

1987

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

BROADCASTING (OWNERSHIP AND CONTROL) BILL (NO.2) 1987

EXPLANATORY MEMORANDUM

(Circulated by the Authority of the
Minister for Transport and Communications,
Senator the Hon. Gareth Evans)

BROADCASTING (OWNERSHIP AND CONTROL) BILL
(NO.2) 1987

OUTLINE

The Broadcasting (Ownership and Control) Act 1987 (the Ownership and Control Act), inter alia, introduced in the Broadcasting Act 1942 (the Principal Act):

- (a) a Multi-Channel Service (MCS) interest limit which applies to a person holding a prescribed interest in a licence that is within an approved market and to which an MCS permit is attached (sub-section 92(1AA) of the existing Principal Act);
- (b) cross-media interest limits which prohibit the holding of a prescribed interest in a commercial television licence and a monopoly radio licence or an associated newspaper (section 92FAB of the existing Principal Act); and
- (c) directorship limits associated with the prescribed interest limits in (a) and (b) above (sub-section 92C(1AA) of the existing Principal Act - MCS directorships; section 92FAD of the existing Principal Act - cross-media directorships).

The Ownership and Control Act also includes grandfathering exemptions in relation to the new prescribed interest and directorship limits outlined at paragraphs (a) - (c) above. MCS interest and directorship grandfathering provisions of continuing application are included in sub-sections 92(1AA) - (1AD) and 92C(1AA)-(1AC) of the existing Principal Act. Grandfathering provisions of transitional application are included in subsections 22(3)-(6) and 24(2)-(3) (MCS limits) of the Ownership and Control Act, as well as in sub-sections 27(2)-(15) (cross-media limits) of the Ownership and Control Act.

The purpose of this Bill is to make minor amendments of certain provisions in the Principal Act which were put in place through the Ownership and Control Act, and of other transitional provisions which remain part of the Ownership and Control Act. The amendments in this Bill are designed either to clarify the technical operation of relevant provisions, or to remove anomalies in their operation, or to make other minor drafting improvements. In summary, the provisions of the Bill:

- (a) provide grandfathered protection for relevant interests or directorships acquired before 28 November 1986 which, as a consequence of service area aggregation pursuant to sections 94S or 94ZH of the Principal Act, would otherwise contravene the cross-media limits in sections 92FAB or 92FAD of the existing Principal Act (paragraphs 9(c) and 9(e) of the Bill);

- (b) ensure that persons with grandfathered protection under section 92 of the Principal Act, or sections 22 or 27 of the Ownership and Control Act, in respect of relevant commercial radio or television licences or newspapers do not lose that protection as a consequence of the grant, in substitution for two or more previous licences, of a consolidated licence pursuant to sections 94ZC or 94ZG of the existing Principal Act (paragraphs 4(b), 8(b) and 9(b) of the Bill);
- (c) remedy a technical defect in the MCS interest limit grandfathering provisions in section 22 of the Ownership and Control Act by making special provision for a person holding an "old system" commercial television station licence under the previous Broadcasting and Television Act 1942 where, after the prescribed date, that licence has been converted to a "new system" licence held under the existing Principal Act (paragraph 8(c) of the Bill);
- (d) clarify the intended operation of relevant grandfathering provisions in section 92 of the existing Principal Act and sections 22 and 27 of the Ownership and Control Act by ensuring that a person only loses grandfathered protection during a period when a new, contravening, interest is held after the relevant prescribed date; and does not forever lose entitlement to protection through the acquisition of that new interest (paragraphs 4(a), 8(a) and 9(a) of the Bill);
- (e) allow a person who has indirectly acquired a new contravening interest in the circumstances in paragraph (d) above to regain grandfathered protection if the person subsequently does not hold any greater percentage shareholding interest than before the prescribed date and is not in any position to exercise greater control of the relevant licensee company (or newspaper company, in the case of the cross-media interest limit grandfathering provisions in section 27 of the Ownership and Control Act) than the person was able to exercise before the prescribed date (paragraphs 4(b), 8(b) and 9(b) of the Bill);
- (f) clarify the intended effect of the cross-media directorship limits in section 92FAD of the existing Principal Act by ensuring that those limits do not apply to the holding of a directorship in a single company holding grandfathered cross-media interests (Clause 6 of the Bill);
- (g) provide that a person who holds a directorship in a company, itself holding grandfathered cross-media interests, can also hold a directorship in any subsidiary of that company without contravening the cross-media directorship limits in section 92FAD of the existing Principal Act (paragraph 9(d) of the Bill); and

- (h) correct a technical drafting defect in relation to the period within which notices of the acquisition of a prescribed interest in a newspaper must be provided to the Australian Broadcasting Tribunal pursuant to section 92FAC of the existing Principal Act (paragraph 9(c) of the Bill).

