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SENATE

BROADCASTING SERVICES AMENDMENT BILL (No. 2) 1997

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Communications, the Information
Economy and the Arts, Senator the Hon Richard Alston)

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BROADCASTING SERVICES AMENDMENT BILL (No. 2) 1997

OUTLINE

The Broadcasting Services Amendment Bill (No. 2) 1997 (the Bill) would amend the *Broadcasting Services Act 1992* (the BSA) so that:

- (a) the prohibition in relation to the broadcasting of programs that have been refused classification or have been classified as "X" that applies to commercial television broadcasting licensees and to subscription television broadcasting licensees would also apply to the provision by a person of an open television narrowcasting service or a subscription television narrowcasting service in accordance with a class licence (Item 6 of Schedule 1 of the Bill);
- (b) the restrictions in relation to the broadcasting of programs that have been classified as "R" that apply to commercial television broadcasting licensees would also apply to the provision by a person of an open television narrowcasting service in accordance with a class licence (Item 6 of Schedule 1 of the Bill); and
- (c) the requirements that apply to commercial television broadcasting licensees and community television broadcasting licensees in developing codes of practice relating to community standards and the protection of children from exposure to harmful program material would also apply to the development of codes of practice in relation to these matters by industry groups representing providers of open television narrowcasting services (Item 1 of Schedule 1 of the Bill).

FINANCIAL IMPACT STATEMENT

The amendments are expected to have no impact on Commonwealth expenditure or revenue.

REGULATION IMPACT STATEMENT

A. PROBLEM IDENTIFICATION AND SPECIFICATION OF REGULATORY OBJECTIVES

The BSA distinguishes between broadcasting services (programming intended to appeal to the general public) and narrowcasting services (whose reception is limited through specialised program appeal or in some other way). Currently, material rated "X" and "R" is prohibited on free-to-air commercial television broadcasting services and subscription television broadcasting services. There are no restrictions on narrowcasting services.

The Government acknowledges the widespread concern that exists in the community about "X" rated material on television narrowcasting services. Accordingly, the Government considers that it is in the public interest and consistent with current

community standards that "X" rated material be prohibited on all television services, whether broadcast or narrowcast.

The Government has decided that open narrowcasting services should be subject to the same level of regulation in respect of "R" rated programs as is applied to commercial broadcasting services, given that open narrowcasting services can be readily accessed by children. On the other hand, there is more restricted access to subscription narrowcasting services.

The Bill will give effect to the Government's decisions by imposing statutory licence conditions on open and subscription narrowcasting services.

B. IDENTIFICATION OF ALTERNATIVES

An alternative approach is to encourage the Australian Broadcasting Authority (the ABA) and industry to address these concerns in industry codes of practice. Codes of practice are an established means of providing community safeguards through industry self-regulation where programming is permitted. However, codes may not be an appropriate regulatory measure where Government has decided that some classifications of programming on certain services should be prohibited altogether. It is consistent with the legislative scheme of the BSA that total prohibitions on programming classifications on certain services should be effected by statute supported by legislative sanctions, rather than left to industry codes of practice (eg. Schedule 2 to the BSA includes provisions which prohibit material rated "X" and "R" on commercial television).

C. IMPACT ANALYSIS

The Bill is focused on achieving a social outcome, the protection of community standards in respect of programs provided on narrowcasting services.

The Bill involves no direct cost to the Government in respect of implementation, compliance or enforcement. The new licence conditions will not automatically result in increased administrative workload. The ABA will deal with complaints received from the public of alleged non-compliance with the proposed conditions, as for any other licence category.

The Bill should involve no direct cost to industry in respect of implementation or compliance. In a broader context, the prohibition of "X" rated programs on narrowcasting services will remove, what the industry perceives to be, a potentially lucrative source of revenue, and may affect the future planning of some pay TV operators. However, the ABA has advised that there are currently no services carrying "X" rated material.

The proposed restrictions will provide enhanced protection of community standards. The corollary is that consumers will be denied the right to choose certain types of programming.

D. OTHER REQUIREMENTS

Consultation

The Senate Select Committee on Community Standards Relevant to the Supply of Services Utilising Electronic Technologies has consulted widely in the preparation of its reports. The Department of Communications and the Arts has consulted with the ABA and relevant departments in developing advice to Government on this issue. Members of the pay television industry were concerned that existing or planned services would be jeopardised by the introduction of new legislative prohibitions. Community views on this issue varied considerably, from those who advocated a total ban on all material rated "X" and "R" on all television services to those who advocated that adult viewers should have the option to watch what they like in their own homes.

Administrative simplicity, economy and flexibility

The prohibition of "X" rated material on narrowcasting services and restrictions on "R" rated material on open narrowcasting services will become a licence condition subject to the present regulatory enforcement provisions. Compliance and monitoring will be administered through the current resources of the ABA.

Explanatory Material

The Department will advise the ABA when legislation comes into force, and information will be provided to the relevant industry bodies for dissemination to individual broadcasters.

E. REVIEW

Paragraph 158(n) of the BSA requires the ABA to report to the Minister on the operation of the Act. The ABA has provided annual reports to the Minister which identify any perceived problem areas and provide recommendations for possible measures to enhance the effectiveness of regulatory provisions. Any issues arising from the operation of a prohibition of "X" rated material on all narrowcasting television services and restrictions on "R" rated material on open narrowcasting services will be addressed in future ABA reports to the Minister.

