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THE PARLIAMENT OF THE COMMONWEALTH
OF AUSTRALIA

HOUSE OF REPRESENTATIVES

BROADCASTING AMENDMENT BILL 1990

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Transport and
Communications, the Hon Kim Beazley MP)



BROADCASTING AMENDMENT BILL 1990

OUTLINE

This Bill amends the Broadcasting Act 1942 (the Act) to give the Australian Broadcasting Tribunal a flexible range of remedies as an alternative to licence suspension or revocation where an adverse finding has been made against the suitability of a commercial radio or television licensee (clauses 3, 7-10, 12-17, 19 and the Schedule).

The proposed alternative remedies will enable the Tribunal to revoke, vary or impose licence conditions, issue directions and, if necessary, direct interests to be divested within 6 months.

The Bill also amends the Act to clarify beyond doubt that -

- . the Minister has power to invite applications for a commercial radio licence after receiving an application for a supplementary radio licence in an overlapping service area (clauses 4-6); and
- . the Tribunal may consider simultaneously the application for a supplementary radio licence and the applications for a commercial radio licence in an overlapping area (clauses 4-6).

Amendments are also included in the Bill to -

- . enable aspiring public licensees, when conducting test transmissions, to broadcast sponsorship announcements in accordance with the rules applying to public broadcasters (clause 11); and
- . permit public radio licensees to broadcast community promotional material (clauses 18 and 21).

FINANCIAL IMPACT

The Bill is expected to have no significant impact on Commonwealth expenditure or revenue.

ABBREVIATIONS

The following abbreviations are used in this Explanatory Memorandum:

- the Act: the Broadcasting Act 1942
- the Tribunal: the Australian Broadcasting Tribunal.

STRUCTURE OF THE AMENDMENTS GIVING ALTERNATIVE REMEDIES TO THE TRIBUNAL

Being a "fit and proper person" and having the "financial, technical and management capabilities necessary to provide an adequate and comprehensive service" are suitability requirements which must be considered by the Tribunal in determining whether it is advisable in the public interest to grant (paragraph 83A(4)(a)), renew (paragraph 86AA(4)(b)), suspend or revoke (paragraph 88(2)(b)), approve the transfer of (subparagraph 89A(8)(c)(i)) or approve a transaction involving the acquisition of prescribed interests in (subsections 90JA(2) - radio; 92FAA(2) - television) a commercial licence.

This Bill amends the relevant provisions of the Act concerning licence renewal (section 86AA) and suspension and revocation (section 88) to expressly enable the Tribunal, in determining whether it is advisable in the public interest to refuse to renew or to suspend or revoke a licence because of a failure to comply with the suitability requirements, to have regard to the existence of alternative powers as modified by other provisions in the Bill.

These other powers are the existing power to revoke, vary or impose conditions on the licence under section 85, and the modified powers to give directions under section 92M and give directions for divestiture under section 92N.

The Bill also includes consequential amendments of the transaction approval provisions in sections 90JA (radio) and 92FAA (television) to confirm the availability of the licence conditions power and to enable the use of the modified directions power where divestment is required as a consequence of a refusal by the Tribunal to approve a transaction on suitability grounds.

NOTES ON CLAUSES

Clause 1 - Short title etc.

This clause provides for the citation of the Broadcasting Amendment Act 1990 and provides that in that Act, 'Principal Act' means the Broadcasting Act 1942.

Clause 2 - Commencement

This clause provides for the commencement of the Broadcasting Amendment Act 1990 on the day on which it receives the Royal Assent.

Clause 3 - Interpretation

Section 4 of the Act provides definitions of terms used in, and rules for interpretation of, the Act.

Clause 3(a) inserts a definition of the term 'suitability requirements' in subsection 4(1). The term is defined to have the meaning given by new subsections 4(18) and (19).

Clause 3(b) inserts new subsections 4(18) and (19) in the Act. The new subsections provide rules for interpreting when a licensee (new subsection (18)), or an applicant for approval of an ownership or control transaction (new subsection (19)), fails to meet the suitability requirements that apply to a licence.

