



Submission by Free TV Australia

**Foreign Owners of Media
Assets Register**

**Australian Communications
and Media Authority**

August 2022

1. Summary

- Free TV Australia appreciates the opportunity to comment on the Australian Communications and Media Authority's (ACMA) review of the operation of the Foreign Owners of Media Assets (FOMA) register.
- As a general principle, Free TV members accept and agree with the public policy rationale for the transparent disclosure of information regarding material foreign ownership of media assets.
- However, any disclosure regime should avoid duplication with other transparency measures, be targeted on foreign owners who have a sustained material ability to control media assets and that ensures the information disclosed is valued by the public.
- On this basis, Free TV submits that the current legislation should be amended to:
 - Impose a 15% disclosure threshold, consistent with the control threshold in Section 63 of the *Broadcasting Services Act 1992* (BSA);
 - only apply to those media entities that do not have disclosure obligations under the more recently created Foreign Ownership of Australian Assets (FOAA) register.
- This would ensure that there is a consistent threshold that applies to "control" of media assets for media ownership reporting requirements. It would also ensure that duplication in reporting frameworks was minimised, with the reporting under the FOMA register appropriately targeted on those media organisations that would otherwise have no foreign ownership disclosure obligations.
- Imposing a lower threshold for reporting creates an administrative burden on the media sector that includes small foreign holdings that have no ability to exercise any managerial or editorial control over media companies and therefore is inconsistent with the intent of the legislation.

2. Introduction

Free TV Australia is the peak industry body for Australia's commercial free-to-air broadcasters. We advance the interests of our members in national policy debates, position the industry for the future in technology and innovation and highlight the important contribution commercial free-to-air television makes to Australia's culture and economy. We proudly represent all of Australia's commercial free-to-air television broadcasters in metropolitan, regional and remote licence areas.

Our members have a fundamental role in bringing local content to Australian audiences. This includes the provision of local news services, current affairs, sports and other culturally significant programs that are relevant and responsive to our audiences across Australia.



2.1 Existing disclosure obligations

The commercial broadcast sector is subject to an extensive array of disclosure obligations. As the ACMA has set out in the discussion paper, Free TV members are subject to disclosure obligations under:

- BSA – requires the disclosure when a person comes into a position to control, or ceases to be in a position to control, a regulated media asset, where control has a threshold of 15 per cent;

- *Corporations Act 2001 (ASX)* – requires disclosure when a person who, either alone or together with their associates, has relevant interests in voting shares representing 5 per cent or more of the votes in a listed company, body or listed registered managed investment scheme and continuous disclosure obligations where these holdings change by one per cent (applies to listed Free TV members only);
- *Foreign Acquisitions and Takeovers Act 1975 (FATA)* – disclosure required for a ‘significant action’ and a ‘notifiable action’ defined as being where a foreign person acquires an interest of at least 5 per cent in an entity or business that wholly or partly carries on an Australian media business (noting that an associated Foreign Ownership of Australian Assets (FOAA) register is due to commence by the end of 2024, as discussed below).

2.2 What public policy problem is being addressed?

The Explanatory Memorandum that accompanied the *Broadcasting Legislation Amendment (Foreign Media Ownership and Community Radio) Bill 2017* acknowledged the existing reporting obligations set out above. However, the EM argued that not all of the existing reporting obligations required disclosure of whether changes in control or ownership related to foreign parties.

As such, the key public policy justification the EM set out was:

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.¹

Free TV agrees with the principle behind this statement. A free and open media is critical to the community and it is very important that the public have confidence that there has been transparent disclosure where foreign owners have the capacity to control managerial or editorial decisions.

However, the EM does not adequately justify the current imposition of a 2.5 per cent FOMA register disclosure threshold:

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 (sic) assessing the extent to which foreign persons may have the capacity to influence or affect the operations of Australian media companies.²

While this statement is included in the EM, the evaluation section does not actually address why it was considered that very small foreign holdings should be disclosed, nor does it adequately justify the departure from the existing 15 per cent control threshold used in the BSA. In our view, foreign holdings as small as 2.5 per cent do not have the “capacity to influence or affect the operations of Australian media companies.”

¹ Explanatory Memorandum, *Broadcasting Legislation Amendment (Foreign Media Ownership and Community Radio) Bill 2017* Pg.8

² Ibid, Pg. 7.

