

1990

THE PARLIAMENT OF THE COMMONWEALTH  
OF AUSTRALIA

HOUSE OF REPRESENTATIVES

BROADCASTING (FOREIGN OWNERSHIP) AMENDMENT BILL 1990  
EXPLANATORY MEMORANDUM

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

## BROADCASTING (FOREIGN OWNERSHIP) AMENDMENT BILL, 1990

### OUTLINE

This Bill amends the Broadcasting Act 1942 (the Act) to -

- . make the 20 per cent aggregate limit for the amount of foreign shareholding interests that may be held in a commercial licensee more effective by providing for the tracing of foreign interests held through intermediate companies (clauses 7, 8, 10 and 11); and
- . provide that at least 80 per cent of the directors of a commercial licensee must be Australian citizens (clauses 3, 4, 5, 6 and 9).

The Bill allows a transition period until 22 May 1993 for licensees to comply with the more effective aggregate foreign shareholding limit. The Bill also enables the Australian Broadcasting Tribunal to extend the transition period in relation to a particular licence in certain circumstances (clause 12). The Tribunal must not grant an extension unless it is satisfied that the licensee made reasonable efforts to ensure that the more effective limit would be complied with at the end of the period being extended.

### FINANCIAL IMPACT

This Bill is expected to have no significant impact on Commonwealth expenditure or revenue. Some additional responsibilities will be placed on the Tribunal in investigating possible breaches of licence conditions. However, it is not expected that the Tribunal would monitor compliance on an on-going basis, but would investigate situations which give reasonable grounds for belief that a breach has occurred.

Some \$80,000 has been allocated to the Tribunal in the 1990/91 financial year to cover additional costs which cannot be offset. Sums of \$50,000 have also been earmarked for the following 2 financial years for the same purpose.

### ABBREVIATIONS

The following abbreviations are used in this Explanatory memorandum -

- |                   |  |
|-------------------|--|
| the Act:          | the <u>Broadcasting Act 1942</u>                               |
| the Amending Act: | the <u>Broadcasting (Foreign Ownership) Amendment Act 1990</u> |
| the Tribunal:     | the Australian Broadcasting Tribunal                           |

## NOTES ON CLAUSES

### Clause 1 - Short title etc.

This clause provides for the citation of the Broadcasting (Foreign Ownership) Amendment Act 1990 and provides that, in the Amending Act, 'Principal Act' means the Broadcasting Act 1942.

### Clause 2 - Commencement

This clause provides for the commencement of provisions of the Amending Act.

Clause 2(1) provides that subject to clause 2(2), the Amending Act commences upon Royal Assent.

Clause 2(2) provides that sections 3 to 6 and 9 commence on 22 May 1991. This date gives licensees 12 months from the date of the Government's announcement of the new rule that at least 80 per cent of the directors of a commercial licensee must be Australian citizens to comply with the rule.

### Clause 3 - Criteria for grant of commercial licence

Section 83A of the Act sets out the criteria under which the Tribunal is required to refuse to grant a commercial licence.

One of the criteria (set out in paragraph 83A(7)(c)) under which the Tribunal is required to refuse to grant the licence is where, if the Tribunal granted the licence, a condition specified in section 90G or 92D would be contravened (ie the conditions governing the foreign ownership and control of the licence). This clause amends paragraph 83A(7)(c), as a consequence of the amendments in clauses 6 and 9, to require the Tribunal to also refuse to grant a commercial licence to a person if the new condition that at least 80 per cent of the directors of the licensee must be Australian citizens would be contravened.

By clause 2(2), this clause commences on 22 May 1991.

### Clause 4 - Renewal of commercial licence

Section 86AA of the Act sets out the criteria under which the Tribunal is required to refuse to renew, or may refuse to renew, a commercial licence.

One of the criteria (set out in paragraph 86AA(5)(c)) under which the Tribunal is required to refuse to renew a licence is where, if the Tribunal renewed the licence, a condition

specified in section 90G or 92D would be contravened (ie. the conditions governing the foreign ownership and control of the licence).

This clause amends paragraph 86AA(5)(c) as a consequence of the amendments in clauses 6 and 9, to require the Tribunal to also refuse to grant a commercial licence to a person if the new condition that at least 80 per cent of the directors of the licensee must be Australian citizens would be contravened.

By clause 2(2), this clause commences on 22 May 1991.

