Amendments and New Clauses to be Moved on Behalf of the Government
(Sheet Number QS387)

(Circulated by authority of Senator the Hon. Helen Coonan,
Minister for Communications, Information Technology and the Arts)
GOVERNMENT AMENDMENTS TO THE BROADCASTING SERVICES AMENDMENT (MEDIA OWNERSHIP) BILL 2006

OUTLINE

The Broadcasting Services Amendment (Media Ownership) Bill 2006 (the Bill) amends the Broadcasting Services Act 1992 (the BSA) to reform the foreign and cross-media ownership regime in Australia.

The current foreign ownership and control restrictions relating to free to air (FTA) commercial television broadcasting, and cross-media ownership restrictions in the BSA limit competition in the media sector and restrict access to capital, expertise and opportunities for growth. The proposed changes will encourage greater competition and allow media companies to achieve economies of scale and scope, while protecting the diversity of Australia’s media.

Cross-media ownership

The Bill will permit cross-media mergers in radio licence areas where sufficient diversity of media groups remains following the merger. At least five separate media groups will be required to remain after any merger activity in mainland State capitals, and four groups in licence areas elsewhere, including regional areas. Any media merger, including one that is not a cross-media merger, will not be permitted if it would reduce the number of media groups in a licence area below the minimum level.

Unacceptable 3-way control

The amendments and new clauses proposed to be moved by the Government have the effect of prohibiting control of more than 2 out of the 3 regulated media platforms in a licence area. If a person did obtain control over more than 2 of the platforms, this would be an offence and a breach of a civil penalty provision. These amendments reinforce the Government’s commitment to protect the diversity of Australia’s media.

FINANCIAL IMPACT

The amendments are not expected to have any significant impact on Commonwealth expenditure or revenue.
NOTES ON AMENDMENTS

Amendment (1)

Amendment (1) inserts a new definition of “unacceptable 3-way control situation” in proposed section 61AA of new Division 5A to be inserted by the Bill. This amendment provides that “unacceptable 3-way control situation” has the meaning given by new section 61AEA.

Amendment (2)

Amendment (2) inserts new section 61AEA of the BSA, which establishes a new concept of an “unacceptable 3-way control situation.” An unacceptable 3-way control situation exists in relation to a licence area of a commercial radio licence (first radio licence area) where a person is in a position to exercise control of:

(a) a commercial television broadcasting licence (where more than 50% of the licence area population of the first radio licence area is attributable to the licence area of the commercial television broadcasting licence); and
(b) a commercial radio broadcasting licence (where the commercial radio broadcasting licence area is, or is the same as, the first radio licence area; and
(c) a newspaper that is associated with the first radio licence area.

The proposed definition of “unacceptable 3-way control situation” uses the relevant commercial radio broadcasting licence area because such licence areas will more closely reflect the influence of relevant radio services or newspapers in a community than a television licence area (which may be very large and highly geographically diverse).

An “unacceptable 3-way control situation” will exist where a person, who is in a commercial radio licence area (first radio licence area), is in a position to exercise control of a commercial radio broadcasting licence in the first radio licence area, a newspaper that is associated with the first radio licence area and a commercial television broadcasting licence, the licence area of which has more than half of the population of the first radio licence area.

The effect of this amendment is that a person cannot own more than two regulated media platforms.

Amendment (3)

Amendment (3) inserts new Subdivision BA into New Division 5A of Part 5 of the BSA. New Subdivision BA prohibits transactions that result in an unacceptable 3-way control situation coming into existence.
**Prohibition on transactions resulting in an unacceptable media diversity situation**

New section 61AMA provides that a person commits an offence if the person is party to one or more transactions, or was in a position to control the transactions, that occur after the commencement day, and the transactions cause an unacceptable 3-way control situation to come into existence in the licence area of a commercial radio broadcasting licence.

The maximum penalty for an offence under new section 61AMA is 20,000 penalty units for a natural person, or 100,000 penalty units for a body corporate (section 4B of the *Crimes Act 1914*).

A person can only commit an offence in relation to a transaction that takes place after the “commencement day”. The commencement day is the day on which Schedule 2 to the *Broadcasting Services Amendment (Media Ownership) Act 2006* (the Act) commences (new section 61AA of the BSA). Schedule 2 will commence either on Proclamation, or on 1 January 2008 if the Act is not proclaimed earlier (clause 2 of the Bill).