By new subsection 4(18), the licensee fails to meet the suitability requirements that apply to the licence if the Tribunal is satisfied that the licensee does not meet the character or capacity requirements. These requirements are taken into account when the Tribunal decides whether to refuse to renew a commercial licence (paragraph 86AA(4)(b)) or to suspend or revoke a commercial licence (paragraph 88(2)(b)).

By new subsection 4(19), the applicant for approval of an ownership or control transaction fails to meet the suitability requirements that apply to the licence if the Tribunal is satisfied that the applicant does not meet the character or capacity requirements in subparagraph 90JA(2)(c)(ii) or 92FAA(2)(c)(ii) of the Act or, where the Tribunal is required to treat the transaction as an application for the transfer of a commercial licence under section 89A, the Tribunal would not be satisfied that the applicant met the character or capacity requirements in sub-subparagraph 89A(8)(c)(i)(A) or (B).

Paragraphs 90JA(2)(a) and 92FAA(2)(a) apply the licence transfer criteria to a party to a transaction (eg. the purchaser of shares) who acquires a deemed controlling interest (more than 15%) either directly in a licensee company or in a company itself holding direct interests in the licensee company (subsections 90JA(4) and 92FAA(4)).

The character and capacity requirements in subparagraphs 90JA(2)(c)(ii) and 92FAA(2)(c)(ii) apply to a purchaser of shares who is not deemed to hold such a controlling interest.

Clause 4 - Ordinary inquiries

Section 17C of the Act requires the Tribunal to hold an inquiry before exercising its "substantive powers" under the Act. Subparagraph 17C(6)(b)(i) provides that the regulations under the Act may provide for the holding of joint ordinary inquiries into the exercise of 2 or more powers by the Tribunal.

This clause inserts a new subsection (6A) in section 17C making it clear that the reference to the exercise of 2 or more powers in paragraph 17C(6)(b) includes a reference to the power to grant a supplementary radio licence and the power to grant a commercial radio licence with an overlapping service area.

The amendment removes any doubt that may exist that the Tribunal can hold joint inquiries into the exercise of the 2 powers.

**Clause 5 - Insertion of new section:
82AAA Simultaneous commercial
licence and supplementary radio
licence inquiries**

Under subsection 82A(1) of the Act, a regional AM commercial radio licensee may apply for the grant of a supplementary FM licence to serve the same area. Subsection 82A(4) enables the Minister to refer the application to the Tribunal or dismiss the application.

Subsection 82(1) of the Act has the effect of requiring that, before a commercial radio licence is granted, the Minister publish a notice that, amongst other things, invites interested persons to apply to the Tribunal for the grant of the licence.

This clause inserts a new section 82AAA in the Act for the purpose of removing any doubt that the Minister may publish a notice under subsection 82(1) inviting applications for a commercial radio licence even though an application has been lodged for a supplementary licence under section 82A and whether or not the supplementary licence application has been referred to the Tribunal. The new section also makes it clear that the Tribunal may hold a joint inquiry into the applications.

New subsection 82AAA(1) provides that the Minister may publish a notice under subsection 82(1) in relation to a commercial radio licence, even though an application for a supplementary licence has been lodged and the Minister has not determined whether to refer the application to the Tribunal or to dismiss the application (paragraph (a)), or the Minister has referred the application to the Tribunal and the Tribunal has not determined whether to grant the licence (paragraph (b)).

New Subsection 82AAA(2) provides, where an application for a supplementary licence has been lodged and the Minister has published a notice under subsection 82(1), that the Tribunal can consider the supplementary licence application and any commercial licence applications simultaneously, that the Tribunal may determine the matters arising out of the applications in the order it thinks fit and that it may hold a joint inquiry.

New subsection 82AAA(3) makes it clear that the new section has been inserted for the purpose of removing doubt. It is not intended to imply that the Minister or the Tribunal did not possess their respective powers under the new section before the commencement of the section, or that procedures authorised by the new section were not authorised before its commencement.

Clause 6 - Criteria for grant of supplementary radio licence

Section 83B of the Act sets out criteria for refusing to grant a supplementary radio licence. One of the criteria (set out in subsection 83B(7)) requires the Tribunal to refuse to grant such a licence if the Tribunal determines that an additional

commercial radio licence is reasonably likely to be commercially viable and, having considered relevant matters, that it is in the public interest that applications for such a licence should be invited.

