

Section 67 of the *Broadcasting Services Act 1992* provides a certain flexibility for the broadcasting industry and its players. It allows the industry to restructure while ultimately complying with the Act. The following article looks at how s.67 works.

Prior approval of temporary breaches (limitations on control)

Section 67 of the *Broadcasting Services Act 1992* provides the industry and its players with limited flexibility to re-structure and improve their position within the industry.

Under s.67 of the Act, a person (company, director or individual) may apply to the ABA for approval of a temporary breach of the limitations on control, or directorships and cross-media rules. The ABA cannot, under s.67, grant approval of a temporary breach of the limitations on foreign ownership.

The application must be made before the breach occurs, otherwise the ABA cannot consider the application. Applicants are encouraged to provide comprehensive details of the proposed transaction or agreement using form ABA 7.

The ABA makes its decision on a s.67 application based on the information given to it by the applicant. The ABA assesses the arguments contained in the application and ABA staff may meet with the applicant to discuss options for remedying the breach, and the time frame within which the breach is to be remedied.

Under s. 67(4), for the ABA to consider approving a breach of the Act, it must be satisfied of the following matters:

- a) if the transaction took place or the agreement was entered into, it would place the person in breach of a provision of Division 2, 3 or 5 of the Act;
- b) the person will take action to ensure that the breach of that provision ceases; and
- c) the breach is incidental to the objectives of the transaction or agreement.

If the ABA is satisfied of these matters, it has a discretion to approve the breach

by way of notice in writing. In exercising the direction the ABA consider the:

- nature of the proposed transaction;
- seriousness of the breach;
- likely length of time of the breach;
- commercial implications if the application is refused or approved; and
- the objects of the Act.

The nature of the transaction includes consideration of whether interests in the licences are purchased individually or as part of a package. When considering the seriousness of the breaches, the ABA assesses the individual market including the total number of relevant broadcasting or media services in the licence area and the impact of the breach.

If the ABA approves the breach it must specify a period of time during which the applicant must ensure the breach ceases. The period of approval commences on the day that the transaction takes place or the agreement is entered into.

The ABA may specify how the applicant is to remedy the breach. To date the ABA has not done so, preferring to leave that decision to the applicant.

Extensions of time

Under s.68 of the Act a person who has been given a s.67 notice may apply to the ABA for an extension. The ABA is not required to grant an extension, but may do so if, in its opinion, an extension is appropriate in all the circumstances. In deciding whether to grant an extension to an applicant the Act provides that the ABA must have regard to the endeavours that the applicant made and the difficulties that the applicant experienced in attempting to

comply with the notice. However the ABA must not have regard to any financial disadvantage that compliance with the notice may cause.

In the exercise of its discretion, in addition to the statutory criteria, the ABA may take into account other factors such as the seriousness of the breach.

The ABA is not restricted by specific time periods in the Act and may extend the period by any length of time, provided the period does not exceed that originally granted, or one year, whichever is the lesser. For example, an applicant for an extension of time who has been granted a six month approval under s.67 can be granted an extension for any period up to, but not in excess of, the six month period.

Applications for an extension of time must be made in the final three months of the period prior to the time specified in the s.67 notice.

The ABA has a period of 45 days in which to make a decision regarding applications under s.67 and s.68. This period may be extended by a further 30 days if the ABA decides to request further information.

To date the ABA has received 26 applications for approval of temporary breaches and 13 applications for an extension of time. The average time taken by the ABA to make decisions under ss. 67 and 68 is 20 days.

The ABA maintains a Register of approvals under s.67 and extensions under s.68. Approvals under s.67 are not included in the Register until the relevant transaction or agreement has taken place.

The Register is available for inspection at the ABA's library, Level 16, 201 Sussex Street, Sydney. 