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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

COMMUNICATIONS AND TOURISM LEGISLATION AMENDMENT BILL
1995

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Communications and the Arts and
Minister for Tourism, the Hon Michael Lee, MP)



COMMUNICATIONS AND TOURISM LEGISLATION AMENDMENT BILL 1995

OUTLINE

This Bill contains amendments to Communications legislation administered within the Communications and the Arts portfolio and legislation administered within the Tourism portfolio.

The amendments are of a minor policy or technical nature and do not contain any significant new policy measures.

The amendments included in the Bill are described below.

Australian Tourist Commission Act 1987

The amendments to this Act:

- remove the requirement that members of the Board of the Australian Tourist Commission cease to hold office at the age of 65; and
- remove the requirement that the Board not employ persons on terms and conditions more favourable than those of the Managing Director.

Australian Tourist Commission (Transitional Provisions) Act 1987

The Bill repeals this Act as it no longer has any application.

Broadcasting Services Act 1992

The amendments to this Act:

- ensure that commercial television broadcasting licensees in solus markets who are given permission by the ABA under section 73 to operate a second commercial television broadcasting service in the same licence area can be allocated a second licence to operate that service; and
- clarify the interaction between the process for giving a permission to operate a second service under section 73 and the price-based allocation of a new licence under Part 4;
 - by "stopping the clock" on a section 73 application until the proposed price-based allocation is completed.

Broadcasting Services (Transitional Provisions and Consequential Amendments) Act 1992

The amendments to this Act:

- remove the Minister's powers to vary or revoke technical conditions and impose further conditions in respect of transmitter licences that were formerly licence warrants or retransmission permits granted under the *Broadcasting Act 1942* and place those powers in the hands of bodies more appropriate to exercise them - the ABA and the SMA; and
- remove transitional provisions relating to provisions of the *Broadcasting Act 1942* relating to political broadcasting which no longer apply;

Radiocommunications Act 1992

The amendments to this Act:

- enable the SMA, in determining a price-based allocation system under section 106 in relation to specified transmitter licences, to limit eligibility to apply for those licences to persons who are authorised under the Act or other law to operate radiocommunications transmitters of that kind, or to provide the services for which the transmitters will be used; and
- enable radio inspectors to enter unoccupied premises to turn off Emergency Position Indicating Radio Beacons which have activated spontaneously.

FINANCIAL IMPACT STATEMENT

The amendments in the Bill are not expected to have a significant impact on Commonwealth expenditure or revenue.

NOTES ON CLAUSES

Clause 1 - Short title

This clause provides for the citation of this Act.

Clause 2 - Commencement

This clause provides for sections 1, 2 and 8 of the Act to commence on Royal Assent.

The remaining clauses and the amendments set out in the Schedule commence on the 28th day after the day of Royal Assent by virtue of subsection 5(1A) of the *Acts Interpretation Act 1901*.

Clause 3 - Transitional - application for permission to operate a second commercial television broadcasting service in a licence area

Items 3 to 8 of the Schedule to the Bill contain amendments which include in the *Broadcasting Services Act 1992* a mechanism for allocation of an additional commercial television licence in a single market where the existing licensee is given a permission under section 73 of the Act to operate a second commercial television broadcasting service in the licence area.

Some applications for such a permission may be lodged under section 73 before the commencement of the amendment which enables the allocation of a licence.

This clause is a transitional provision which ensures that if the ABA has not informed the licensee of the outcome of an application under section 73 made before commencement, the application is taken to have been made on commencement. This will ensure that the ABA has 45 days after commencement of the amendments to consider an application, including any application under consideration at the time of the amendment, and if a permission is given, an additional licence will be able to be allocated under the new section 38A.

Clause 4 - Conditions imposed under the *Radiocommunications Act 1992*

Items 9 to 14 of the Schedule to the Bill contain amendments which omit subsection 10(10) of the *Broadcasting Services (Transitional Provisions and Consequential Amendments) Act 1992* (the "Transitional Provisions Act"),

replace that subsection with new subsections 10(10) and (10A) and make other amendments consequential upon this change.