Clause 6(a) amends paragraph 83B(7)(b) consequential upon clauses 4 and 5, to clarify that the Tribunal is considering whether an additional commercial radio licence should be granted rather than whether applications should be invited since applications for that licence may, or may not, already have been invited.

Subsection 83B(8) of the Act sets out the Tribunal's duties after making a determination under subsection 83B(7) refusing to grant a supplementary radio licence.

Consequential to the amendments in clause 6(a), clause 6(b) omits subsection 83B(8) and substitutes new subsections (8), (9) and (10) clarifying the Tribunal's duties after making a subsection 83B(7) determination.

New subsection 83B(8) has the same effect as the current paragraph 83B(8)(a), requiring the Tribunal to give the applicant and the Minister written notice of the determination and the reasons for the determination.

New subsection 83B(9) requires the Tribunal to recommend that the Minister invite applications for a commercial licence if the process for achieving the grant of such a licence is not in train when the Tribunal makes the subsection 83B(7) determination.

New subsection 83B(10) provides that the process for achieving the grant of a commercial radio licence is in train if a notice under subsection 82(1) calling for applications for such a licence has been published and the Tribunal has not determined the applications, or has determined them but the licence has not yet been granted.

Clause 7 - Renewal of commercial licence

Section 86AA of the Act sets out the criteria for the Tribunal to refuse to renew a commercial radio or television licence. One of the criteria (set out in paragraph 86AA(4)(b)), requires the Tribunal to refuse to renew a licence if it appears to the Tribunal, having regard to the suitability requirements, that it is advisable in the public interest to refuse to renew the licence.

It is proposed to require the Tribunal, in determining whether it is advisable in the public interest to refuse to renew a licence because of a failure to meet the suitability requirements, to have regard to the existence of the powers to revoke, vary or impose conditions on the licence under section 85, give directions under new subsection 92M(1A) and give directions for divestiture under new subsection 92N(2A).

This clause inserts a new subsection 86AA(4A) requiring the Tribunal to have regard to the existence of the powers referred to in section 86AAA (inserted by clause 8) and such other matters it considers relevant, in determining whether it is advisable in the public interest to refuse to renew a licence under paragraph 86AA(4)(b).

Clause 8 - Insertion of new section:
86AAA Powers of the Tribunal where licensee fails to meet suitability requirements that apply to a commercial licence.

This clause inserts in the Act a new section 86AAA which provides that, where the Tribunal is satisfied under paragraph 86AA(4)(b) that a commercial licensee has failed to meet the suitability requirements applying to the licence, the Tribunal may use its powers under subsections 85(1) or 86(6), new subsection 92M(1A) (inserted by clause 16) or new subsection 92N(2A) (inserted by clause 17).

New subsection 86AAA(2) makes it clear that these powers are in addition to and do not limit any other power the Tribunal has to deal with the licensee's failure (such as non-renewal of the licence).

Clause 9 - Suspension and revocation of commercial licence

Section 88 of the Act sets out the criteria for the Tribunal to suspend or revoke a commercial radio or television licence. Under one of the criteria (set out in paragraph 88(2)(b)), the Tribunal may suspend or revoke a commercial licence if it appears to the Tribunal, having regard to the suitability requirements, that it is advisable in the public interest to do so.

This clause inserts a new subsection 88(2A) requiring the Tribunal to have regard to the existence of the powers referred to in section 88AA (inserted by clause 10) and such other matters it considers relevant in determining whether it is advisable in the public interest to suspend or revoke a commercial licence under paragraph 88(2)(b).

Clause 10 - Insertion of new section:
88AA Powers of the Tribunal where licensee fails to meet suitability requirements that apply to a commercial licence

This clause inserts a new section 88AA which is a mirror provision to new section 86AAA (inserted by clause 8).

New subsection 88AA(1) provides that where the Tribunal is satisfied under paragraph 88(2)(b) that a commercial licensee has failed to meet the suitability requirements applying to the licence, the Tribunal may use its powers under subsections 85(1) or 86(6), new subsection 92M(1A) (inserted by clause 16) or new subsection 92N(2A) (inserted by clause 17).

