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1990—91—92

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE HOUSE OF REPRESENTATIVES

BROADCASTING SERVICES (SUBSCRIPTION TELEVISION BROADCASTING)
AMENDMENT BILL 1992

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Minister for Transport and Communications, Senator
the Hon. Bob Collins)

BROADCASTING SERVICES (SUBSCRIPTION TELEVISION BROADCASTING) AMENDMENT BILL 1992

The *Broadcasting Services Act 1992* was passed by the both Houses of Parliament on 26 June 1992 and commenced on 5 October 1992. However, before the Act was passed, provisions for subscription television broadcasting in Part 7 of the *Broadcasting Services Bill 1992* were removed and referred to the Senate Select Committee on Subscription Television Broadcasting. The Committee reported back to the Senate on 16 September 1992.

This *Broadcasting Services (Subscription Television Broadcasting) Amendment Bill 1992* implements the Government's decisions on subscription television broadcasting (Pay TV) following consideration of the Committee's recommendations. This is to be achieved by amending the *Broadcasting Services Act 1992* to include the new Part 7 as provided for in this Bill.

This Bill is part of the process of reform commenced in the *Broadcasting Services Act* and it should be read in the context of the reforms of that Act.

The *Broadcasting Services (Subscription Television Broadcasting) Amendment Bill 1992*:

- . provides a licensing and regulatory regime for the provision of subscription television broadcasting services that can be delivered using any technology (for example cable, microwave or satellite);
- . provides for the licensing of individual subscription television broadcasting service;
- . puts in place a regime for services delivered by a "subscription television broadcasting satellite", ie. a satellite operated by AUSSAT Pty Ltd under its telecommunications carrier licence (AUSSAT is a subsidiary of OPTUS Communications Ltd), by providing for:
 - the allocation by a price-based allocation process of two licences ("licence A" and "licence B") each to provide up to four subscription television broadcasting services;
 - the allocation of a licence ("licence C") to a subsidiary of the Australian Broadcasting Corporation that allows the provision of up to two subscription television broadcasting services;
 - an ownership and control regime that applies until 1 July 1997 and imposes limits on the ownership and control of licence A; and
- . introduces measures that will provide consumer protection including:
 - mandating the use of digital technology for the delivery of satellite services to, in part, avoid consumer confusion, cost and risk caused by competing or superseded technologies;
 - requiring access by any satellite operator to customer reception equipment s

that customers only need one set of reception equipment to be able to receive any or all services.

FINANCIAL IMPACT

The allocation of subscription television broadcasting service licences (A and B) by a price-based process conducted by the Minister for Transport and Communications will lead to an unknown amount of revenue. It will depend on the commercial assessment of the value of the licences. Other licences will be allocated by the Australian Broadcasting Authority (ABA) on a cost recovery basis.

Initial funding made allowance for this activity when the ABA was established. The introduction of subscription television broadcasting services will: lead to the introduction of new broadcasting technology; generate significant employment, manufacturing and program production opportunities; and establish a sizeable new industry in Australia with good opportunities for the export of its programs, services and reception technology.

NOTES ON CLAUSES

Clauses 1 and 2 provide for citation and commencement. Clause 3 inserts a new Part 7 into the Broadcasting Services Act.

PART 7-SUBSCRIPTION TELEVISION BROADCASTING SERVICES

Division 1 - Allocation of subscription television broadcasting licences

New section 93 - Minister to determine allocation system for satellite licences allocated before 1 July 1997

This section defines the licences for the provision of satellite subscription television broadcasting services and sets out their method of allocation. These are to be the only licences for satellite delivered services to be issued before 1 July 1997.

New section 93(1) requires the Minister to determine a priced-based allocation system for the allocation of licence A and licence B each of which allows the provision of up to 4 subscription television broadcasting services. The system will set out the manner in which the successful applicants are chosen where price is intended to be the deciding factor.

New section 93(2) requires the Minister to allocate licence C for the provision of up to 2 subscription television broadcasting services to a subsidiary of the Australian Broadcasting Corporation (ABC). The timing of this allocation is to be as soon as it is deemed appropriate by the Minister after the allocation of licences A and B

The allocation of licence C is subject to any terms and conditions the Minister determines (new section 93(3)) and these will form conditions on licence C(new section 93(4)). Conditions could address matters such as restrictions on the sale of equity in the licensee

company; limiting the risk to, and liability of, the Commonwealth; developing a charging regime for the use of ABC assets, goods and services; and measures to avoid potential adverse impacts on the Corporation's free-to-air television services.

The Bill leaves licence C free to form strategic or commercial alliances with licence A or licence B. They could cooperate to provide a service of up to 6 program services.

New section 93(5) allows the allocation of the licence to be undertaken by the ABA if the Minister decides that this would be appropriate. An application fee can be charged as part of the price-based allocation system for cost recovery purposes.

