

Baker McKenzie submission - 25 August 2022

A. EXECUTIVE SUMMARY

This submission sets out our responses to each of the questions raised in the Australian Communications and Media Authority's (**ACMA's**) consultation paper relating to the review of the legislative requirements for foreign ownership of Australian media assets dated July 2022 (**Consultation Paper**).

In summary:

- we query whether Division 10A of the Broadcasting Services Act 1992 (Cth) (BSA) effectively addresses the stated policy objectives of the Division;
- we note that there are a number of different legislative regimes which apply to foreign persons investing in Australian media companies (AMCs), including under the Foreign Acquisitions and Takeovers Act 1975 (Cth) (FATA) and the Corporations Act 2001 (Cth) (Corporations Act);
- we consider that Division 10A of the BSA currently imposes a significant reporting burden on foreign stakeholders, with full compliance almost impossible to achieve in certain cases; and
- in our view, the BSA should be amended to streamline reporting requirements for foreign investors or alternatively, foreign investment in AMCs should be solely dealt with by the Foreign Investment Review Board under the FATA.

B. COMMENTS TO ACMA'S QUESTIONS

Policy objectives for Division 10A

1.1 Does the operation of Division 10A address the stated policy objectives set out by the government, and are there other processes that would facilitate these better?

We understand from the Consultation Paper that the policy objective of Division 10A of the BSA is to improve transparency about the levels and source of foreign investment into AMCs. More specifically, we understand that the objective of Division 10A of the BSA is to ensure that:

- the Australian public is able to easily access information about the levels and sources of foreign investment in mainstream media outlets; and
- government consideration of media policy issues is informed by an accurate and up-to-date assessment of the levels and sources of foreign ownership in AMCs.

For the reasons below, we question whether Division 10A of the BSA effectively addresses the stated policy objectives:

- Firstly, we question whether the Register provides accurate and up to date information about the level of foreign investment into AMCs - as noted in our response at 2.1 below, based on the current definition of 'company interests' and the requirement to trace company interests using the fractional tracing method, the foreign stakeholder is likely to encounter a number of practical issues when attempting to report its 'company interests' in an AMC, the result being that the information reported to ACMA may not be an accurate reflection of the actual 'company interests' held by that particular stakeholder in the relevant AMC.
- Secondly, the 'company interests' of a foreign stakeholder in any given AMC is likely to vary from time to time, particularly where the foreign stakeholder only has a company interest in an AMC by virtue of its holding in a listed entity (which in turn has the interest in, or controls, an AMC). In this case, trading in the securities of the listed entity on the relevant securities exchange will ultimately result in changes in the foreign stakeholder's 'company interest' in the AMC. Practically speaking, it is very difficult for the foreign stakeholder to report all

changes in its company interest to ACMA (particularly where there may be multiple trading transactions in any given day and where the foreign stakeholder's indirect interest in the AMC may be fluctuating around the 2.5% threshold). Strict compliance with the BSA could mean that the foreign stakeholder would be required to lodge multiple notifications on a daily basis over the day's trade if its interest is crossing above and below the 2.5% threshold. We doubt whether foreign stakeholders would notify ACMA in such a scenario, and therefore doubt the accuracy and timeliness of the information in the Register.

- Finally, the way in which information is reported on the Register, combined with the fact that the information cannot be easily filtered, may mean that it is difficult for the Australian public to easily analyse and meaningfully use the information in the Register.

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| 1.2 | What amendments, if any, could be made to Division 10A so that the statutory mechanisms, once implemented could better meet the policy objectives? |
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We consider that the following mechanisms could be implemented to better strike a balance between promoting the policy objectives of the government and reducing the reporting / compliance burden on foreign stakeholders.

