information on the levels and sources of foreign investment in Australian media companies.

There will be five circumstances under which foreign persons will be required to disclose information to the ACMA (four are ongoing and one is once-off during a transitional period). Fines are payable for non-compliance with the proposed notification requirements. Although the ACMA will be able to utilise a range of sources of information for populating and updating the Register, including public information and information given by any person, the

main source of information is anticipated to be information given by foreign persons in accordance with the reporting obligations.

Foreign persons (which would have the same meaning as under the FATA) would be required to report at different times about their interests, where their company interests exceed a specified threshold (two and a half per cent). To determine whether a person is a foreign person, the FATA foreign person tracing rules apply, so that interests of 20 per cent or more are traced up through the chain of entities (which includes associates). Entities will be characterised as foreign persons if there are sufficient upstream foreign holders, as per the FATA rules. To take an example, assume that Company A is a foreign person and controls 25 per cent of the voting power of a downstream company, Company B. In turn, Company B has a 40 per cent holding in Company C. Under section 19 of the FATA, Company B and C would be considered to be foreign persons even if they were incorporated in Australia, because they are held by Company A. If Company B acquired a 4 per cent share in an Australian media company, then Company B would be required to notify the ACMA of this under the new register provisions.

Australian Communications and Media Authority Act 2005

Item 1 - Paragraph 53(2)(k)

Section 52 of the ACMA Act provides, subject to section 53, for a Division within the ACMA to delegate all or any of the functions and powers delegated to it under section 52 to a member of the Division, an associate member, an ACMA staff member, or a person whose services are made available to the ACMA under subsection 55(1).

Item 1 carves out from the limits on powers delegable to persons other than the Division (as set out in section 53), the power to issue a notice under Division 10A of Part 5 of the BSA. The effect of this amendment is that the ACMA is able to delegate directly to any ACMA staff member the power to issue notices under new Division 10A.

Broadcasting Services Act 1992

Item 2 - Subsection 52A(1)
Item 3 - Subsection 52A(2)
Item 4 - Subsection 52A(2)

Items 2 – 4 would make three consequential changes stemming from the insertion of the new Division 10A into Part 5 of the BSA by item 5.

Section 52A of the BSA deals with the application of the BSA in relation to newspapers. Among other things, it provides that the BSA has the effect that it would have if each reference in Part 5 to a 'newspaper' were confined to a newspaper where the publisher is a constitutional corporation. Section 52A is designed to enable the provisions referring to newspapers to be severably underpinned by various heads of power in the Constitution. As the proposed new laws in respect of the Register of Foreign Owners of Media Assets are intended to have extraterritorial application, it is necessary to exclude the new Division 10A from the operation of section 52A.

Item 5 - After Division 10 of Part 5

Item 5 would insert the new Division 10A into Part 5 of the BSA. The new Division 10A would establish the Register of Foreign Owners of Media Assets, and sets out related notification, penalty and administration arrangements.

An outline of the proposed new Division 10A is as follows:

Register of Foreign Owners of Media Assets

Division 10A

Subdivision A	Introduction
74A	Simplified outline of this Division
74B	Definitions
74C	Foreign stakeholder
Subdivision B	Register of Foreign Owners of Media Assets
74D	Register of Foreign Owners of Media Assets
74E	Information to be set out in the Register of Foreign Owners of Media Assets
Subdivision C	Notification
74F	Notification by a person who becomes a foreign stakeholder in an Australian media company
74G	Notification by a person who ceases to be a foreign stakeholder in an Australian media company
74H	Notification by a person who is a foreign stakeholder in an Australian media company at the end of a financial year
74J	Notification by a person who is a foreign stakeholder in an Australian media company at the commencement of this Division
74K	Notification by a person who is a foreign stakeholder in an Australian media company—requirement by the ACMA
74L	Requirement for executors, administrators and liquidators to give notification
74M	Person may give the ACMA relevant information

Subdivision D	Miscellaneous
74N	Minister may direct the ACMA about the performance of its functions or the exercise of its powers
74P	Service of summons, process or notice on corporations incorporated outside Australia
74Q	Extra-territorial application
74R	Annual report
74S	Part 13 not limited
74T	Limitation for damages

These sections are discussed in more detail below.

Proposed Division 10A—Register of Foreign Owners of Media Assets

Subdivision A—Introduction

Proposed section 74A - Simplified outline of the Division

Proposed section 74A provides a simplified outline of the new Division 10A to assist the reader.

- The ACMA must maintain the Register.
- The Register must set out, for each Australian media company, information about each foreign stakeholder in the company.
- Foreign stakeholders must notify the ACMA of their company interests in Australian media companies.

A note is included at the end of the simplified outline to remind readers that the expression, ‘company interests’ is defined in section 6 of the BSA.

Proposed 74B - Definitions

The proposed section 74B inserts a number of definitions for key terms used in the new Division 10A.

Meaning of ACMA official

The term *ACMA official* has the same meaning as in the ACMA Act.

Meaning of Australia

The term *Australia*, geographically would include all the external Territories.

