

1991

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

TRANSPORT AND COMMUNICATIONS LEGISLATION AMENDMENT
BILL 1991

SUPPLEMENTARY EXPLANATORY MEMORANDUM

(New clauses to be moved on behalf of the Government)

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



TRANSPORT AND COMMUNICATIONS LEGISLATION AMENDMENT
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OUTLINE

The proposed amendments of the Transport and Communications Legislation Amendment Bill 1991 will -

- . insert a new Part 1A containing amendments to the *Australian and Overseas Telecommunications Corporation Act 1991*;
- . amend Part 3 to include further amendments to the *Civil Aviation Act 1988*; and
- . insert a new Part 6A containing amendments to the *Telecommunications Act 1991*.

The proposed amendments to the *Australian and Overseas Telecommunications Corporation Act 1991* will ensure that a merger of wholly-owned subsidiaries of Telecom and OTC that occurs as a consequence of the merger of Telecom and OTC will be exempt from tax and will have a tax neutral effect. It is expected that Telecom Australia (International) and OTC (International) will so merge, but the decision to do so will be a matter for the Board of AOTC. Any decision for other subsidiaries to merge will also be a decision for the Board. As it is not possible to identify the subsidiaries which are to be merged in advance of the merger of Telecom and OTC, the amendments make provision for the bodies concerned to be declared in regulations.

The proposed amendments of the *Civil Aviation Act 1988* will clarify that the Civil Aviation Authority (CAA) has the power to investigate cases of damage to property caused by wake vortices and to make arrangements for compensation for people affected.

The proposed amendments to the *Telecommunications Act 1991* will reduce the period that the Parliament has to disallow delegated legislation made under the *Telecommunications Act* from 15 sitting days to 5 sitting days in the case of delegated legislation tabled in the Parliament in the period from 14 November 1991 to 31 December 1991. This reduction is proposed to give the new second telecommunications carrier certainty about the rules that will govern its operation before it purchases AUSSAT. Without the amendments, the new carrier is unlikely to be prepared to proceed with the purchase of AUSSAT and early network rollout as the relevant legislative instruments which govern its operations will not be settled with certainty.

The other proposed amendments to the Telecommunications Act will make changes to the scheme in Part 8 of that Act which gives carriers the right to interconnect their facilities to networks of other carriers. Those changes will make it clear that a carrier has a right to have telecommunications services supplied to it by another carrier when it makes a reasonable request for the supply of those services. A minor technical change is also made to the tariffing requirements in section 194 of the Telecommunications Act.

FINANCIAL IMPACT

None of the proposed amendments is expected to have a significant financial impact, although a failure to enact the amendments to the Telecommunications Act could considerably delay the sale process for AUSSAT and the introduction of network competition.

NOTES ON AMENDMENTS

AMENDMENT (1)

PART 1A - AMENDMENTS OF THE AUSTRALIAN AND OVERSEAS TELECOMMUNICATIONS CORPORATION ACT 1991

This Amendment inserts a new Part in the Transport and Communications Legislation Amendment Bill 1991 containing amendments to the *Australian and Overseas Telecommunications Corporation Act 1991*.

Clause 2A - Principal Act

This clause defines the term 'Principal Act' to mean the *Australian and Overseas Telecommunications Corporation Act 1991* in new Part 1A.

Clause 2B - Interpretation

Section 3 of the Principal Act contains definitions of terms used in the Principal Act.

Section 27 of the Principal Act ensures that no tax is payable under Commonwealth, State and Territory law in relation to an exempt matter.

'Exempt matter' is defined in section 3 to mean the operation of, or giving effect to, Part 4. Part 4 provides for the merger of Telecom and OTC to become the new body AOTC.

Clause 2B(a) omits the definition of 'exempt matter' and substitutes a new definition. The new definition ensures that the term 'exempt matter' will also apply to the merger of subsidiaries of Telecom and OTC, as well as the merger of those bodies themselves.

The new definition does not seek to prescribe the manner in which such a merger occurs in the way that Part 4 does in relation to Telecom and OTC. Such a merger could occur, for example, as a result of share transfers, transfers of undertakings and assets or through a scheme of arrangement. Such a merger will be required, however, to achieve a result that, for commercial purposes, is to a substantial degree similar or analogous to the result achieved in relation to Telecom and OTC under Part 4.

Clause 2B(b) inserts definitions of the terms 'entity', 'merged entity', 'merger day' and 'merging entities' in section 3.

The definition of 'entity' ensures that the exemption from taxation only applies to the merger of Telecom and OTC or a merger involving a group company. 'Group company' is already defined in section 3 to mean AOTC and a wholly owned subsidiary of AOTC.

Accordingly, the tax exempt status for merger of subsidiaries will only apply where the merger occurs between wholly owned subsidiaries of AOTC or between AOTC and one or more wholly owned subsidiaries.