Removal of annual reporting obligation

Currently, under the BSA a foreign stakeholder is required to notify ACMA within 30 days if they:

- **(section 74F)** become a foreign stakeholder (i.e. the foreign stakeholder holds a company interest of 2.5% or more in an AMC);
- **(section 74G)** cease to be a foreign stakeholder (i.e. the foreign stakeholder's company interest drops below 2.5% in an AMC); and
- **(section 74H)** are a foreign stakeholder at the end of the financial year (i.e. the foreign stakeholder has a company interest of 2.5% or more in an AMC as at 30 June in the relevant financial year).

The current reporting regime imposes a significant reporting and compliance burden on foreign stakeholders, as foreign persons are not only required to monitor (minor) fluctuations in their company interests in AMCs throughout the financial year, but are also required to report to ACMA on an annual basis.

One way in which the compliance burden could be reduced, is to remove the annual reporting obligation under section 74H of the BSA.

Given that foreign stakeholders are already required to report to ACMA when their company interest in an AMC increases above or below the 2.5% notification threshold throughout any given financial year (under section 74F and section 74G of the BSA), we query the utility in having a blanket annual notification requirement.

If the aim of the annual notification obligation is for ACMA to be notified of increases in a foreign stakeholder's interest in any given AMC above the 2.5% threshold, then the BSA could be amended to provide for a reporting regime similar to the substantial shareholder regime under section 671B of the Corporations Act, whereby foreign stakeholders are only required to notify ACMA if there are material *changes* to their interests in any given AMC.

In circumstances where there is no change in the foreign stakeholder's interest in an AMC, the annual notification is a mere duplication of the information which has already been (or should have been) reported to ACMA as part of the 'becoming a foreign stakeholder' notification under section 74F of the BSA. In this scenario, ACMA arguably does not receive any additional value / benefit from the information in the annual notification, yet the foreign stakeholder incurs the reporting burden and associated compliance costs (which, as further detailed in our response to question 5.2, can be significant). Where there are minor fluctuations in a foreign stakeholder's company interest in an AMC since the time where it last lodged a section 74F notification with ACMA, we question the value of the foreign stakeholder notifying ACMA of minor changes on an annual basis.

Increase the notification threshold

As noted above, the current notification threshold is 2.5%. This notification threshold is arguably too low, and imposes a significant compliance burden on foreign stakeholders which is not commensurate with the policy objectives of the BSA. This is particularly so when considered in light of other notification and approval thresholds which apply to investments in Australian companies, including AMCs. This is discussed further in our response at 2.1.

Remove the requirement to provide a structure chart

Currently, structure charts are required to be provided with any notification. These are not made publicly available and require foreign stakeholders to incur significant time and cost to produce with no discernible benefit. We would propose that the requirement be removed.

Introduce an exemption to reporting where the foreign stakeholder's interest in an AMC only arises by virtue of passive investments in listed entities

We also consider that the BSA could be amended to provide for an exception to the reporting obligations under Division 10A where the foreign stakeholder only has an interest in an AMC by virtue of passive shareholdings in an entity on the ASX. This would alleviate some of the practical difficulties foreign stakeholders have in attempting to trace their company interests in AMCs through listed entities (as further explained in our response at 2.1).

Definition of foreign stakeholder and notification thresholds

2.1 Comments on the definition of 'foreign stakeholder' and the current notification threshold of 2.5% company interests, including whether the threshold remains appropriate. If not, what should the appropriate threshold be?

Definition of foreign stakeholder

As noted in the Consultation Paper, a 'foreign stakeholder' is defined in the BSA as a 'foreign person [who] has company interests in an Australian media company of 2.5% or more' (section 74C of the BSA).

'Foreign Person' has the same meaning as given to the term in the FATA.

'Company interests' is defined in the BSA as follows:

"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 2 or more of those interests, whichever of those interests has the greater or greatest percentage".

In accordance with Schedule 1, company interests of a foreign person are to be traced through a chain of companies using the 'fractional tracing method'. Under the fractional tracing method, a foreign person is effectively required to trace through the interests of companies (including listed companies) in which it has an interest to understand that company's interest (and in turn the foreign stakeholder's company interest) in any AMCs.