Meaning of Australian media company

The term *Australian media company* would capture three types of corporate entities:

- a company which holds a commercial television broadcasting licence; or
- a company which holds a commercial radio broadcasting licence; or
- a company that is a publisher of a newspaper that is associated with the licence area of a commercial television or radio broadcasting licence and which is a constitutional corporation.

Meaning of designated information

The term *designated information* is central to the proposed notification obligations and Register-publication related provisions. It covers the foreign person's contact details (address, email address and telephone number (if any)), and also extends to the following types of information which varies depending on the entity type of the foreign person:

- for natural persons:
  - the person's date of birth; and
  - the country in which the person is ordinarily resident;
- for corporations:
  - the country in which the corporation was formed;
- for trustees:
  - the name of the trust; and
  - the country in which the trust was established;
- for foreign government investors in a separate government entity of a foreign country or a part of a foreign country:
  - the foreign country or the part of the foreign country;
- for foreign government investors:
  - the foreign government.

While the above information must be reported to the ACMA, if the ACMA is satisfied that the publication of commercial confidential information on the Register would be substantially prejudicial to a person's commercial interest and not in the public interest to publish, the ACMA will not be permitted to publish the information (proposed section 74E).

Meaning of foreign government

The term *foreign government* has the same meaning as in the FATA. It covers an entity (within the ordinary meaning of that term) that is: a body politic of a foreign country; a body politic of part of a foreign country; and any part of such body politics.

Meaning of foreign government investor

The term *foreign government investor* has the same meaning as in the FATA. Under the FATA foreign government investors include foreign governments and their separate agencies and instrumentalities, and also corporates, trusts and limited partnerships (through their trustees, general partners and limited partners) in which any of them hold an interest of at least 20 per cent, or more than one hold an interest of at least 40 per cent.

Meaning of foreign person

The term *foreign person* is central to the new Division 10A. It has the same meaning as given in the FATA, namely:

- an individual not ordinarily resident in Australia (an Australian citizen who is living overseas may therefore be a 'foreign person' under this limb);
  - See Example 1 below.
- a corporation in which an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, holds a substantial interest (under the FATA, a person holds a substantial interest in an entity if the person holds an interest of at least 20 per cent in the entity);
  - See Example 2 below.
- 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 (under the FATA, two or more persons hold an aggregate substantial interest in an entity if the persons hold an aggregate interest of at least 40 per cent in the entity).
  - See Example 3 below.
- 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 (under the FATA, a person holds a substantial interest in the case of a trust (including a unit trust), if a person holds together with any one or more associates, a beneficial interest in at least 20 per cent of the income or property of the trust);
  - See Example 4 below.
- the trustee of a trust in which two or more persons, each of whom is either an individual not ordinarily resident in Australia, a foreign corporation or a foreign government, hold an aggregate substantial interest (under the FATA, two or more persons, together with any one or more associates of any of them hold, in the aggregate, beneficial interests in at least 40 per cent of the income or property of the trust).
  - See Example 5 below.
- a foreign government (as defined under the FATA); or
- any other person, or any other person that meets the conditions, prescribed by the regulations made under the FATA. Currently, the FATA Regulation

specifies a general partner of a limited partnership who is either: an individual not ordinarily resident in Australia, a foreign corporation or a foreign government that holds an interest of at least 20 per cent in a limited partnership; or two or more persons, each of whom is an individual not ordinarily resident in Australia, a foreign corporation or foreign government that hold an aggregate interest of at least 40 per cent in the limited partnership.

For the purposes of the definition of 'foreign person' under the FATA, which is adopted under the new Division 10A, interests held by upstream foreign persons will be taken into account in determining substantial interests.

Examples of the application of the various definitions is below. Note that these examples are for illustrative purposes only.

Example 1

James is an Australian citizen, and owns a six per cent interest in QWERTY Ltd, an entity which satisfies the definition of 'Australian media organisation'. In 2015, James relocated to the United States, where he is now deemed to ordinarily reside. James would be required to notify the ACMA of his company interest in QWERTY Ltd, because James holds more than a two and a half per cent interest in an Australian media company and is person not ordinarily resident in Australia.

Example 2

XYZ Pty Ltd is an Australian registered constitutional corporation. XYZ Pty Ltd holds a three per cent interest in QWERTY Ltd, an entity which satisfies the definition of 'Australian media organisation'. XYZ Pty Ltd has two shareholders: Allan, who is not an Australian citizen, is ordinarily resident in Australia, and holds 70 per cent of the shares. Joanna, who is an Australian citizen, is ordinarily resident in New Zealand, and holds 30 per cent of the shares. XYZ Pty Ltd would be required to notify the ACMA of its interest in QWERTY Ltd, because XYZ Pty Ltd holds more than a two and a half per cent interest in an Australian media company, and it is a corporation in which an individual not ordinarily resident in Australia holds a substantial interest.