New subsection 88AA(2) makes it clear that these powers are in addition to and do not limit any other power the Tribunal has to deal with the licensee's failure (such as suspension or revocation of the licence).

Clause 11 - Advertising not allowed pursuant to temporary transmission permit

Section 89DH of the Act provides that, subject to certain exceptions, the holder of a temporary transmission permit shall not broadcast advertisements.

It is proposed that a public licensee, or an applicant or potential applicant for a public licence, granted a temporary transmission permit be able to broadcast sponsorship and community information announcements under the permit in the same way as a public licensee can.

Clause 11(a) makes the prohibition on temporary transmission permit holders broadcasting advertisements subject to the new subsection 89DH(3) inserted by clause 11(b).

Clause 11(b) inserts new subsections (3) to (7) in section 89DH.

New subsection 89DH(3) provides that the prohibition on advertising by temporary transmission permit holders under subsection 89DH(1) does not apply to a permit granted to a person to whom new subsection 89DH(4) applies.

New subsection 89DH(4) applies to a public licensee, or an applicant or a potential applicant for a public licence, to whom a temporary transmission permit is granted for the purposes of conducting broadcasts connected with the public licence or proposed public licence. The applicant and potential applicant are defined in new subsection 89DH(7).

Section 119AB of the Act makes special provision for public licences. Subsection 119AB(2) prohibits advertising subject to the other provisions of the section. Subsection 119AB(3) provides that the public radio licensee may broadcast, in accordance with any applicable program standards, community information (and by clause 18 - community promotional information), material promoting the licence service and sponsorship announcements. Subsections 119AB(3A) and (3B) provide rules for interpreting what is community information and a sponsorship announcement.

New paragraph 89DH(5)(a) applies the rule in subsection 119AB(2) to a public licensee or an applicant or a potential applicant for a public licence to whom a temporary transmission permit is granted.

New paragraph 89DH(5)(b) applies the rules in subsections 119AB(3), (3A) and (3B) to a public licensee, or an applicant or a potential applicant for a public licence, to whom a temporary transmission permit is granted, subject to any conditions specified in the permit or any other conditions determined by the Minister under subsection 89DF(9) of the Act.

Subsection 119AB(4) of the Act makes it a condition of a public licence that any money derived from the operation of the service be expended for certain purposes.

New subsection 89DH(6) makes it a condition of a temporary transmission permit granted to a public licensee or an applicant or a potential applicant for a public licence that any money derived from broadcasting pursuant to the permit be expended for certain purposes.

The range of purposes in new subsection 89DH(6) is wider than in subsection 119AB(4) to take account of the nature of the permit and the different persons who may have obtained it - a public licensee and an applicant or potential applicant for a public licence.

Persons who breach this condition will be guilty of an offence under section 132 of the Act. The Department will respond to complaints in appropriate cases, by investigation of, and prosecution for, the offence. Breaches of this condition may also be considered by the Tribunal, as part of any subsequent inquiry, where the permit holder is an applicant for a public licence.

New subsection 89DH(7) defines an applicant and a potential applicant for a public licence for the purposes of section 89DH.

Under new paragraph 89DH(7)(a), a person is an applicant for a public licence if the Minister has invited applications for the grant of a licence under subsection 82(1) of the Act and the person has applied.

Under new paragraph 89DH(7)(b), a person is a potential applicant for a public licence if the Minister is satisfied on reasonable grounds that the person intends to apply for a public licence or the person is a member of a body which intends to form a corporation to apply for the grant of a public licence.

Clause 12 - Approval of transactions

Section 90JA of the Act sets out criteria for Tribunal approval of share transactions involving the acquisition of, or increase in, a prescribed interest in a commercial radio licensee company. Subsection 90JA(2) specifies criteria for the Tribunal to refuse approval of the transaction.

Subsection 90JA(11) creates an offence where the Tribunal has refused approval of a transaction in whole or in part and the person has not divested the non-approved interests after 6 months from the Tribunal serving notice of the refusal or, on application within that 6 months period, after such longer period as the Tribunal allows.

