Regulation gone berserk

Paul Mallam agrees that the Broadcasting Amendment Act 1991 will not hinder the Packer bid for Fairfax and will be impossible to administer

The Government's *Broadcasting Amendment Act* 1991 is a regressive step which will belabour the industry with significant inefficiencies. The Act has arisen out of concerns regarding the bid by the Tourang Consortium for the Fairfax Group. Yet ironically, while imposing a significant regulatory burden across the industry, it now appears that the Tourang proposal will escape the Act's notification requirements.

The Act explained

In general terms the notification provisions of the Act apply to any acquisition under which a person either acquires a prescribed shareholding or voting interest in a licence or an interest that would result in a contravention of the foreign or cross-media ownership rules. For the purpose of identifying whether or not the notification provisions apply, the interests of a person and any of her or his associates are to be treated as a single interest. Relatives, de facto spouses and persons who during the past five years have been partners, employees, employers, professional advisers on more than one occasion and related companies are deemed to be associates, amongst other relationships. There is provision for the multiple application of the 'associate' test, whereby if A is an associate of B, and B and C are associates, then A is an associate of C.

Notice of any acquisition covered by the notification procedures must be lodged with the Australian Broadcasting Tribunal at least ten days before the acquisition takes place. The notice must comply with sub-section 90J(7CC) of the *Broadcasting Act*. If the acquisition takes place, then a notice must be lodged with the Tribunal as soon as practicable and in any case within seven days advising it of that fact. The Tribunal's power to acquire information under Section 89X has been amended so that the Tribunal may require information within seven days or shorter time, if necessary.

Section 92P has been amended to allow the Federal Court to make orders to prevent, or prevent a continuation of, any contravention of a provision of Part IIIBA of the Act (concerned with ownership and control). This provision is of wider scope than the previous provisions, under which the Federal Court may make orders only in respect of certain specified contraventions or offences of the Act. Orders similar to those available to the Tribunal under section 92M will also now be available to the Federal Court.

The amendments are largely procedural, in that they introduce notification requirements and enlarge the circumstances in which the Tribunal may make an application to the Federal Court and the orders that might be made by the Court. However, they do not change the substantive law regarding the test to determine whether a contravention of the ownership and control rules had occurred. Nevertheless, the Act provides that the Tribunal is to have regard to the associates of a person in exercising its powers under Part IIIBA of the Act. But as the substantive law in relation to 'associates' has not changed, then the manner in which the Tribunal could have regard to them in exercising its powers seems to be uncertain.

Misdirected legislation

The Government has obviously decided that the Act should have a wide-ranging operation, in order to catch any potential transaction which the Tribunal identifies as requiring further scrutiny and/or action in the Federal Court before the transaction is consummated. The Act focuses on shareholding and voting interests, and not on any form of de facto control. Accordingly, where a person acquires less than a prescribed interest in a licence, and her or his associates do not acquire any shareholding or voting interests, then the acquisition would not require notification. Thus it appears in relation to the Tourang Consortium that if Malcolm Turnbull does not acquire either a shareholding or voting interest in the Fairfax Group (and Mr Packer's interest in that Group does not exceed 15 per cent) the Act's provisions will not be triggered.

On the other hand, the wide-ranging scope of the Act will catch a large number of innocuous transactions — often in circumstances where the person who is a party to the transaction will not even realise that the Act applies. The Government was obviously conscious of the width of its potential operation, as the obligation to notify the Tribunal only arises if a person is aware that the section applies.

The Tribunal has a power to determine that a specified class of associates is to be disregarded for the purposes of the Act. This power will need to be utilised quickly given its wide-ranging operation. For example, the Act would appear to catch any acquisition of shares by an employee in a company holding a prescribed interest in a licence under an employee share scheme.

Bewildering scope

Furthermore, the extended associate provision also results in some unusual consequences. It is not uncommon for a prescribed interest in a licence to be held through a series of companies with interlocking shareholdings. The professional advisers to those companies would need to comply with the notification requirements if they proposed to acquire interests in them. It appears that all partners of those professional advisers would also need to comply with the associate provisions. Those partners would of course be associates of all the companies, listed and unlisted public and private, to which they provide professional advice. By virtue of the extended associate provisions, this would result in a company to which a legal or accountancy firm provided advice being deemed to be an associate of all other companies to which that firm provides advice. In short, multiple applications of the associate provisions render the Act's potential width and scope absolutely bewildering.

Few would doubt that the objective of arming a broadcasting regulator with sufficient powers to uphold the law is worthy. However, that objective has to be balanced with other considerations. The extremely limited number of situations in which the Tribunal might be required to exercise its powers prior to an acquisition taking place does not justify the Act's elaborate regulatory regime which will ultimately be impossible to administer.

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