Example 3

DEF Inc. is a corporation registered in the United States (and therefore a foreign corporation). DEF Inc holds a 20 per cent share in JKL Pty Ltd, an Australian registered constitutional corporation. JKL Pty Ltd holds a five per cent interest in QWERTY Ltd, an entity which satisfies the definition of 'Australian media organisation'. JKL Pty Ltd would be required to notify the ACMA of its interest in QWERTY Ltd, because JKL Pty Ltd holds more than a two and a half per cent interest in an Australian media company, and is a corporation in which a foreign corporation holds a substantial interest.

Example 4

Nicholas is a United States citizen, and is ordinarily resident in the United States. Nicholas is the sole director of QRS Pty Ltd, which is the sole trustee of the PQR Trust, a trust which was established in Australia. Nicholas controls all of the shares in QRS Pty Ltd and is the sole beneficiary of the trust. The PQR Trust has a 10 per cent interest in QWERTY Ltd, an entity which satisfies the definition of 'Australian media organisation'. The PQR Trust must notify the ACMA of its interest in QWERTY Ltd, because the PQR Trust holds more than a two and

a half per cent interest in an Australian media company, and has a foreign person who has a beneficial entitlement to at least 20 per cent of the income or property of the trust.

Example 5

Following on from Example 5, Nicholas' sister Heather, and his son Stewart, each acquire a 15 per cent interest in QRS Pty Ltd and become beneficiaries in the PQR Trust, while Maeve, an external third party (who is an Australian citizen and ordinarily resides in Australia) acquires a 55 per cent interest. Nicholas, Heather and Stewart are all citizens of the United States and ordinarily reside there, and are considered to be associates of each other. Together, they own 45 per cent of the shares in QRS Pty Ltd (in equal shares) and have a beneficial entitlement to 45 per cent (in equal shares) of the income or property of the trust. The PQR Trust must notify the ACMA of its interest in QWERTY Ltd, because the PQR Trust owns more than a two and a half per cent interest in an Australian media company, and has foreign persons who have, in aggregate, a beneficial entitlement to at least 40 per cent of the income or property of the trust.

For the purposes of calculating the interest (or aggregate interest) that a person or entity holds, for the purpose of determining whether they are a 'foreign person' under the FATA, the interests held by the person's associates are also taken into account. The term *associate* (section 6 of the FATA) is defined broadly. By way of example, the following people would be associates of a foreign person based on this definition (this is not an exhaustive list):

- a person's 'relative' (section 4 of the FATA defines this term as having the meaning given by the *Income Tax Assessment Act 1997*);
- any person with whom the person is acting, or proposes to act, in concert in relation to a covered action;
- any person with whom the person carries on a business in partnership;
- any entity of which the person is a senior officer (e.g. company director, trustee) or any holding entity, and any senior officer of the entity;
- any entity whose senior officers are accustomed to, or under an obligation, whether formal or informal, to act in accordance with the directions, instructions or wishes of the person, or, if the person is an entity, the senior officers of the person;
- an entity if the person is accustomed or under an obligation, whether formal or informal, to act in accordance with the directions, instructions or wishes of the entity or the senior officers of the entity;
- any corporation in which the person holds a 'substantial interest' (as defined under the FATA);
- if the person is a corporation, a person who holds a 'substantial interest' in the corporation;
- the trustee of a trust in which the person holds a 'substantial interest';
- if the person is a trustee of a trust, a person who holds a 'substantial interest' in the trust;

- if the person is a foreign government, a separate government entity or a foreign government investor;
- any other person that is a foreign government in relation to that country (or any part of that country); and
- any other person that is a separate government entity in relation to that country (or any part of that country).

Meaning of foreign stakeholder

The term *foreign stakeholder*, in relation to an Australian media company, has the meaning given by the proposed section 74C (see below).

Meaning of initial disclosure period

The term *initial disclosure period* means the period of six months beginning the day after the Bill receives the Royal Assent (being the day when the new Division 10A commences).

Meaning of person

The term *person* includes a foreign person.

Meaning of separate government entity

The term *separate government entity* has the same meaning as in the FATA. It means an individual, a corporation, or a corporation sole that is an agency or instrumentality of the foreign country and is not part of the body politic of a foreign country or of a part of a foreign country.

Proposed section 74C - Foreign stakeholder

Proposed section 74C would specify that for the purposes of the new Division 10A, if a foreign person has company interests in an Australian media company of two and a half per cent or more, that person is a *foreign stakeholder* in that company. The consequence of being a foreign stakeholder is that such persons must report those interests to the ACMA (refer to proposed sections 74F, 74G, 74H, 74J, and 74K).

Subdivision B—Register of Foreign Owners of Media Assets

Proposed section 74D - Register of Foreign Owners of Media Assets

Proposed subsection 74D(1) would require the ACMA to maintain the Register. The act of maintenance includes keeping the Register current and accurate, and updating it, as required.

The Register would need to be maintained by electronic means (proposed subsection 74D(2)) and made available for inspection on the internet (purposed subsection 74D(3). The ACMA is expected to publish the Register on its website and in such a way that it is easily accessible by the public.

Proposed subsection 74D(4) explicitly states that the Register is not a legislative instrument. This is a statement that is merely declaratory of the law, reflecting the purely administrative character of the Register.