Financial Impact Statement

There will be no additional costs to the Commonwealth in the administration of the provisions in this Bill.

NOTES ON CLAUSES

PART I - PRELIMINARY

Clause 1 - Short Title

Citation.

Clause 2 - Commencement

The amendments in Clauses 1, 2, 3 and 5 of the Bill will come into operation on Royal Assent. The remaining provisions in the Bill will be deemed to have come into operation on commencement of section 27 of the Ownership and Control Act (1 July 1987).

PART II - AMENDMENTS OF THE BROADCASTING ACT 1942

Clause 3 - Principal Act

Formal

Clause 4 - Limitation on interests in commercial television licences

Paragraph 4(a) of the Bill amends sub-section 92(1AC) of the Principal Act to make it clear that a person will lose grandfathered protection under sub-section 92(1AB) by the acquisition of a new interest after the prescribed date (being the date of declaration of an approved market including the service area of a relevant commercial television licence) only during the period while that new interest is held; and can regain protection by the subsequent divestment of that new interest.

Paragraph 4(b) of the Bill introduces a new sub-section 92(1AE) of the Principal Act. This new sub-section covers the circumstance where a person, having grandfathered protection by virtue of sub-section 92(1AB), loses that protection through the operation of sub-section 92(1AC) by indirectly acquiring a new interest after the prescribed date as a consequence of the direct acquisition of an interest in the licensee company by another company (new sub-paragraphs 92(1AE)(a) -(d) of the Principal Act).

The effect of new sub-section 92(1AE) is to allow a person who has indirectly acquired a new interest in the circumstance described in the paragraph above to regain protection where subsequent action is taken to reduce the person's percentage shareholding interest in the licensee company to that percentage shareholding interest which was held before the prescribed date (new sub-paragraph 92(1AE)(e)(i) of the Principal Act).

The provisions in new sub-paragraph 92(1AE)(c)(i) are subject to the requirement in new sub-paragraph 92(1AE)(e)(ii) that, if at any time after the prescribed date a person's percentage shareholding interest has been reduced to a level below that held before the prescribed date, the percentage shareholding interest sufficient to regain grandfathered protection will be the lowest such reduction in the person's percentage shareholding interest. This requirement is consistent with the existing provisions in sub-section 92(1AD) of the Principal Act. That sub-section has the effect that an interest acquired after the prescribed date will be treated as a new interest falling outside the scope of protection under sub-section 92(1AB); notwithstanding that the new interest was preceded by a reduction in the interests held by the person in a licensee company.

The provisions in new paragraph 92(1AE)(e) are also subject to the further requirement in new paragraph 92(1AE)(f) that a person seeking to regain grandfathered protection by reduction to the required level of percentage shareholding interest is also not in a position to exercise greater control of the licensee company than the person was able to exercise before the prescribed date.

For the purposes of calculating a person's shareholding interest percentage in a company under new sub-section 92(1AE), new sub-section 92(1AF), which is also introduced by paragraph 4(b) of the Bill, applies the proportional method in section 91A of the existing Principal Act for the tracing of shareholding interests through a series of companies. The deemed "control of a company" tracing provisions in section 91AAC of the existing Principal Act are expressly excluded from the operation of new sub-section 91(1AE).

Paragraph 4(b) of the Bill also introduces new sub-section 92(1AG) of the Principal Act. This new sub-section provides for maintenance of grandfathered protection under sub-section 91(1AB) of the existing Principal Act in the circumstances where a consolidated licence is granted, in substitution for two or more former licences, pursuant to section 94ZC or 94ZG of the existing Principal Act. Grandfathered protection is maintained, however, only where the person continued to hold a prescribed interest in one or more of the former licences between the prescribed date and the grant of the new consolidated licence.

Paragraph 4(c) of the Bill introduces a new sub-section 92(5) of the Principal Act. The new sub-section clarifies the intended effect of references in sub-sections 92(1AA) and 92(1AB) to the person being the holder, before a particular day (being a relevant date for the provision of grandfathered protection), of interests in a company holding a licence. New sub-section 92(5) makes it clear that grandfathered protection can be obtained as long as the person held interests in the company before the relevant date, regardless of whether the company held that licence before the date.