The purpose of the amendments is to remove the Minister's power to vary or revoke conditions and impose further conditions that apply to certain transmitter licences and place those powers in the hands of bodies more appropriate to exercise them - the ABA and the SMA. The relevant licences were formerly licence warrants or retransmission permits granted under the *Broadcasting Act 1942* and continued in force under section 100 or 102 of the *Radiocommunications Act 1992* by virtue of section 10 of the Transitional Provisions Act.

As the relevant licences were continued in force under the relevant Radiocommunications legislation, it had been thought that relevant provisions of that legislation also provided a power for the revocation or variation of conditions or the imposition of new conditions on these licences. However, there is an argument that the relevant powers are available only under the Transitional Provisions Act.

It is considered more in keeping with the general scheme of the Broadcasting Services Act and the Radiocommunications Act for the ABA and the SMA to have the relevant powers to affect the conditions of transmitter licences.

This clause removes any uncertainty about the status of decisions taken by the SMA before commencement of the amendments to impose or revoke or vary conditions of the relevant licences by deeming any purported exercise of the relevant powers by the SMA under the *Radiocommunications Act 1992* to be a valid exercise of the power under subsection 10(10) of the Transitional Provisions Act.

Clause 5 - Conditions imposed under the *Radiocommunications Act 1983*

The reasons for the inclusion of this clause are explained in the notes on the preceding clause. This clause is included to avoid any uncertainty about the status of decisions to impose or revoke or vary conditions of the relevant licences under the *Radiocommunications Act 1983*. During the period between 5 October 1992 and 1 July 1993, the relevant licences were continued in force under the *Radiocommunications Act 1983* by virtue of section 10 of the Transitional Provisions Act as in force at that time.

This clause removes any uncertainty about the status of decisions taken to impose or revoke or vary conditions of the relevant licences by deeming any purported exercise of the relevant powers under the 1983 Radiocommunications Act between 5 October 1992 and 1 July 1993 to be a valid exercise of the power under subsection 10(10) of the Transitional Provisions Act.

Clause 6 - Conditions imposed under the *Broadcasting Services (Transitional Provisions and Consequential Amendments) Act 1992*

Items 9 to 14 of the Schedule to the Bill contain amendments which omit subsection 10(10) of the *Broadcasting Services (Transitional Provisions and Consequential Amendments) Act 1992*, replace that subsection with new subsections 10(10) and (10A) and make other amendments consequential upon this change.

The purpose of the amendments is explained in the notes on clause 4.

This clause contains 2 transitional provisions which deem any licence condition in force immediately before commencement which has been:

- . imposed or varied under subsection 10(10) of the Transitional Provisions Act; or

- . deemed to have been imposed or varied under the preceding 2 clauses;

to have been imposed or varied under the relevant new subsections 10(10) and (10A). This will ensure that after commencement the ABA and the SMA powers to revoke or vary conditions will extend to the relevant conditions which have been previously imposed or varied, irrespective of the mechanism used to impose or vary them.

Clause 7 - Amendment of Acts

This clause provides for the making of the amendments set out in the Schedule.

Clause 8 - Repeal

This clause repeals the *Australian Tourist Commission (Transitional Provisions) Act 1987*. This Act no longer has any application. The purpose of this Act was to protect contractual arrangements in place in 1987 when the *Australian Tourist Commission Act 1987* came into effect. This is the usual practice when a statutory authority moves from the authority of one Act to another. In this case one of the purposes was to enable the then Managing Director of the Australian Tourist Commission to continue in office in accordance with the terms and conditions of his original appointment.

SCHEDULE

Australian Tourist Commission Act 1987

Item 1 - Subsection 14(3)

This item omits subsection 14(3) of the Act to remove the requirement that members appointed to the Board of the Australian Tourist Commission cease to hold office at age 65.