Proposes 74E - Information to be set out in the Register of Foreign Owners of Media Assets

Proposed subsection 74E(1) would require the Register to set out, for each Australian media company, the following information about each foreign stakeholder in the company:

- the foreign stakeholder's full name;
- the foreign stakeholder's company interests in the company;
- the method used to determine those company interests;
- the reason why the foreign stakeholder is a foreign person (under this reporting item, the person's foreign interests of 20 per cent or more are traced up through chains of entities, thereby revealing the extent of foreign ownership);
- for natural persons—the country in which they are ordinarily resident;
- for corporations—the country in which they were formed;
- for trustees: the trust name, and country in which the trust was established;
- for foreign government investors in full or part (by application of paragraph 17(a) of the FATA Regulations to a separate (or part of a) government entity of a foreign country)—the foreign country or the part of the foreign country, as the case may be;
- for foreign government investors in full or part (by application of paragraph 17(b), (c), (d) or (e) of the FATA Regulations to a separate government entity of a foreign country or a part of a foreign country —the foreign government; and
- for foreign government investors wholly or partly as the result of the application of paragraph 17(b), (c), (d) or (e) of the FATA Regulation to a separate government entity of a foreign country or a part of a foreign country—the foreign country or the part of the foreign country, as the case may be.

The ACMA will be able to utilise a range of sources of information for populating and updating the Register, including public information and information given by any person. It is anticipated that the main source of information will be the information given by foreign persons in accordance with the five separate reporting obligations under proposed subsections 74E, 74F, 74G, 74H and 74HA.

Proposed subsection 74E(2) provides an exception to the publication of information requirements under subsection (1) to address commercially sensitive information. The Register must not set out particular information if the ACMA is satisfied that disclosure of the information on the Register could reasonably be expected to materially prejudice the commercial interests of the person.

This provision operates as a safeguard against the disclosure of information that would not ordinarily be provided to third parties due to its confidential nature. However, it is anticipated that the information which will be provided to the ACMA will be factual in nature and able to be made publicly available.

Proposed Subdivision C—Notification

Proposed Subdivision C would create five circumstances under which foreign persons will be required to disclose information to the ACMA. Foreign persons who hold company interests in an Australian media company of two and a half per cent or more will be required to notify the ACMA under the following circumstances:

- When the person becomes a foreign stakeholder in an Australian media company (within 30 days of coming into such a position) (proposed section 74F);
  - See Example 1 below.
- When the person ceases to be a foreign stakeholder in an Australian media company (within 30 days of coming into such a position) (proposed section 74G);
  - See Example 2 below.
- At the end of each financial year, by the foreign stakeholders (within 30 days of the end of the financial year)(proposed section 74H);
  - See Example 3 below.
- At the commencement of the new Division 10A (within a six month period known as the 'initial disclosure period') (proposed section 74J);
  - See Example 4 below.
- At any time requested by the ACMA by written notice (proposed section 74K).
  - See Example 5 below.

Note that these examples are for illustrative purposes only.

<u>Example 1</u>

Giovanni is an Italian citizen, and is ordinarily resident in Italy. On 30 September 2018, Giovanni acquired a three percent interest in QWERTY Ltd, an entity which satisfies the definition of 'Australian media organisation'. Giovanni became a foreign stakeholder in an Australian media company on 30 September 2018, and is required to notify the ACMA of his interest within 30 days from this date.

<u>Example 2</u>

Following on from Example 1, on 30 September 2019, Giovanni decides to dispose of one percent of his interest in QWERTY Ltd, so that he now holds a two per cent interest in QWERTY Ltd. Giovanni ceased to be a foreign stakeholder in an Australian media company on 30 September 2019, and is required to notify the ACMA of this fact within 30 days from this date.

<u>Example 3</u>

Following on from Example 1, on 30 June 2018, Giovanni still held a three per cent interest in QWERTY Ltd. Giovanni is a foreign stakeholder in an Australian media company at the

end of the financial year, and is required to provide the ACMA with any changes to his designated information within 30 days from this date.

Example 4

Paulina is a citizen of Cyprus and is ordinarily resident in the United States. At the commencement of the new Division 10A, Paulina holds a 22 per cent interest in QWERTY Ltd, an entity which satisfies the definition of 'Australian media organisation'. Paulina is a foreign stakeholder in an Australian media company at the commencement of the new Division 10A, and is required to notify the ACMA of this fact within six months of the commencement of the new Division 10A.

Example 5

Following on from Example 4, Paulina receives a notice from the ACMA requiring her to update her details. Paulina is required to provide the ACMA with the information it has requested within the time specified in the notice (which must not be less than 14 days from the date that the notice is given).

Proposed section 74F - Notification by a person who becomes a foreign stakeholder in an Australian media company

Under the first circumstance of notification, a foreign person who becomes a foreign stakeholder in a particular Australian media company must give the following information to the ACMA:

- The person's name; and
- How the person became a foreign stakeholder in the company (under this reporting item, the foreign person must give details about how the interest arose and when); and
- The person's company interests in the company (under this reporting item, the foreign person must specify the amount of the interest); and
- The method used to determine those company interests; and
- The reason why the person is a foreign person (under this reporting item, the foreign person must give an explanation of how they are a foreign person within the meaning of the FATA including, where relevant, tracing their interests); and
- 'Designated information' relating to the person (this reporting item covers a range of identifying information such as the person's country of residence for natural persons, and the country of formation for corporations); and
- Any other information relating to the person as specified in a legislative instrument made by the ACMA under proposed paragraph 74E(1)(g).

