

# Ownership and Control - The New Approach

Jack Ford examines the new approach to ownership and control in the Broadcasting Services Act

**T**here are four key claims in the Explanatory Memorandum which are relevant to the new approach to ownership and control under the *Broadcasting Services Act 1992* ("BSA"):

1. The rules are intended to be clear, stable and predictable.
2. An important object is the establishment of minimum requirements expected of industry participants.
3. There is a desire to introduce flexibility into the regime to enable responsiveness to changing circumstances.
4. There is also the provision of a wide range of redressive measures to the Australian Broadcasting Authority ("ABA") to deal with breaches.

In my view many of these claims have been achieved in the BSA, although the results will not in every instance please industry participants. This paper reviews the general approach to ownership and control of commercial broadcasting services adopted in the Act.

## Control

**C**entral to the regulation of ownership and control under the BSA is a wide ranging general definition of control itself. The history of the legislature's and the ABT's dealings with control of the broadcasting industry is littered with a series of amendments (sometimes major) to the *Broadcasting Act*, long and complex Inquiries before the ABT and equally complex questions of law being tested in the Federal Court. This history is a direct function of the large amounts of money which have been invested in an industry which is itself regulated. For so long as this continues, it would be quite wrong to assume that legalism, investigations or hearings by the ABA or amendments to legislation like the BSA will not occur with the same frequency as had characterised the past.

In a considerably helpful development the BSA has for the first time included, in legislative form, an essay dealing with control. I briefly analyse some of its concepts.

## Company interests

**T**he first concept the essay deals with is that of company interests, which are defined to be:

- (a) shareholding interests;

- (b) voting interests;
- (c) dividend interests; and
- (d) winding up interests.

The first two interests are already well known under present legislation. The latter two, however, are new, not only to this legislation but also to other comparable legislation. In my view, these latter two interests go too far. There is no suggestion in the *Corporations Law*, one of the specific aims of which is to define control of companies, via definitions like relevant interests, that an entitlement to a dividend or return of capital upon winding up *prima facie* leads to control.

A winding up interest is, for 99% of the life of a company, a contingency only, in many cases a contingency that never becomes a reality. And yet a person with such a contingent interest is *prima facie* deemed under the BSA to control a company and its licence at all times, not simply when and if a contingency is realised.

Likewise, economic interests (or dividend interests) have not traditionally been regarded as conferring control, in the broadcasting or any other industry. Accordingly, what we will have from 1 October in my view is a broadcasting regime which is far stricter in its scope than any other Australian industry.

Unlike the position under the present *Broadcasting Act*, it is important to bear in mind that the control test under the BSA is a *prima facie* one only and can be disproved in any particular situation. Although the BSA provides that the present 15% level is, in the absence of proof to the contrary, to be regarded as a controlling position, it recognises that there will be instances where:

1. a person with interests far in excess of 15% will not be in a position to exercise control; and
2. a person with an interest of less than 15% could be in a position to exercise control.

People will have an opportunity to argue in any particular case that a level of shareholding, voting, economic interest or whatever, will not amount to control, no matter how high it may be. This will be advantageous to the industry in that it will provide the flexibility which is sought and also allow more flexible ownership structures. On the other hand, it will also provide the ABA with a

considerably higher workload, in my view, than the present ABT, when it comes to working out whether a particular ownership structure will or will not amount to control. The tendency will increase due to the wideranging definition given to "associates" when examining questions of control.

## Breaches

**T**he BSA provides for dramatic penalties, up to \$2 million, in the case of some breaches relating to commercial television licences or \$200,000 in the case of commercial radio licences. Continuing offences attract a penalty of 10 per cent of the penalty applicable to the original breach per day with no maximum cap on the total penalty.

By comparison, in the United States the Federal Communications Commission is empowered to impose maximum penalties on an American television network of \$US250,000. These penalties must be seen within the context that each American television network is in itself far larger than the entire Australian television industry and serves a population many times our size.

Additionally, in the event of a breach by a licensee it is open to the ABA, after giving a licensee notice and the opportunity to make submissions to it, to impose additional conditions on a licence.

In extreme circumstances, where a licensee has breached a condition of its licence or failed to comply with a notice given by the ABA to remedy a breach of a condition, the ABA may suspend the licence for up to 3 months or cancel it, again after giving a licensee notice and the opportunity to make submissions. These powers emphasise the importance that the ownership and control provisions will play under the BSA.

*Jack Ford is a partner in the Sydney office of Blake Dawson Waldron.*