The purpose of new section 93(6) is to allow the Minister to conduct the allocation process and select the successful applicant, but for the licence to be formally allocated by the ABA.

It is a requirement of the Broadcasting Services Act that a licensee be suitable at all times.

New section 93(7) makes the allocation of licences by this section subject to the opinion of the Trade Practices Commission. The opinion is to address whether the allocation of the licence to an applicant would within the meaning of Part IV of the *Trade Practices Act 1974* constitute a contravention of that Part.

New section 93(8) requires the Minister to publish the names of the successful applicants for licences A and B and the amount paid by those applicants to ensure openness and accountability of licensing decisions.

New section 94 - Transmission system standards

New section 94 sets out the procedure for determining the full digital transmission standard that must be used by all satellite subscription television broadcasting services. Licences A and B have the primary role in this process consistent with the system chosen being a significant factor in the cost of services and thus the commercial risk. The single transmission standard so determined is enforceable as a licence condition.

New section 94(1) provides that, if licensees A and B both agree on the full digital transmission standard to be used, then, subject to consultation with OPTUS on the efficient use of the satellite (new section 94(2)), the Minister is to declare the agreed standard as that to be used in satellite transmission and reception equipment by all satellite service providers.

If licensees A and B disagree, the Minister has the power to declare a standard of the Minister's choosing (new section 94(3)). Before declaring the standard the Minister is to consult with licensees A and B, with Optus in relation to the efficient use of the satellite, and to have regard to any relevant international standards (under section 94(4)).

To provide opportunities for local manufacture of consumer reception equipment for satellite subscription television broadcasting, consumer equipment to the standard must be capable of being manufactured in Australia (new section 94(5)).

Each satellite subscription television broadcasting licence is subject to a condition that they provide their services using a transmission system in accordance with the standard

declared by the Minister (new section 94(6)).

New section 95 - When subscription television broadcasting licence must not be allocated

New section 95(1) prohibits a subscription television broadcasting licence being allocated to an applicant that: (a) is not an Australian company; or (b) the ABA decides, under new section 98(2), is not suitable.

New section 95(2) makes it clear that, notwithstanding paragraph (1)(b), the ABA is not required to decide on an applicant's suitability before allocating a licence to that applicant. If suitability is raised as an issue, the ABA may decide that an examination of an applicant's suitability to hold a subscription television broadcasting licence is necessary.

New section 96 - Allocation of other subscription television broadcasting licences

New section 96 provides for the allocation of all other subscription television broadcasting licences except those in new section 93. From the commencement of this Act this section will apply to the licensing of all technologies other than satellite (before 1 July 1997) that could be used to deliver subscription television broadcasting. This section will therefore be used to deliver microwave (MDS) and cable delivered subscription television broadcasting services.

New section 96(1) provides for the allocation on application of subscription television broadcasting licences by the ABA. Each licence will permit the provision of one subscription television broadcasting service (new section 96(2)).

The ABA is not permitted to allocate a licence under this section for satellite delivery before 1 July 1997 (new section 96(3)). This limitation is supported by s.132 of the Broadcasting Services Act that makes it an offence to provide a subscription television broadcasting service without a licence.

While there is no limit on the number of licences that can be issued under section 96(1), and hence the number of program services an individual can deliver, new section 96(5) makes the allocation of any licence under this section subject to the opinion of the Trade Practices Commission. The opinion is to address whether the allocation of the licence to an applicant-

- would have the effect of placing the applicant in a position of market dominance in the meaning of section 50 of the *Trade Practices Act 1974*; and
- would not be authorised under s.88 of that Act.

This opinion must be provided within 30 days. Normally such an allocation would not be subject to the Trade Practices Act so the Commission is required to consider the allocation if that Act applied.

This brings the allocation of subscription television broadcasting licences within the jurisdiction of the Trade Practices Act as it applies to general commercial activities. Together with new sections 93(7) and 116B, it makes the allocation of all subscription television broadcasting licences subject to that Act. The market conduct of all licensees

will come within the jurisdiction of the Trade Practices Act.

New section 97 - Requests to the Trade Practices Commission

This section supports new sub-sections 93(7) and 96(5) by requiring the ABA to request the Trade Practices Commission to provide a report before allocating a licence under section 93 or 96 to a person.

New section 98 - Suitability for allocation of licence

This section sets out the manner in which, and the factors by reference to which, the ABA is to determine the suitability of a company for a subscription television broadcasting licence. This approach is the same as that in the Broadcasting Services Act for commercial broadcasters. The factors set out in this section are expected to minimise the need for subjective judgements. The fact of suitability does not have to be tested at licence allocation by investigation or hearings by the ABA. It is at the discretion of the ABA to test suitability if it has cause for concern (refer to section 95(2)). It is a standard licence condition of the Broadcasting Services Act that licensees continue to meet the suitability requirements (refer to paragraph 10(2) of Schedule 2).