#### Clause 5 - Transfer of commercial licences

Section 89A of the Act, inter alia, sets out the criteria under which the Tribunal is required to refuse to give consent to the transfer of a commercial licence.

One of the criteria (set out in subparagraph 89A(8)(d)(iii)) under which the Tribunal is required to refuse to give consent to the transfer of a licence is where, if the Tribunal gave consent, a condition specified in section 90G or 92D would be contravened (ie the conditions governing the foreign ownership and control of the licence).

This clause amends subparagraph 89A(8)(d)(iii) as a consequence of the amendments in clauses 6 and 9, to require the Tribunal to also refuse to give consent to the transfer of a licence if the new condition that at least 80 per cent of the directors of the licensee must be Australian citizens would be contravened.

By clause 2(2), this clause commences on 22 May 1991.

#### Clause 6 - Insertion of new section

Division 2 of Part IIIA of the Act contains provisions creating limitations on the ownership and control of commercial radio licences.

This clause inserts a new section 90FA in Division 2 of Part IIIA which makes a commercial radio licence subject to a new foreign directorship limitation.

New subsection 90FA(1) makes it a condition of a commercial radio licence that at all times while the licence is in force, at least 80 per cent of the directors of the licensee must be Australian citizens.

There may be circumstances where the new foreign directorship limit could be inadvertently breached - for example, where an Australian director died in an accident or after suffering a heart attack. Accordingly, new

section 90FA provides a period of grace during which action can be taken to remedy the breach.

New subsection 90FA(2) provides that the foreign directorship condition is not contravened where there is a breach which does not continue longer than 28 days after the day the licensee became aware of or should have become aware of, the breach, whichever is earlier.

The reasons for enabling the period of grace to run from the day on which the licensee should have become aware of the breach are explained in the notes on new subsection 90G(7) below.

New subsection 90FA(3) enables the Tribunal to extend the 28 day period in a particular case.

New subsection 90FA(4) requires any application for an extension to be made within the 28 day period and the grant of the extension to be by written notice.

New subsection 90FA(5) prevents the Tribunal granting an extension unless satisfied that it is in the public interest to do so having regard to certain criteria.

By clause 2(2), this clause commences on 22 May 1991.

#### **Clause 7 - Foreign shareholdings etc.**

Subsection 90G(2) makes a commercial radio licence subject to a condition imposing a 20 per cent limitation on the amount of general meeting votes in the licensee company that foreign persons may control and the amount of shareholding interests in the company that foreign persons may hold (measured as both a percentage of voting shares and a percentage of all shares).

Subsection 90G(3) provides a definition of a foreign person for the purposes of section 90G. Paragraph 90G(3)(b) provides that a company controlled by a person or persons who are not Australian citizens is a foreign person.

Subsection 90G(4) provides that a company shall be deemed to be controlled by a person or persons for the purposes of paragraph 90G(3)(b) if the persons are in a position to exercise control of 50 per cent of the company's general meeting votes or hold more than 50 per cent of the shareholding interests in the company (measured as a percentage of voting shares or a percentage of all shares, respectively).

Subsection 90G(5) provides a tracing mechanism to trace foreign control through a series of companies. The provision operates by attributing the votes in company A

controlled by company B, or shareholding interests in company A held by company B, to C where C is deemed to control company B under subsection 90G(4).

Clause 7(a) amends subsection 90G(5) to prevent the tracing mechanisms being applied to the measuring of shareholding interests for the purposes of paragraphs 90G(2)(b) and (c) as a consequence of the amendment made by clause 8 which includes a new tracing mechanism for the purposes of these paragraphs.

Clause 7(b) adds new subsections at the end of section 90G to provide a period of grace during which action can be taken to remedy a breach of the foreign ownership and control limitations in section 90G.

The new subsections are being added to meet the concern that licensees may inadvertently breach the conditions imposed by section 90G due to circumstances beyond the control of the licensee, particularly as a result of the more effective limits created by the tracing mechanism inserted by clause 8.

For example, shares may be purchased by a foreign person in a company having indirect shareholding interests in a licensee through a chain of intermediate companies, resulting in a breach of the condition in paragraph 90G(2)(b) or (c).

An example of a problem which could arise under the current Act is where a foreign person was in a position to exercise control of 14.9 per cent of the shareholding interests in a licensee through a chain of intermediate Australian companies and one of the intermediate companies increases its interests in another of the companies resulting in the foreign person's indirect shareholding in the licensee exceeding 15 per cent and therefore a breach of subsection 90G(1).

