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AUSTRALIAN AND OVERSEAS TELECOMMUNICATIONS CORPORATION BILL 1991

EXPLANATORY MEMORANDUM

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

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AUSTRALIAN AND OVERSEAS TELECOMMUNICATIONS CORPORATION BILL 1991

GENERAL OUTLINE

The central provisions of the Bill will:

- Provide for the succession of the Australian and Overseas Telecommunications Corporation Limited (AOTC) to all the rights, property, staff and liabilities of the Australian Telecommunications Corporation (Telecom) and OTC Limited (OTC);
- Permit the Minister for Transport and Communications to specify that particular charges for a telecommunications service or facility levied by Telecom or OTC (or by AOTC after the succession) are subject either to specific price control arrangements or to notification and disallowance, and to determine principles to govern the operation of the price control arrangements;
- Permit the Minister for Transport and Communications to give written directions to the new company in relation to the exercise of the company's powers; and
- Establish that the new company is to remain wholly-Government owned.

SUCCESSION TO AUSTRALIAN TELECOMMUNICATIONS CORPORATION AND OTC LIMITED

The succession provisions of the Bill will commence at the time AUSTEL certifies that appropriate interconnection and equal access arrangements between the networks of Telecom and OTC and the second carrier are fully in place in each of the capital cities and that a timetable has been agreed by Telecom and OTC for the early installation of such arrangements for provincial cities. The Bill's provisions will vest all property and rights of Telecom and OTC in AOTC, make all liabilities of Telecom and OTC become liabilities of AOTC, transfer the staff of Telecom and OTC to AOTC (while preserving their rights, accrued entitlements and continuity of service), and make AOTC the successor in law of Telecom and OTC. Further provisions will deal with other elements, including taxation aspects, of the succession process.

MINISTER'S POWER TO REGULATE CHARGES

The purpose of this part of the Bill is to set the parameters of the price regulation regime which is to apply to AOTC.

Telecom and OTC are at present separately subject to price control arrangements. These arrangements consist of an overall price cap for price rises equal to the consumer price index (CPI) less 4 percentage points in the case of both Telecom and OTC. In the case of Telecom, control is also exercised through notification and disallowance by the Minister of charges relating to a number of reserved service charges. These arrangements will continue until 1 July 1992, at which time it is proposed to introduce a more stringent regime of price caps, with only a limited number of services subject to notification and disallowance.

MINISTER'S POWER TO GIVE DIRECTIONS TO THE COMPANY

Part 3 of the Bill provides that, where the Minister for Transport and Communications considers that it is necessary in the public interest, he or she may give directions to the company in relation to the exercise of the company's powers.

RESTRICTIONS ON HOLDING OF SHARES

The Commonwealth is to hold and retain all the shares in AOTC. The Board of the AOTC will be required to issue all shares in the company to the Commonwealth and the Commonwealth will be prohibited from transferring any of its shares in the company.

FINANCIAL IMPACT STATEMENT

The Government's decision to merge Telecom and OTC followed consideration of what would be the most appropriate structural arrangement in a more competitive industry. It is expected that significant synergies will be realised by removing the current arbitrary distinction between domestic and international telecommunication services. It is, however, not possible to assess definitively the magnitude of the synergies at this time.

Direct Commonwealth outlays arising from the merger will be minimal, being limited to the costs of establishing and registering the new company.

As regards additional revenue to the Commonwealth from the merger, at this time it is not possible to be precise about either the amount or the method of payment of the merger fee to be paid to the Government by the new company. The Government has requested advice from the Interim Board (which comprises representatives of the Telecom and OTC Boards) on this matter.

The Bill provides for certain exemptions from Commonwealth State and Territory taxes with regard to the succession process, recognising there has been no change in beneficial ownership of the carriers.

NOTES ON CLAUSES

Clause 1 - Short Title

Self-explanatory.

Clause 2 - Commencement

That Part of the Bill dealing with the Minister's power to regulate charges commences on 1 July 1991.

The succession provisions of the Bill will commence on a day to be fixed by proclamation. This is so that proclamation can be made to coincide with the certification by AUSTEL that interconnection and equal access arrangements between the networks of Telecom and OTC and the second carrier are fully in place in all capital cities and an implementation timetable has been agreed by Telecom and OTC for provincial cities. This linkage has been made to provide an incentive for Telecom and OTC to move quickly on interconnection so that they can begin to derive the benefits of their merger. The standard provision, which provides for automatic commencement within 6 months if there has been no proclamation, has not been included because there can be no certainty that the AUSTEL certification can be provided within that timeframe.