Division 2 - Conditions of subscription television broadcasting licence

New section 99 - Additional conditions applicable to subscription television broadcasting licence

This section imposes the standard licence conditions, set out in Part 6 of Schedule 2 of the Broadcasting Services Act, on subscription television broadcasting licences. This section, consistent with the approach for other categories of service, also empowers the ABA to vary, revoke, or impose additional conditions on such a licence, subject to certain specified limitations. Procedures the ABA must follow in taking action to impose licence conditions are also provided.

New section 99(3) allows the Minister to direct the ABA to impose special conditions on licence C at any time, or to vary or revoke existing conditions. It is in addition to subsection 93(4) that allows the Minister to impose conditions on licence C at the time of its allocation to the ABC.

New section 100 - Matters to which conditions may relate

New section 100(1) limits conditions that may be imposed by the ABA under section 99 to those relevant to the provision of subscription television broadcasting services.

New section 100(2) lists some of the conditions the ABA may impose. These include, inter alia, a condition requiring the licensee to comply with a code of practice that is applicable to the licensee. Codes of practice are made under Part 9 of the Act and are to be observed in the conduct of broadcasting operations. Section 100(2) is intended to obviate the need for the ABA to set a program standard under section 125 of the Act if there are only one or two operators in breach of the code on whom conditions can be imposed.

Conditions may also require compliance with the film classification system administered by the Office of Film and Literature Classification.

New section 100(3) requires the ABA to impose conditions in relation to the accessibility of consumer reception equipment by all satellite subscription television broadcasting services and that licensees provide access for all other operators, at a fair price, to any subscriber management systems that they have established. These conditions are to, firstly, make it necessary for consumers of satellite subscription television broadcasting services to purchase or rent only one reception system and, secondly, to reduce the economic barriers to entry to the market of later satellite subscription television broadcasting service providers.

New section 100(4) allows the Minister to direct the imposition of a licence condition relating to the involvement of Australian industry on licences A, B and C. This allows any industry development plan to be imposed as a licence condition and thus to be enforceable.

New section 100(5) requires the ABA to impose on all subscription television broadcasting licences a licence condition requiring them to provide domestic reception equipment on a rental basis, rather than just for purchase. This will provide consumers with protection from changes in technology, services not living up to expectations or services failing.

New section 100(6) requires the ABA to impose on all non-satellite subscription television broadcasting licences a licence condition requiring that customers who rent domestic reception equipment are able to terminate rental agreements by giving one month's written notice.

New section 101 - Special condition relating to advertising

This section imposes a general condition on all subscription television broadcasting services prohibiting them from broadcasting advertisements before 1 July 1997.

New section 101(2) describes when a person is not to be taken to have broadcast an advertisement, and new section 101(3) is to allow subscription television broadcasting services to promote themselves and other subscription television broadcasting services without being in breach of the advertising ban.

New section 102 - Special condition relating to Australian content

This section imposes a special condition on each subscription television broadcasting licence, requiring 10% per year of program expenditure on drama program services to be on new Australian drama programs. "Australian drama program" is defined at section 1(1). It is intended that this licence condition will provide opportunities for the Australian drama production industry to provide new material for these services that people are willing to watch to pay.

This condition is subject to review before 1 July 1997 under section 215(b) of the Act.

New section 103 - Special condition applicable to licences A and B

This section allows an enforceable condition to be placed on licences A and B that they commence services within 6 months of the Minister being satisfied that suitable transmission and reception equipment is available. This is to prevent unnecessary delay in the commencement of services where digital transmission and reception equipment is commercially available, given that OPTUS is reserving satellite capacity for satellite subscription television broadcasting services until 30 June 1997.

Division 3 - Ownership and cross-media rules

Subdivision A - Preliminary

New section 104 - Application of Division

This section is the sunset provision on the ownership and control regime established in this Division until 30 June 1997. Specific limits on the foreign ownership will remain after that date and (new section 109) and concentration of ownership, competition and market behaviour will then be a matter for the Trade Practices Act.

New section 105 - Large circulation newspapers

This section provides for the establishment of a Large Circulation Newspaper Register for newspapers having average daily circulation exceeding 100,000, the administration of the Register, and for public access to the Register.

Subdivision B - Ownership restrictions

New sections 106, 107 and 108 impose limits on the ownership and control of licence A by incumbent broadcasters, newspaper operators and telecommunications carriers to provide for the introduction of a new and independent media player via that licence and to prevent the common carriers of services becoming fully vertically integrated in, and potentially dominating, services and their delivery.

