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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

BROADCASTING SERVICES AMENDMENT BILL 1994

REVISED SUPPLEMENTARY EXPLANATORY MEMORANDUM

(Amendments to be moved on behalf of the Government)

(Circulated by authority of the Minister for Communications and the Arts, the Hon Michael Lee, MP)

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AMENDMENTS TO THE BROADCASTING SERVICES AMENDMENT BILL 1994

OUTLINE

The Broadcasting Services Amendment Bill 1994 amends the *Broadcasting Services Act 1992* (the Principal Act) to ensure that events can be removed from the pay-TV 'anti-siphoning' list under subsection 115(1) of the Principal Act (for example, where the rights to events have been acquired, but not used, by a free-to-air broadcaster). The Bill also clarifies the Minister's powers to add events to the list.

The proposed Government amendments of the Bill deal with the allocation of second commercial television and radio broadcasting licences in solus markets; a fixed 15% deemed "control" rule for the purposes of the control limits in the Principal Act; further operational aspects of the anti-siphoning provisions affecting the acquisition of broadcasting rights by subscription television licensees; and cooperation between satellite subscription television broadcasting licensees A and B.

In summary, the proposed Government amendments of the Principal Act would:

(a) replace the existing provisions in section 73 with express provisions for the allocation of a second commercial television broadcasting licence to the single licensee in an area, without breaching relevant ownership and control limits in the Principal Act, where the Australian Broadcasting Authority (the ABA) is satisfied that there is no independent operator interested in and in a position to provide the second commercial television broadcasting service (Amendments 2, 5, 6 and 10);

(b) streamline the operation of the provisions in section 39 by providing for the allocation of a second commercial radio broadcasting licence to the single licensee in an area, where suitable radio frequency spectrum is available for providing an additional commercial radio broadcasting service in that area (Amendment 3);

(c) provide that, for the purpose of the 'control' limits in the Principal Act, a person will be deemed to be in a position to control a company by holding more than 15% of company interests in the company, without the need for factual inquiry as to whether the person is otherwise in a position to exercise control over that company (Amendments 4 and 11);

(d) provide 'grandfathering' protection where a person is in breach of a control limit by reason of circumstances existing before the date of the announcement by the Government of its intention to introduce a fixed 15% control rule (Amendment 14);

(e) streamline the operation of the anti-siphoning provisions, by providing for the automatic removal of events from the anti-siphoning list 1 week after the end of the event, unless the Minister publishes a declaration that the event remains on the list (Amendments 7 and 8);

(f) enable satellite subscription television broadcasting licensees to enter into co-operation agreements for the joint use of facilities, etc., without causing a breach of relevant control limits in the Principal Act (Amendment 9);

(g) remove any doubt that Schedule 1 of the Principal Act, which deals with concepts of 'control' and the tracing of company interests, applies to subscription television broadcasting licences, as well as to commercial licences (Amendments 11 and 13); and

(h) ensure that the anti-siphoning provisions are not circumvented where the rights to an event included on the anti-siphoning list are acquired only by a regional broadcaster, in circumstances where the televising of the event would not be freely available to the majority of the Australian public (Amendment 12).

FINANCIAL IMPACT STATEMENT

The Government Amendments are expected to have no significant impact on Commonwealth expenditure or revenue.

NOTES ON AMENDMENTS

Amendment (1)

This amendment would substitute new commencement provisions in Clause 2.

The effect of new subclause 2(1) would be that the amendments relating to the grant of additional commercial television broadcasting licences (see paragraph (a) of the Outline), the grant of additional commercial radio broadcasting licences (see paragraph (b) of the Outline) and the deemed 15% control rule (see paragraphs (c) and (d) of the Outline) would commence operation 28 days after the Act receives Royal Assent.

The effect of new subclause 2(2) would be that the amendments relating to the operation of the anti-siphoning provisions (see paragraphs (e) and (h) of the Outline), co-operation agreements between satellite subscription television broadcasting licensees (see paragraph (f) of the Outline), and the application of the "control" and tracing mechanisms to subscription television broadcasting licences (see paragraph (g) of the Outline), would commence operation on the date of Royal Assent.

Amendment (2)

This amendment would add a new clause 2A to the Bill.

Subclause 2A(1) would add a new section 38A to the Principal Act to provide, in specified circumstances, for the allocation of a second commercial television broadcasting licence in a 'solus market' (ie, where there is only one commercial television broadcasting licence in force for a particular licence area).