Item 2 - Subsection 42(3)

This item omits subsection 42(3) of the Act to remove the requirement that persons should not be employed by the Board on terms and conditions more favourable than those applying to the Managing Director. It is considered appropriate to remove the subsection to avoid any confusion relating to conditions of employment of Australian Tourist Commission officers.

In some countries where the Australian Tourist Commission has overseas offices, the high cost of living results in substantially higher wages in Australian dollar terms than those prevailing in Australia. The amendment will clarify that contractual agreements can be made with locally engaged staff which result in remuneration which, when converted to Australian dollars, exceeds that of the Australian Tourist Commission's Managing Director.

Broadcasting Services Act 1992

Item 3 - Paragraph 38(1)(a)

This item makes a minor technical amendment to paragraph 38(1)(a) of the Act to require the ABA, when it is advertising for applications for commercial broadcasting licences, to include the day by which applications must be received, rather than the date before which they must be received.

The amendment avoids potential confusion by ensuring the advertised day is the last day on which applications can be lodged, which is usually the case in such matters.

Item 4 - New section 38A - Additional commercial television licences in single markets

Items 3 to 8 of the Schedule contain amendments which include in the Act a mechanism for allocation of an additional commercial television licence in a single market where an existing licensee is given a permission under section 73 of the Act to operate a second commercial television broadcasting service in the licence area.

Subsection 73(1) of the *Broadcasting Services Act 1992* provides that if there is only one commercial television broadcasting licensee providing broadcasting services in a licence area and additional commercial television broadcasting licences can be allocated in that area, the existing licensee may apply to the ABA for permission to operate a second commercial television broadcasting service in the licence area.

Subsection 73(2) allows the ABA to give the licensee permission to operate a second service for a period of not more than five years if satisfied that it is unlikely that another person would be interested in, and likely to be in a position to, operate another commercial television broadcasting service in the licence area.

The amendments are necessary because the Act does not currently provide a specific mechanism for the allocation of a licence if a licensee is given a permission under section 73.

This item inserts a new section 38A in the Act which provides a mechanism for the allocation of such a licence.

New subsection 38A(1) requires the ABA to allocate a licence if, after new section 38A commences, the ABA gives a commercial television broadcasting licensee permission to operate a second service in a licence area under subsection 73(2).

The requirement to allocate a licence is subject to the suitability requirements under sections 37 and 41 of the Act.

Subsection 53(2) of the Act contains a prohibition on a person being in a position to exercise control of more than one commercial television broadcasting licence in the same licence area.

Section 55 of the Act contains prohibitions on a person being a director of a company in a position to exercise control of 2 commercial television broadcasting licences in the same area.

Accordingly, new subsection 38A(1) specifically allows the allocation of the additional licence despite these prohibitions and allows the licensee to provide services under both licences for the period that the section 73 permission is in force.

The licences will remain in force for 5 years in accordance with section 45 and can be renewed under section 46.

However, the exemption from subsection 53(2) and section 55 only lasts for the period that the permission is in force. Accordingly, before the permission ends, the licensee will need to:

- transfer the licence, or the licensee's other licence for that licence area, to another person under section 48; or
- surrender the licence, or the licensee's other licence to the ABA under section 49; or
- obtain an extension of the original period of the permission under subsection 73(3).

Note that under subsection 73(2), the maximum period for which a permission can be given is 5 years and under subsection 73(3), only one extension can be given for a maximum period of a further 5 years.

New subsection 38A(2) provides for a fee to be payable by the licensee on the allocation of the additional licence, but the amount of the fee must not exceed the costs incurred in allocating the licence. A similar fee applies in relation to the allocation of additional radio licences under subsection 39(2).

New subsection 38A(3) makes it a condition of a licence allocated under new subsection 38A(3) that the licensee will continue to provide services under both licences for at least 2 years after the allocation of the additional licence. A similar condition applies in relation to the allocation of additional radio licences under subsection 39(3).

Item 5 - Subsection 73(2)

This item amends subsection 73(2) to require a permission given under that subsection to be at least for 2 years as a consequence of the licence condition in the new subsection 38A(3).