The new subsections added to section 90G by clause 7(b) provide a period of grace during which action can be taken to remedy a breach of the conditions imposed by section 90G.

New subsection 90G(7) provides that the foreign ownership conditions under section 90G are not contravened during a period of 28 days after the day the licensee became aware of, or should have become aware of, the situation in which the condition is not complied with, whichever is the earlier.

The alternative commencement of the period of grace in new paragraph 90G(7)(b) - 'the day on which the licensee should have become aware of the situation' - is included because of the difficulty any person, other than the licensee, would have in establishing when the licensee became aware of the situation of breach - this is a matter peculiarly

within the knowledge of the directors and senior executives of the licensee itself.

Paragraph 90G(7)(b) would enable the Tribunal, in a particular case, to consider the reasonableness of a claim that a licensee only became aware of a situation on a particular date. This provision, together with the 28 day time limit for an application for an extension (see new subsection 90G(9)), will encourage licensees to make an early approach to the Tribunal to inform it of a breach.

New subsection 90G(8) enables the Tribunal to extend the 28 day period in a particular case.

New subsection 90G(9) requires any application for an extension to be made within the 28 day period or that period as extended earlier and the grant of the extension to be by written notice.

New subsection 90G(10) prevents the Tribunal granting an extension unless satisfied that it is in the public interest to do so having regard to certain criteria.

New subsection 90G(11) prevents the Tribunal granting an extension unless satisfied that a licensee made reasonable efforts to ensure that the condition would be complied with at the end of the period being extended.

#### Clause 8 - Insertion of new sections

Subsection 90G(2) of the Act makes a commercial radio licence subject to conditions that 2 or more foreign persons shall not at any time during the currency of the licence -

- . hold more than 20% of the voting shares of the licensee company (paragraph 90G(2)(b)); and
- . hold more than 20% of all shares in the licensee company (paragraph 90G(2)(c)).

The current operation of the rule in subsection 90G(2) is illustrated in Diagrams 1 and 2 below.

In Diagram 1, 4 foreign persons each hold 10 per cent of the shares of a licensee and there would be a breach of the 20 per cent foreign ownership limit. Australian interests are not shown.

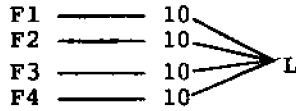


Diagram 1  
Breach of s.90G(2)

In Diagram 2, 4 foreign persons each hold 10 per cent of the shares of a holding company which holds 100 per cent of the licensee and there is no breach of the foreign ownership limits in the Act.

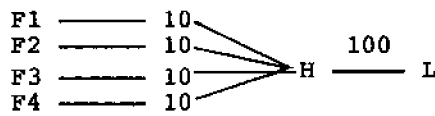


Diagram 2  
No breach of s.90G(2)

This clause inserts new sections 90GA and 90GB in the Act to provide a mechanism for tracing foreign interests through a series of companies for the purposes of paragraphs 90G(2)(b) and (c) respectively.

The tracing mechanisms in new sections 90GA and 90GB are virtually identical, except that new section 90GA traces foreign interests in voting shares through a series of companies for the purposes of paragraph 90G(2)(b) and new section 90GB traces foreign interests in all shares through a series of companies for the purposes of paragraph 90G(2)(c).

The tracing provisions are drafted so that they only apply to the first identified foreign interest ie. only to a foreign person with an interest in an Australian company, not to, for example, a foreign person with interests in a foreign company with interests in an Australian company. This avoids "double counting" of a number of foreign interests in the same parcel of shares and, by limiting the number of interests which could only be ascertained by searching foreign share registers, reduces the workload placed on the licensee.

The tracing provisions also include arrangements to prevent the tracing of minor shareholding interests held by foreign persons to relieve the potential administrative burden on licensees and the Tribunal of following lengthy chains of company ownership. However, a Tribunal discretion to require further tracing has also been included to prevent the 'minor interests' arrangements being used as a mechanism to avoid the operation of the new aggregate foreign shareholding limit.



A detailed illustration of the operation of new section 90GB is set out below. Diagrams have been used to help explain the provisions of the section. The examples used merely indicate how the provisions would operate in simple cases. The tracing rules would also operate in an enormous range of more complex company structures.

New section 90GA operates in a similar fashion to new section 90GB, but only in relation to shareholding interests in respect of voting shares in the companies through which interests are traced (see the definitions of 'shareholding interests' and 'voting share' in new subsection 90GA(1)).