New section 38A is related to Amendment 5, which provides an exemption under new section 73 from the operation of the ownership and control limits in Part 5 of the Principal Act where a licensee is allocated an additional commercial television broadcasting licence under new section 38A. The purpose of this Amendment and Amendment 5 is to remove legal uncertainty about the operation of the existing provisions in section 73, and to recast them as licensing provisions, thus providing a clear mechanism for the grant of an additional licence in a commercial television solus market.

New subsection 38A(1) would allow an existing commercial television broadcasting licensee in a particular licence area which is a solus market, where additional commercial television broadcasting licences can be allocated, to apply to the ABA for an additional commercial television broadcasting licence for that area.

New subsection 38A(7) would provide that any two licence areas are taken to be the one licence area if more than 30% of the licence area population of a licence area is attributable to an overlap area (ie, that part of a licence area which is within another licence area), or, a licence area is entirely within another licence area. This provision is similar to the rules in section 51 of the Principal Act which apply for the purposes of the ownership and control provisions in Part 5 of the Principal Act, and which currently apply to the existing section 73.

New subsection 38A(2) would require the ABA to grant an additional licence to the existing licensee if it is satisfied that it is unlikely that another person would be interested in operating, and be in a position to operate, another commercial television broadcasting service in the licence area. The criteria which the ABA must take into account are based on those set out in the existing subsection 73(2).

New subsection 38A(3) makes it clear that, if the ABA is not satisfied of the requirements in new subsection 38A(2), then the ABA must refuse to allocate an additional licence to the existing licensee.

New subsection 38A(4) would provide that the ABA has 45 days to make a decision on an application made by an existing commercial television broadcasting licensee under new subsection 38A(1), commencing from the time the application has been made. If the ABA has not within that 45 day period made a decision to refuse the application, then the ABA will be deemed to have made a decision to allocate the licence, and must allocate it as soon as practicable after the expiry of the 45 day period.

New subsection 38A(5) would allow the ABA to suspend its consideration of an application made under new subsection 38A(1) during the period commencing from when the ABA has advertised under section 38 for applications for the allocation of a commercial television broadcasting licence in the same licence area pursuant to a price-based allocation system, and ending when it has either determined the last application it has received as a result of that advertisement, or if no applications have been received, the last day by which applications can be lodged. As a result, the 45 day clock for making a decision on whether to allocate an additional licence will be stopped pending the outcome of a price-based system for allocating an additional commercial television broadcasting licence in the same licence area, thereby ensuring that any applications for new independent licences will be considered before the existing licensee's application under the new subsection 38A(1).

This clock-stopping mechanism is included because the outcome of an independent licence allocation process would be a relevant matter for the ABA to consider in forming a view as to whether the criteria in new subsection 38A(2) have been satisfied. For example, if a commercial television broadcasting licence is to be allocated under section 36 then the criteria set out in subsection 38A(2) would not be satisfied and the ABA

would be obliged, under subsection 38A(3), to refuse to allocate a licence under section 38A. In these circumstances, new subsection 38A(6) removes the obligation on the ABA to formally refuse the application made under subsection 38A(1) by deeming it to have been withdrawn.

It is intended that the legislative framework that will apply to the additional licence will be similar to that applying to the parent licence. In particular, new subsection 38A(11) makes it clear that the ABA will need to consider whether the eligibility requirements in section 37 are met by the existing licensee in relation to the additional licence. However, the licensee will also be required to:

- pay an administrative fee to the ABA on allocation of the additional licence which must not be more than the amount, which in the opinion of the ABA, represents the costs (including planning costs) which it has incurred in allocating the additional licence - new subsection 38A(8); and

- continue to provide services under the parent and the additional licence for at least two years after the date of allocation of the additional licence (this will also become a condition of the parent licence) - new subsection 38A(9).

New subsection 38A(10) would ensure that any attempt by the holder of a licence, during the first two years after the allocation of the licence, to transfer the parent licence or the additional licence is of no effect unless both of the licences are transferred at the same time by a person who holds both of the licences to the same transferee.

New subsection 38A(12) defines the expression "allocation period" used in new subsection 38A(5) for the purposes of that provision.