The information must be given to the ACMA within 30 days after the acquisition of the two and a half per cent or greater interest takes place (see Example 1 above).This reporting obligation is in addition to information and other disclosure obligations the foreign person may have when it applies for approval of foreign investment proposals in accordance with the FATA.

A foreign person will contravene a civil penalty provision if they fail to comply with proposed section 74F(1), and it would be a separate contravention for each day that the person has failed to comply with the notification obligation (subsections 74F(3) and(4)).

Civil penalty provision are enforceable under Division 2, Part 14B of the BSA.

Subsection 74F(5) provides that subsection 74F(1) is a designated infringement notice provision. This will enable an authorised infringement notice officer to issue, under Part 14E of the BSA, an infringement notice if the officer believes on reasonable grounds that the person contravened a civil penalty provision relating to the foreign interest notification obligation.

Infringement notices are a useful alternative to court action. Only a limited number of provisions in the BSA are designated infringement notice provisions. The formal requirements for issuing an infringement notice under the BSA are set out in clauses 10.2 to 10.5 of the Guidelines relating to the ACMA's enforcement powers under the BSA.

A person who is given an infringement notice can choose to pay the amount specified in the notice as an alternative to having court proceedings brought against the person for a contravention of a provision subject to an infringement notice under Part 14B of the BSA. Payment of the amount is not an admission of guilt or liability. However, if the person fails to pay the infringement notice, the person is exposed to the risk that the ACMA may apply to a court for an order that the person pay a civil penalty. If the person pays the pecuniary penalty amount, proceedings cannot be brought against the person for the contravention.

The amount of penalty units for the five notification obligations are set out in the table below.

Table 1. Summary of penalty amounts

Type of provision	**Amount of penalty (based on one penalty unit of $210)**	
	Body corporate	Non-body corporate
Civil penalty provision Proposed subsections 74F(3), 74G(2), 74H(3), 74J(3), 74K(4),	300 penalty units currently ($63,000)	60 penalty units currently $12,600)
Designated infringement notice provision Proposed subsections 74F(5), 74G(4), 74H(5), 74J(5), 74K(6)	60 penalty units (currently $12,600)	10 penalty units (currently, $2,100)

The common law privilege against self-incrimination entitles a natural person to refuse to answer any question, or produce any document, if the answer or the production would tend to incriminate that person. A foreign person, who is a natural person, will not be required to comply with the notification obligation under proposed subsection 74F(1) if giving the information or producing the document might tend to incriminate him or her. This preserves the privilege against self-incrimination; subsection 74F(6) conserves this privilege.

Proposed subsection 74G - Notification by a person who ceases to be a foreign stakeholder in an Australian media company

Proposed subsection 74G(1) sets out the second notification obligation imposed on foreign persons. Under this provision, if a foreign stakeholder in an Australian media company is no longer a foreign stakeholder in that company, the person must provide the following information to the ACMA:

- notice of the termination of the company interest (under this reporting item, it is expected that the person will also give the date upon which the company interest ceased); and
- the circumstances that resulted in the company interest terminating (for example, the cessation arose as a result of the sale (or other divestiture) of securities).

The information must be provided to the ACMA in writing within 30 days after the foreign person ceases to hold the company interest.

Similar to the notification obligation under proposed subsection 74G(1), the cessation of the holding notification obligation is a civil penalty provision (proposed subsection 74G(2)) and is also a designated infringement notice provision (proposed subsection 74G(4)). It will be a separate contravention for each day that the person has failed to comply (proposed subsection 74G(3)).

Proposed subsection 74G(5) conserves the privilege against self-incrimination.

Proposed section 74H - Notification by a person who is a foreign stakeholder in an Australian media company at the end of a financial year

Proposed subsection 74H(1) sets out the third notification obligation imposed on foreign persons. Under this provision, any person who is a foreign stakeholder in an Australian media company at the end of each financial year, must provide the following information to the ACMA:

- the person's name; and
- the circumstances that resulted in the person being a foreign stakeholder in the company at the end of the particular financial year; and
- the person's company interests in the company at the end of the particular year; and
- the method used to determine those company interests; and
- the reason why the person was a foreign person at the end of the financial year; and
- the designated information relating to the person; and
- any other information relating to the person as specified in a legislative instrument made by the ACMA under proposed subsection 74H(2).

Similar to the other notification obligations, the end of financial year holding notification obligation is a civil penalty provision (proposed subsection 74H(3)) and also a designated

infringement notice provision (proposed subsection 74H(5)). It will be a separate contravention for each day that the person has failed to comply with the obligation (proposed subsection 74H(4)).

Proposed subsection 74H(6) conserves the privilege against self-incrimination.