New sub-section 92(6A), which is also introduced by paragraph 4(c) of the Bill, defines the concept of "shareholding interest percentage" for the purposes of new sub-sections 92(1AE)-(1AF) of the Principal Act. The definition of this concept in terms of the total amounts paid on shares in the company is consistent with the definition in paragraph 91(3)(b) of the existing Principal Act of the "amount" of shareholding interest.

Clause 5 - Person having prescribed interest in a commercial television licence to notify Tribunal of prescribed interest in associated newspaper

Clause 5 of the Bill remedies a drafting defect in section 92FAC of the existing Principal Act by making it clear that notice of the acquisition of a prescribed interest in an associated newspaper must be provided not more than 28 days after the acquisition of that interest. However, if the relevant prescribed interest was acquired between 28 November 1986 and Royal Assent (commencement of new sub-section 92FAC(2)) the notice must be provided not more than 28 days after Royal Assent.

Clause 6 - Limitations on cross media directorships

Clause 6 of the Bill amends sub-section 92FAD(1) of the existing Principal Act to clarify the intended effect of that sub-section; ie, that the cross-media directorship limits do not apply to the holding of a directorship in a single company which has relevant cross-media interests. The holding of such cross-media interests by a company will contravene section 92FAB of the existing Principal Act, unless the company has grandfathered protection under sub-section 27(2) of the the Ownership and Control Act. If the cross-media directorship limits were to prohibit the holding of a directorship in a single company holding cross-media interests, then a grandfathered company holding "controlling" cross-media interests would be unable to replace its grandfathered directors on their death or resignation.

**PART III - AMENDMENT OF THE BROADCASTING
(OWNERSHIP AND CONTROL) ACT 1987**

Clause 7 - Principal Act

Formal.

Clause 8 - Limitation of interests in commercial television licences

Paragraph 8(a) of the Bill amends sub-section 22(4) of the Ownership and Control Act. The amendment makes it clear that a person will lose grandfathered protection under sub-section 22(3) by the acquisition of a new interest in a licensee company after the prescribed date (2 June 1987) only during the period while that new interest is held; and can regain protection by the subsequent divestment of that new interest.

Paragraph 8(b) of the Bill introduces new sub-sections 22(5A)-(5B) of the Ownership and Control Act. These new sub-sections cover the circumstance where a person, having grandfathered protection under sub-section 22(3), indirectly acquires a new interest in a licensee company after the prescribed date through the direction acquisition of an interest in a licensee company by another company. The new sub-sections allow such a person to regain grandfathered protection by a subsequent reduction to the percentage shareholding interest held by the person before the prescribed date. The new sub-sections are identical in the manner of their operation to the provisions in new sub-sections 92(1AE)-(1AF) of the Principal Act (see Explanatory Notes on paragraph 4(b) of the Bill).

Paragraph 8(b) of the Bill also introduces a new sub-section 22(5C) of the Ownership and Control Act to provide for maintenance of grandfathered protection under sub-section 22(3) in the circumstances where a consolidated licence is granted, in substitution for two or more former licences, pursuant to sections 94ZC or 94ZG of the existing Principal Act. New sub-section 22(5C) is identical in the manner of its operation to new sub-section 92(1AG) of the Principal Act (see Explanatory Notes on paragraph 4(b) of the Bill).

Paragraph 8(c) of the Bill introduces a new sub-section 22(7) of the Ownership and Control Act. This new sub-section covers the circumstance where a person has grandfathered protection under sub-section 22(3) by virtue of holding an "old system" commercial television licence (or licences) (subject to the previous Broadcasting and Television Act 1942) and, pursuant to sections 99 or 99A of the Broadcasting and Television Amendment Act 1985, the person is then granted a "new system" licence (subject to the Broadcasting Act 1942) in substitution for that "old system" licence (or licences). The effect of new sub-section 22(7) is to maintain grandfathered protection for the holder of a "new system" licence in those circumstances. The provisions in new sub-section 22(7) are identical to those in sub-section 27(7) of the existing Ownership and Control Act in relation to grandfathered protection under the cross-media interest limits in section 92FAB of the existing Principal Act.

Paragraph 8(c) of the Bill also introduces a new sub-section 22(8) of the Ownership and Control Act. This new sub-section clarifies the intended effect of the references in sub-section 22(3) to the person being the holder, before 2 June 1987, of interests in a company holding a licence. New sub-section 22(8) makes it clear that grandfathered protection can be obtained under sub-section 22(3) as long as the person held interests in the company before the grandfathered date, regardless of whether the company held that licence before that date. This would apply, for example, to a person who, before the date, held interests in a company holding an "old system" licence (or licences) where, in the circumstances described in the previous

paragraph, the company is subsequently granted a "new system" licence in substitution for that licence (or licences). It should be noted, however, that grandfathered protection can be provided under sub-section 22(3) of the Ownership and Control Act only where interests are held before 2 June 1987 in circumstances which would otherwise have constituted a contravention of sub-section 92(1AA) of the existing Principal Act.