Subclause 2A(2) would provide that if the ABA has granted a permission to a licensee under the existing section 73 of the Principal Act before the commencement of Clause 2A of the Bill, then the ABA must allocate an additional licence to the licensee under new section 38A of the Principal Act for the same licence area.

Subclause 2A(2) would exempt such a licensee from the requirement, which would be imposed on licensees who are allocated an additional licence under the new section 38A, to pay a fee on the allocation of the licence. An exempted licensee will also not be required to provide services under both the parent licence and the additional licence for a period of two years after the additional licence has been allocated. Nor will the exempted licensee be subject to the two year restriction on the separate transfer of either of the licences. These exemptions are provided to ensure that any licensees who have been granted permissions under the existing provisions of section 73 of the Principal Act before commencement of the amendments are not made subject to retrospective obligations.

Amendment (3)

This Amendment would add a new Clause 2B to the Bill which would repeal existing section 39 and substitute a new section 39 in the Principal Act.

The new section 39 would promote the quicker introduction of a second commercial radio broadcasting service into a solus market, ie, where there is currently only one commercial radio broadcasting license in force for a particular licence area. This will be achieved by enabling the ABA to allocate a second commercial radio broadcasting licence to an existing licensee in a solus market, without the need for the ABA to have already undertaken the detailed planning processes (under section 26 of the Principal Act) in determining a "licence area plan".

To encourage the early uptake of these licences by eligible licensees, and to avoid any delays in the allocation by the ABA of any further commercial radio broadcasting licences which may arise from the licence area planning process, the new section 39 will also impose a time limit on eligible licensees to request the allocation of a licence under the new section, with special provisions to cover those licensees who may become eligible after commencement.

New subsection 39(1) would provide that, where there is one existing commercial radio broadcasting licence for a particular licence area which does not have an excessive overlap area (within the meaning of new subsection 39(5)), and the licensee is providing a service under that licence, the ABA must, on request, allocate to the licensee an additional commercial radio broadcasting licence for that area which is a broadcasting services bands licence, if it is satisfied that suitable broadcasting bands spectrum is available for the provision of another commercial radio broadcasting service in that area.

New paragraph 39(1)(c) refers to the concept of "excessive overlap area" in relation to the licence area of the parent licence. New subsection 39(5) sets out the circumstances when a licence area for a parent licence has an excessive overlap area with another commercial radio licence. The effect of that subsection, in combination with new subsection 39(1), is that where there are two overlapping solus markets, the existing licensee in each of those markets will be eligible to apply for an additional licence under section 39(1), if no more than 30% of the licence area population of the licence area of one of those licences is attributable to an area which overlaps with the licence area of the other licensee.

Where the overlap is between a commercial radio broadcasting licence that has a solus market and a market in which there is more than one commercial radio broadcasting licence in force, the commercial radio broadcasting licensee in the solus market is eligible to apply for an additional licence under subsection 39(1) only if the overlap area represents 30% or less of the licence area population of the licence in the solus market.

To encourage the early introduction of new services into solus markets, a time limit would apply during which an application under new subsection 39(1) can be made. New subsection 39(2) would provide that an application under subsection 39(1) must be made within 60 days after the commencement of the new section 39, or within 60 days after a commercial radio broadcasting licensee becomes eligible for the grant of a section 39 licence.

New subsection 39(4) sets out the following matters which the ABA must take into account in forming an opinion as to whether there is suitable broadcasting services bands spectrum available for the provision of another commercial radio broadcasting service in that area:

- any relevant frequency allotment plan determined by the ABA under section 25 of the Principal Act;

- any relevant licence area plan determined by the ABA under section 26 of the Principal Act; and

- any relevant capacity that has been reserved by the Minister under section 31 of the Principal Act.

New subsection 39(3) would provide that if, at the time a licensee makes an application, all of the conditions for the grant of a section 39 licence are not satisfied (eg, suitable broadcasting services bands spectrum is not currently available in that licence area for providing another commercial radio broadcasting service), but at a later time those conditions are satisfied, then the ABA is obliged at that later time to allocate the additional licence, unless the licensee withdraws the application.

When allocating the licence, the ABA would be required, pursuant to new subsection 39(6), to make a determination in writing setting out the technical specifications that apply to the additional licence. The ABA would not, however, be required to make the determination if a licence area plan determined under section 26 applies to the licence area of the additional licence, as the licence area plan would already contain the information that would be included in a determination under this section if it were made. New subsection 39(7) would provide that for the purposes of the Principal Act and section 109 of the *Radiocomunications Act 1992*, the technical specifications are taken to have been determined under section 26 of the Principal Act.

