

1990

The Parliament of the Commonwealth
of Australia

The Senate

BROADCASTING AMENDMENT BILL (NO.2) 1990
SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments and new clauses to be moved on behalf of the
Government

(Circulated by authority of the Minister for Transport
and Communications, the Hon Kim C Beazley MP)

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**AMENDMENTS OF THE BROADCASTING AMENDMENT
BILL (NO.2) 1990**

OUTLINE

The amendments of the Broadcasting Amendment Bill (No.2) 1990 would -

- . exempt the loan agreements of authorised lenders from being taken into account in determining to what extent the lender, or a person in a position to exercise control of the lender, is in a position to exercise control of a media company (amendments (1), (2), (5) to (7), (9) to (13) and (15));
- . enable the Chairman of the Tribunal, rather than the Minister, to grant leave of absence to a member or associate member (amendment (3));
- . remedy a technical defect in the operation of a transitional provision which relates to the increase in the licence renewal period from 3 to 5 years (amendment (4));
- . limit the operation of the joint control provision in the Bill to arrangements for the purpose of being in a position to exercise actual control of a commercial licence, newspaper or company rather than arrangements for the purpose of being in a position of deemed as well as actual control (amendment (8)); and
- . enable the Tribunal to give directions to protect a licensee at any time, even though no transaction concerning the licensee which is subject to Tribunal approval has occurred (amendment (14)).

FINANCIAL IMPACT

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

NOTES ON AMENDMENTS

Amendments (1) and (2)

Clause 2 of the Bill provides for the commencement of the various measures in the Bill.

The amendment to exempt authorised lenders from being taken to be in a position to exercise control of a media company will commence at the same time as the provisions of the Bill clarifying the definition of control of a company.

Amendments (1) and (2) will enable the consequential new clauses inserted by amendments (5) and (6) and the new directions power inserted by amendment (14) to commence at the same time as the authorised lenders exemption, upon Royal Assent.

Amendment (3)

Section 14 of the Act provides that the Minister may grant leave of absence to a member or associate member upon such terms and conditions as to remuneration or otherwise as the Minister determines.

This amendment inserts new clauses 2A and 2B in the Bill to streamline administrative procedures for leave arrangements for Tribunal members and associate members.

New clause 2A repeals section 14 of the Act and substitutes a new section which continues the arrangements for the Minister to grant leave of absence to the Chairman of the Tribunal, but enables the Chairman to grant another member or associate member leave of absence upon terms and conditions determined by the Chairman.

New clause 2B makes a minor amendment to subparagraph 15A(2)(b)(ii) of the Act consequential upon the amendment in new clause 2A.

Amendment (4)

Clause 5(1)(a) of the Bill increases the maximum licence renewal period from 3 to 5 years. Clause 5(2) of the Bill is a transitional provision which sets out which licences will have the increased renewal period.

It was intended that the increase apply to -

- . licences renewed after commencement; and
- . licences in force on commencement for the maximum 3 years.

However, the increase was not intended to increase the duration of a licence -

- . in force at commencement for a period of less than 3 years; or

- . in force under subsection 87(3) (ie. because although the 3 years is over, the Tribunal has commenced to hold an inquiry into its renewal).

Due to a technical defect in clause 5(2), that provision prevents the increase in the maximum renewal period applying to licences in the above categories when they are subsequently renewed.

The amendment omits clause 5(2) and substitutes a new clause which -

- . recognises that the increase in the maximum licence renewal period in clause 5(1)(a) applies to licences renewed after commencement; and
- . also applies the increase from 3 to 5 years to licences in force on commencement other than those in force because of subsection 87(3).

The amendment makes no express reference to licences in force at commencement for a period less than 3 years as the amendment in clause 5(1)(a) would not operate to increase the period those licences continue in force.

Amendment (5)

Subsection 89E(1) of the Act contains a definition of the term 'control' for the purposes of Part IIIIBA of the Act. The definition provides, in paragraph (c), that when used in relation to a company, control has the meaning given by section 89K. Clause 11(a) of the Bill amends paragraph (c) of the definition to give control the meaning in new section 89JA as well.

This amendment will make paragraph (c) of the definition of control subject to new section 89KB as a consequence of the insertion of new section 89KB by amendment (9).

Amendment (6)

This amendment inserts a new definition of 'loan agreement' in subsection 89E(1) as a consequence of new section 89KB being inserted by amendment (9).

The definition is intended to include the types of financing agreements commonly used in commercial transactions.

Amendment (7)

This amendment makes a minor drafting change to clause 17 of the Bill consequential upon new section 89KB being inserted in that clause by amendment (9).

Amendment (8)

New section 89KA inserted by section 17 deems 2 or more persons to be in a position to exercise control of a commercial licence, newspaper or company where, acting together for that purpose, they secure joint control through an agreement, arrangement, understanding or practice.

Due to the current operation of section 89K of the Act, the joint control provision would deem a person to be in a position to exercise control of a company when the person acts with others to control more than 15% of the general meeting votes or hold more than 15% of the shareholding interests in the company.

This amendment clarifies the impact of the joint control provision by confining its operation to situations where persons act together to be in a position to exercise actual (section 89JA) control, rather than deemed (section 89K) control.

Amendment (9)

This amendment inserts a new section 89KB in clause 17 of the Bill. The new section would exempt the loan agreements of authorised lenders from being taken into account in determining to what extent the authorised lender or a person in a position to control the lender is in a position to exercise control of a media company.