Further, a person will not have committed an offence if the Australian Communications and Media Authority (the ACMA) gave prior approval for the transactions under new section 61AMC.

New section 61AMB provides that the same conduct also constitutes a contravention of a civil penalty provision. Under the proposed Communications Legislation Amendment (Enforcement Powers) Bill 2006 (CLAB), the ACMA may apply to the Federal Court for a civil penalty order for a contravention of a civil penalty provision (new subsection 205F(1), Item 48 of CLAB).

The maximum pecuniary penalty that may be payable for a civil penalty contravention is the same as the maximum penalty for the equivalent criminal offence (new subsection 205F(4), Item 48 of CLAB).

**Prior approval of transactions**

New subsection 61AMC(1) provides that a person may, before the transaction takes place, make an application to the ACMA for prior approval of a transaction that would result in an unacceptable 3-way control situation. This new provision is similar to existing section 67 of the BSA, which enables the ACMA to grant prior approval for transactions that would breach the current cross-media rules or the statutory control rules. This new provision will operate alongside section 67 as consequentially amended (Items 13 and 14 of Schedule 2 of the Bill).

The application is to be made in accordance with a form approved in writing by the ACMA (new subsection 61AMC(2)).

If the ACMA is satisfied that:

- the transaction would place the person in breach of new section 61AMA or 61AMB; and
• either the applicant or a third party will take action within 12 months to ensure that the unacceptable 3-way control situation does not eventuate;

the ACMA may approve the transaction (new subsection 61AMC(4)).

The ACMA may seek further information from the applicant before making a decision (new subsection 61AMC(3)). In deciding whether to approve the transaction, the ACMA must consider all relevant matters, including any relevant undertakings given by a third party under new section 61AS (new subsection 61AMC(7)).

If the ACMA approves a transaction on the basis that the applicant itself will take certain action, the ACMA must specify a time period during which the action to prevent or alleviate the unacceptable 3-way control situation must be taken. The period specified must be at least one month, and it can be no longer than 12 months (new subsection 61AMC(5)).

The ACMA may specify in the notice the action that the applicant is to take (new subsection 61AMC(6)). For example, the ACMA may approve the transaction subject to the person divesting their interests in a specific media operation.

If the ACMA approves a transaction on the basis that a third party will take certain action, the ACMA must notify the applicant accordingly.

If the ACMA refuses to approve a transaction, the ACMA must give written notice of the refusal to the applicant (new subsection 61AMC(8)).

New subsection 61AMC(9) provides that the ACMA must deal with application for prior approval in order of receipt. The ACMA must use its best endeavours to deal with an application it receives for prior approval within 45 days of receipt (new subsection 61AMC(10)).

**Extension of time for compliance with prior approval notice**

If the ACMA approves the transaction, the applicant may seek an extension of time for compliance (new subsection 61AMD(1)). The ACMA may seek further information from the applicant before making a decision in relation to a request for an extension (new subsection 61AMD(3)).

The ACMA has the discretion to grant an extension in appropriate circumstances (new subsection 61AMD(2)). For example, the ACMA may consider it very likely that the applicant will divest an interest in a media operation within three months, thereby resolving the unacceptable 3-way control situation. In such a case, the ACMA might consider it appropriate to grant an extension for three months.

In deciding whether to grant an extension, the ACMA must have regard to:

• the endeavours the applicant has made to comply with the notice; and

• any difficulties the applicant has experienced in attempting to comply with the notice (new subsection 61AMD(5)).
However, the ACMA must not have regard to any financial disadvantage that may be suffered by the applicant. For example, the fact that the price of shares has recently dropped is not a relevant consideration.

Any extension granted by the ACMA can be for no longer than either the original period specified in the notice, or six months, whichever is the shorter period (new subsection 61AMD(4)).

If the ACMA does not make a decision within 45 days of receiving the applicant, or of receiving additional information if this was requested, the ACMA is deemed to have decided to extend the period for compliance by the period specified in the notice, or six months, whichever is the shorter period (new subsection 61AMD(6)).

