WHAT IS CONTROL?

Introduction

The views expressed in this paper are entirely my own. They do not necessarily represent the views of any person or company for whom I act or have acted in matters arising under the relevant legislation.

This paper is primarily concerned with the answer to the question "What is Control?". That question must now be asked and answered in the light of the proposed new legislation announced by the then Minister for Communications, the Hon. Mr Michael Duffy MP on 27 November, 1986. In the absence of any more detailed information, it is necessary to speculate about the new regime to a considerable extent. There are clearly risks in such an exercise, but they are risks worth taking in the debate about the new rules relating to ownership and control. The mere announcement of them has brought about one of the greatest media reshuffles this country has ever seen.

For the sake of simplicity, and because the process of change in relation to ownership and control of television appears to be more advanced than in the case of radio, I propose to limit the scope of this paper to television. Except where expressly stated references to "the Act" are to both the Broadcasting and Television Act, 1942 and the Broadcasting Act, 1942.

Background

The origins of the development of the equalisation policy and the announcement of the 75% audience reach proposals can be traced back to the report presented by the Packer Organisation to the Fraser Government in 1977, relating to the introduction of a domestic satellite system. Since then, in the context of a series of studies, reports, inquiries and announcements, equalisation has become central to the present Government's commercial television policy as I perceive it. Equalisation means that all Australians, or as many as possible, should have access to a choice of three commercial television channels in the same way as viewers in five of the six mainland capital cities. The policy also made the grant of a third commercial television licence in Perth inevitable.

The means by which equalisation is to be achieved remain an area of controversy. The debate about the use of multi-channel services (MCS) or aggregation and the possibility of the staging of MCS followed by aggregation has excited the regional stations. It has also been followed with great interest by the networks. The timing, commercial viability and the relationship between MCS and aggregation are all matters dealt with in the Broadcasting Amendment Bill, 1986 which was reported on by the Richardson Committee.

The New Rules

The Government's proposal to expand ownership and control to enable any one television owner to reach 75% of Australia's population has opened up the whole market, both in respect of the metropolitan stations and the regional stations. The combination of proposed changes has given a new perspective to networking. While all this may not rectify "the structural imbalance" of the Melbourne and Sydney stations to which reference is so often made, it has produced a distinct shift in the balance, if not in the centre of gravity. Fears of undue concentration under the new ownership rule have been somewhat allayed by the limitation on cross-media ownership.

Despite the frenetic market activity of the past few months, the existing law remains unchanged. Section 92 of the Act still prohibits a person having a "prescribed interest" in more than two commercial television licences. In his press release dated 27 November, 1986 the Minister said that the "two-station" rule was to be abandoned. He said it would be replaced by a new rule which would limit the reach of any one commercial station owner to 75% of Australia's popu-

lation. An important feature of the abandonment of the two-station rule was the introduction of limitations on "cross-ownership". The press release said that the legislation which would be introduced would prevent a person from acquiring a television licence to serve an area in which that person, for example, owned a daily newspaper whose main circulation was in the same area, or who already held a licence for a commercial radio station which had a monopoly in the service area. Existing interests held on 27 November, 1986 which would otherwise offend the cross-ownership rules were to be "grandfathered". The Minister made it clear that future acquisitions of a prescribed interest in a television licence, whether or not that licence was "grandfathered", would require the new owner to conform to the cross-ownership test. This part of the announcement made it clear that the new package of rules was intended to be enacted with effect from 27 November, 1986.

The Recent Acquisitions

It is against this background that a whole series of acquisitions have been made. As at 27 November, 1986 the three existing networks were owned as follows:-

	Seven Network	Nine Network	Ten Network
Brisbane:	BTQ-7 Fairfax	QTQ-9 Bond	TVQ-0 Skase
Sydney:	ATN-7 Fairfax	TCN-9 Packer	TEN-10 NTHL
Melbourne:	HSV-7 HWT	GTV-9 Packer	ATV-10 NTHL
Adelaide:	ADS-7 HWT(18)	NWS-9 Lamb	SAS-10 Bell

In addition STW-9 Perth, also owned by Bond, was an affiliate member of the Nine Network. TVW-7, owned by Bell, was identified with the Seven Network and the proposed new station WTW-10, owned by Stokes, was identified with the Ten Network.

As a result of the various acquisitions, subject to the approval of the Australian Broadcasting Tribunal (ABT) and the passage of the implementing legislation, the Networks are now owned as follows:-

Brisbane:	BTQ-7 Fairfax	QTQ-9 Bond	TVQ-0 Skase
Sydney:	ATN-7 Fairfax	TCN-9 Bond	TEN-10 WCC
Melbourne:	HSV-7 Fairfax	GTV-9 Bond	ATV-10 WCC
Adelaide:	ADS-7 Stokes	NWS-9 Lamb	SAS-10 Bell
Perth:	TVW-7 Bell	STW-9 Bond	WTW-10 Stokes

Pending the enactment of the proposed legislation these various acquisitions must be the subject of applications under s92F.