New sub-section 22(9) of the Ownership and Control Act, which is also introduced by paragraph 8(c) of the Bill, defines the concept of "shareholding interest percentage" for the purposes of new sub-sections 22(5A)-(5B). The new sub-section is identical in the manner of its operation to that of new sub-section 92(6A) of the Principal Act (see Explanatory Notes on paragraph 4(c) of the Bill).

Clause 9 - Amendments of section 27 of the Broadcasting
(Ownership and Control) Act 1987

Paragraph 9(a) of the Bill amends sub-section 27(3) of the Ownership and Control Act to make it clear that a person will lose grandfathered protection under sub-section 27(2) by the acquisition of a new interest in a licensee or newspaper company after the prescribed date (28 November 1986) only during the period while that new interest is held; and can regain protection by the subsequent divestment of that new interest.

Paragraph 9(b) of the Bill introduces new sub-sections 27(4A)-(4B) of the Ownership and Control Act, dealing with the indirect acquisition of interests after the prescribed date, and new sub-section 27(4C) of the Ownership and Control Act, dealing with licence consolidation. These new sub-sections are identical in the manner of their operation to that of new sub-sections 92(1AE)-(1AF) and 92(1AG) of the Principal Act respectively (see Explanatory Notes on paragraph 4(b) of the Bill).

Paragraph 9(c) of the Bill introduces a new sub-section 27(6A) of the Ownership and Control Act. The new sub-section has the effect of providing grandfathered protection under sub-section 27(2) to a person who has acquired relevant interests before the prescribed date, but who would otherwise contravene the cross-media interest limits in section 92FAB of the existing Principal Act through a subsequent change in the service area of a commercial radio or television licence. Protection is provided by treating the change in the service area of the licence in these circumstances as if it had occurred immediately before the prescribed date.

Paragraph 9(d) of the Bill introduces a new sub-section 27(8A) of the Ownership and Control Act. The new sub-section has the effect of exempting a person from a contravention of the cross-media directorship limits in section 92FAD of the existing Principal Act which would otherwise arise by reason of a person

holding a directorship in a company which has grandfathered protection under sub-section 27(2) of the Ownership and Control Act and also holding one or more directorships in any other company that is a subsidiary of that grandfathered company. This new sub-section would, for example, allow one grandfathered director holding multiple directorships within the same group of companies holding grandfathered cross-media interests to be replaced by another single person without the replacement director contravening the cross-media directorship limits.

Paragraph 9(e) of the Bill introduces a new sub-section 27(10) in the Ownership and Control Act. The new sub-section has the effect of providing grandfathered protection from the operation of the cross-media directorship limits in section 92FAD for a person who held relevant directorships before the grandfathered date, but who would otherwise contravene the directorship limits by a subsequent change in the service area of a commercial radio or television licence. New sub-section 27(10) supplements the grandfathered protection provided in new sub-section 27(6A) of the Ownership and Control Act against the operation of the cross-media interest limits in section 92FAB of the existing Principal Act (see Explanatory Notes on paragraph 9(c) of the Bill).

Paragraph 9(f) of the Bill introduces a new sub-section 27(14) of the Ownership and Control Act. This new sub-section is consistent with new sub-section 92(5) of the Principal Act (see Explanatory Notes on paragraph 4(c) of the Bill) and with new sub-section 22(8) of the Ownership and Control Act (see Explanatory Notes on paragraph 8(c) of the Bill). New sub-section 27(14) makes it clear that reference to being the holder, before the prescribed date, of an interest in a company holding a relevant licence or publishing a relevant newspaper does not require that the company held that licence or published that newspaper before that date.

New sub-section 27(15), which is also introduced by paragraph 9(f) of the Bill, defines the concept of "shareholding interest percentage" for the purposes of new sub-sections 27(4A)-(4B) of the Ownership and Control Act. The new sub-section is identical in the manner of its operation to that of new sub-section 92(6A) of the Principal Act (see Explanatory Notes on paragraph 4(c) of the Bill).

New sub-section 27(16), which is also introduced by paragraph 9(f) of the Bill, defines the term "subsidiary of a company" for the purposes of new sub-section 27(8A) of the Ownership and Control Act. This term is to have the same meaning as in the Companies Act 1981.