Clause 2C - Insertion of new section

This clause inserts a new section 3A in the Principal Act which contains rules for interpreting the meaning of the terms 'merging entities', 'merged entity' and 'merger day' for the purposes of the Principal Act.

New subsection 3A(1) defines the above terms in relation to the merger of Telecom and OTC - Telecom and OTC are the merging entities, AOTC is the merged entity and the succession day is the merger day.

New subsection 3A(2) deals with the situation of other mergers which are to be given a tax neutral effect under new section 28. This subsection will enable regulations to declare that specified entities are merging entities, a specified entity is the merged entity and a specified day is the merger day.

The merger day must be a day on or after the day the declaration takes effect and must be within a period of 12 months after the merger of Telecom and OTC.

The requirement for the merging bodies to be specified in regulations is included as it is not yet known which bodies are to merge - this will be a decision for the new Board of AOTC. This requirement will also enable the exemption from tax to only be applied to mergers directly consequential to the merger of Telecom and OTC and not undertaken as a part of a restructuring of the AOTC group for commercial reasons only. The requirement for such mergers to occur within 12 months of the merger of Telecom and OTC will also ensure that there is no open ended ability to engage in restructuring that is exempt from taxation.

New subsection 3A(3) ensures that the only mergers which can be declared in the regulations are mergers between what were wholly owned subsidiaries of Telecom and OTC or between AOTC and one or more wholly owned subsidiaries of Telecom and OTC.

New subsection 3A(4) ensures that more than one declaration can be made under new subsection 3A(2).

New subsection 3A(5) ensures that, in circumstances that comply with new subsection 3A(3), a later merger can include an entity that has already merged.

New subsection 3A(6) ensures that regulations providing for the merger of subsidiaries can only be made within 12 months of the merger of Telecom and OTC.

Clause 2D - Repeal of section 28 and substitution of new section

Section 28 of the Principal Act provides for AOTC to be taken as the same body as Telecom and OTC for the application of Commonwealth, State and Territory taxation laws. In effect, the provision ensures that the taxation treatment of AOTC will be the same as that which would have applied had Telecom and OTC not merged.

This clause repeals section 28 and substitutes a new section 28 which ensures that, as well as in the case of the merger of Telecom and OTC, a merger of subsidiaries of OTC and Telecom in accordance with new section 3A has tax neutral effect.

AMENDMENT (2)

AMENDMENTS OF THE CIVIL AVIATION ACT 1988

This Amendment inserts new clauses in Part 3 of the Transport and Communications Legislation Amendment Bill 1991 which contains amendments to the Civil Aviation Act 1988.

Clause 7A - Amendments to section 9

This clause omits subsection 9(1A) and the reference to that subsection in subsection 9(4) of the Principal Act. Those provisions are re-made in the new section 9AA.

Clause 7B - New section 9AA

This clause inserts a new section 9AA dealing with the environmental responsibilities of the CAA. It remakes earlier amendments included in subsection 9(1A) and, in particular, clarifies that the CAA has the power to investigate cases of damage to property caused by wake vortices and to make arrangements for compensation.

New subsection 9AA(1) defines "Commonwealth jurisdiction aircraft" for the purposes of the section.

New subsection 9AA(2) spells out the environmental functions of the CAA. These functions include:

- . a general power to carry out activities to protect the environment from the effects of, and the effects associated with, the operation of Commonwealth jurisdiction aircraft [s. 9AA(2)(a)]; and
- . a specific power to investigate damage to property caused by wake vortices and make arrangements for the provision of compensation [s. 9AA(2)(b) and (c)].

New subsection 9AA(3) provides that a reference to property damage does not include damage to aircraft in flight.

New subsection 9AA(4) enables the CAA to itself pay compensation if it considers it appropriate.

New subsection 9AA(5) clarifies that the CAA's responsibilities to compensate people whose property has been damaged by wake vortices does not confer a right to compensation.

New subsection 9AA(6) provides that, subject to a Ministerial direction, the environmental functions referred to in paragraph 9AA(2)(a) may be performed at the discretion of the CAA.

AMENDMENT (3)

PART 6A - AMENDMENTS OF THE TELECOMMUNICATIONS ACT 1991

This Amendment inserts a new Part in the Transport and Communications Legislation Amendment Bill 1991 containing amendments to the *Telecommunications Act 1991*.

Clause 35A - Principal Act

This clause defines the term 'Principal Act' to mean the *Telecommunications Act 1991* in new Part 6A.

Clause 35B - Objects

Section 136 of the Principal Act sets out the object of Part 8, which sets out a legislative scheme for the provision of access by carriers to the networks and services of other carriers.

This clause amends subsection 136(2) which sets out how the object is to be achieved. This amendment is consequential to the amendment made by clause 35C. That amendment will modify the right of a carrier under subsection 137(3) to have its communications carried by other carriers, to make it a right to have other carriers supply telecommunications services to it on reasonable request for the purposes of its supply of telecommunications services.

