
**SUBMISSION TO THE
PRODUCTIVITY COMMISSION
REGARDING THE
BROADCASTING INQUIRY**

**PREPARED BY:
MACQUARIE BANK LIMITED**

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INTRODUCTION

Macquarie Bank Limited (“Macquarie”) is a full service Australian Investment Bank. As such, Macquarie has a keen interest in matters that concern the Australian public, particularly when those matters relate to the economic well-being of Australia and the Australian investment community. Macquarie is pleased to put forth the following submission to the Productivity Commission regarding the Broadcasting Inquiry (the “Inquiry”).

This submission seeks to address two specific but important aspects of the Inquiry pertaining to media ownership. They relate to the “foreign” status of certain funds management institutions and the ability to trace foreign interests through Australian funds management institutions.

Macquarie was the Joint Lead Manager and Underwriter to Australia’s most recent media-related initial public offering, Ten Network Holdings Limited (“Ten”) which took place in April 1998. Through this role, Macquarie has experienced some of the difficulties with certain provisions of the Broadcasting Services Act (or “BSA”).

Broadly, we are seeking to have the Broadcasting Services Act amended so it is consistent with the Qantas Sale Act and the regulations to the Telstra Act which considers institutions to be Australian where Australians own more than 60% of the funds under its management.

QANTAS SALE ACT 1992

Clause 7 of the Qantas Sale Act 1992 (“QSA”) provides that Qantas’ articles of association are to include various national interest safeguards including the overriding safeguard that foreign persons must not have relevant interests in more than 49% of the aggregate value of the issued share capital of Qantas.

“Foreign person” is defined in the QSA as a foreign airline or as a person (other than a foreign airline) who is not an Australian person.

“Australian person” is defined in the QSA to include:

- a) Australian citizens, or persons who are ordinarily resident in Australia;
- b) the Commonwealth, or a State, or a Territory or a nominee or authority of the Commonwealth, or a State or a Territory
- c) a company incorporated in Australia and substantially owned and effectively controlled by Australian persons (as defined above).
- d) **a person in the capacity of a trustee or manager of a fund in which the total interests of Australian persons (as defined above) represents 60% or more of the total interests in the fund.**

Paragraph (d) above is designed to cover the situation where a clear majority of moneys in a fund are invested by Australian persons but the trustee or manager of the funds is a foreign person. This definition ensures that such a fund is not classed as a foreign person just because the person managing the investment of the fund is foreign.

This inclusion was widely seen as sensible by the investment community.

BROADCASTING SERVICES ACT 1992

The Broadcasting Services Act 1992 (“BSA”) stipulates that two or more foreign persons must not have company interests in a licensee that exceed 20%.

Under the BSA a “foreign person” means:

- a) a natural person who is not an Australian citizen; or
- b) a company, wherever incorporated, where natural persons who are not Australian citizens hold company interests in the company exceeding 50%; or
- c) a company, wherever incorporated, where:
 - i) a company referred to in paragraph b); or
 - ii) natural persons, who are not Australian citizens and a company or companies referred to in paragraph b);hold company interests in the company exceeding 50%.

Further, “company interests” can be traced through a chain of companies using a method known as the “fractional tracing method”.

TEN NETWORK HOLDINGS IPO

The recent Ten IPO illustrated the difficulties of the BSA with regard to passive institutional investors managing funds on behalf of Australian superannuants. Issues which arose in the Ten IPO included:

- The inability of a number of fund managers to estimate the degree of foreign ownership for tracing purposes due to the dynamic nature of their share ownership. Some managers chose to ignore this issue and not consider an investment altogether while others gave their best estimates.
- Change of ownership - Axiom (previously State Super and now Morgan Grenfell) was purchased by Deutsche Morgan Grenfell in late 1996. The nature of the funds under management (primarily New South Wales public servants) did not change but as the new owner is foreign, Axiom were essentially precluded from investing.
- A significant variance in the interpretation of how the Act is to be applied with respect to the beneficial ownership of the shares as opposed to the applicant for shares.

