

1994

THE PARLIAMENT OF THE COMMONWEALTH
OF AUSTRALIA

HOUSE OF REPRESENTATIVES

TRANSPORT AND COMMUNICATIONS LEGISLATION AMENDMENT
BILL 1994

EXPLANATORY MEMORANDUM

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

THIS MEMORANDUM TAKES ACCOUNT OF AMENDMENTS MADE BY THE
SENATE TO THE BILL AS INTRODUCED



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**TRANSPORT AND COMMUNICATIONS LEGISLATION AMENDMENT BILL
(NO. 3) 1993**

GENERAL OUTLINE

This Bill amends the following Acts administered within the Transport and Communications portfolio:

Air Navigation Act 1920
Australian and Overseas Telecommunications Corporation Act 1991
Navigation Act 1912
Occupational Health and Safety (Maritime Industry) Act 1993
Protection of the Sea (Civil Liability) Act 1981
Protection of the Sea (Prevention of Pollution from Ships) Act 1983
Telecommunications Act 1991

The amendments do not introduce substantial new policy schemes, but contain provisions aimed at improving mechanisms for the administration and delivery of existing policies, as described below:

AIR NAVIGATION ACT 1920

The Government decided on 12 February 1992 that Australia should introduce a scheme of multiple designation of Australia's scheduled international air services. Bilateral arrangements govern Australia's rights to designate Australian carriers for scheduled international air services.

Each bilateral arrangement to which Australia is a party includes a clause under which 'substantial ownership and effective control' must be vested in the nationals of the country designating the airline(s). Under that clause, the country to which a designated Australian carrier operates may withhold, revoke or suspend operating permission if Australia cannot demonstrate to the other country's satisfaction that its designated airline(s) meet national ownership and control tests.

The object of the amendments is to enable the Government to ensure that any Australian carrier seeking designation or already designated on an international route can demonstrate its compliance with bilateral requirements that it is substantially owned and effectively controlled by Australian nationals.

The amendments give the Minister the power to require information as to shareholdings from Australia's international airlines and the power to require the divestiture of foreign airline shareholding in an Australian international airline where equity held by foreign airlines in aggregate exceeds 35 per cent, or where equity by a single

foreign airline exceeds 25 per cent. These amendments are similar to provisions in the *Qantas Sale Act 1992*.

AUSTRALIAN AND OVERSEAS TELECOMMUNICATIONS CORPORATION ACT 1991

This Act is amended consequential upon the change of name of the Australian and Overseas Telecommunications Corporation Limited to Telstra Corporation Limited.

NAVIGATION ACT 1912

A number of provisions in Part XI of this Act provide for exemptions from certain provisions of the Act. These exemption provisions are been combined into one section with provision for review by the Administrative Appeal Tribunal in cases of exemptions not being granted or where a conditional exemption is granted.

There is also a minor amendment consequential upon the *Seafarers Rehabilitation and Compensation Act 1992*.

OCCUPATIONAL HEALTH AND SAFETY (MARITIME INDUSTRY) ACT 1993

This Act is being amended to insert a new section 121 to allow the Governor-General to make regulations.

PROTECTION OF THE SEA (CIVIL LIABILITY) ACT 1981

This Act is being amended to provide for the recovery of the amount of any loss, damages, costs or expenses incurred by the Australian Maritime Safety Authority in exercising its obligations to combat pollution in the marine environment.

There are also amendments to provide that the existing power of detention for unpaid charges applies to a foreign ship while it is in the exclusive economic zone (EEZ) and to provide a power to escort a detained ship to a port.

PROTECTION OF THE SEA (PREVENTION OF POLLUTION FROM SHIPS) ACT 1983

This Act is being amended to extend the application of the Act to the EEZ and to provide for the detention of any foreign vessel suspected of causing marine pollution in the territorial sea or in the EEZ.

TELECOMMUNICATIONS ACT 1991

This Act is being amended to provide that the same standard of access to the standard telephone service will not be required to be provided to prescribed external Territories as is required to be provided to the rest of Australia.

In addition, minor amendments are being made to a number of Acts to take account of the name of the Australian and Overseas Telecommunications Corporation Limited being changed to Telstra Corporation Limited.

FINANCIAL IMPACT STATEMENT

None of the amendments included in the proposed Bill will have a direct impact on Commonwealth revenue or expenditure. However, the amendments to the *Protection of the Sea (Civil Liability) Act 1981* will provide more surety that costs of combating pollution can be recovered.

NOTES ON CLAUSES

Clause 1 Short title

This clause provides for the proposed Act to be cited as the *Transport and Communications Legislation Amendment Act 1994*.