Clause 35C - Repeal of section 137 and substitution of new section

Section 137 of the Principal Act sets out the rights a carrier has to interconnection of its facilities to other carriers' networks and carriage of its communications over those networks.

During the course of negotiations between the bidders for the second general carrier licence and Telecom and OTC about the interconnection arrangements, it became apparent that there were some technical defects in the access rights provided by section 137 that were contrary to the original policy given effect to in that section. In particular, the status of the following under section 137 was not clear -

dedicated capacity and leased lines may become part of the network of the second carrier for the purposes of section 137, and accordingly would not be dealt with under the access right in the existing subsection 137(2);

- . the use of facilities outside Australia used to provide international services; and
- . situations where carriage of communications by one carrier on behalf of another may not necessarily involve the interconnection of facilities (for example, in the case of certain public mobile telecommunications services).

Accordingly, this clause omits section 137 and substitutes a new section 137 which ensures that the provision fully reflects the original policy intent and removes any doubt in relation to the above issues.

The new section 137 ensures that a carrier has the right to interconnect its facilities to the network of another carrier and also has a right to have telecommunications services supplied to it by another carrier when it makes a reasonable request for the supply of those services.

The right of a carrier to have telecommunications services supplied will be independent of whether any facilities need to be interconnected with the other carrier's network, although the qualification that the carrier's request must be reasonable having regard to the objects of Part 8 and any other relevant matter could be expected to limit the circumstances in which the right can be exercised.

The right to have telecommunications services supplied will apply so far as it is necessary or desirable for the purposes of the requesting carrier to supply domestic or international services.

New subsection 137(1) contains definitions of the terms 'domestic or international services', 'network', 'network facilities' and 'reasonable' for the purposes of the new section 137.

New subsection 137(2) gives a carrier the right to interconnect its network facilities to a network of another carrier for the purpose of the other carrier supplying telecommunications services to the first-mentioned carrier on such reasonable terms and conditions as are agreed or AUSTEL determines.

New subsection 137(3) gives a carrier a right to have telecommunications services supplied to it by another carrier when it makes a reasonable request for the supply of those services on such reasonable terms and conditions as are agreed or AUSTEL determines.

'Reasonable' is defined in new subsection 137(1) to mean reasonable having regard to section 136 (the objects of Part 8) and any other relevant matter.

New subsection 137(4) makes it clear that the right of a carrier to have services supplied to it exists independently of whether or not the carriers facilities are to be interconnected with the facilities of the other carrier's network.

Clause 35D - Supplementary access conditions of licences

This clause makes amendments to section 138 of the Principal Act, which enables supplementary access conditions to be included in carrier licences, consequential upon the inclusion of the new section 137 by clause 35C.

Clause 35E - Minister may determine principles to govern charging for access

This clause makes amendments to section 140 of the Principal Act, which concerns the principles which govern charging for access, consequential upon the inclusion of the new section 137 by clause 35C.

Clause 35F - Arbitration by AUSTEL of terms of access

This clause makes amendments to section 154 of the Principal Act, which provides for AUSTEL to arbitrate on the terms and conditions of access where 2 carriers cannot agree, consequential upon the inclusion of the new section 137 by clause 35C.

Clause 35G - AUSTEL's way of operating

This clause amends section 159 of the Principal Act, which sets out AUSTEL's way of operating, to specifically require AUSTEL, in conducting an arbitration, to have regard to the objects of the Part.

Clause 35H - Basic carriage service must be tarified if supplied to a person other than a carrier

Section 194 of the Principal Act has the effect of requiring a carrier to include a basic carriage service in its tariff if it is supplying the service to the public generally.

This clause amends section 194 to extend the tariffing requirement to any situation where the supply of such services is to a person other than a carrier. This will ensure that a carrier cannot avoid the requirement to include services in its tariff by supplying services of a

particular kind under special arrangements to certain persons but not to the public generally.

Clause 35J - Addition of new sections

This clause adds new sections 408 and 409 at the end of the Telecommunications Act to change from 15 to 5 sitting days the period in which a notice of motion of disallowance can be given in relation to regulations and disallowable instruments tabled after 14 November and before 31 December 1991.

New section 408 applies to regulations made under the Telecommunications Act and new section 409 applies to other disallowable instruments made under that Act.

New subsections 408(3) and 409(3) provide that if either House passes a resolution approving regulations or a disallowable instrument tabled during the 14 November - 31 December period, the ability for that House to disallow the regulations or other instrument ceases.

The amendments are proposed to give certainty to the new second telecommunications carrier about the rules which will govern its operation. The second carrier is unlikely to be willing to complete the contract for the sale of AUSSAT or begin the major investment required for network rollout, until it has certainty about the rules which apply to it. If the disallowance period is not shortened in relation to instruments that are tabled before the Christmas break, there may be considerable delay in the processes involved.

The amendments will also have the effect of requiring a notice of motion of disallowance to be considered within 5 sitting days of the notice being given, or else the regulations or instrument will be disallowed.

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