Until the legislation is enacted, the Tribunal would be required to refuse the applications unless steps were taken by the applicant to comply with the two-station rule. Under s92FAA(11) where an applicaton for approval of a transaction is refused by the Tribunal, and notice of such refusal given to the applicant, the applicant has six months after the date of service of the notice, or such longer period as the Tribunal, on application, allows, to dispose of excess prescribed interests. The Act, therefore, recognises that transactions which would result in a contravention of s92 may be entered into. The contravention does not itself constitute an offence under the Act. The Tribunal may, however, give a direction for divestiture under s92N(1) where it is satisfied that a person is the holder of interests in a company in contravention of s92. If the circumstance arose that there was no reasonable prospect of the relevant legislation being passed in the foreseeable future, the Tribunal could give directions under s92(1)(a), if it thought necessary "to ensure that the person ceases to hold interests in that company in contravention of that

section". Such a direction cannot take effect during any period in which the contravention referred to in s92N(1) does not constitute an offence. Thus, the direction may not be given until after expiration of the period of six months after the date of service or notice by the Tribunal of its refusal to approve the transaction, or such longer period as the Tribunal allows. The directions when given would not necessarily require that the additional interest sought to be acquired by a party following the Minister's announcement be the subject of divestiture. The divestiture could cover existing interests, which were held prior to the acquisition of additional prescribed interests following the Minister's announcement. Alternatively, if it emerged that there was no prospect of enactment of the legislation in the foreseeable future, application for additional interests in excess of that permitted by the two-station rule could be approved, subject to a condition that any existing interests which, together with the new interests, would be in excess of the rule, should be disposed of.

In the period between acquisition and the determination of any application there is, however, a difficulty about directorships. Section 92C(1) of the Act provides that:-

> "Subject to this section, a person contravenes this section if, and so long as, he is a director of two or more companies that are, between them, in a position to exercise control of three or more licences."

There is an obvious loophole in this provision in that there is no prohibition against a person being a director of one company that is in a position to exercise control of three or more licences.

Possible Legislation Change

The Act as it stands contains elaborate provisions regulating ownership and control. Given that the two-station rule is abolished and replaced by a rule which limits station ownership or control to services which reach no more than 75% of Australia's population, it is quite possible that fairly elaborate provisions relating to ownership and control in terms of the new limit will continue to apply. It is to be hoped that the opportunity will be taken for simplifying and streamlining the existing provisions as far as possible.

It is interesting to speculate how the limitation might be expressed in the legislation. For example, s92(1) could be simply repealed and replaced by a provision to the effect that, subject to the section, a person contravenes the section if, and so long as, he has a prescribed interest in any licence or in each of two or more licences where the aggregate of the population in the service area of that licence or those licences, as the case may be, as determined by reference to the most recent census, exceeds 75% of the total population of Australia as so determined. Instead of expressing the limit in terms of population, it would also be possible to express the limit in terms of audience reach. Thus, the limitation could be expressed in terms of television homes.

There is a real question whether the concept of prescribed interest should necessarily be retained and a question whether the concepts of ownership and control should be defined more in terms of the ordinary meaning of those concepts, rather than using deeming provisions to extend them to cover situations where a mere potential for influence exists. A prescribed interest is, essentially, a shareholding, voting or financial interest of more than 5% in a company holding a commercial television licence: s91(2). A person is also deemed to have a prescribed interest if he is in a position to excercise control directly or indirectly of a licence: s92B.

Control

The definition of "control" in s91(1) is expressed in inclusive terms which do not define what control is, but describe the means by which control may be exercised. "Control" is defined as including:

"... control as a result of, or by means of, trusts, agreements, arrangements, understandings and practices, whether or not having legal or equitable force and whether or not based on legal or equitable rights."

It is essential to determine what is meant by "control". This is because a person is deemed to have a prescribed interest in a licence, even if he has no direct interest in it, if he is in a position to exercise control either directly or indirectly of a licence: s92A. A person is deemed to be in a position to exercise control of a licence under s92A(1) if:

> "(a) that person is the holder of the licence;
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> (b) that person is in a position to exercise control of the company that holds the licence; or
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> (b) that person is in a position to exercise control of the operations conducted under or by virtue of the licence, the management of the station in respect of which the licence is in force or the selection or provision of the programmes to be televised by that station."