Clause 3 - Interpretation

Self-explanatory.

Clause 4 - Operating under a name

For the purpose of protection of business names, this clause specifies circumstances which establish whether a body is operating under a particular name in a State or Territory.

Clause 5 - Subsidiaries

Self-explanatory.

Clause 6 - Extension of Act to External Territories

Self-explanatory.

Clause 7 - Act binds the Crown

Self-explanatory.

Clause 8 - Commonwealth to retain ownership and control of AOTC

Sub-clause (1) ensures the AOTC will remain wholly Commonwealth owned by prohibiting the Commonwealth from transferring any of its shares.

Sub-clauses (2) and (3) ensure that the Commonwealth retains control over the company by requiring the Commonwealth to hold continuously all the voting shares in the AOTC.

Clause 9 - Minister may give directions to the Board

Where the Minister for Transport and Communications considers it is necessary in the public interest, he or she may give directions to the company in relation to the exercise of the company's powers. The Board of Directors must ensure that the company complies with a direction given.

It is also made clear that should a conflict arise between a Ministerial direction under this clause and an AUSTEL direction, determination, or order given under the Telecommunications Act 1991, the Ministerial direction will have effect.

The Minister's power is, however, subject to certain limits. The Minister cannot give directions in relation to charges in particular instances (although this does not affect his or her powers under Part 6 which provides the Minister with the power in general to determine price control arrangements for telecommunications services and facilities).

Sub-clause (5) provides that any directions must be laid before each House of the Parliament within 15 sitting days of that House after the direction has been given.

To avoid the possible interpretation under the Corporations Law that the Minister's power implies that he or she is a director of the AOTC, sub-clause (6) expressly states that he or she is not a director.

Clause 10 - Extra-territorial operation of Part

To the maximum extent of the Federal Parliament's power, this clause gives effect to the succession of AOTC to Telecom and OTC in relation to property and things situated outside Australia and acts, transactions and matters occurring outside Australia.

Clause 11 - Vesting of property, rights, and liabilities

This clause is the central provision of Part 4. It provides for the AOTC to become the successor in law of Telecom and OTC on the succession day. Further, it provides that from the succession day all property, rights and liabilities of Telecom and OTC become those of the AOTC.

Clause 12 - Protected body may operate under protected business name

This, and the following clauses in Part 5, establish a scheme of protection for the use of certain business names for a transitional period of 3 months. The transitional protection period is provided to allow the AOTC time to complete necessary business name reservations and registrations. This need arises because OTC's business names are currently protected by a statutory regime. It is not intended to provide the AOTC with a perpetual protected names regime.

Clause 13 - Other persons not to use protected names

This clause prevents other persons from using, during the transitional protection period, a protected name, or a name so closely resembling a protected name that it could be mistaken for it. The penalty for an offence is $1000.

Clause 14 - Exceptions for pre-existing rights

This clause restricts the operation of Clause 13 so as to uphold certain rights conferred by the Trade Marks Act 1955, the Designs Act 1906, or in the ways it specifies, the rights of existing users of protected names.

Clause 15 - Use of other names by protected bodies

Self-explanatory.

Clause 16 - Effect on State and Territory laws

Self-explanatory.

Clause 17 - Interpretation

Defines the terms used in this part of the Bill.

Clause 18 - Minister may determine price control arrangements

Makes the Minister responsible for determining, by disallowable instrument, whether certain telecommunications services offered by Telecom and OTC (or after the succession, AOTC) are to be subject to price control.

Clause 19 - Effect of price control arrangements

This Clause allows the Minister, by disallowable instrument, to determine price cap arrangements and other price control arrangements to apply to any charge for a particular service. It also allows the Minister to determine in writing principles to govern the operation of the price control arrangements. These principles may cover:

- factors which AUSTEL is to consider in assessing whether or not any price variations proposed by AOTC fall within the pricing regime;
- types of alterations that require, and do not require AUSTEL consent;
- the period of notice to be given to AUSTEL before making that type of alteration;
- the amount and nature of information to be provided by the carrier to AUSTEL in relation to any particular alteration; and
- in relation to alterations that require AUSTEL's consent, the period of time in which AUSTEL must give or refuse consent to the variation.

The principles are designed to allow flexibility for negotiation of varying arrangements between AUSTEL and AOTC, depending on the particular circumstances surrounding a proposed price variation. They are intended to allow greatest leniency in terms of control by AUSTEL in cases of proposed short term temporary price reductions, such as for special occasions (eg Mothers Day, ANZAC Day).

Where permanent variations are proposed, in particular rises, or rises for some services combined with cuts in prices for other services, the principles will be much more stringent.