Item 6 - Subsections 73(4) and (5)

This clause omits subsections 73(4) and (5) and substitutes new subsections 73(4) to (10).

Subsection 73(5) of the Act provides that while a permission under section 73 is in force, the service to which the permission relates and the second service are, for the purposes of Part 5 of the Act, to be taken to be one service provided under the one licence. This provision is unnecessary because new

subsection 38A(1) creates the necessary exemptions from the relevant control and directorship rules for both licences for the period that the permission is in force.

Subsection 73(4) requires the ABA to make decisions within 45 days in relation to applications under section 73.

New subsections 73(4) to (8) replace this rule with rules that take into account the potential interaction between an application under section 73 and an allocation process that the ABA may be undertaking under sections 36 and 38 of the Act.

New subsection 73(4) provides for an automatic giving of a 5 year permission or 5 year extension if the ABA does not make a decision and notify the applicant within 45 days of receiving the application for the permission or extension.

New subsection 73(5) creates a “stop the clock” mechanism for an application under section 73 where there are outstanding applications for the allocation of a commercial television licence in the licence area under Part 4. The outstanding applications must be considered first.

New subsection 73(6) creates a “stop the clock” mechanism for an application under section 73 where an application for the allocation of a commercial television licence in the licence area is made under Part 4 after a section 73 application has been lodged and before 45 days have elapsed.

This is intended to deal with a situation where the ABA is proceeding with a price-based allocation of a new commercial licence in a solus market and the existing licensee lodges an application under section 73 before applications have been received under the price-based system. The applications under the price-based system must be considered first.

New subsection 73(7) deems a section 73 application to be withdrawn if an application for a new commercial television licence under Part 4 referred to in new subsections 73(5) or (6) is successful.

New subsection 73(8) creates a “stop the clock” mechanism for an application under section 73 where the ABA advertises under section 38 for applications for the allocation of a commercial television licence in the licence area after a section 73 application has been lodged and before 45 days have elapsed from its lodgement (ie before a decision is deemed to have been made under new subsection 73(4)). The clock is stopped on the section 73 application until the allocation period has elapsed.

This is intended to deal with a situation where the ABA is proposing to proceed with a price-based allocation of a new commercial licence in a solus market and the existing licensee lodges an application under section 73 before the ABA has advertised under section 38. The price-based system

must proceed first before the section 73 application is considered, unless the ABA takes more than 45 days to advertise under section 38 (in which case new subsection 73(4) deems a decision to have been made).

New subsection 73(9) deems a section 73 application to be withdrawn if at the end of the allocation period an additional commercial television licence is allocated.

New subsection 73(10) defines the allocation period for the purpose of the "stop the clock" rule in new subsection 73(8) and the rule in new subsection 73(9).

Item 7 - New section 73A - When permission to operate a second commercial television broadcasting service ends

This item inserts a new section 73A in the Act to make it clear that a permission to operate a second commercial television broadcasting service under section 73 ends in certain circumstances.

The new section makes it clear that such a permission ends if:

- . the licensee is denied an additional licence under section 38A (for example, because subsection 41(2) applies - the licensee is unsuitable)
- . the licensee transfers the original or additional licence to another person (section 48);
- . the licensee surrenders the original or additional licence (section 49);
- . one of the licences is cancelled under section 143.

Item 8 - Section 131

Section 131 of the Act creates an offence for a person to provide a commercial television broadcasting service without a licence.

This item adds a new subsection 131(2) which is included to make it clear that a permission granted under section 73 is not a licence for the purpose of this provision. Where a section 73 permission is obtained, a licence is required under new section 38A before the person can provide the additional service.

Broadcasting Services (Transitional Provisions and Consequential Amendments) Act 1992

Items 9 to 14 of the Schedule to the Bill contain amendments which omit subsection 10(10) of the *Broadcasting Services (Transitional Provisions and Consequential Amendments) Act 1992* (the "Transitional Provisions Act"), replace that subsection with new subsections 10(10) and (10A) and make other amendments consequential upon this change.