If the ACMA refuses to approve an application, the ACMA must give written notice of the refusal to the applicant (new subsection 61AMD(7)).

Breach of prior approval notice - offence

If a person breaches a notice issued under new section 61AMC, the person is guilty of an offence (new subsection 61AME(1)). A person commits a separate offence for each day during which a contravention of the notice continues (new subsection 61AME(2)).

The maximum penalty for an offence under new subsection 61AME(1) is 20,000 penalty units for a natural person, or 100,000 penalty units for a body corporate (section 4B of the Crimes Act 1914).

Breach of prior approval notice – civil penalty

New section 61AMF provides that the same conduct also constitutes a contravention of a civil penalty provision (new subsections 61AMF(1) and (2)). Under the proposed CLAB Bill, the ACMA may apply to the Federal Court for a civil penalty order for a contravention of a civil penalty provision (new subsection 205F(1), Item 48 of CLAB). A person commits a separate civil penalty contravention for each day during which a contravention of the notice continues (new subsection 61AMF(3)).

The maximum pecuniary penalty that may be payable for a civil penalty contravention is the same as the maximum penalty for the equivalent criminal offence (new subsection 205F(4), Item 48 of CLAB).

Amendment (4)

This amendment is a technical amendment consequential to Amendment (5).

Amendment (5)

Amendment (5) inserts new section 61ANA of the BSA, which allows the ACMA to issue remedial directions where it is satisfied that an unacceptable 3-way control situation exists.

Remedial directions
If, on or after the commencement day, the ACMA is satisfied that an unacceptable 3-way control situation exists, the ACMA may give a person a remedial direction for the purpose of ensuring that the situation ceases to exist (new subsection 61ANA(1)). Such a notice must specify a particular timeframe within which the action must be taken (new subsection 61ANA(4)).

The types of directions that the ACMA might give include:

- a direction requiring a person to dispose of shares or interests in shares; and
- a direction restraining a person from exercising any rights attached to shares (new subsections 61ANA(2) and (3)).

The ACMA may only give a remedial direction to a person after the “commencement day”. The commencement day is the day on which Schedule 2 to the Act commences (new section 61AA of the BSA). Schedule 2 will commence either on Proclamation, or on 1 January 2008 if the Act is not proclaimed earlier (clause 2 of the Bill).

If the ACMA issues a remedial direction, the notice must specify a period during which the required action must be taken (new subsection 61ANA(4)). The period specified must be no longer than 12 months (new subsection 61ANA(5)). However, if the person acted in good faith, took reasonable precautions and exercised due diligence to avoid an unacceptable 3-way control situation developing, the person will be entitled to a 12 month period (new subsection 61ANA(6)).

In contrast, if the ACMA considers that a person acted flagrantly in breach of section 61AMA or 61AMB, the ACMA must specify a period of only one month (new subsection 61ANA(7)). This requirement is notwithstanding the fact that a requirement to take action within one month may be financially disadvantageous for the person concerned (e.g. if the share market is at a low point) (new subsection 61ANA(8)).

Amendment (6)

This amendment is consequential to Amendment (5). A person who is subject to a remedial direction under new section 61ANA may also apply to the ACMA for an extension of time for compliance, but not if the person was subject to a one month period for compliance (proposed subsections 61AP(1) and (2)).

Amendment (7)

This amendment is a technical amendment consequential to Amendment (8).

Amendment (8)

Amendment (8) inserts new subsection 61AP(3A) of the BSA, which allows the ACMA the discretion to grant an extension in the case of a remedial direction issued under new section 61ANA.

New subsection 61AP(3A) provides that the ACMA has discretion to grant an extension if:
• the ACMA considers it likely that an unacceptable 3-way control situation will cease to exist in the licence area within 3 months of the end of the period specified in the remedial direction; and

• the person acted in good faith; and

• the extension is appropriate in all the circumstances.

The ACMA may seek further information from the applicant before making a decision (proposed subsection 61AP(4)).

The ACMA cannot grant an extension for a period of more than 3 months, and only one extension may be granted (proposed subsection 61AP(5)).

**Amendment (9) - (11)**

These amendments are consequential to Amendment (5).