The 2% company interest limit imposed in this section is intended to minimise the opportunity to manipulate the ownership limits as a defence against hostile takeovers and not prejudice normal commercial operations where a small parcel of shares is acquired inadvertently or incidental to a larger transaction.

New section 106 - Person in control of newspaper not to control, or hold company interests, in licence A

Prohibits a person who controls a newspaper that is entered in the Large Circulation Newspaper Register from controlling, or having company interests of more than 2% in, licence A.

New section 107 - Commercial television licensees not to control, or hold company interests in, licence A

prohibits a person who controls a commercial television broadcasting licence from controlling, or having company interests of more than 2% in, licence A.

New section 108 - Telecommunications carriers not to control, or hold company interests in, licence A

prohibits each telecommunications carrier from controlling, or having company interests of more than 2% in, licence A.

New section 109 - Foreign ownership limits for subscription television broadcasting licences

This section applies individual and aggregate foreign ownership limits to all subscription television broadcasting licences regardless of the delivery mechanism.

New section 109(1) limits to 20% the company interests in a subscription television licence which may be held by a foreign person.

New section 109(2) prohibits the aggregate of company interests held by foreign persons in a subscription television broadcasting licence from exceeding 35%.

The sunset provision in section 104 does not apply to this section.

New section 110 - Limits between satellite subscription television broadcasting licences

prohibits a person who controls licence A from controlling, or having company interests exceeding 2% in, licence B. The same restrictions on a person controlling licence B apply with respect to licence A. This is to ensure that licences A and B are independent.

Division 4 - Offences for breaches

New section 111 - Offences for breaches

This section creates an enforcement regime for the ownership and control limits by applying Divisions 7 and 8 of Part 5 of the Act (relating to approval of temporary ownership and control breaches, and action by the ABA to enforce ownership and control limits) to the limits applying to subscription television broadcasting licences under Division 3 of this Part.

Division 5 - Notification provisions

New section 112 - Notification provisions

This section imposes notification requirements on each a subscription television broadcasting licensee similar to the notification requirements imposed on commercial broadcasting licensees under Division 6 of Part 5 of the Act. Other than those sub-sections

relation to notification of foreign ownership and control, the notification requirements cease on 1 July 1997 when the limits they relate to cease to have effect.

Division 6 - Miscellaneous

New section 113 - Transfer of subscription television broadcasting licence

Permits transfer of a subscription television broadcasting licence to another person except for licence C. Because licence C will be allocated to a subsidiary of the ABC free of charge it can only be transferred with the written approval of the Minister.

New section 114 - Surrender of subscription television broadcasting licence

Enables a subscription television broadcasting licence to be surrendered to the ABA.

New section 115 - Minister may protect the free availability of certain types of programs

This section is an 'anti-siphoning' provision. Program siphoning in this context means the obtaining by a subscription television broadcasting licensee of the rights to broadcast events of national importance and cultural significance that have traditionally been televised by free-to-air broadcasters, such that those events could not be received by the public free of charge. Such siphoning will be curtailed by way of a list of special events, or types of events, to be notified by the Minister under this section.

To enforce these provisions, it is a condition of a satellite subscription television broadcasting licence (see paragraph 10(1)(e), Part 6 of Schedule 2 of the Act) that a licensee not acquire the right to broadcast an event listed in a notice published by the Minister under new section 115(1) unless a national broadcaster or a commercial television licensee has acquired that right.

If the national and commercial television broadcasters have had an opportunity to acquire such a broadcasting right in relation to an event, and they have passed up that opportunity, then the Minister may remove that event from the list of events notified under this section (new section 115(2)).

This process should ensure, on equity grounds, that Australians will continue to have free access to important events. It will, however, also allow subscription television broadcasters to negotiate subsequent rights to provide complementary, or more detailed, coverage of events.

New section 115(3) subjects a notice under subsection (1) or (2) to parliamentary oversight by making it a disallowable instrument.

New section 116 - Certain arrangements do not result in persons being associates

This section modifies the definition of "associate" in section 6 of the Act so that-
 subscription television broadcasting licensees may jointly operate facilities and market their services without breaching ownership and control rules; and

commercial television broadcasting licensees can participate jointly in licence B without that joint venture making them associates for Part 5 of the Act (ownership and control rules for commercial television).

New section 116A - Use of additional capacity

This section allows satellite licensees to make use of additional satellite capacity, or other delivery technologies, to extend the coverage of their services without requiring additional licences.

New section 116B - Application of section 51 of the Trade Practices Act

This section makes it clear that the Trade Practices Act applies to subscription television broadcasting.

New section 116C - Interpretation

This section defines the expressions "licensee A" and "licensee B".

New section 128 - Standards and codes to be amendable by the Parliament

Clause 4 repeals section 128 of the *Broadcasting Services Act 1992* and substitutes a new section 128 that gives the Parliament the power to amend standards or codes of practice made under the Act.



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