This clause amends section 90JA to make the Tribunal's power to extend the period of 6 months subject to the requirement that the period of extension is no longer than six months where the Tribunal has refused to approve the transaction because the applicant failed to meet the suitability requirements that apply to the licence.

New subsection 90JA(11B), inserted by this clause, also requires the Tribunal, in determining whether or not to grant an extension in relation to a person who has failed to meet the suitability requirements, to have regard to whether the applicant has made all reasonable efforts to dispose of relevant interests, the effect of granting the extension on the licensee's service or related operations, the effect on its ability to meet the suitability requirements that apply to the licence and other relevant matters.

**Clause 13 - Insertion of new section:
90JAA Powers of Tribunal
where approval of transaction
refused under section 90JA**

This clause inserts in the Act a new section 90JAA which provides that, where the Tribunal refuses to approve a transaction in whole or in part under subsection 90JA(2) because the applicant failed to meet the suitability requirements applying to the licence, the Tribunal may use its powers under subsections 85(1) or 86(6), new subsection 92M(1B) (inserted by clause 16) or new subsection 92N(2B) (inserted by clause 17).

New subsection 90JAA(2) makes it clear that these powers are in addition to and do not limit any other power the Tribunal has to deal with the applicant's failure.

Clause 14 - Approval of transactions

This clause makes the same amendments as those made by clause 12 to section 90JA, to section 92FAA which is the corresponding section providing for the approval of "prescribed interest" transactions in relation to a commercial television licensee.

**Clause 15 - Insertion of new section:
92FAAA Powers of Tribunal where
approval of transaction refused
under section 92FAA**

This clause inserts in the Act a new section 92FAAA which has a corresponding effect to new section 90JAA inserted by clause 13 and applies where the Tribunal refuses to approve a transaction in whole or in part under subsection 92FAA(2).

**Clause 16 - Directions to enforce ownership and control or
licensing provisions or to protect licensee**

Section 92M of the Act gives the Tribunal a power, where a transaction concerning a commercial radio (section 90J) or television (section 92F) licensee has occurred, to give directions to protect the ability of the licensee to comply with the licence conditions or to protect the operations of the licensee in providing the service or in the selection or provision of the programs to be broadcast.

This clause inserts new subsections (1A) to (1E) in section 92M to enable the Tribunal to give directions to enforce the licensing suitability requirements, either in relation to licensee suspension, revocation or non-renewal (new subsection 92M(1A)) or in relation to approval of prescribed interest transactions (new subsection 92M(1B)).

New subsection 92M(1A) provides that, where new section 86AAA or 88AA (see clauses 8 and 10) applies to a licence (ie. the licensee has failed to meet the suitability requirements that apply to the licence), the Tribunal may give a person directions to enable or require the licensee to meet the suitability requirements that apply to the licence (new paragraph 92M(1A)(a)) or to prevent the person from doing certain acts or things (new paragraph 92M(1A)(b)).

For the purposes of new paragraph 92M(1A)(b), the acts or things to be prevented are those that are likely to have an adverse effect on the licensee's ability to comply with the licence conditions, the licensee's operations in providing the service, or the selection or provision of programs to be broadcast.

Directions pursuant to new paragraph 92M(1A)(b) could, for example, be given by the Tribunal to supplement directions under new paragraph 92M(1A)(a), or to safeguard the operations of a commercial licensee before relevant interests are divested in accordance with a direction given under new subsection 92N(2A) (inserted by clause 17).

New subsection 92M(1B) provides that where new section 90JAA or 92FAAA (see clauses 13 and 15) applies to a licence (ie. the Tribunal has refused to approve a share transaction in whole or part because the applicant failed to meet the suitability requirements), the Tribunal may give a person directions for the purpose of preventing the person from doing an act or thing likely to have the same adverse effects listed in new paragraph 92M(1A)(b).

New subsection 92M(1C) lists examples of persons to whom directions may be given under subsections 92M(1A) and (1B).

New subsection 92M(1D) imposes formal requirements that a direction under subsection 92M(1A) or (1B) be in writing and served on the person to whom it is given.