**Amendment (9) - Section 61AP**

In respect of remedial directions issued under new section 61ANA, in deciding whether to grant an extension, the ACMA must have regard to:

• the endeavours the applicant has made to comply with the notice;

• any difficulties the applicant has experienced in attempting to comply with the notice; and

• the seriousness of the situation giving rise to the notice (amendment to proposed subsection 61AP(6)).

However, the ACMA must not have regard to any financial disadvantage that may be suffered by the applicant. For example, the fact that the price of shares has recently dropped is not a relevant consideration. If the ACMA does not make a decision within 45 days of receiving the application, or of receiving additional information if this was requested, the ACMA is deemed to have decided to extend the period for three months (new subsection 61AP(7)).

**Amendment (10) - Section 61AQ**

If a person breaches a remedial direction issued under new section 61ANA, the person is guilty of an offence (new subsection 61AQ(1)). A person commits a separate offence for each day during which a contravention of the notice continues (new subsection 61AQ(2)).

The maximum penalty for an offence under new subsection 61AQ(1) is 20,000 penalty units for a natural person, or 100,000 penalty units for a body corporate (section 4B of the *Crimes Act 1914*).

**Amendment (11) - Section 61AR**
Proposed section 61AR provides that the same conduct also constitutes a contravention of a civil penalty provision. Under the proposed Communications Legislation Amendment (Enforcement Powers) Bill 2006 (CLAB), the ACMA may apply to the Federal Court for a civil penalty order for a contravention of a civil penalty provision (new subsection 205F(1), Item 48 of CLAB). A person commits a separate civil penalty contravention for each day during which a contravention of the notice continues (new subsection 61AR(2)).

The maximum pecuniary penalty that may be payable for a civil penalty contravention is the same as the maximum penalty for the equivalent criminal offence (new subsection 205F(4), Item 48 of CLAB).

**Amendment (12) and (13)**

These amendments are technical amendments consequential to Amendment (14).

**Amendment (14)**

Amendment (14) extends the ACMA’s ability to accept undertakings under the power in proposed section 61AS. This amendment allows the ACMA to accept an undertaking offered by a person to the effect that a person will take specified action to ensure that an unacceptable 3-way control situation does not exist in the commercial radio broadcasting licence area (new paragraph 61AS(1)(c)).

**Amendment (15)**

This amendment is consequential to Amendment (16), which removes the requirement in the BSA for the Australian Competition and Consumer Commission (ACCC) to clear transactions involving television, radio and newspaper in regional licence areas. This amendment inserts a pre-condition that the ACMA must be satisfied that an unacceptable 3-way control situation does not exist before entering the media group in the Register. This new pre-condition replaces the ACCC prior approval pre-condition for registration, which is no longer relevant.

**Amendment (16)**

Amendment (16) proposes that new Subdivision F of Division 5A of Part 5 of the BSA be opposed. Subdivision F, which deals with ACCC clearance for transactions involving television, radio and newspaper in regional licence areas, is no longer required due to the introduction of the new rules relating to unacceptable 3-way control situations. This amendment removes the additional requirement for ACCC clearance in the BSA but the requirement under section 50 of the *Trade Practices Act 1974* (TPA) still applies.

**Amendment (17) and (18)**

These amendments are consequential to Amendment (3).

**Amendment (19)**
Amendment (19) amends new section 205Q (Item 48 of the proposed Communications Legislation Amendment (Enforcement Powers) Bill 2006 (CLAB)).

This amendment extends the ACMA’s ability to apply to the Federal Court for an injunction to restrain a person from engaging in any conduct which would result in a contravention of proposed new section 61AMB of the BSA (Amendment (3) - the proposed new civil prohibition on unacceptable 3-way control situations coming into existence in a commercial radio broadcasting licence area).

If, in the Federal Court’s opinion, it is desirable to do so, the Court will also be able to require the person to do something (new paragraph (205Q(b)). The ACMA may apply to the Federal Court for a civil penalty order for a contravention of a civil penalty provision (new subsection 205F(1), Item 48 of CLAB).

This amendment is intended to ensure that the ACMA has a range of enforcement measures available to it when parties may be proposing to conduct a transaction that would result in an unacceptable 3-way control situation coming into existence.