New subsection 89KB(1) provides definitions of the terms 'authorised lender', 'controller' and 'media company' for the purposes of the new section.

New subsection 89KB(2) provides that, subject to new subsections 89KB(3) and (4), for the purposes of Part IIIA, where an authorised lender has a loan agreement with a media company, the agreement and certain other matters are to be disregarded in determining to what extent the lender or any controller of the lender is in a position to exercise control of the company, the acts and operations of the company or the votes in another company of which the company is in a position to exercise control (the matters in new paragraphs 89JA(1)(d), (e) and (f)).

The other matters to be disregarded under new subsection 89KB(2) are -

- . any arrangement, mortgage or other transaction associated with the agreement (for example - ancillary arrangements that may be required in relation to the agreement, such as the granting of a mortgage);
- . any rights or powers of the lender under the agreement or such a transaction; and
- . the exercise of any of those rights or powers (for example - a Bank would not necessarily be taken to be in a position to exercise control of a licensee because it appointed a receiver to a holding company of the licensee, although the person appointed as the receiver would be taken to be in such a position).

'Authorised lender' is defined in new subsection 89KB(1). The definition restricts authorised lenders to banks operating in Australia, State banks and corporations whose sole or principal business is lending and which are -

- . registered under the Financial Corporations Act 1974;
- . declared by the Tribunal to be an authorised lender under new subsection 89KB(5); or
- . awaiting a decision from the Tribunal as to whether or not a declaration will be made in relation to them.

'Media company' is defined in new subsection 89KB(1) to mean a company that holds a commercial licence, a company that publishes a newspaper or a company that is in a position to exercise control of one of those companies.

New subsections 89KB(3) and (4) prevent the exemption in new subsection 89KB(2) applying in certain circumstances.

New subsection 89KB(3) applies in relation to a commercial radio or television licence, preventing the exemption from applying where an authorised lender or controller of the lender -

- . exercises control in such a way as to prevent the licensee complying with a condition of the licence (such as the condition to provide an adequate and comprehensive service); or
- . controls the selection or provision of the programs to be broadcast pursuant to the licence.

New subsection 89KB(4) applies in relation to a company that publishes a newspaper, preventing the exemption from applying where an authorised lender or controller of the

lender controls the selection or provision of the material to be published in the newspaper.

New subsection 89KB(5) enables the Tribunal to declare a corporation to be an authorised lender. It could be expected that the Tribunal would make declarations, for example, in relation to reputable financial institutions, but would not make a declaration or would revoke a declaration where it was concerned about the bona fides of the corporation or suspected that a loan agreement with the corporation was being used by another person as a device to obtain control of a licensee.

Amendment (10)

This clause inserts a transitional provision at the end of clause 17 to give a financial corporation a 3 month period after commencement to become an 'authorised lender' and gain the benefit of the exemption in new subsection 89KB(2).

Amendment (11)

This amendment inserts a new clause 17A in the Bill which will amend new subsection 89KB(2) to prevent the exemption for loan agreements with media companies from applying to the provisions requiring quarterly notification of changes in control (new sections 90LA and 92GA). This amendment is in the form of a separate clause as new sections 90LA and 92GA will commence after new section 89KB, and the amendment to section 89KB should not commence until those sections commence.

Amendment (12)

This amendment leaves out the definition of 'loan agreement' in new subsection 90LA(1) as a consequence of the inclusion of a definition of that term in subsection 89E(1) (see amendment (6)).

Amendment (13)

This amendment leaves out a reference to the definition of 'loan agreement' in new subsection 90LA(1) found in new subsection 92GA(1) as a consequence of the inclusion of a definition of that term in subsection 89E(1) (see amendment (6)).

Amendment (14)

Subsection 92M(1) of the Broadcasting Act gives the Tribunal a power, where a transaction concerning a commercial radio or television licensee which is subject to

Tribunal approval has occurred, to give directions to protect the ability of the licensee to comply with the licence conditions or to protect the operations of the licensee in providing the service or in the selection or provision of the programs to be broadcast.

The current directions power in subsection 92M(1) is restricted to circumstances where a transaction which is subject to Tribunal approval takes place. On 14 September 1990, the Tribunal gave directions to creditor banks of the Ten network. The Tribunal was able to act on the basis that a transaction inquiry was in process. However, it may not always be the case that in circumstances where the Tribunal needs to give protective directions, a transaction has taken place.

Accordingly, new subsection 92M(1AA) will give a power to the Tribunal to give protective directions although no transaction to which section 90J or 92F applies has taken place.

New clause 28A(a) inserts a new subsection 92M(1AA) in the Act to enable the Tribunal, at any time, to give protective directions to a person in a position to exercise control of a commercial licence.

The protective directions must be for the purpose of preventing the person or any servant or agent of the person from doing any act or thing likely to have an adverse effect on -

- . the licensee's ability to comply with the licence conditions; or
- . the operations of the licensee in providing the service pursuant to the licence or the selection or provision of the programs to be broadcast pursuant to the licence.

New clause 28A(b) makes a minor amendment to subsection 92M(2) of the Act consequential upon the amendment in clause 28A(a).

Amendment (15)

This amendment leaves out a reference to the definition of 'loan agreement' in new subsection 90LA(1) found in clause 29 as a consequence of the inclusion of a definition of that term in subsection 89E(1) (see amendment (6)).