Clause 20 - Alteration of charges subject to price control arrangements

This Clause sets out the process to be followed by a carrier wishing to alter a charge subject to price control arrangements.

Where AUSTEL's consent is required before alterations can be made, the Clause sets out the conditions under which consent is made or assumed to be made.

The Clause also provides for an extension of time for AUSTEL to consider proposals when it is necessary to seek further information from a carrier.

Clause 21 - Carrier charges subject to notification and disallowance

This Clause enables the Minister to determine, by disallowable instrument, that certain charges are to be controlled by means of notification and disallowance. This mechanism will be necessary, under the proposed new pricing regime, only in limited circumstances, where control by price cap is not considered necessary, but where a reserve power to scrutinise is desirable given the competitive impact of certain charges on other service providers or on community interests and expectations. Examples would be charges for directory assistance and for calls from payphones.

Clause 22 - Alteration of charges subject to notification and disallowance

This clause relates to the process to be applied to charges that are subject to notification and disallowance. It specifies the advisory role of AUSTEL in this process, and the time limit that is to apply for AUSTEL's consideration of the proposal. It also empowers the Minister, taking the advice of AUSTEL into account, to direct AOTC not to make the proposed price variation.

Clause 23 - Effect of determination under 62, 63 or 65 of the Telecommunications Act 1989

This provides continuity between the Telecommunications Act 1989 and this Bill, so that any Ministerial determinations relating to price control which were made under the previous Act will remain in effect even though the previous Act will be repealed.

Clause 24 - AOTC not public authority etc

This clause provides that the AOTC shall not be a Commonwealth authority or otherwise come under the protection of the Crown for the purposes of a law of the Commonwealth, State, or Territory unless express provision is made to the contrary. This will mean that a number of Commonwealth Acts which applied to Telecom will not apply to the AOTC, although others will still apply by their own force.

Clause 25 - Exemption from taxes and charges

Establishes a mechanism for exemptions from tax under Commonwealth laws, (not including income tax), for anything done in the operation of Part 4 of the Bill, or in giving effect to it. It also establishes a mechanism for exemption from tax under a law of a State or Territory, in relation to the operations of, or giving effect to, Part 4 of the Bill.

Clause 26 - AOTC taken to be the same body as Telecom and OTC for tax purposes

The Clause provides that for the purposes of Commonwealth, State and Territory taxation laws the merger of Telecom and OTC into AOTC, on and from the succession day, is to be treated in neutral terms as if Telecom and OTC had continued in existence. That is, as if the merger did not occur so that all the taxation consequences, which might otherwise flow just because of the merger, are ignored.

The taxation consquences which are to be ignored include, but are not limited to, the following examples:

- AOTC will be treated as if it were Telecom and OTC in relation to the property that becomes vested in AOTC by reason of this Bill;

- The transfer of assets from Telecom and OTC to AOTC on the succession day will not be treated as a disposal by Telecom or OTC, nor as an acquisition by AOTC for capital gains tax purposes. AOTC will be treated as having acquired those assets at the date they were acquired by Telecom and OTC;

- Trading stock on hand immediately prior to the date of succession will not be taken to have been disposed of by Telecom and OTC to AOTC, and will be treated as having the same values as if Telecom and OTC had continued in existence;

- AOTC will be entitled to claim, on the same basis as would have been available to Telecom and OTC if they had continued in existence, deductions for depreciation of plant and articles used for the purpose of producing assessable income;

- AOTC will be entitled to claim, on the same basis as would have been available to Telecom or OTC if they had continued in existence, any unrecouped tax losses incurred by Telecom or OTC prior to the succession day;

- In the event that AOTC writes off as bad any debts that are transferred to it from Telecom or OTC, a deduction will be allowable on the same basis as would have been available to Telecom or OTC if they had continued in existence;

- AOTC will be entitled to deductions for losses and outgoings incurred by either Telecom or OTC prior to the succession date, provided that they would have been allowable deductions to Telecom or OTC if they had continued in existence;

- AOTC will be able to continue or initiate proceedings relating to objections and appeals against any assessment in respect of Telecom or OTC as if they had continued in existence;

- On and from the succession day, AOTC will be taken to have derived the income, incurred the allowable deductions and been entitled to any credits or rebates of tax as if Telecom and OTC had continued in existence;

- There is to be no change in the underlying beneficial ownership in Telecom, OTC or any company in which Telecom or OTC has a shareholding interest, in order that the continuity of ownership is clear for the purposes of various tax provisions, such as those concerned with prior and current year losses, losses transferred within a company group, other intra group transfers, capital gains tax provisions; and

- Any objection and amendment rights available to and obtained by Telecom and OTC prior to the merger are to be preserved.