New subsection 92M(1E) makes it clear that a reference in subsection 92M(1A) or (1B) to preventing a person from doing an act or thing includes a reference to the actions of a servant or agent of the person.

Clause 17 - Directions for divestiture

Section 92N of the Act enables the Tribunal to give divestiture directions where a person holds interests in circumstances which constitute an offence against the ownership and control limits or an offence for not disposing of interests within the required period after a prescribed interest transaction has been refused approval by the Tribunal.

Under subsection 92N(1), the Tribunal is empowered to give directions to ensure that the person ceases to hold interests in the company and to prohibit the disposal of the interests and related interests to a specified person or persons in a specified class.

This clause inserts new subsections (2A), (2AA), (2AB), (2AC) (2AD), (2AE) and (2B) in section 92N.

New subsection 92N(2A) provides that where section 86AAA or 88AA (see clauses 8 and 10) apply to a licence (ie. the licensee has failed to meet the suitability requirements that apply), and the Tribunal is satisfied that the holding of particular interests in a company by a person gives rise to or contributes to the failure to meet the suitability requirements, the Tribunal may give certain directions concerning divestiture.

Under subsection 92N(2A), the Tribunal may give directions to ensure that the person ceases to hold specified interests in the company before the end of 6 months and may give directions prohibiting the person disposing their interests or related interests to a specified person or persons in a specified class.

New subsections 92N(2B) to (2F) enable the Tribunal to extend by up to 6 months the period of 6 months in which the person must divest interests under new paragraph 92N(2A)(c).

Under new subsection 92N(2D), the Tribunal in determining whether or not to grant an extension under new subsection 92N(2B), is to have regard to whether the applicant has made all reasonable efforts to dispose of relevant interests, the effect of granting the extension on the licensee's service or related operations, the effect on its ability to meet the suitability requirements that apply to the licence and other relevant matters.

New subsection 92N(2G) applies where section 90JAA or 92FAAA (see clauses 13 and 15) applies to a licence (ie. the Tribunal refused to approve a transaction in whole or part because the applicant failed to meet the suitability requirements), and a person has interests required to be divested in accordance with paragraph 90JA(11)(c) or 92FAA(11)(c).

Under new subsection 92N(2G), the Tribunal may give the person directions prohibiting the person disposing their interests or related interests to a specified person or persons in a specified class.

Clause 18 - Special provisions relating to public licences

Subsection 119AB(2) of the Act prohibits a public radio licensee from broadcasting advertisements. Under paragraph 119AB(3)(a) a public radio licensee may broadcast, in accordance with applicable program standards, community information (by announcement, interview or otherwise). Subsection 119AB(3A) provides a rule for determining whether information is community information for the purposes of paragraph 119AB(3)(a).

Clause 18(a) amends paragraph 119AB(3)(a) to ensure that community promotional material may be broadcast.

Clauses 18(b) and (c) amend subsection 119AB(3A) to make the same rule for determining whether information is community information apply in determining whether material is community promotional material for the purposes of paragraph 119AB(3)(a).

Clause 19 - Minor and consequential amendments

This clause provides for the Act to be amended as set out in the Schedule. The amendments in the Schedule are of a consequential nature, inserting in other provisions of the Act appropriate references to new provisions inserted by this Bill and making other minor changes.

Clause 20 - Application of amendments

This clause is an application provision which ensures that the amendments made by this Bill concerning alternative remedies apply to a failure by a licensee or applicant to meet the suitability requirements that apply to a licence, where the Tribunal has found that the failure occurred before the commencement of the section, or finds after commencement that the failure has occurred (whether the facts or circumstances on which the finding was based occurred before or after commencement).

Clause 21 - Amendment of Broadcasting and Television Act 1942 as in force immediately before 1 January 1986 for the purposes of its continued application to old system licences

The Broadcasting and Television Amendment Act 1985 (the Amending Act) implemented a new licensing system for broadcasting based on service area. By section 98 of the Amending Act, the Broadcasting and Television Act 1942 as in force immediately before 1 January 1986, continued to apply to old system licences.

This clause applies the amendments to section 119AB of the Act made by clause 18 to relevant old system licences.