Proposed section 74J - Notification by a person who is a foreign stakeholder in an Australian media company at the commencement of Division 10A

The fourth notification obligation is set out in proposed section 74J. This notification obligation, unlike the other four obligations, is a non-recurring one. Rather, it only applies during the first six months from the commencement of the new Division 10A. Under this obligation, if a person is a foreign stakeholder in an Australian media company on the day after the Bill has received the Royal Assent, within six months of that date (the initial disclosure period), they must notify the ACMA in writing of certain information.

The required information is largely the same set of information that is required to report under subsection 74J(1).

The information required to be reported under proposed subsection 74J(1) is:

- the person's name; and
- the circumstances that resulted in the person being a foreign stakeholder in the company at the commencement of this Division; and
- the person's company interests in the company at the commencement of Division 10A; and
- the method used to determine those company interests; and
- the reason why the person was a foreign person at the commencement of this Division; and
- the designated information relating to the person; and
- any other information relating to the person as specified in a legislative instrument made by the ACMA under proposed subsection 74J(2).

If a foreign person has multiple interests of two and a half per cent or more in different Australian media companies, the person would be required to report the abovementioned information for each interest. However, it would be open to the person to collate each report and serve the set of reports on the ACMA at the same time.

As with the other notification obligations, the initial disclosure period notification obligation is a civil penalty provision (300 penalty units for a body corporate, and 60 penalty units for all other persons) (proposed subsection 74J(3) and item 8) and also a designated infringement notice provision (60 penalty units for a body corporate, and 10 penalty units for all other entity types) (proposed subsection 74J(5) and item 10). Each day that the person has failed to comply with the obligation will constitute a separate contravention (proposed subsection 74J(4)).

The privilege against self-incrimination is retained by proposed subsection 74J(6).

Proposed section 74K – Notification by a person who is a foreign stakeholder in an Australian media company—requirement by the ACMA

The fifth and final notification obligation is set out in proposed subsection 74K(1). This notification obligation is ongoing. If, at any time after the commencement of the new Division 10A, the ACMA requests information in writing from a foreign stakeholder in an Australian media company, the foreign stakeholder must give the ACMA the following information:

- the foreign stakeholder's company interests in the company; and
- the method used to determine those company interests; and
- any other information relating to the person as specified in a legislative instrument made by the ACMA under proposed subsection 74K(2).

The range of circumstances in which the ACMA may make a request for information may vary, and intentionally there are no preconditions imposed on the ACMA for the issuance of a notice. For example, if there was media speculation about an impending takeover of an Australian media company by a foreign person who already was known to have an interest in the company of two and a half per cent or greater, the ACMA could give notice to such a person, and the person would be obliged, subject to proposed subsection 74K(7), to provide the requisite information in response.

If a foreign stakeholder is served with a notice by the ACMA for the purposes of the proposed subsection 74K(1), the person must respond within the period specified in the notice. The specified period cannot be less than 14 days after the notice is given. This guards against an unreasonable response period being specified by the ACMA.

As with the other notification obligations, this ad hoc notification obligation is a civil penalty provision (proposed subsection 74K(4)) and also a designated infringement notice provision (proposed subsection 74K(6)). Each day that the person has failed to comply with the obligation will constitute a separate contravention (proposed subsection 74K(5)).

Proposed section 74HA - Requirement for executors, administrators and liquidators to give notification

If a natural person is required to give notice under subsection 74F(1), 74G(1), 74H (1), 74J(1) or 74K(1) but dies before doing so, the executor or administrator of their estate must give the notice (proposed subsection 74L(1)).

Similarly, if a corporation is required to give notice under subsection 74F(1), 74G(1), 74H (1), 74J(1) or 74K(1) but the corporation is wound up before doing so, the liquidator of the company must give the notice (proposed subsection 74L(2)).

Proposed section 74M - Person may give the ACMA relevant information

In recognition of the multiple sources of information that can be used to populate the Register, the proposed subsection 74J(1) permits a person to voluntarily give the ACMA information that is relevant to the performance of the ACMA's functions under the new Division 10A. If a person so chooses to give relevant information, to the extent that the information may consist of, or include, personal information (within the meaning of the *Privacy Act 1988*), they would be permitted to do so without being in breach of that Act. This is because proposed section 74J would represent an Australian law which authorises the disclosure of another's personal information without their consent.

Proposed Subdivision D—Miscellaneous

Proposed section 74N - Minister may direct the ACMA about the performance of its functions or the exercise of its powers

Proposed subsection 74N(1) confers a broad power on the Minister to issue directions, either of a general or specific nature, to the ACMA about the performance of the ACMA's functions, or the exercise of its powers conferred on it by the new Division 10A (other than proposed section 74U). This is intended to be a reserve power. The Minister will not be able to direct the ACMA in respect of the statutory review the ACMA is required to undertake in accordance with section 74U.

By operation of the proposed subsection 74N(2), the ACMA would be obliged to comply with any ministerial direction given to it under the proposed subsection 74N(1).