NOTES ON CLAUSES

Clause 1 - Short title

Clause 1 provides for the citation of the *Broadcasting Services Amendment Act (No. 2) 1997*.

Clause 2 - Commencement

Clause 2 of the Bill provides for the Act to commence 28 days after the day on which it receives the Royal Assent.

Clause 3 - Schedule(s)

Clause 3 of the Bill provides for amendments of the BSA to be set out in a Schedule and for other items in a Schedule to have effect according to their terms.

SCHEDULE 1 - Amendment of the *Broadcasting Services Act 1992*

Item 1 - After subsection 123(3B)

Section 123 of the BSA makes provision for radio and television groups representing commercial broadcasting licensees, community broadcasting licensees and providers of subscription broadcasting services, subscription narrowcasting services and open narrowcasting services to develop, in consultation with the ABA, codes of practices to be applicable to each of these sections of the broadcasting industry.

Definitions of the different categories of broadcasting services are provided in Part 2 of the BSA. In particular:

- (a) section 18 defines "open narrowcasting services" as broadcasting services whose reception is limited (for example, by being targeted to special interest groups, by being intended only for limited locations or by being provided during a limited period or to cover a special event) and that comply with any determinations or clarifications made by the ABA under section 19; and
- (b) section 17 defines "subscription narrowcasting services" as broadcasting services whose reception is limited, that are made available only on payment of subscription fees and comply with any determinations or clarifications made by the ABA under section 19.

Codes of practice developed for a section of the broadcasting industry may relate to preventing the broadcasting of programs that, in accordance with community standards, are not suitable to be broadcast by that section of the industry, methods of ensuring that the protection of children from exposure to program material which may be harmful to

them is a high priority, and methods of classifying programs that reflect community standards (paragraphs 123(2)(a)-(c) of the BSA).

In developing codes of practice in relation to the matters specified in paragraphs 123(2)(a)-(c), industry groups representing commercial television broadcasting licensees and community television broadcasting licensees must ensure that those codes:

- (a) apply the film classification system administered by the Office of Film and Literature Classification (OFLC) (paragraph 123(3A)(a));
- (b) provide for methods of modifying films classified by the OFLC so that they are suitable for broadcast (paragraph 123(3A)(b));
- (c) include provisions which restrict the hours at which films classified as "M" and "MA" (which would include modified films originally classified as "R") may be broadcast (paragraphs 123(3A)(c) and (d));
- (d) provide for the provision of advice to consumers on the reasons for films receiving a particular classification (paragraph 123(3A)(e); and
- (e) ensure that films classified as "M" or "MA" do not portray material that goes beyond the previous "AO" classification (subsection 123(3B)).

This item inserts new subsections 123(3C) and (3D), which apply to industry groups representing providers of open narrowcasting television services the same requirements in relation to the development of codes of practice in relation to the matters specified in paragraphs 123(2)(a)-(c) as apply under subsections 123(3A) and (3B) to codes of practice developed by commercial broadcasting licensees and community broadcasting licensees.

Items 2 - 5 - Subsections 123A(1) and (2)

Subsection 123A(1) requires the ABA to periodically conduct a review of the operation of subsection 123(3A) to see whether the provisions in that subsection are in accordance with prevailing community standards. If the ABA concludes, as a result of such a review, that subsection 123(3A) is not in accordance with prevailing community standards, subsection 123A(2) requires it to recommend to the Minister appropriate amendments to the BSA.

These items make consequential amendments to subsections 123A(1) and (2) to include references to new subsection 123(3C) which is inserted by Item 1.

Item 6 - At the end of clause 11 of Schedule 2

Part 3 of Schedule 2 of the BSA sets out conditions which apply to commercial television broadcasting licensees. These include the following conditions relating to the broadcast of programs classified as "X" and "R" by the OFLC:

- (a) paragraph 7(1)(g) of Part 3 of Schedule 2 prohibits a licensee from broadcasting programs refused classification or classified as "X"; and
- (b) paragraph 7(1)(ga) of Part 3 of Schedule 2 prohibits a licensee from broadcasting "R" classified films unless they have been modified as mentioned in paragraph 123(3A)(b) (ie, so that they are either suitable to be broadcast or suitable to be broadcast at particular times).

This item amends Clause 11 in Part 7 of Schedule 2, which sets out conditions applying to the provision by persons of broadcasting services under class licences (including class licences for the provision of open narrowcasting services and subscription narrowcasting services). The effect of the amendments would be that:

- (a) the prohibition in relation to the broadcasting of programs that have been refused classification or have been classified as "X" that applies to commercial television broadcasting licensees and to subscription television broadcasting licensees (paragraph 7(1)(g) of Part 3 of Schedule 2 and paragraph 10(1)(f) of Part 6 of Schedule 2) would also apply to the provision by a person of an open television narrowcasting service or a subscription television narrowcasting service in accordance with a class licence; and
- (b) the restrictions in relation to the broadcasting of programs that have been classified as "R" that apply to commercial television broadcasting licensees (paragraph 7(1)(ga) of Part 3 of Schedule 2) would also apply to the provision by a person of an open television narrowcasting service in accordance with a class licence.

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