PROPOSAL

We propose that the trustee/fund manager section included in the QSA be included as an exception to the “foreign person” definition in the BSA. We further propose that such trustees/fund managers also be included as an exception to the tracing provisions.

The rationale for these proposals seems sensible and are consistent with the central public interest objectives of the Government’s policy being plurality, diversity and competition as well as avoiding the foreign control of media assets. In the management of investment monies, trustees and fund managers are beholden to their investors by virtue of the prospectuses and trust deeds under which the monies were invested. The fund managers have a fiduciary duty to their investors and are not free to follow their own agenda. They are merely agents managing money on behalf of their investors. As such, a fund manager must act in the best interests of its Australian investors.

We believe that the above proposals would be warmly welcomed by the financial markets without causing any concern to the public at large. It would have a number of benefits including:

- ensuring consistency across industries in relation to foreign investment;
- increase liquidity and diversity of ownership of media companies; and
- increase investment opportunities for the savings of Australians which are in funds managed by foreigners.

These factors were clearly accepted in relation to Qantas and we see no reason why this should not also be the case in relation to media companies.

IMPACT

The current legislative situation is more than a just fringe issue affecting one or two institutions. According to our estimates, at least nine of the top twenty Australian fund managers are considered foreign under the BSA as it currently stands and are accordingly hindered in their ability to invest in media companies. In addition, due to the tracing provisions of the BSA, if certain “non-foreign” funds purchased shares in a broadcasting company they would be contributing to the aggregate level of foreign ownership. Indeed, if the aggregate foreign ownership level was approaching 20% then they would be prohibited from buying any shares. A further eight of the top twenty Australian fund managers have the potential to be affected by the tracing provisions.

RANK	INSTITUTION	AUSTRALIAN EQUITIES UNDER MANAGEMENT \$B	DOMICILE
1.	AMP	15.2	Australian [#]
2.	Colonial First State	10.9	Australian [#]
3.	Lend Lease	9.3	Australian [#]
4.	QIC	8.2	Australian
5.	Maple Brown Abbott	7.9	Australian
6.	Morgan Grenfell	7.7	Foreign
7.	BT Funds Management	6.8	Foreign
8.	National Mutual	5.9	Foreign
9.	Norwich	5.6	Foreign
10.	Commonwealth Bank	5.5	Australian [#]
11.	National Australia	5.4	Australian [#]
12.	Mercantile Mutual	4.7	Foreign
13.	Westpac	4.1	Australian [#]
14.	Perpetual	3.9	Australian [#]
15.	NRMA	3.3	Australian [*]
16.	Macquarie Bank	3.0	Australian [#]
17.	Rothschild	2.9	Foreign
18.	Merrill Lynch	2.9	Foreign
19.	Sun Alliance	2.7	Foreign
20.	HSBC	2.7	Foreign

* May become "foreign" after listing

May be unable to buy shares in a broadcasting company due to the tracing provisions

Source: Rainmaker Investor Services, 31 December 1998(amended to include recent acquisitions)

ANTI-AVOIDANCE PROVISION

We are seeking this amendment to the BSA to increase the investment opportunities for institutions which hold the majority of their funds on behalf of Australian investors. If there are any concerns that such an amendment may be misused by foreign parties then an anti-avoidance provision could be added. This may be similar to Division 6, Part 2A of the *Telstra (Dilution of Public Ownership) Act 1996* which applies to anyone carrying out a scheme for the sole or dominant purpose of avoiding the foreign ownership restrictions.

METHOD OF IMPLEMENTATION

The proposed legal changes to the BSA should be implemented like other changes to statutory law that affect public companies. Announcing changes to the BSA regarding foreign ownership will undoubtedly have an impact of the share prices of publicly listed Australian media companies. The announcement, however, will be made to all Australians equally without risk of insider trading.

FURTHER INFORMATION

Should you wish to discuss any aspect of this submission, please contact either Bill Best on (02) 9237 3120 or Warwick Smith on (02) 9237 6059.