Practically this causes a number of problems for the foreign stakeholder. Essentially, it requires the foreign stakeholder to actively monitor the ASX announcements of all listed entities in which the foreign stakeholder holds an interest to ascertain whether the listed entity has any company interests in AMCs and then monitor the listed company's ASX announcements to determine whether there has been any change in the listed company's interest (i.e. through acquisitions or disposals of its interest in AMCs). This imposes a significant monitoring obligation / cost on foreign stakeholders (particularly in circumstances where their interest in the listed entity may only be 2.5%).

Even then, monitoring ASX announcements of the listed company does not guarantee the foreign stakeholder's compliance with ACMA's notification regime. This is because a listed entity does not have a positive obligation to disclose to the ASX its interest in every AMC or notify the ASX of all acquisitions or disposals of AMCs or a change to its interest in an AMC. Such information will typically only be disclosed in ASX announcements if it is likely to have a material effect on the price or value of the listed entity's securities (in accordance with Australia's continuous disclosure reporting regime). If

an AMC only represents a small percentage of the revenue or assets of a listed entity, an acquisition or disposal of an AMC is unlikely to satisfy the continuous disclosure test and so not be announced publicly.

This leaves the foreign stakeholder in a position where, despite its reasonable efforts, it may not be able to comply fully with the requirements of the BSA.

If the definition of 'company interests' and the tracing obligations in Schedule 1 are retained, then we consider that:

- the BSA could be amended to provide for an exception to the reporting obligations under the BSA for company interests in AMCs which only arise by virtue of passive shareholdings in ASX listed companies; or
- alternatively, a positive obligation needs to be imposed on ASX listed companies to disclose all interests they hold in AMCs and any change to their interests in AMCs.

Notification threshold

As noted in the Consultation Paper, there are a number of different regulatory regimes which apply to foreign investors when investing into Australian businesses (including AMCs), each with different notification and approval thresholds. For example, a foreign investor must (among other things):

- **(FATA)** seek approval from the Australian Treasurer when it acquires 'a direct interest' (generally an interest of 10% or more in the absence of other control or influence) in an entity that wholly or partly carries on an 'Australian media business'; and
- **(Substantial shareholding)** report to the ASX when it becomes a substantial shareholder in any Australian company (i.e. has an interest of 5% or more) and, once a substantial shareholder, notify the ASX of every 1% movement in its shareholding thereafter.

We consider that the notification threshold of 2.5% under the BSA is arbitrary and too low, and that there is utility in streamlining the various thresholds which apply. An interest of 2.5% is highly unlikely to provide any element of control or influence over an AMC - for example, under the Corporations Act, a shareholder requires a shareholding of at least 5% to convene a shareholders meeting. One option could be to amend the BSA by increasing the notification threshold from 2.5% to 5%, to bring it in line with the substantial shareholding reporting regime.

It does not seem necessary to have multiple reporting regimes for foreign investment into AMCs, all with different reporting notification and approval thresholds. There is a risk that the reporting requirement under Division 10A of the BSA actually discourages foreign investment in Australian listed media companies, given the compliance burden.

Accessibility of the Register and transparency and utility of the information

3.1 How often have you accessed the register?

We access the Register periodically throughout any given financial year.

3.2 For what purpose did you access the Register and did you also need to access other foreign ownership registers to find the information you needed?

We typically access the Register on behalf of our clients for the purpose of assisting our clients comply with their reporting obligations under the BSA. We have not had to access other foreign ownership registers to find the information we require.

3.3 Is the information on the Register easily accessible and comprehensible? If not, how could it be improved?

The information on the Register is easily accessible in the sense that the information is made publicly available and free of charge on ACMA's website. However, the information cannot be easily searched and filtered (which reduces the ease of which information can be accessed and meaningfully used).

3.4 Does information accessed from the Register provide visibility about the levels and sources of foreign investment in mainstream media outlets?

