

1990-91

THE PARLIAMENT OF THE COMMONWEALTH
OF AUSTRALIA

BROADCASTING AMENDMENT BILL 1991

EXPLANATORY MEMORANDUM

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



BROADCASTING AMENDMENT BILL 1991

OUTLINE

This Bill amends the Broadcasting Act 1942 (the Act) to introduce a requirement of prior notice of acquisition of interests which may breach the ownership and control rules of the Act. It also augments the Federal Court's powers to make interim and permanent orders to enforce the spirit of the Act and to protect licensees and other companies which may be affected by interests acquired, or proposed to be acquired, in contravention of the Act.

The main measures in the Bill will:

- (a) require any person who holds, or proposes to acquire, an interest that may contravene the Act (either through contravening the audience reach, foreign ownership or cross media rules), whether by itself or if combined with an interest held, or proposed to be acquired, by an associate of that person, to give the Australian Broadcasting Tribunal (the ABT) prior notice where ever possible or, in any other case, notice within 7 days of acquisition of the interest or of commencement of the provision, whichever is the latter (clauses 5, 6 and 11 - proposed section 90HA, 92EA and transitional provision);
- (b) define associate relationships for the purpose of the notification requirements (clauses 5 and 6 - proposed subsections 90HA (10) and (11) and 92EA (10) and (11));
- (c) require the ABT to have regard to associate relationships in exercising any of its powers, but as evidence, not conclusive evidence, that may be relevant in establishing if a requirement of the Act has been contravened (clauses 5 and 6 - proposed sections 90HB and 92EB);
- (d) allow the ABT, by notice published in the Gazette and disallowable by Parliament under the Acts Interpretation Act 1901, to exempt specified classes of persons from the notification requirement in proposed section 92EA and the related requirement for the ABT to consider associate relationships under proposed subsection 92EB (clauses 5 and 6 - proposed sections 90HC and 92EC);
- (e) augments the powers of the Federal Court of Australia to make orders to prevent, or protect companies from the effects of, contraventions of the ownership and control rules of the Act (clause 9);
- (f) allows the ABT, as an alternative to having to apply to the Federal Court for orders under section 92P as

proposed to be amended, to accept undertakings from persons likely to be affected by an inquiry and, if necessary, to approach the Federal Court for orders to enforce those undertakings (clause 8 and clause 9 - proposed paragraph 92P(2)(b)); and

- (g) allows the ABT to share information, in appropriate cases, with the Trade Practices Commission and the Foreign Investment Review Board (clause 10), subject to a general requirement for the ABT not to disclose information about a prospective transaction except for the purposes of an inquiry or application to the Federal Court or where the ABT is satisfied that disclosure would not be a breach of confidence (clause 3 - proposed section 17AA).

FINANCIAL IMPACT

The Bill is expected to have no significant impact on Commonwealth expenditure or revenue. The greater efficiency with which the ABT will be able to identify matters requiring exhaustive investigation as a result of the prior notification requirement should offset the cost of monitoring those notifications and the potential to avoid blatant contraventions and the expensive process of trying to rectify contraventions through ABT inquiry could result in savings.

NOTES ON CLAUSES

Clause 1 - Short title etc.

Fixes the citation of the Bill and defines the Act as the Principal Act for the purposes of the Bill.

Clause 2 - Commencement

Provides that the Bill will commence on the day on which it receives Royal Assent.

Clause 3 - Insertion of new section

Inserts a new section in Division 2 of Part II of the Act which requires the ABT not to disclose information received of or about a prospective transaction. This will not prevent the disclosure of information where that disclosure is either:

- (a) necessary for the purpose of any ABT inquiry or of an application to the Federal Court, either under the Act or under another Act for a purpose allowed by section 125, as proposed to be amended - this will include any appeals from an application to that Court; or

- (b) the ABT is satisfied that the information is so widely known that disclosure would not be a breach of confidence.

A disclosure would amount to a breach of confidence in a number of circumstances, the most obvious example of which would be if the disclosure allowed a business competitor to disadvantage the person supplying the information on the basis of that information unless the latter person has consented to the disclosure.

This provision will affect the operation of section 19 of the Act (Inquiries to be held in public except in special circumstances), but is necessary to ensure that normal commercial confidences in relation to a prospective inquiry are respected. The provision reinforces, but is not intended to limit the operation of, the general secrecy provision (section 125 of the Act).

Clause 4 - Tribunal may seek information

The clause amends section 89X of the Act to clarify that the information gathering powers of the ABT can be used whether or not the ABT has decided, or has instituted, an inquiry. The ABT, which is bound by the general principles of administrative law to act reasonably and is subject to judicial review if it does not do so, will now be able to require a range of information relevant to its functions within a specified period of not less than 7 days.

The ABT will, however, have the power to specify a period of less than 7 days if satisfied that, in all the circumstances of the case, it is reasonable to do so (proposed subsection (1A)).

This will enable the ABT to gather preliminary information before having to decide whether to apply to the Federal Court for interim orders under section 92P as proposed to be amended before acquisition of an interest will generally proceed.

Clause 5 - Insertion of new sections

Inserts 3 new sections.

Proposed section 90HA will require any person who:

- (a) holds a prescribed interest in a commercial radio service, or cross media or foreign interests which contravene the Act;
- (b) will acquire those interests; or
- (c) would, if that person's interests or interests proposed to be acquired were aggregated with interests held or

proposed to be acquired by an associate of the person, exceed the ownership or control limits of the Act,

to notify the ABT of that fact (proposed subsections (1) and (2)).

The provision will not require every increase in a prescribed interest or an excess foreign or cross media interest to be notified. Only the acquisition of those interests is affected.