New subsection 90GB(1) provides definitions of the terms 'Australian company', 'foreign person', 'licensee' and 'minor interests' for the purposes of the new section.

New subsection 90GB(2) provides a mechanism for ascertaining the amount of shareholding interests a foreign person holds in an Australian company when they are held through an intermediate Australian company. The amount of the foreign person's interests is calculated in accordance with the formula contained in the subsection.

The operation of the formula can be easily explained through Diagram 3.

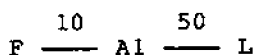


Diagram 3

Operation of new s.90GB(2)

(Not all interests shown, each company has 100 fully paid shares)

In Diagram 3, a foreign person holds 10% of the shareholding interests in Australian company A1 which holds 50% of the shareholding interests in the Australian licensee company L. Under the formula in new subsection 90GB(2), the foreign person is taken to have shareholding interests in licensee company L of an amount calculated as follows -

The amount of A1's interests in L  $\times$   $\frac{\text{the amount of F's interests in A1}}{\text{the total interests in A1}}$

$$50 \times \frac{10}{100} = 5$$

Accordingly, the foreign person is taken to have 5 shares in the licensee out of a total of 100 and has 5 per cent of the shareholding interests in the licensee.

New subsection 90GB(5) provides a mechanism for ascertaining the amount of shareholding interests an Australian company has in a third Australian company when they are held through an intermediate second Australian company. The amount of the first company's interests is calculated in accordance with the formula contained in the subsection.

The operation of the formula in new subsection 90GB(5) can be easily explained through Diagram 4.

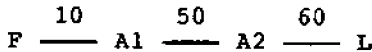


Diagram 4

Operation of new s.90GB(5)  
(not all interests shown, each company has  
100 fully paid shares)

In Diagram 4, a foreign person holds 10% of the shareholding interests in Australian company A1, which holds 50% of the shareholding interests in the Australian company A2 which holds 60% of the shareholding interests in the Australian licensee company L. Under the formula in new subsection 90GB(5), Australian company A1 is taken to have shareholding interests in licensee company L of an amount calculated as follows -

The amount of A2's interests in L  $\times$   $\frac{\text{the amount of A1's interests in A2}}{\text{the total interests in A2}}$

$$60 \times \frac{50}{100} = 30$$

Accordingly, A1 is taken to have 30 shares in the licensee out of a total of 100 and has 30 per cent of the shareholding interests in the licensee.

New subsection 90GB(3) provides that for the purposes of new subsection 90GB(2), a foreign person's shareholding interests in an Australian company include interests taken to exist because of any application or applications of new section 90GB.

Taking Diagram 4 as an example, under new subsection 90GB(5), A1 is taken to have 30 shares in the licensee. Applying the rule in new subsection 90GB(2) in accordance with new subsection 90GB(3), the foreign person is taken to have shareholding interests in licensee company L of an amount calculated as follows -

The amount of A1's x the amount of F's interests in A1  
interests in L the total interests in A1

$$30 \times \frac{10}{100} = 3$$

Accordingly, the foreign person is taken to have 3 shares in the licensee out of a total of 100 or 3 per cent of the shareholding interests in the licensee.

The rule in new subsection 90GB(3) also enables a foreign person's shareholdings in an Australian company held through different Australian intermediate companies to be taken into account.

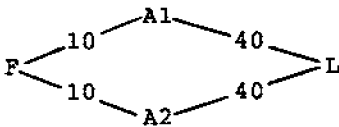


Diagram 5

(not all interests shown, each company has 100 fully paid shares)

In Diagram 5, a foreign person holds 10% of the shareholding interests in 2 Australian companies, A1 and A2, which in turn each hold 40% of the shareholding interests in the licensee company L. The rule in new subsection 90GB(2) is applied twice so that the foreign person is taken to have shareholding interests in the licensee company L of an amount calculated as follows-

The amount of A1's x the amount of F's interests in A1  
interests in L the total interests in A1

plus

The amount of A2's x the amount of F's interests in A2  
interests in L the total interests in A2

$$\left( 40 \times \frac{10}{100} \right) + \left( 40 \times \frac{10}{100} \right) = 8$$

Accordingly, the foreign person is taken to have 8 shares in the licensee out of a total of 100 or 8 per cent of the shareholding interests in the licensee.