The information does provide visibility about the level and sources of foreign investment in mainstream media outlets as disclosed by the foreign stakeholder to ACMA. Implicit in this is that the accuracy of information on the Register relies heavily on the accuracy of the information *prepared by the foreign stakeholder and disclosed to ACMA*. Given the practical difficulties which foreign stakeholders may have in ascertaining the nature of their company interests in an AMC at any given time, we suspect that the Register may not be a true reflection of the precise level and sources of foreign investment in mainstream media outlets at any given point in time.

We are also not clear on what steps ACMA takes to verify the accuracy of the information provided to it, or otherwise investigate instances where information is not provided to it. Without verification by ACMA, there is no way of knowing (a) whether foreign stakeholders are in fact disclosing their company interests; and (b) whether the information that is disclosed by foreign stakeholders is accurate.

3.5 Is the information appropriate and relevant? Should additional or different information be shown?

We do not consider that any additional information should be shown in the Register. We consider that improvements could be made to the format / structure of the information to enable the Australian public to easily understand and analyse the information recorded. For example, (a) the information on foreign stakeholders within a particular corporate should be able to be shown and aggregated (currently this information is reported on an entity basis); (b) the information on the Register should be able to be filtered (rather than only being extractable in a PDF); and (c) the information could be presented in graph or table form (so that it is easily digestible).

3.6 To what extent does the information on the Register meet the government's stated policy objectives?

Please see our response at 1.1.

Information on the Register compared to other sources

4.1 Have you found that any of the information on the Register is also available through other sources?

We have not taken steps to verify whether information on the Register is also available through other sources. That said, where an AMC is controlled or wholly owned by a listed entity and a shareholder has disclosed their voting power in that listed entity pursuant to the substantial shareholding notification regime noted above, the same information would effectively be available through the announcements platform of the relevant securities exchange.

4.2 Should any information that is available only through other sources also be recorded on the Register? If yes, where is that information?

Please see our response at 4.1.

Notification requirements for foreign stakeholders

5.1 Do you have any suggestions for improvements on how to streamline the notification process while still achieving the intended policy objective?

Please see our response at 1.2.

5.2 What are the costs to business of complying with the notification provisions to meet FOMA obligations? To what extent can these costs be reduced (for example, by removing duplication with other reporting/notification requirements and/or by streamlining Division 10A)? If you are a foreign stakeholder, you may include specific costs that you have incurred when making notifications

In our experience, foreign stakeholders incur significant costs (both internal and external) as a result of complying with the notifications requirements under the BSA. In our experience, it costs approximately A\$30,000 - A\$40,000 in annual external legal fees alone for a foreign stakeholder to comply with the BSA. In addition, the foreign stakeholder is required to invest significant internal resources to monitor its level of investments across different AMCs to ensure that it does not cross above the 2.5% threshold. In our experience, foreign stakeholders that regularly invest in listed equities have sophisticated systems (often provided by third party service providers) to ensure compliance with Australian substantial shareholding requirements but there are no readily available equivalent third party services available around compliance with Division 10A of the BSA, particularly given the compliance must be monitored at the individual AMC level.

5.3 Are the circumstances when a foreign person is required to notify the ACMA (section 74F - section 74L of the BSA) appropriate? If so, what information is essential? If not, what information is less essential?

Please see our responses above.

5.4 Is the scope of the FOMA framework suitable to achieve its stated policy outcomes, including the types of media entities covered, the meaning of key terms such as 'foreign stakeholder' and 'foreign person' and the size of the minimum interest that triggers a notification requirement?

Please see our responses above.

5.5 Is the scope of the FOMA framework suitable to achieve its stated policy outcomes, including the types of media entities covered, the meaning of key terms such as 'foreign stakeholder' and 'foreign person' and the size of the minimum interest that triggers a notification requirement?

We note that under the definition of 'Australian media company' under the BSA differs from the definition of 'Australian media business' under the FATA, and we query the rationale for the different definitions.

5.6 Are there additional circumstances relating to interests held in AMCs by foreign stakeholders that should be notified by foreign stakeholders and recorded on the Register?

No.