Section 92B sets out various circumstances under which a person is deemed to be in a position to exercise control of a company. For the purposes of these provisions "person" includes a company.

Basically, the position is that a person who holds more than 15% of the voting power at a general meeting, or who holds shareholding interests exceeding an amount of 15% of the total of the amounts paid on all shares, or all shares of a particular class, in the company is deemed to be in a position to exercise control of the company. These deeming provisions are not, however, exhaustive: see In Re The News Corporation Limited and the Broadcasting and Television Act 1942 unreported, Fed. Ct. (Full Ct. Bowen CJ, Lockhart and Beaumont JJ) 20 January, 1987. This is because the definition of "control" in s91(1) is expressed in wide inclusive terms which are capable of extension to situations other than those specified as those in which a person shall be deemed to be in a position to exercise control under ss92A and 92B. Hence, for example, the expression "in a position to exercise control" in s92C(1) in relation to directorships has a meaning which is wider than that connoted by the various deeming provisions. It must be remembered, however, that the ordinary meaning of "control" is the power or function of directing and regulating. It does not extend to merely having a capacity to influence.

The wording in s92C is to be contrasted with the wording of the limitation on foreign shareholdings in s92D which refers to a person being "in a position to exercise control, either directly or indirectly, of the company holding the licence". This was the provision that was considered in the abovementioned case by the Full Court of the Federal Court. In that case it was held that The News Corporation Limited (TNCL) had a shareholding interest such that it was deemed to be in a position to exercise control of Network 10 Holdings Limited (NTHL) and its subsidiaries pursuant to s92B of the Act. More importantly, the Full Court held that the premiums paid on the relevant shares were to be included in the calculations of both "an amount equal to the value of the shares" and "an amount equal to the value ... of the person's interest in the shares", within the meaning of s91(3)(b) of the Act. It was also held that s92B did not exhaustively define the meaning of "being in a position to control, either directly or indirectly, of the company holding the licence" within the meaning of s92D(1). In my view, while some of the reasoning relating to the inclusion of the amount of any premium in the relevant calculations for the purposes of s91(3)(b) is open to question, the non-exhaustive construction placed upon ss90E and 92B is undoubtedly correct. There is, however, a clear distinction between ss92C and 92D. Section 92C refers to "companies

that are, between them, in a position to exercise control of 3 or more licences". Section 92D refers to a person being "in a position to exercise control, either directly or indirectly, of the company holding the licence". In my view, s92C refers to direct control of the licensee company in the sense of control of more than 50% of the votes which may be cast at a general meeting of the relevant company, or control of more than half of the members of the board of directors: cf W.P. Keighery Pty Ltd v FCofT (1957) 100 CLR 66 per Dixon CJ, Kitto and Taylor JJ at 84; Mendes v Commissioner of Probate Duties (Vic) (1967) 122 CLR 152 per Kitto J at 165; per Taylor J at 166; and per Windeyer J at 169; and Kolotex Hosiery (Australia) Pty Ltd v FCofT (1973) 130 CLR 64 per Mason J at 77-78; (1975) 132 CLR 535 per Gibbs J at 572-573. In FCofT v Commonwealth Aluminium Corporation Ltd (1980) 143 CLR 646 the High Court distinguished the meaning of "control" of a business. Stephen, Mason and Wilson JJ said at 659-660 that shareholders, through their power to control the company general meeting and, perhaps, through their power to elect directors, may be said to "control" the company, "but as a general rule they do not exercise de facto control of the company's business." The control referred to in s92C is control of the licence, which means control of the business rather than control of the company. This requires control of the company in the true sense rather than in any artificial or deemed sense.

Section 92B gives three instances of circumstances in which a person shall be deemed to be in a position to exercise control of a company. In substance these are, first, where the person controls more than 15% of the maximum number of votes that could be cast at a general meeting, whether with respect to all questions or only one or more of such questions. Secondly, where he holds shareholding interests in respect of voting shares on all questions at a general meeting, exceeding in amount of 15% of the total of the amounts paid on all shares of the same kind. Thirdly, where the person has shareholding interests in a company exceeding in amount 15% of the total of the amounts paid on all shares in the company. In the third case, the Full Court decision in Re The News Corporation Limited and The Broadcasting and Television Act, supra requires any premium paid in respect of shares to be taken into account in computing the amounts paid on shares in the relevant company. In my view this result was somewhat surprising. A premium is normally credited to a share premium reserve. While this reflects a shareholder's financial stake it does not, without more, have any significance in terms of control as distinct from mere influence. Even more surprising was the decision that the ability to nominate one half of the board of directors of a company amounted to being in a position to exercise control of that company. This equated a power of veto with control and also required an assumption that the nominees would vote en bloc as directed or required by the appointor.