The purpose of the amendments is to remove the Minister's power to vary or revoke the conditions and impose further conditions that apply to certain transmitter licences and place those powers in the hands of bodies more appropriate to exercise them - the ABA and the SMA. The relevant licences were formerly licence warrants or retransmission permits granted under the *Broadcasting Act 1942* and continued in force under section 100 or 102 of the *Radiocommunications Act 1992* by virtue of section 10 of the Transitional Provisions Act.

It is considered more in keeping with the general scheme of the Broadcasting Services Act and the Radiocommunications Act for the ABA and the SMA to have the relevant powers to affect the conditions of these transmitter licences.

Item 9 - Section 4

Section 4 of the Transitional Provisions Act contains definitions of terms used in that Act.

This amendment inserts a new definition of the term 'Spectrum Manager' consequential upon the amendment in item 12.

Item 10 - Subsection 10(7)

This item makes a minor amendment to subsection 10(7) of the Act consequential upon the amendment in item 12.

Item 11 - Subsection 10(8)

This item makes a minor amendment to subsection 10(8) of the Act consequential upon the amendment in item 12.

Item 12 - Subsection 10(10)

This item omits subsection 10(10) and substitutes new subsections 10(10) to (10D). The reason for the amendment is explained above.

New subsection 10(10) gives the ABA the power to impose further conditions or revoke or vary conditions of a licence continued in force as a transmitter licence under section 102 of the Radiocommunications Act by virtue of subsection 10(1) of the Transitional Provisions Act. The reason for giving this power to the ABA is that subsection 26(1) of the Broadcasting Services Act together with paragraph 109(1)(d) of the Radiocommunications Act gives the function of determining technical specifications in relation to broadcasting services bands transmitter licences to the ABA.

New subsection 10(10A) gives the SMA the power to impose further conditions or revoke or vary conditions of a licence continued in force as a transmitter licence under section 100 of the Radiocommunications Act by virtue of subsection 10(3) or(5) of the Transitional Provisions Act. The reason for giving this power to the SMA is that paragraph 107(1)(g) of the Radiocommunications Act gives the function of determining conditions in relation to section 100 licences to the SMA.

New subsection 10(10B) gives the ABA the power to delegate its powers under the new subsection 10(10) as if they were powers of the ABA under the Broadcasting Services Act (BSA). Clause 18 of Schedule 3 to that Act enables delegation of ABA powers to an ABA member, associate member or member of staff. The prohibition in clause 18(2)(c) of that Schedule does not apply to prevent the delegation in respect of these licences because that prohibition applies only to licences allocated by the ABA under the BSA (see the definition of 'licence' in subsection 6(1) of the BSA).

New subsection 10(10C) gives the Spectrum manager the power to delegate the SMA's powers under the new subsection 10(10A) to the ABA. This reflects a similar power given to the SMA under subsection 238(3) of the Radiocommunications Act which enables arrangements to be made for the most convenient way of handling licensing arrangements for the relevant section 100 licences.

New subsection 10(10D) enables the ABA to in turn delegate powers delegated to the ABA by the SMA to members, associate members and members of staff of the ABA (see clause 18(1) of Schedule 3 to the Broadcasting Services Act). This reflects a similar arrangement under subsection 238(4) of the Radiocommunications Act which applies to similar powers.

Item 13 - Subsection 10(11)

This item makes a minor amendment to subsection 10(11) of the Act consequential upon the amendment in item 12.

Item 14 - Subsection 16(2)

This item changes a reference from 'Minister' to 'ABA' in subsection 16(2) of the Act consequential upon the amendment in item 12.

Item 15 - Subsection 28(1)

At the time the *Broadcasting Services Act 1992* (BSA) was drafted, the provisions of Part IIID of the *Broadcasting Act 1942* relating to political broadcasting had been challenged in the High Court but no decision had been handed down. As a consequence, no provisions equivalent to Part IIID were included in the BSA but the relevant provisions in the *Broadcasting Act 1942* were kept on foot by means of a transitional provision in section 28 of the Transitional Provisions Act.