New subsection 90GB(4) provides that for the purposes of new subsection 90GB(2), an Australian company's shareholding interests in another Australian company include interests that exist because of any application or applications of new subsection 90GB(5).

New subsection 90GB(6) enables minor interests in a

licensee to be disregarded in measuring a foreign person's shareholdings for the purposes of paragraph 90G(2)(c) of the Act.

Under the definition in new subsection 90GB(1), minor interests means a foreign person's shareholding interests in a licensee held through an Australian company whose shareholding interests in the licensee are not more than 2 percent.

New subsection 90GB(6) also includes a discretion for the Tribunal to require further tracing of interests where it suspects that, if minor interests or a class of minor interests held in the licensee were taken into account, the total foreign shareholding interests would exceed 20%. Those interests traced would also be taken into account for the purposes of paragraph 90G(2)(c).

New subsection 90GB(7) gives an example of a type of class of minor interests that the Tribunal may decide to trace further under new subsection 90G(6). The example is of all, or a class of, minor interests in the licensee that foreign persons have because of shareholding interests in Australian companies which have shareholding interests in the licensee not greater than a particular percentage. There is no limit on the size of the percentage - it would be less than 2 percent and could be a fraction of 1 percent.

#### Clause 9 - Insertion of new section

Division 3 of Part IIIA of the Act contains provisions creating limitations on the ownership and control of commercial television licences.

This clause inserts a new section 92CA in Division 3 of Part IIIA which makes a commercial television licence subject to a condition that, at all times while the licence is in force, at least 80 per cent of the directors of the licensee must be Australian citizens.

New section 92CA is identical to new section 90FA inserted by clause 6. For more details, see the notes on that clause.

By clause 2(2), this clause commences on 22 May 1991.

#### Clause 10 - Foreign shareholdings etc.

Section 92D of the Act imposes conditions on the foreign ownership and control of commercial television licences. The provisions are similar to those in section 90G which govern the foreign ownership and control of commercial radio licences. They are explained in detail in the notes on clause 7.

Clause 10(a) amends subsection 92D(5) of the Act as a consequence of the amendment made by clause 11.

Clause 10(b) adds new subsections at the end of section 92D to provide a period of grace during which action can be taken to remedy a breach of the foreign ownership and control limitations on commercial television licences in section 92D.

The amendments made by clauses 10(a) and (b) are identical to the amendments made by clauses 7(a) and (b) and are made to provisions applying to commercial television licences that are similar to the provisions applying to commercial radio licences amended by clauses 7(a) and (b). For more detail concerning the amendments, see the notes on those clauses.

#### Clause 11 - Insertion of new sections

Subsection 92D(2) of the Act makes a commercial television licence subject to conditions that 2 or more foreign persons shall not at any time during the currency of the licence -

- . hold more than 20% of the voting shares of the licensee company (paragraph 92D(2)(b)); and
- . hold more than 20% of all shares in the licensee company (paragraph 92D(2)(c)).

This clause inserts new sections 92DA and 92DB in the Act to provide a mechanism for tracing foreign interests through a series of companies for the purposes of paragraphs 92D(2)(b) and (c) respectively.

The new sections 92DA and 92DB are virtually identical with new sections 90GA and 90GB inserted by clause 8. For more detail concerning the new sections, see the notes on clause 8.

#### Clause 12 - Transitional - disregard of interests

This clause is a transitional provision which gives licensees a period of time in which to comply with the changes to the foreign ownership rules made by clauses 7, 8, 10 and 11.

Clause 12(1) provides that where a licensee was complying with a condition imposing the aggregate foreign ownership limit on 22 May 1990, but would not have complied if the amendments made by clauses 7, 8, 10 and 11 had been in force on that day, because of shareholding interests that would have been taken to be interests in the licensee, then the interests are to be disregarded until 22 May 1993 for the purposes of the condition.

Clause 12(2) enables the Tribunal to extend the period ending on 22 May 1993 for a particular licence.

Clause 12(3) prevents the Tribunal granting an extension unless an application is made within the original period or during a period of extension and requires an extension to be granted by written notice.

Clause 12(4) prevents the Tribunal granting an extension unless it is satisfied that it is in the public interest to do so having regard to certain matters.

Clause 12(5) prevents the Tribunal granting an extension or further extension unless satisfied that the licensee made reasonable efforts to ensure that the new aggregate foreign ownership condition would be complied with at the end of the period ending on 22 May 1993 or that period as earlier extended.





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