Under Schedule 1, Part 2 of the BSA, a person is in a position to exercise control of a licence or a company if the person, either alone or together with an associate of the person, can:

- control the licensee
- control the selection or provision of a significant proportion of the programs broadcast by the licensee
- control a significant proportion of the operations of the company
- veto any action taken by the board of directors
- appoint, secure or veto the appointment of at least half of the board of directors
- exercise direction or restraint over any major issue affecting the management or affairs of the licensee or company.³

Parties that have a 2.5 per cent holding in an entity are highly unlikely to be in a position to exercise control as defined by the BSA. We therefore submit that applying such a low threshold is not necessary (or desirable) to achieve the stated policy aim of disclosing foreign holdings that have the potential to exercise control over Australian media companies.

While Free TV accepts the premise underpinning the disclosure regime, we consider that changes are required to the legislation to ensure that only foreign ownership that has a material capacity to influence or affect the operation of local media companies is captured. As set out below, we consider that the appropriate threshold for control is that already applying to disclosure under the BSA.

3. Changes since the FOMA was introduced

3.1 FOAA register

As set out above, a key rationale for the creation of the FOMA register was a view that there was a gap in the existing disclosure framework that neither the ASX nor the ACMA media ownership disclosure obligations required information on whether a foreign party was involved.

However, since the time that the FOMA register was created, the FATA has been amended to allow for the creation of the FOAA register of significant actions. As the ACMA is aware, this register will be administered by the Australian Taxation Office and will include disclosure obligations on foreign parties that acquire a significant interest in, amongst others, an Australian media company.

As acknowledged in the ACMA's consultation paper the creation of the FOAA register (by the end of 2024) will create an overlap for some media companies who will face disclosure obligations under both the FOAA and FOMA registers.

Free TV submits that this duplication in disclosure obligations should be avoided by limiting the FOMA obligations to only those entities that are not subject to FOAA obligations. This will ensure that the public policy objective of ensuring that there is disclosure of material foreign interests in media companies is upheld, while minimising the administrative burden on the local media sector.

³ Schedule 1, BSA, & ACMA "Understanding media control", <https://www.acma.gov.au/understanding-media-control#the-meaning-of-control>, accessed 7 August 2022

3.2 Low numbers of visits to the register

Free TV acknowledges that there is a difference in operation between the intended FOAA register and the existing FOMA register. As the ACMA consultation paper sets out, the FOAA register will likely not be searchable by the general public given commercial sensitivity and privacy concerns. By contrast, the existing FOMA register is available for the general public to review.

In determining whether this difference is sufficient to require overlapping disclosure obligations to endure, regard should be had to the value that the public places on the general availability of the information register, as opposed to the information being disclosed to a government authority. To assess this, Free TV notes the information included by the ACMA in the consultation paper regarding the number of unique views of the landing webpage for the FOMA register. As noted by the ACMA, the number of page views is approximately 1 per day, with no data available on what percentage of these page views resulted in a search of the register. While the precise usage of the register cannot be determined from this data, what is clear is that usage of the register is very low. As such, that the potential downside of relying on the FOAA register is limited, given the low usage of the FOMA register by the general public.

4. Proposed disclosure framework

4.1 Consistent application of 15 per cent control threshold

Free TV submits that the current FOMA threshold should be amended such that disclosure is required when a foreign entity acquires a holding of more than 15 per cent of an Australian media company.

This would ensure that there was a consistent threshold applied for the Register of Controlled Media Groups, also administered by the ACMA and the FOMA register.

Consistent with the current arrangements, disclosure should occur on an annual basis. The administrative burden associated with more regular disclosure was acknowledged in the Regulatory Impact Statement that accompanied the establishment of the FOMA register. In particular, continuous disclosure obligations can result in volatile disclosure obligations as the market capitalisation of listed entities fluctuates, even if the underlying foreign holding remains unchanged.

4.2 Targeted on companies with no existing disclosure obligations

Free TV submits that the legislation should be amended such that only foreign entities that are not already subject to a foreign interest disclosure obligation be subject to the FOMA register obligations.

This would ensure that all foreign parties that have a material holding in an Australian media company are subject to at least one disclosure register. However, it would remove the potential for the same foreign holding to be subject to multiple disclosure obligations, different thresholds and administrative arrangements.

Such an approach preserves the public policy intent of the FOMA, while ensuring that the associated administrative costs imposed on both the disclosing entities and the regulator are minimised.