Part IIID was subsequently held to be invalid by the High Court in Australian Capital Television v the Commonwealth.

Accordingly, items 15 and 16 remove the relevant transitional provisions. These amendments do not change the existing provisions relating to political broadcasts set out in Schedule 2 to the Broadcasting Services Act.

Item 16 - Subsections 28(2) and (3)

This item omits subsections 28(2) and (3) for the reason explained in the preceding item.

Radiocommunications Act 1992**Item 17 - After subsection 106(1)**

Subsection 106(1) of the Act empowers the SMA to determine in writing a price-based allocation system for issuing specified transmitter licences. The SMA may determine a price-based allocation system which applies generally or in respect of a particular area and may also determine a system which applies only in relation to a specified range of frequencies (subsection 106(2)).

This item inserts a new subsection 106(1A) which enables the SMA, in determining a price-based allocation system under section 106 in relation to specified transmitter licences, to limit eligibility to apply for those licences to persons who are:

- authorised under the Act or other law to operate radiocommunications transmitters of that kind, or to provide the services for which the transmitters will be used; or

eligible to be so authorised; or

both.

Subsection 32(1) of the Act empowers the SMA, by written instrument, to prepare frequency band plans, which provide for the purposes for which the band may be used.

The power to limit applicants under a price-based allocation system will be able to be used where a limited class of persons is eligible to use particular parts of the radiofrequency spectrum to provide particular services.

An example of circumstances where limiting eligibility could be appropriate is where, under a frequency band plan made under subsection 32(1) of the Act, part of the spectrum is reserved for particular telecommunications services for which a licence is required under the *Telecommunications Act 1991*. New subsection 106(1A) will enable the SMA to limit the applicants under the price-based allocation system to those licensees or persons eligible to be licensees or both.

Item 18 - Paragraph 277(1)(a)

Items 18 to 21 make amendments to section 277 of the Act to enable radio inspectors to enter premises to turn off Emergency Position Indicating Radio Beacons (EPIRBs) which have been activated spontaneously or otherwise.

EPIRBs are used to enable search and rescue, and other emergency services, to locate and assist persons who have been shipwrecked, or have suffered some accident, or are otherwise stranded. Occasionally an EPIRB spontaneously activates, causing emergency services to respond to what turns out to be a false alarm. In such circumstances it is necessary for a radio inspector to enter premises to turn off the EPIRB. There are other cases where the operation of a transmitter unwittingly causes substantial interference to the radiocommunications of emergency, safety of life, Royal Flying Doctor, or police services, or causes substantial loss or damage. The consequences of such operation can on occasions be so serious as to require an urgent entry to premises in which the transmitter is located to make appropriate adjustments to the transmitter, such as turning it off.

Section 277 of the Act allows an inspector to enter unoccupied land, premises, a vessel, aircraft or vehicle to adjust transmitters where the inspector has reasonable grounds to believe that a transmitter is being used in contravention of Part 4.2 of the Act and where the transmitter is interfering with radiocommunications essential to safety of human life, or is causing substantial loss or damage. This power may only be exercised in circumstances of such seriousness and urgency as to require and justify entry without the authority of a court order or warrant.

This item substitutes a new paragraph 277(1)(a) to remove the requirement that a transmitter be used in contravention of Part 4.2. The offences in Part 4.2 only apply where a transmitter is used with particular knowledge, and a radio inspector would not be able to be satisfied of this mental element where an EPIRB activates spontaneously on unoccupied premises.

Item 19 - Paragraph 277(1)(c)

This item substitutes a new paragraph 277(1)(c) to enable the power in section 277 to be used where the transmitter is interfering substantially with the operations of police and emergency services organisations.

Item 20 - Paragraph 277(1)(e)

This item substitutes a new paragraph 277(1)(e) which reflects the terms of the new paragraph 277(1)(c).

Item 21 - Subsection 277(2)

This item amends subsection 277(2) to reflect the terms of the new paragraph 277(1)(c).