

1987

THE PARLIAMENT OF THE COMMONWEALTH
OF AUSTRALIA

SENATE

BROADCASTING AMENDMENT BILL (NO.4) 1987

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Transport and
Communications, The Hon. Gareth Evans QC)

This memorandum takes account of amendments made by
the House of Representatives to the Bill as introduced

OUTLINE

The purpose of the Broadcasting Amendment Bill (No. 4) 1987 is to make a number of amendments to the Broadcasting Act 1942 and the 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 Bill has two significant objects:

- (a) to introduce an "establishment fee" for new commercial radio licences which have been or are proposed in notices under subsection 82(1) on or after 1 January 1987; and
- (b) to impose a moratorium on the transfer of commercial radio and television licences within two years of the initial grant of the licence.

FINANCIAL IMPACT STATEMENT

This Bill has no direct financial implications. While it covers procedural aspects and the method of calculating the establishment fee for new commercial radio licences, the related Radio Licence Fees Amendment Bill (No.2) 1987 makes the amendment to the new Radio Licence Fees Act which formally creates the obligation to pay the fee.

The Bill will create additional work for the Tribunal through monitoring the prohibition on transfer of control of a new licence, which will be absorbed within existing appropriations.

NOTES ON CLAUSES

Clauses 1 and 2: Short title and commencement

The first two clauses provide for the short title and commencement of the legislation. The Broadcasting Amendment Act (No. 4) 1987 shall come into operation on the day it receives the Royal Assent. "Principal Act" is defined to mean the Broadcasting Act 1942,

Clause 3: Special notices in relation to new commercial radio licences

Clause 3 inserts a new section 82AA into the Principal Act.

Proposed sub-section 82AA(1) provides that where applications for a new commercial radio licence have been or are invited under sub-section 82(1) of the Principal Act on or after 1 March 1987 the Minister is to publish in the Gazette an additional notice specifying the amount of the establishment fee that will be payable on the grant of the licence under subsection 6(1A) of the Radio Licence Fees Act 1964 and certain statistical information relevant to the calculation of the fee. The new fee will be payable only in respect of licences granted after the commencement of the Radio Licence Fees Amendment Act (No.2) 1987 (see clauses 4 and 8(3) of that Act).

Proposed sub-sections 82AA(2) to (4) outline the means by which the fee that is to be specified in the notice to be published under sub-section (1) is to be calculated. In most markets where a new commercial service is currently proposed, the new licensee will be placed in direct competition with an existing solus operator with substantially the same service area. In these situations the new licensee will be charged the incumbent licensee's gross earnings as assessed for licence fee purposes in the most recent accounting period before the issue of the notice inviting applications for the new licence. If there is more than one incumbent licensee with substantially the same service area as the proposed new licence, the fee will be the average of the earnings of the incumbent licensees.

Where the new licence is being introduced in an area which is not substantially the same as the service area of an existing commercial radio licence, the fee will be calculated in one of the following two ways.

Where more than 70% of the population of the proposed service area at the most recent census is served by at least one commercial radio service, the fee will be the gross earnings of that or those existing licensees in the proposed service area in the most recent accounting period. The earnings of the existing licence or licences in the proposed service area will be assumed to bear the same proportion to the total earnings of the existing licensee(s), as does the population of the relevant part of the proposed service area to the total populations serviced by the existing licensees.

Where less than 70% of the population of the proposed service area is currently served by at least one commercial radio service, a fee calculated in accordance with the last method outlined is likely to understate the true value of the new licence. In these circumstances, the fee will be set at \$15 per head of population in the proposed service area. This reflects the average per capita earnings of solus regional commercial radio licenses in 1985-86, the most recent year for which data is available.

These three different methods of calculating the fee are intended to employ the most useful data which is available for particular markets. Where there is already a licensee operating with substantially the same service area, the licensee's revenue will be the best guide to the revenue a competitor could expect. Where there is not direct competition but other overlapping licensees who have been broadcasting to most of the proposed new market, the revenue of these licensees will be the best guide. Where a substantial proportion of the proposed market currently is not served by commercial radio, the earnings of other licensees in similar service areas provides the most helpful reference point.

Proposed sub-section 82AA(5) requires the Minister in publishing a notice under sub-section (1) to have regard to the most recently available official census count results.

Clause 4: Consideration of licence applications by Tribunal

Clause 4 amends section 83 of the Principal Act to reflect the introduction of "establishment fees" for commercial radio licences.

Under the proposed amendments the Tribunal will determine which of the "eligible applicants" for the licence is the most suitable applicant and give that applicant notice that the licence is available to it. If that applicant then pays to the Commonwealth the amount of the "establishment fee" for the licence within 60 days of being notified of the availability of the licence or within 30 days of the final resolution of any legal proceedings arising out of the Tribunal's decision, the licence will be granted to it.

Should the applicant fail to pay the fee within the required period, the applicant will be taken to have withdrawn its application and the Tribunal will re-open the inquiry and determine a next most suitable applicant. The termination of legal proceedings means the expiry of the period which a party has to appeal against the decision. Where there is no other suitable applicant, the Minister will be empowered to extend the suitable applicant's time to pay and to charge a late payment fee along the lines of the existing fee payable under section 123A. Alternatively, the Minister may immediately call for fresh applications for the licence. Where the Minister does decide to extend the time available to an

applicant to pay fees and the applicant still fails to pay within the extended time, the Minister may then call for fresh applications for the licence.