Clause 27 - General Application of Commonwealth Laws

Because AOTC is being established as a company under the Corporations Law, it will, unlike Commonwealth statutory corporations, be subject to all laws applying to any other incorporated company. Some specific exemptions from these laws are given in this Bill and further exemptions may be given by regulation. Such exemptions will be kept to a minimum and will be provided only in cases where the cost to AOTC will be particularly onerous and would result in substantial flow-on to customers, where the introduction of effective competition would be hampered, or where an exemption is essential in order to satisfy other Government policy objectives.

Clause 28 - Lands Acquisition Act

This clause continues an exemption which has applied to both Telecom and OTC.

Clause 29 - Public Works Committee Act

This clause operates to exclude AOTC from the scrutiny of the Public Works Committee. It continues an identical provision which has applied to both Telecom and OTC.

Clause 30 - Environmental Protection (Impact of Proposals) Act

A special approach to environmental concerns has been adopted (the development of a national code detailed in the Telecommunications Bill 1991) to ensure that due consideration is given to them while at the same time ensuring that the second carrier is not unduly impeded from constructing and operating a competitive network infrastructure in the shortest possible time. To ensure proper consideration is taken of environmental issues, the EP(IP) Act will continue to apply to the telecommunications industry until an enforceable national planning code has been developed in consultation with relevant State and local authorities.

Clause 31 - Corporations Law

This clause provides an exemption from those parts of the Corporations Law which require there to be a minimum of 5 members in a company. The Commonwealth will be the sole member of the company, consistent with Clause 8.

Clause 32 - Laws relating to buildings, structures and facilities

This clause provides that State and Territory building, design, planning and development laws will not apply retrospectively to buildings and facilities which AOTC inherits from Telecom and OTC. The exemption will apply to buildings and facilities occupied or in use prior to the succession date and also where the construction of a new building or facility or the alteration or demolition of an existing building or facility commenced before the succession date.

Clause 33 - Environment protection laws

Subclause (1) provides that AOTC and its employees will not be liable for any past acts or omissions of Telecom, OTC and their employees which might constitute a breach of State or Territory environment protection laws.

Subclause (2) provides that the exemption does not apply to acts and omissions of AOTC and its employees that occur on or after the succession date. This means that AOTC would be liable if it failed to take reasonable steps to restore or decontaminate a polluted site which it inherited from Telecom or OTC.

Clause 34 - Certain instruments to remain in force

This clause ensures that all Telecom and OTC instruments continue to have effect on and after the succession day, but in such a way that references to Telecom and OTC are read as references to the AOTC. Instruments are defined in clause 3 to include both a document and an oral agreement and would cover legislative instruments or any other instruments to which Telecom and OTC was a party, that were given in favour of Telecom and OTC, or that refer to Telecom and OTC.

The Clause is made subject to the regulations as a safeguard. Should Telecom and OTC identify any potential problems with the operation of the clause in relation to particular documents, any necessary regulations can be put in place before the succession.

Clause 35 - Financial Statements and Reports

The AOTC, in addition to complying with the accounting and auditing requirements of the Corporations Law, will be obliged to forward financial documents to the Minister for Transport and Communications. The Minister is required to forward copies to each House of the Parliament for tabling (sub-clauses (1) and (2)).

The Auditor-General is to be regarded as having been appointed as the auditor of the company (sub-clause (3) but is protected by proposed sub-clause (5) from any criminal liability in respect of this matter.

Clause 36 - Pending Proceedings

This clause substitutes the AOTC for Telecom and OTC as a party to any legal proceedings to which either of the other two bodies were parties before the succession day.

Clause 37 - Registration of interests in land

This clause enables State and Territory Registrars to register any change in title to land that has, under Part 4, become land belonging to the AOTC. Registration can take place upon lodgement of a certificate signed by an authorised person (defined in Clause 3 to be the Minister or a person authorised by the Minister).

Clause 38 - Transfer to AOTC of employees of former corporation

Sub-clause (1) provides for the transfer of Telecom and OTC staff to the AOTC from the succession day. The clause preserves the rights, accrued entitlements and continuity of service of such employees.

Clause 39 - Judicial notice of seal

Self-explanatory.

Clause 40 - Compensation for acquisition of property

This clause requires the AOTC to pay reasonable compensation to any persons from whom property may be acquired as a result of the operation of the Bill. It is included as a safeguard as it is difficult to envisage in the context of the succession that it would be needed.

Clause 41 - Regulations

Self-explanatory.

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