It is intended that the legislative framework that will apply to the additional licence will be similar to that applying to the parent licence. In particular, new subsection 39(11) makes it clear that the ABA will need to consider whether the eligibility requirements in section 37 are met by the existing licensee in respect of the additional licence. However, the licensee will also be required, in relation to the additional licence, to:

pay an administrative fee to the ABA on allocation of the additional licence which must not be more than the amount, which in the opinion of the ABA, represents the costs (including planning costs) which it had incurred in allocating the additional licence - new subsection 39(8); and

continue to provide services under the parent and the additional licence for at least two years after the date of allocation of the additional licence (this will also become a condition of the parent licence) - new subsection 39(9).

New subsection 39(10) would ensure that any attempt by the holder of a licence, during the first two years after the licence is allocated, to transfer the parent licence or the additional licence is of no effect unless both of the licences are transferred at the same time to the same transferee, by a person who holds both of the licences.

New subsection 39(1) requires the ABA to allocate the additional licence for the same licence area as the parent licence.

New subsection 39(12) would remove the need for the ABA to designate a licence area for the additional licence under section 29 of the Principal Act, before allocating that licence, if the licence area of the parent licence is not provided for under a licence area plan under section 26 of the Principal Act.

Many of the additional licences which will be allocated in the period after commencement, will have parent licences that were granted under the *Broadcasting Act 1942* and preserved under paragraph 5(1)(f) of the *Broadcasting Services (Transitional Provisions and Consequential Amendments) Act 1992* (the Transitional Act). The licence area of the additional licence in this situation will be the licence area of the parent licence that was preserved under section 8 of the Transitional Act, ie, the licence areas of both the parent licence and the additional licence will correspond to the "service area" of the parent licence under the *Broadcasting Act 1942*.

Amendment (4)

This Amendment would add a new Clause 2C to the Bill. New Clause 2C would repeal subsection 57(2), which prohibits a foreign person from having company interests in a commercial television broadcasting licensee that exceed 15%. Subsection 57(1) prohibits a foreign person from being in a position to exercise control of a commercial broadcasting television licence.

The amendment is consequential upon the amendment made by new subclause 6(2)(a) (Amendment (11)), which automatically deems a person to be in a position to exercise control of a company if the person holds company interests in the company exceeding 15%, without the need for factual inquiry as to whether the person is otherwise in a position to exercise control over that company.

The effect of new subclause 6(2)(a) is that subsection 57(2) would have no independent operation from subsection 57(1). This is because a foreign person who held more than 15% of company interests in a commercial television broadcasting licensee, whether directly and / or indirectly through the operation of the tracing provisions in Clause 7 or Clause 8 of Schedule 1, would be automatically taken to be in breach of subsection 57(1) by reason of being in a position to control the licensee.

Amendment (5)

This Amendment would add a new Clause 2D to the Bill which substitutes a new section 73 into the Principal Act. Some of the provisions of the existing section 73 have been replaced by the new section 38A, making it clear that an incumbent licensee who wishes to operate a second service in a solus market must obtain a licence to do so. The effect of the new section 73 is to provide an exemption from the relevant ownership and control rules in Part 5 of the Principal Act (ie, sections 53 and 55), where a licence has been allocated under new section 38A.

New subsection 73(1) would provide that where an incumbent commercial television broadcasting licensee is allocated an additional licence under the new section 38A, the parent and the additional licence are to be treated for the purposes of the ownership and control rules set out in Part 5 of the Principal Act as being one licence, during the period of 5 years after the date of allocation of the additional licence and during any additional period granted by the ABA under the new subsection 73(3).

New subsection 73(2) would provide that the exemption for the periods provided for under section 73 will no longer apply where the licences in respect of which the exemption is granted are held for the first time by different persons. This will prevent the exemption from applying to both licences if the licensee were to transfer one of the licences to another company.