Tracing Control

Once company A is deemed to be in control of company B, company A is deemed to have any shareholding interest that company B has in another company. Thus, as long as the 15% level in any relevant sense carries on up a chain from a company holding a licence, all persons and companies in the chain will be deemed to be in control of the companies further down the chain and, consequently, of the company holding the licence. The position is made even more complex by the provisions in s91A for a means of proportional tracing, even where the chain of deemed control of companies has been broken. The tracing exercise is required to be done both horizontally and vertically. Thus, a number of proportionately traced shareholdings in a licensee company obtained through shareholdings in a range of different companies may all need to be aggregated. This could result in a person being found to have a prescribed interest in a licence. There are also the provisions for loan interests. It is clearly a matter for consideration whether all of these

detailed provisions will need to survive the abolition of the two-station rule. There would be much to be said for a change which equated a prescribed interest (now 5%) with a deemed controlling interest (now 15%).

Networking and Control

The concept of networking, particularly in the context of the proposals for MCS and aggregation of regional television stations, raises important questions of control. Currently, a person is deemed to be in a position to exercise control of a licence if he is in a position to exercise control of the selection or provision of the programmes to be televised by the station the subject of the licence. It is generally agreed that the introduction of MCS or aggregation will stimulate the development of networking from the existing networks into the regional stations, unless an alternative network were to be established. Under the policy of equalisation there is a perception that this will entitle viewers to have the same choice of three commercial channels as do viewers in the mainland capital cities. It does not necessarily follow that this choice should be a choice between three programme line-ups which, apart from elements of localism, are identical with the programmes currently being shown on the three networks. Against this, however, it is necessary to ask what objection there could be to a situation developing where, local programmes apart, the bulk of programming in regional areas was the same as that shown in the cities. This could not occur if the 75% rule were drafted or interpreted in such a way as to limit network coverage to 75% of the population, thus arbitrarily depriving 25% of the population of the opportunity of watching programmes of a particular network. I doubt this is intended. It could occur, however, if the networking arrangements were in such a form that the person or company which controlled the originating stations in the network was deemed to control all participating stations (quite apart from the ownership and control rules) by reason only of the selection or provision of programmes.

Many people would now be familiar with the form of programme agreement entered into by STW9 with the Nine Network relating to the supply of programmes. It was shown as an attachment to the FDU Report on Future Directions for Commercial Television. Under this agreement STW9 was not bound to take any particular programme, nor was it bound to show the programmes at any particular time. Independence in relation to advertising was also assured. These and other provisions prevented the relevant programme agreement from having the result that STW9 was deemed to be controlled by Nine Network Pty Ltd, TCN9 Pty Ltd or any other company in the Packer organisation. In my view the mere fact that licensee A (owned and controlled by X) makes its full range of television programmes available to licensee B (owned and controlled by Y) upon terms which do not require licensee B to show all or any of the programmes made available, or to show them at any particular time, should not have the effect that the population in the area serviced by licensee B should be taken into account for the purposes of the application of the 75% rule to licensee A.

Notwithstanding the elaborate framework of rules regulating ownership and control which has now been in existence for many years, Australian commercial television stations have formed networks. There is an existing power under s134 of the Act to make regulations governing the operations of networks, but no such regulations have ever been made. In its Satellite Programme Services Report in 1984, the Tribunal listed four major economic advantages of networking:

(a) spreading the cost of programme development, production and acquisition over a number of stations;

(b) facilitating the national sale of advertising;

(c) reducing programme distribution costs;

(d) scheduling of several hours of

continuous programming when distributed simultaneously enabled the network to take advantage of "audience flow" from one programme to the next.

The Tribunal regarded some form of networking to be inevitable for commercial television in Australia. It regarded networking as economically rational and beneficial, insofar as it allowed high quality programmes to be made available to viewers throughout the country. The abolition of the two-station rule and the introduction of a 75% audience reach rule are themselves a recognition of the major part networking has to play in the future of commercial television in Australia. The report of the Richardson Committee also recognises the role of networking in commercial television broadcasting in Australia. The Committee pointed out that some types of networking arrangements may be advantageous or essential to the development of the Australian television industry, in particular in relation to the production of more Australian programmes. It was also indicated that, provided demand for local programming was strong, networking need not necessarily interfere with "localism" in commercial television broadcasting in Australia.

Conclusion

It may be anticipated that the policy of equalisation will bring about the introduction of competitive commercial television throughout Australia. The cross-media ownership rules should be accepted as an essential political step in an attempt to counter-balance the great increase in potential media ownership, control and influence provided by the adoption of the 75% rule.

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