Proposed section 74P - Service of summons, process or notice on corporations incorporated outside Australia

Proposed section 74P is a deeming provision setting out the circumstances in which certain summons, processes or notices under or in connection with the new Division 10A will be taken to have been served on, or given to, an overseas body corporate. Proposed subsections 74P(1) and (2) have the effect of providing that where the body corporate incorporated outside of Australia does not have a registered or principal office in Australia but has an agent in Australia, then a summons, process or notice will be deemed to have been served or given where it is served on or given to the body corporate's agent in Australia.

Proposed section 74P provides more scope for the ACMA to take action in relation to the failure to give notification where the relevant foreign person is incorporated outside of Australia.

Section 28A of the *Acts Interpretation Act 1901* deals with the service of documents. It provides that a document may be served on a person by sending it by prepaid post to the person's residential address last known to the person who was serving the document. Proposed subsection 74P(3) clarifies that subsection (2) does not override section 28A and instead, operates in addition to that provision.

Proposed section 74Q - Extra territorial application

Proposes section 74Q provides that the new Division 10A extends to acts, omissions, matters and things outside Australia. This means that the new provisions relating to the Register as set out in Division 10A will operate both within and outside of Australia.

Proposed section 74R - Annual report

The ACMA will be required, after the end of each financial year, to prepare a report about the company interests in Australian media companies that were held by foreign stakeholders at the end of that financial year, and give the report to the Minister (proposed subsection 74R(1)).

Whilst it is expected that the report will predominantly be factual in nature, it will be open to the ACMA to include in the report its observations about trends relating to the company interests in Australian media companies that are held by foreign stakeholders (proposed subsection 74R(2)). The information contained in the report will inform the Government and

assist with future public policy development in respect of regulating foreign interests in Australian media assets.

The Minister may choose to have the report published on the Department's website (proposed subsection 74R(3)).

Proposed section 74S - Part 13 not limited

Proposed section 74S is included for the avoidance of doubt, to make clear that nothing in Division 10A limits the operation of Part 13 of the BSA. That part confers certain investigative powers on the ACMA. The ACMA will be able to rely upon its Part 13 powers to collect information relevant to its powers and functions under the new proposed Division 10A.

Proposed section 74T - Liability for damages

To guard against the risk of the ACMA (or its officers) and the Commonwealth being sued in relation to acts or omissions done or omitted to be done good faith by the ACMA (and its officers) in the performance or exercise of the new Register-administration powers, proposed section 74T confers a broad and appropriate immunity to the Commonwealth, the ACMA or an ACMA official from any legal action or other proceeding for damages for, or in relation to the act or omission. By operation of this provision, by way of example, the ACMA could not be sued for any error in the published information.

The provision is modelled on subsection 68(6) of the *Interactive Gambling Act 2001*.

The ACMA is expected to undertake all reasonable efforts to ensure the accuracy of the information on the Register.

Proposed section 74U

New subsection 74U requires the ACMA to conduct a review of the operation of:

- new Division 10A (proposed subparagraph 74U(1)(a)(i)); and
- the remaining provisions of the BSA to the extent they are related to new Division 10A (proposed subparagraph 74U(1)(a)(ii)).

The review also needs to consider if any amendments should be made to new Division 10A or the remaining provisions of the BSA to the extent to which they relate to the new Division (proposed subparagraphs 74U(1)(a)(iii) and (iv)).

In terms of timing, the review needs to be conducted as soon as practicable after the end of the 3-year period that began at the end of the 'initial disclosure period'.

A report of the review must be prepared by the ACMA (proposed subsection 74U(2)) and given to the Minister (proposed subsection 74U(3)).

The Minister must ensure that copies of the report are tabled in each House of the Parliament within 15 sittings days of that House after the completion of the preparation of the report (refer new subsection 74U(4)).

The intent of this statutory review is to provide clear direction on the ongoing utility of the Register. As the ACMA will be administering the Register, and is an independent statutory

authority, it is best placed to conduct such a review. It is expected that by the time the review is required to be undertaken, the ACMA would have experience in administering the Register and be in a position to provide recommendation on how it can be simplified and streamlined.

Item 6 - Subsection 205F(4)
Item 7 - Subsection 205F(5)
Item 8 - After subsection 205F(5)

The Bill ensures that regulatory action can be taken in response to contravention of the disclosure obligations.

The amounts of penalty units that have been specified for the civil offence provisions (under proposed subsection 205F(5)) have been set at an appropriate level to act as a deterrent and provide a clear and real disincentive for non-compliance. However, in framing the offence provisions, proportionality between the seriousness of the contravention and the quantum of the penalty has been sought. The amounts of penalty units contemplate the cost of court proceedings, and would justify the need to go to court.

Items 6 to 8 would amend section 205F of the BSA to provide for the maximum pecuniary penalties payable by a person who contravenes the new notification obligations under proposed subsections 74F(1), 74G(1), 74H(1), 74J(1), and 74K(1).