New subsections 73(3), (4), and (5) set out the circumstances in which the ABA may extend the original 5 year period for the exemption given under new subsection 73(1). Following an application by the licensee made under new subsection 73(3), within a period commencing 6 months before the expiry of the existing exemption period and ending 3 months prior to the expiry of the existing exemption period, the ABA may grant an additional period of up to 5 years (see new subsection 73(4)). However, the ABA would be required to apply the same criteria as it would apply under new subsection 38A(2), ie, the ABA may grant an additional period if it is satisfied that there is no other person, apart from the incumbent licensee, who would be interested in operating, or be in a position to operate, another commercial television broadcasting service in the licence area. The ABA will have 45 days to decide whether or not to grant the extension, and if it does not, the ABA will

be deemed, in a manner similar to new subsection 38A(4), to have made a decision to grant an additional exemption period of five years.

New subsection 73(6) would make it clear that there is no limit to the number of additional periods which may be granted by the ABA, provided the criteria for extending the exemption are satisfied.

Amendment (6)

This Amendment would insert a new Clause 2E into the Bill to amend section 75 of the Principal Act, which makes provision for the maintenance of a Register by the ABA to facilitate the accountability of the ABA in the exercise of its powers relating to the ownership and control rules by making relevant information available to the public.

Clause 2E would amend section 75 ensure that the Register includes licences granted under section 38A and additional periods granted under the new section 73. (This is consistent with the references in existing paragraph 73(1)(f) to approvals granted under the existing section 73.)

Amendment (7)

This Amendment would amend Clause 3(b) of the Bill to insert a new subsection 115(1B). The new subsection provides that an event specified in a notice under subsection 115(1) (ie, an event on the anti-siphoning list) is taken to be removed from the notice 168 hours (ie one week) after the end of the event.

Automatic de-listing of completed events will streamline the de-listing process and add a degree of certainty to the commercial operations of broadcasters.

The one week period which is provided in the Amendment before a completed event is taken to be removed from a notice will allow a free to air broadcaster to acquire rights to the event immediately after the end of the event, so that it can be available to the majority of the Australian population on free to air television. The amendment does not, however, prevent a subscription television licensee from acquiring the rights to televise a listed event, once the rights to televise that event have been acquired by a free to air broadcaster.

New subsection 115(1B) also gives the Minister a reserve power, which can be exercised at any time before one week after the end of the event, to declare that the event continues to be specified on the anti-siphoning list. This power is made subject to Parliamentary disallowance by Amendment (8).

The reserve power of the Minister to declare that an event continues to be specified on the anti-siphoning list is intended to provide sufficient flexibility

to ensure that an event is not automatically removed from the list in circumstances which would be contrary to the policy objectives of the anti-siphoning regime. For example, the Minister may decide to retain an event on the anti-siphoning list where none of the broadcasting rights have been made available to a national broadcaster (ie the Australian Broadcasting Corporation (ABC) or the Special Broadcasting Service (SBS)) or a commercial television licensee prior to the event occurring, but the Minister is of the opinion that retaining the event on the list is likely to have the effect that the rights will subsequently be offered in circumstances which will enable delayed coverage of the event to be made available free to the general public.

New subsection 115(1B) is also expressed to be subject to subsection 115B(2). That subsection gives the Minister a power to amend the anti-siphoning list, by Gazette notice, to remove an event from the list at any time.

Amendment (8)

This Amendment would add paragraph 3(c) of the Bill and substitute a new paragraph consequential upon Amendment (7).

New paragraph 3(c) omits subsection 115(3) of the Principal Act and substitutes a new paragraph which makes notices and declarations under section 115 disallowable instruments.

Amendment (9)

This Amendment adds a new Clause 4 at the end of the Bill. The Amendment would omit existing subsections 116(1) and (2) of the Principal Act and insert new subsections 116(1) and (2).

The Amendment is intended to enable satellite subscription television broadcasting licensees (and persons in a position to control those licences) to enter into co-operative arrangements of the kind outlined in existing subsection 116(1), without causing a breach of section 110, as long as the arrangement does not confer control by one licensee over the selection or provision of programs to be broadcast by the other licensee.

Existing subsection 116(1) provides that a satellite subscription television broadcasting licensee is not an "associate" of another subscription television broadcasting licensee only because of a provision of a contract (or an arrangement or understanding) between them relating to the use of a common subscriber management system, joint marketing, joint use of transmission facilities or such other things as are prescribed (by regulations).

Existing subsection 116(2) provides that the exemption in subsection 116(1) does not apply to a contract under which one licensee becomes in a position

to control the selection or provision of a significant proportion of programming of the other licensee, or a significant proportion of the operations of the other licensee.