Persons aware of the acquisition will be required to give at least 10 days prior notice. If the person only becomes aware of the proposed acquisition within the 10 day period, notice would be given as soon as practicable. If the person only becomes aware of the acquisition after it has been completed, notice would be given as soon as practicable, but not later than 7 days after becoming aware of the acquisition (proposed subsections (3) and (5)). Where prior notice is given, subsequent notice of completion of the acquisition is required by proposed subsection (4).

It should be noted that a person may acquire interests relevant to the operation of the Act either directly or through traced interests. Persons may not always be aware at the time of interests acquired through tracing of interests of third parties.

Under proposed subsection (6), the notice will give as many details as applicable of those required in applications for approval of share transactions under subsections 90J(7CC). Provision is included to require additional information relevant to the issue by regulation.

Persons giving prior notice of an acquisition under proposed subsection (3), confirmed under proposed subsection (4), are not required to give ex post facto notice under proposed subsection (5) (proposed subsection (7)).

Persons applying for approval of a transaction in the normal fashion, but before the requirement to give notice under the proposed section, will not be required to give notice as well (proposed subsection(8)).

Likewise, persons giving prior notice of a transaction will not, if the details of the transaction remain unaltered, be required to make a formal application for approval by the ABT, providing they confirm the completion of the transaction. That confirmation will be treated as an application (proposed subsection (9)).

Proposed subsections (10) and (11) define what persons are associates of others for the purpose of notification.

Proposed subsection (12) makes it clear that acquisitions which are subject to the notification requirement include acquisitions by way of gift or "operation of law" eg by reason of succession or court order etc.

Proposed section 90HB will require the ABT to consider associate relationships for the purpose of exercising its powers in respect of the ownership and control rules of the Act. However, the existence of an associate relationship will not give rise to any legal obligation apart from the obligation to notify. That relationship may, or may not, be evidence which contributes to establishing, or may itself establish in some cases, that a contravention of the ownership or control rules of the Act has or is likely to occur.

Proposed section 90HC will allow the ABT, by notice published in the Gazette, to exclude specified classes of persons from the requirements to give notice, and the ABT from the requirement to consider associate relationships involving those classes of person, where the ABT is satisfied that the interests held or likely to be held by the class of persons are not likely to contribute to contraventions of the ownership and control rules by persons with whom members of that class are associated.

This provision will allow the ABT the flexibility to exclude persons with interests of minimal concern. Where the ABT exercises this power, the instrument will be tabled in, and is subject to disallowance by, either house of the Parliament (proposed subsection (3)).

Clause 6 - Insertion of new sections

Inserts 3 new sections.

Proposed section 92EA mirrors proposed section 90GAA(radio) in respect of television interests. The only essential difference is the inclusion of a proposed subsection (13) which reflects the operation of subsection 89F(2), by virtue of subsection 92JB(4), of the Act. Those provisions provide that a person with a prescribed interest in a newspaper acquire a prohibited cross media interest if they acquire more than 5% (rather than the usual 15%) interests in a related commercial television licence. Section 92JC of the Act, which required notice of transactions affected by that rule, will now be subsumed in this proposed section and will be repealed by clause 7.

Proposed sections 92EB and 92EC mirror proposed sections 90HB and 90HC (above) for radio.

Clause 7 - Repeal of section 92JC - Notification of acquisition of cross media interests

The requirements of section 92JC will be subsumed by the notice requirements of this Bill, and the section can now be repealed.

Clause 8 - Insertion of new section

The proposed section 92NA will allow the ABT to accept written undertakings from persons affected or likely to be affected by an ABT inquiry. Those undertakings may relate to any matter, but will primarily provide an effective alternative to the need for the ABT to approach the Federal Court for orders. If satisfactory undertakings are given, the ABT and other parties will not be faced with the expense of a Federal Court hearing or with the possible publicity for a bid likely to flow from a court hearing.

The amendments to section 92P of the Act will allow the Federal Court to make orders for the purpose of enforcing or preventing a breach of an undertaking should that prove necessary.

Clause 9 - Powers of Federal Court of Australia

The amendments will ensure that the Federal Court has powers to act in respect of any contravention or potential contravention of the ownership or control rules (paragraph (a)). The Federal Court will also have powers similar to those of the ABT under section 92M, but not restricted to exercise "after a transaction takes place" (proposed subsection 92M (2)). The present subsection 92P(2), which prevented the Federal Court from exercising its powers until after a contravention could constitute an offence (which could be some months, given certain periods of grace under the Act), will be omitted.

This will allow the Federal Court a wide discretion to make orders at any time and whether of an interim or permanent nature, for the purpose of:

- (a) preventing or preventing the continuation of a contravention of the ownership or control rules;
- (b) protecting a licensee or other company from any factor likely to have an adverse effect on the ability of a licensee to meet its obligations under the Act; or
- (c) enforcing or preventing a breach of an undertaking under proposed section 92NA.

The Federal Court will have the power to make orders of an interim nature which will allow thorough investigation of possible contraventions of the ownership or control rules.

These may either be made in their own right under subsections 92P(1) or (2) as proposed to be amended, or under subsection 92P(6) as an adjunct to an application under subsections (1) or (2). Those interim orders might, if thought appropriate, include orders to defer an acquisition of interests pending completion of an ABT inquiry.

Clause 10 - Secrecy

The amendment will allow the ABT to disclose information or to produce documents to the Trade Practices Commission or Foreign Investment Review Board for the purpose of enabling those bodies to carry out their functions. The ABT will retain the discretion to do so.

Clause 11 - Transitional

Where the obligation to give prior notice would apply to a person, but the Bill commences less than 10 days before the acquisition to which the notice would relate, the obligation to give notice will be restricted to a time as early as practicable before the acquisition takes place.