"Eligible applicant" is defined to mean a person to whom, but for sub-section 83(9), the Tribunal would be required to grant the licence. This implies an applicant who meets the basic suitability criteria of fitness and propriety, financial, technical and management competence to provide an adequate and comprehensive service, etc.

Clause 5: Transfer of licences

Makes the existing provisions on transfer of licences expressly subject to the proposed section 89C (see note on clause 6).

Clause 6: No transfer of commercial licence within two years of initial grant

Proposed sub-section 89C(1) provides that a commercial licence shall not be transferred to a person and that a person shall not be admitted to participate in any of the benefits of a commercial licence or to exercise any of the powers or authorities granted by a commercial licence within two years of the initial grant of the licence.

Proposed sub-section 89C(2) provides that the prohibition on the transfer of a commercial licence within two years of the initial grant of the licence will not apply to a licence granted before the commencement of the proposed section 89C, or to a licence granted after that day by way of consolidation or conversion.

Clause 7: No "re-sale" of a licence within two years of initial grant

Clause 7 inserts a new section 90H into the Principal Act. The proposed new section will apply to commercial radio licences.

Proposed subsection 90H(1) provides that where a licence is granted (otherwise than by way of renewal) after the commencement of proposed section 90H, a notifiable share transaction in respect of the licence (i.e.: a transaction that either gives a person a "prescribed interest" in a licence or increases an existing prescribed interest and is hence "notifiable" pursuant to section 90J of the Principal Act) is not to be entered into or conducted within two years of the commencement of the licence unless the Tribunal has "provisionally cleared" the transaction in advance.

Proposed sub-section 90H(2) provides that a purported transaction which contravenes sub-section (1), subject to sub-section (5), is void.

Proposed sub-section 90H (3) provides that where a notifiable share transaction in respect of the licence is proposed any person may apply to the Tribunal for provisional clearance of the transaction. The Tribunal is then required:

- (a) if satisfied that the transaction would not bring about a transfer of control of the licence - to provisionally clear the transaction; or
- (b) if satisfied that the transaction would bring about a transfer of control of the licence - to refuse to provisionally clear the transaction (unless there are "exceptional circumstances" which justify a clearance).

Proposed sub-section 90H(4) provides that where a notifiable transaction is entered into or conducted without the provisional clearance of the Tribunal and the Tribunal has not refused to provisionally clear the transaction a person may apply for a declaration that sub-section (2) does not apply in relation to the transaction, that is, that the transaction is not void.

Proposed sub-section 90H(5) provides that where the Tribunal makes a declaration under sub-section (4) in respect of a transaction, sub-section (2) shall be taken never to have applied to the transaction, that is, the transaction was never void.

Proposed sub-section 90H(6) provides that in determining whether "exceptional circumstances" exist which would justify a provisional clearance for the purposes of sub-sections (3) and (4) the Tribunal may have regard to:

- (a) the death, bankruptcy or insolvency of any person;
- (b) the liquidation or winding up of any company; and
- (c) any order made by a court.

Proposed sub-section 90H(7) provides that a transaction shall be taken to effect a transfer of control of a licence if, and only if, as a direct or indirect consequence of the transaction:

- (i) a person who was, at the time when the licence was granted, in a position to exercise control, directly or indirectly, of the licence ceases to be in a position to exercise control of the licence; or
- (ii) a person who was not, at the time when the licence was granted, in a position to exercise control, directly or indirectly, of the licence is put in a position to exercise control of the licence.

In determining whether a person is in a position to exercise control of a licence, section 90AA ("meaning of control of a licence") applies but sections 90AAB ("meaning of control of a company") and 90B ("Tracing of shareholding interests through a series of companies") do not. Thus in determining who is in a position to "control a licence" the ordinary meaning of that concept is to be considered, rather than the extended definitions of control which are contained in section 90AAB and 90B.

Proposed sub-section 90H(8) makes it clear that the requirements of the proposed section 90H and the existing section 90J (changes in ownership of shares, etc.) are independent. Thus, a transaction which does not contravene the two-year rule may still contravene other ownership and control rules such as cross-media.

Proposed sub-section 90H(9) provides that the prohibition on re-transfer within two years of initial grant will not apply to licences "granted" by way of conversion from old system licensing to new.

Proposed sub-section 90H(10) defines a "notifiable share transaction" as a transaction in respect of shares in a licensee company or shares in a company having an interest in a licensee company that is a transaction in relation to which section 90J applies to a person.

Clause 8: No "re-sale" of licence within two years of initial grant

Clause 8 inserts a new section 92D into the Principal Act. The proposed new section will apply to commercial television licences and it directly mirrors the scheme which proposed section 90H establishes in relation to commercial radio licences (see the notes on clause 7). Consistent with the existing ownership and control provisions of the Principal Act, however, the proposed section 92E (television) is concerned with notifiable share and debenture transactions while the proposed section 90H (radio) is concerned with notifiable share transactions only.

Clause 9: Review of decisions

Clause 9 amends section 119A to provide that a decision of the Tribunal to refuse to grant provisional clearance is reviewable by the Administrative Appeals Tribunal.

Clause 10: Assembly of information

The proposed sub-section 124(6) makes it clear that the Tribunal is to be able to provide the Minister with financial information about licensees for the purpose of calculating fees to be specified in notices under the proposed sub-section 82AA(1).