Subsection 110(1) of the Principal Act prohibits a person, before 1 July 1997, who is in a position to control licence A (one of the satellite subscription television broadcasting licences granted under subsection 93(1)), from being in position to control licence B (the other satellite subscription television broadcasting licence granted under subsection 93(1)), or from holding more than 2% company interests in licence B. Corresponding provisions in subsection 110(2) apply to the control of licence A and to the holding of interests in company A, by a person in a position to control licence B.

Existing subsections 116(1) and (2) are of limited practical effect in that they only provide an exemption where licensees may otherwise be taken to be "associates" of each other (and thereby be taken to be in a position to control each other's licences) through co-operation agreements, if those agreements do not confer control over a significant proportion of their satellite operations or programming.

It is appropriate that satellite subscription television broadcasting licensees be able to enter into co-operative arrangements relating to common subscriber management systems, joint marketing and joint use of facilities for the direct satellite delivery of their services to subscribers, without causing an incidental breach of section 110, if these arrangements do not confer control by one licensee over the selection or provision of programs by the other licensee.

New subsection 116(1) will therefore provide an exemption to persons in a position to control a satellite subscription television broadcasting licence (including the licensee and its holding company) from being taken to be in a position to control another satellite subscription television broadcasting licence only because of a contract (or arrangement or understanding) which deals with the same co-operative elements as are specified in existing subsection 116(1).

New subsection 116(2) will ensure that such co-operative arrangements are not exempted if the contract, arrangement or understanding enables a person in a position to control one licensee to control the selection or provision of a significant proportion of programs broadcast by the other licensee.

Amendment (10)

This Amendment would add a new Clause 5 to the Bill. Clause 5 amends section 204 of the Principal Act, which provides for an application to be made to the Administrative Appeals Tribunal (AAT) for a review of a certain decisions made under the Principal Act. The Amendment is consequential upon the amendments relating to the grant of an additional commercial

television licence to the single licensee in a licence area (see notes on Amendments (2) and (5)).

The effect of this Amendment is that a licensee may apply to the AAT for a review of an ABA decision to refuse to grant an additional licence under section 38A or to refuse to grant an extension of an additional period of exemption under new section 73, in the same way that a licensee may apply for a review of an ABA decision under existing subsection 73(2) to refuse to grant permission to a licensee, or an ABA decision under subsection 73(3) to refuse to extend the original period.

Amendment (11)

This Amendment would add a new Clause 6 to the Bill.

The Amendments of the Principal Act in subclause 6(1) remove any doubt that Schedule 1 of the Act, which deals with concepts of "control" and the tracing of company interests, applies to subscription television broadcasting licences, as well as to commercial licences.

Section 7 of the Principal Act already provides that the provisions in Schedule 1 set out mechanisms that are to be used in deciding whether a person is in a position to control a "licence", company or newspaper for the purposes of the Act; and for the purposes of tracing company interests. The provisions in Schedule 1 support limits in the Act on the ownership and control of commercial licences (Part 5) and limits on the ownership and control of subscription television broadcasting licences (Division 3 of Part 7).

Subclause 6(1)(a) amends Clause 1 of Schedule 1 of the Principal Act to add a reference to "subscription television broadcasting licences", thereby removing any doubt that the provisions in the Schedule relating to elements of "control" of a licence and the tracing of company interests apply to the those licences, as well as to commercial radio and commercial television broadcasting licences.

Paragraph 6(1)(b) is a consequential amendment to the amendment in paragraph 6(1)(a), replacing a reference in the Schedule to "commercial broadcasting licence", with a reference to "licence".

The amendments in subclause 6(2):

- remove the qualification in subclause 6(1) of Schedule 1 of the Act that a person who holds more than 15% company interests in a company will not be taken to be in a position to control that company if there is proof to the contrary; and

- make consequential amendments to other provisions in Schedule 1.

The purpose of the amendment of subclause 6(1) of Schedule 1 of the Principal Act (new paragraph 6(2)(b) of the Bill) is to ensure, for the purpose of the "control" limits in the Act, that a person will be deemed to be in a position to control a company by holding more than 15% of company interests in the company, without the need for factual inquiry as to whether the person is otherwise in a position to exercise control over that company.