Subsections 205F(4) and (5) of the BSA provide for the maximum pecuniary penalty for the contravention of civil penalty provisions under that Act, which is tied to the corresponding criminal offence provision. As there is no offence provision that corresponds with the new proposed subsections, item 8 would insert a new subsection, namely proposed subsection 205F(5AA), into section 205F to provide directly for the maximum penalties for contraventions and ancillary contraventions of the new foreign stakeholder notification civil penalty provisions. Items 6 and 7 make consequential amendments to the existing penalty arrangements to carve out proposed subsections 74F(1), 74G(1), 74H(1), 74J(1), and 74K(1).

The maximum penalty for a body corporate is 300 penalty units, and the maximum for other persons is 60 penalty units.

Item 9 - Section 205ZA
Item 10 - At the end of section 205ZA

Item 9 makes a minor consequential change as a result of the insertion of additional subsection into section 205ZA of the BSA by item 10.

Item 10 inserts two new subsections into section 205A. Proposed subsection 205ZA would specify that the penalty amount to be specified in an infringement notice given to a person relates to subsection 74F(1), 74G(1), 74H(1), 74J(1) or 74K(1) must be a pecuniary penalty equal to:

- if the person is a body corporate—60 penalty units; or
- in any other case—10 penalty units.

The proposed amounts payable under an infringement notice (under proposed subsection 205ZA(3)) is consistent with the maximum that is generally recommended in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement powers* (which is one fifth of the maximum penalty that a court could impose on a person, but not more than

12 penalty units for an individual, and not more than 60 penalty units in the case of a body corporate).

SCHEDULE 2— COMMUNITY RADIO

Broadcasting Services Act 1992

Item 1 – After paragraph 84(2)(b)

Section 84 of the BSA deals with the allocation of community broadcasting licences for television, analogue radio and digital radio. Subsection 84(1) enables the Minister to give directions to the ACMA to give priority to a particular community interest in allocating community licences.

Subsection 84(2) lists a number of matters to which the ACMA is to have regard in deciding whether to allocate a community broadcasting licence to an applicant or one of a group of applicants. The matters listed include the extent to which the proposed service or services would meet the existing and perceived future needs of the community within the licence area of the proposed licence; the nature and diversity of the interests of that community; and the nature and diversity of other broadcasting services (including national broadcasting services) available within that licence area. Item 1 would insert a new paragraph 84(2)(ba) into subsection 84(2). The effect of this change would be to add a new matter that the ACMA is to consider when deciding to allocate a community radio broadcasting licence to an applicant or one of a group of applicants. The new criterion is the extent to which the proposed service or services would provide material of 'local significance'. The term 'local significance' would be defined in new subsection 84(3).

The new criterion in paragraph 84(2)(ba) will also be relevant to the ACMA's decisions on the renewal of community radio broadcasting licences. Section 91(2A) enables the ACMA to refuse to renew a community licence if, having regard to the matters in paragraphs 84(2)(a) to (f), it considers that it would not allocate such a licence if it were deciding whether to allocate the licence to the licensee.

The new assessment criterion would not apply to applications for temporary community broadcasting licences (refer section 79A of the BSA, which specifies that Part 6 of the BSA does not apply in relation to such temporary licences).

Item 2 – At the end of section 84

Item 2 would insert a new subsection 84(3) to provide that, for the purposes of paragraph 84(2)(ba), material would be of 'local significance' if it is hosted in; or produced in; or relates to, the licence area of the proposed licence.

The meaning of 'relates to' the licence area is not defined, in order to provide the ACMA with flexibility to adapt it over time as appropriate in the community radio context. Material could relate to the licence area if, for example, it relates to a person, community organisation or event in the licence area. Material could also relate to the licence area if it relates to a social, economic, political or cultural issue as it affects the licence area (either in the sense of the geographic area or a community within the licence area).

Item 3 – Application of amendments

Item 3 of Schedule 1 to the Bill sets out two application provisions. The effect of these application provisions is that the new local significance criterion would not apply to applications for a new or renewed community radio broadcasting licence which are currently on foot.

Allocation

Under section 80, when the ACMA advertises that they are going to allocate community broadcasting licences, the ACMA is required to include the due date for applications.

Subitem 3(1) would provide that new paragraph 84(2)(ba) (to be inserted by item 1 of this Schedule), applies only to applications for a new community radio broadcasting licence made in response to an advertisement that is published under section 80 of the BSA after the commencement of this item. The effect of this application provision is that ACMA would not be required to consider the new local significance criterion in respect of applications for a new community radio broadcasting licence if the application is made following a section 80 advertisement published before the Bill comes into effect.

Renewal

Under subsection 90(1), the ACMA may renew a community broadcasting licence if the licensee makes a written application in accordance with the form approved in writing by the ACMA. Under subsection 90(1A) of the BSA, the application for renewal must be made no earlier than one year before the licence is due to expire, and no later than 26 weeks before expiry or an earlier time notified in writing to the licensee by the ACMA.

Subitem 3(2) of Schedule 2 to the Bill provides that the new criterion under proposed paragraph 84(2)(ba) would only apply to applications for renewal of the licence where the application was made under section 90 of that Act after the commencement of this item.

It is expected that, if the ACMA is to update application forms to take into account the new material of local significance criterion, these will be ready in advance of the amendments commencing.