

26 August 2022

The Manager
Diversity, Localism and Accessibility Section
Australian Communications and Media Authority
Level 5, The Bay Centre
65 Pirrama Road
Pyrmont NSW 2099

By email: foreignmediaownership@acma.gov.au

Dear Madam

Submission on ACMA Consultation Paper
Foreign ownership of Australian media assets: review of legislative requirements

1 Introduction

- (a) Gilbert + Tobin is an independent Australian corporate law firm that acts for clients on a broad range of legal issues including, from time to time, under the *Broadcasting Services Act 1992* (Cth) (**BSA**).
- (b) Gilbert + Tobin is pleased to provide the ACMA with this submission in response to the ACMA's *Consultation Paper: Foreign ownership of Australian media assets: review of legislative requirements* dated July 2022 (**Consultation Paper**). The author apologises for responding a day late.
- (c) The views expressed in this submission are those of Gilbert + Tobin and not its clients.

2 Scope of submission

- (a) This submission addresses the following issues raised in the Consultation Paper:
 - (i) **Issue 2:** What amendments, if any, could be made to Div 10A of the BSA so that the statutory mechanisms, once implemented, could better meet the policy objectives.
 - (ii) **Issue 3:** The definition of a foreign stakeholder and the current notification threshold of 2.5% company interests, including whether or not the threshold remains appropriate or, if not, what that threshold should be.

3 Submission

- (a) We submit that Australian citizens residing abroad should be excluded from the definition of "*foreign stakeholder*" for the purposes of Div 10A of the BSA. We do so for four reasons.
- (b) **First**, it is not clear what policy objective is achieved through compelling Australian citizens residing abroad – *Australians* – to comply with a regime that is designed to improve the transparency of foreign investment in Australia. However, that is presently the effect of Div 10A

of the BSA, and in particular the definition of “*foreign person*” in section 74B of the BSA, which incorporates the definition of “*foreign person*” from the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (the **FATA**) into the definition of “*foreign stakeholder*” in the BSA.


- (c) **Secondly**, as the BSA, the FATA, the Foreign Investment Review Board (**FIRB**) and the ACMA do not provide guidance for determining when an Australian citizen is “*ordinarily resident*” in Australia, it is inherently uncertain and open to debate as to precisely when:
 - (i) an Australian citizen moving overseas becomes a foreign stakeholder under the BSA, requiring reporting under Div 10A; and
 - (ii) an Australian citizen returning to Australia after residing overseas ceases to be a foreign stakeholder, requiring reporting under Div 10A.
- (d) That inherent uncertainty arises because:
 - (i) section 4 of the FATA defines a “*foreign person*” as, relevantly, “*an individual not ordinarily resident in Australia*”;
 - (ii) although section 5 of the FATA provides a test to discern whether an individual *who is not an Australian citizen* is ordinarily resident in Australia, the FATA does not provide a test to discern whether an *Australian citizen* is ordinarily resident in Australia; and
 - (iii) in the absence of any legislative guidance, principles of statutory interpretation would likely have the consequence that the ordinary meaning of the term “*ordinarily resident in Australia*” would apply. However, the ordinary meaning of the term “*ordinarily resident in Australia*” is inherently uncertain and open to debate. It is a question on which reasonable minds might differ.
- (e) **Thirdly**, on the status quo, it is a civil penalty offence for:
 - (i) an Australian citizen moving overseas and becoming a foreign stakeholder for the purposes of the BSA not to notify the ACMA within 30 days of so becoming a foreign stakeholder for the purposes of the BSA (section 74F); and
 - (ii) an Australian citizen returning to Australia after residing overseas and ceasing to be a foreign stakeholder for the purposes of the BSA (section 74G),

in respect of *each* day during which the contravention continues. There are potentially significant consequences for any breach of these civil penalty offence provisions.
- (f) **Fourthly**, once the second and third submissions above are taken together, one observes that there will be times when Australian citizens are unable to discern whether or not they are complying with, or committing a civil penalty offence under, the BSA. It is critical to the rule of law that Division 10A is legally certain and allows those subject to it to be able to regulate their conduct to ensure they comply with it. Similarly, it is critical that the ACMA is able to discern when there has, and has not been, non-compliance with provisions of Division 10A.
- (g) For the above reasons, it is respectfully submitted that the above matters would be addressed (as it has been in s 104J(2) of the *Duties Act 1997* (NSW)) through amending the definition of “*foreign person*” in section 74B of the BSA so that it includes the following underlined language:

"foreign person" has the same meaning as in the Foreign Acquisitions and Takeovers Act 1975 modified so that an Australian citizen is taken to be ordinarily resident in Australia, whether or not the person is ordinarily resident in Australia under that definition.

(h) Thank you for your consideration of this submission.

Yours faithfully
Gilbert + Tobin

A large black rectangular redaction box covering the signature area.

Crispian Lynch
Partner

A black rectangular redaction box covering contact information.