The proposed deletion of subclause 6(2) of Schedule 1 from the Principal Act (new paragraph 6(2)(c) of the Bill) is consequential on the amendment of subclause 6(1) of Schedule 1. Existing subclause 6(2) of Schedule 1 provides an exemption from the 15% deemed control rule in subclause 6(1) of that Schedule where another person, who is not an associate of the person to whom subclause 6(1) would otherwise apply, holds more than 50% company interests in the relevant company. It is not intended that there be any exceptions from the fixed 15% deemed control rule in subclause 6(1).

The deletions made by paragraphs 6(2)(a) and (d) - (g) are also consequential on the amendment of subclause 6(1) of Schedule 1 and remove paragraphs and phrases in the Schedule that reflect the existing qualification to the deemed 15% control rule in Schedule 1.

Amendment (12)

This amendment would add a new Clause 7 to the Bill.

Subclause 7(a) omits paragraph 10(1)(e) of Schedule 2 of the Principal Act and substitutes a new paragraph 10(1)(e).

New paragraph 10(1)(e) will make it a condition of a subscription television broadcasting licence that the licensee will not acquire the right to televise on a subscription television broadcasting service an event specified in the anti-siphoning list unless a national broadcaster (ie, the ABC or the SBS) has the right to televise the event on its service; or the television broadcasting services of commercial television broadcasting licensees who have the right to televise the event cover a total of more than 50% of the Australian population.

The changes in new paragraph 10(1)(e) are intended to ensure that the legislative scheme in section 115 and Clause 10 of Part 6 of Schedule 2 is not circumvented where rights to an event included on the anti-siphoning list are acquired only by a regional broadcaster, in circumstances where the televising of the event would not be freely available to the majority of the Australian viewing public.

New paragraph 10(1)(e) has also been formulated in a way which ensures that the acquisition of radio rights by a national broadcaster will not enable a subscription televising broadcasting licensee to acquire television rights to an event specified on the anti-siphoning list.

Subclause 7(b) inserts new subclauses 10(1A) and (1B) in Schedule 2 of the Principal Act.

New subclause 10(1A) sets out how the percentage of the Australian population covered by the television broadcasting service of a commercial television broadcasting licensee is measured for the purpose of the new subparagraph 10(1)(e)(ii) of Schedule 2. It is the percentage most recently specified by the ABA under paragraph 30(5)(a) for the licence area of the licensee's licence.

In practice, the requirement in subparagraph 10(1)(e)(ii) that the commercial television broadcasting services of licensees who have the right to televise the event cover a total of more than 50% of the Australian population will be met when one of the major commercial television networks acquires the right to televise the event.

New subclause 10(1B) therefore assists with the operation of the rule in subparagraph 10(1)(e)(ii) by deeming a licensee to have the right to televise an event if a program supplier has that right. A 'program supplier' for a licensee is defined as a person who has an agreement to supply the licensee with program material (whether or not the program material includes matter showing the event), and who supplies the licensee with a substantial proportion of all program material that is televised by the licensee, whether or not the material is supplied under that agreement.

Amendment (13)

This Amendment would add a new Clause 8 to the Bill.

Clause 8 is an application provision which makes it clear that the amendments of Clause 10 of Schedule 2 (which have the effect of including new conditions on subscription television broadcasting licences) extend to such licences issued before the commencement of the amending Act.

Amendment (14)

This Amendment would add a new Clause 9 to the Bill.

New Clause 9 would provide "grandfathering" protection in specified circumstances for persons who would otherwise be in breach of the "control" limits in Part 5 and Part 7 (other than section 109) of the Principal Act as a result of the amendments to the 15% deemed control rule made by proposed new Clause 6(2) of the Bill.

New subclause 9(1) is intended to protect a person from a breach of a relevant control limit which would otherwise be taken to arise at a particular

time after commencement (the "test time"), where all of the circumstances relevant to the breach at the test time were also in existence at the "grandfather time" (ie, at the end of 27 June 1995, being the date of announcement by the Government of its intention to amend the 15% deemed control rule).

The effect of paragraphs 9(1)(b) - (d) is, however, that grandfathering protection will not apply in circumstances where a person was in breach of the control limit at the grandfather time or would have been in breach of the control limit at the test time even if the amendment to the 15% deemed control rule had not been made. For example, if at the grandfather time or the test time a person was in breach of a control limit by virtue of being in a position to exercise actual control of two licensee companies (as set out in Clauses 2 or 3 of Schedule 1 of the Act), the person would not be eligible for grandfathering protection.

The explanation of the phrase "circumstances that are relevant to the breach" in new subclause 9(5) is intended to ensure that grandfathering protection does not apply under subclause 9(1) where, after the grandfather time, a person acquires new company interests in a company (whether directly and/or indirectly through the operation of the tracing provisions in Clause 7 and 8 of Schedule 1) which (together with other company interests held by the person) are relevant to a breach of a control limit, even if the holding of those 'new' company interests does not need to be relied upon to establish the breach.

The combined operation of subclauses 9(1) and (5) is illustrated by the following examples.

Example 1 - Person A holds 20% company interests in licensee X and 100% company interests in licensee Y at the test time (test time 1), in circumstances that would result in a breach of a control limit. At test time 1 the 20% company interests held by A in licensee X are part of circumstances that would otherwise be relevant to a breach of a control limit.

Subclause 9(1) would be satisfied in respect of the holding of those company interests by A if, at the grandfather time, A held the particular interests in the same circumstances that are relevant to the breach at the test time and was then not in breach of the control limit.

If, however, at test time 1, any of the 20% company interests held by A in licensee X are held in different circumstances than those existing at the grandfather time, then A would (unless subject to one of the exemptions described below) lose grandfathering protection under subclause 9A(1).

Example 2 - A would also lose the benefit of the protection afforded by subclause 9(1) if at a later test time (test time 2) it holds an additional 1% (ie 21%) company interests in licensee X. In that case, all of the circumstances

relevant to the breach at test time 2 could not be said to have been in existence at the grandfather time.

Example 3- If, however, at test time 2 A was to reduce its company interests in licensee X from 20% to 16%, this reduction itself would not amount to a change in circumstances relevant to the breach. At test time 2, A would hold particular company interests and would have held those company interests at the grandfather time.

However, if A was at test time 3 to acquire new company interests in licensee X, in total amounting to 20% company interests, it is not intended that A be entitled to grandfathering protection, regardless of the fact that the amount of A's company interests was restored to the previous "grandfathered" level. This is because A's relevant circumstances at test time 3 were not in existence at the grandfather time.

The guiding principle behind the application of the grandfathering requirements in subclauses 9(1) and (5) in the above examples is that a person should not be entitled to maintain grandfathering protection if the person acquires new company interests from those that were held at the grandfather time, in circumstances that are relevant to a breach of the relevant control limit.

It is recognised, however, that a strict application of the above requirements may be inequitable in some situations. New subclauses 9(2) - (4) therefore provide specific exemptions which have the effect that certain "new circumstances" that exist at the test time will be taken to have existed at the grandfather time (ie they do not result in a loss of grandfathering protection).

Subclause 9(2) extends the protection provided in subclause 9(1) to a person who would otherwise not be eligible under the latter subsection because of a change in circumstances relevant to the breach that arose after the grandfather time, if the person was not in a position to prevent those new circumstances from arising. If in Examples 1, 2 or 3 new company interests relevant to a breach of a control limit were acquired through a transaction to which the person was not a party, and the person was unable to prevent the transaction taking place, then the person would not lose grandfathering protection only by reason of that transaction.

Subclause 9(3) provides that grandfathering protection is not lost only by reason of new company interests that may otherwise be taken to exist because of the allotment or issue of shares or debentures to a person who held shares in or debentures of a company at the grandfather time, where that person received the new shares or debentures in common with other holders of shares or debentures of the same class.

New subclause 9(4) provides that grandfathering protection is not lost only by reason of the acquisition of new company interests after the grandfather time if:

a person held company interests in a company at the grandfather time;

the person was at that time in a position to exercise actual control of the company (ie would have been taken under Clause 2 of Schedule 1 of the Act to be in a position to control the company even if the 15% control rule had not been in force); and

the person remained in such a position at all times between the grandfather time and the test time.

It should be noted, however, that the exemption in subclause 9(4) will not entitle a person to grandfathering protection if, at the test time, the person is in a position to exercise actual control of a relevant licensee company (or, in the case of the cross-media limits a company publishing a newspaper) in circumstances that constitute a breach of a control limit (see subclause 9(1)(c)).

Amendment (15)

This Amendment would add a new Clause 10 to the Bill.

New Clause 10 would provide for the payment of reasonable compensation if the Amendment Act or the Principal Act, as amended by the Amendment Act, would result in an acquisition of property within the meaning of paragraph 51(xxxi) of the Constitution.

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