Clause 2 Commencement

This clause provides for the commencement of the various provisions of the proposed Act.

The amendment of the *Occupational Health and Safety (Maritime Industry) Act 1993* will commence on the date of Royal Assent of the proposed Act if Part 5 of the *Occupational Health and Safety (Maritime Industry) Act 1993* has commenced on that date; otherwise that amendment will commence on the date of commencement of Part 5 of the *Occupational Health and Safety (Maritime Industry) Act 1993*.

The amendments of the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* (other than the amendment to subsection 26AB(4) and the amendments to subsections 22(2) and 22(4) of the *Protection of the Sea (Civil Liability) Act 1981*) will commence on the date of Royal Assent of the proposed Act if the *Maritime Legislation Amendment Act 1993* has commenced on that date; otherwise those amendments will commence on the date of commencement of Part 5 of the *Maritime Legislation Amendment Act 1993*.

The amendments to subsection 26AB(4) will not commence until the commencement of section 26 of the *Protection of the Sea Legislation Amendment Act 1986*.

The other amendments included in the proposed Act will commence on the date on which it receives Royal Assent.

Clause 3 Amendment of Acts

This clause provides that the Acts specified in the Schedules are amended as specified in the Schedules

Clause 4 Transitional

This clause provides that any exemptions in force under sections 421, 422, 422A, 423, 423A or 423B (which are repealed by an amendment included in Schedule 1) of the *Navigation Act 1912* will continue in force after that repeal and may be revoked.

SCHEDULE 1

Air Navigation Act 1920

New section 11A - Foreign shareholdings in Australian international airlines'

Subsection 11A(1) provides that the Minister may, by written notice, require an Australian international airline to:

- give to the Minister such information as is specified in the notice concerning the extent to which foreign airlines have relevant interests in shares in that airline; and

take all necessary action to ensure that its articles of association comply with subsection 11A(2) - if foreign airlines have relevant interests in shares in the airline which in total exceed 35 per cent of the total value of the issued share capital of that airline, or if an individual foreign airline has relevant interests in shares in the airline which in total exceed 25 per cent of the total value of the issued share capital of that airline.

Subsection 11A(2) provides that the articles of association of an Australian international airline must, if required by the Minister under subsection 11A(1):

impose restrictions on the issue, transfer and ownership of shares in that airline so as to prevent foreign airlines having relevant interests in shares in that airline which in total exceed 35 per cent of the total value of the issued share capital, and to prevent an individual foreign airline having relevant interests in shares in that airline which in total exceed 25 per cent of the total value of the issued share capital; and

confer powers on the directors of the airline to effect the transfer of particular shares, disenfranchise particular shares, remove particular directors, and refuse to register a transfer of shares in order to prevent breaches of the foreign airline shareholding limits specified.

Subsection 11A(3) provides that "relevant interest" in a share has the same meaning as in Part 1.2 of the Corporations Law, which focuses particularly on whether a person has power to vote in respect of a voting share or has a power to dispose of a share (section 31 of the Corporations Law). Control through indirect means, such as a series of interconnected shareholdings or via a shareholders' agreement, can result in a person being taken to have a relevant interest in a particular share even if that person is not the registered holder of that share.

Subsection 11A(4) contains definitions of terms used in the section. The definition of "Australian international airline" excludes Qantas to avoid possible conflict with the Qantas Sale Act 1992 which provides specific national interest safeguards in respect of Qantas.

New section 11B - Injunctions relating to section 11A

Section 11B provides that where a provision which is required to be contained in the articles of an Australian international airline ("mandatory articles") or a requirement under subsection 11A(1) is threatened to be, is being or has been breached by a person, the Minister may apply to the Federal Court of Australia for an injunction to restrain the person from engaging in the conduct or requiring the person to do an act or thing. This provision is similar to section 10 of the Qantas Sale Act 1992 and section 1324 of the Corporations Law. The Court, for example, could be asked to require the directors of an Australian international airline to comply with the requirements of the airline's mandatory articles. The term "mandatory articles" is defined in subsection 11B(11) as meaning those articles of association of an Australian international airline that would be required for the airline's articles of association to comply with subsection 11A(2).

The Court will also be able to make other orders which it considers appropriate - see subsection 11B(10).

Australian and Overseas Telecommunications Corporation Act 1991

Minor changes are made to the *Australian and Overseas Telecommunications Corporation Act 1991* (the AOTC Act) consequential upon the change in name of the Australian and Overseas Telecommunications Corporation Limited to Telstra Corporation Limited. The name change came into effect on 13 April 1993 following approval by the Australian Securities Commission. The AOTC Act continues to apply to Telstra because that Act defines AOTC as the company incorporated under the Corporations Law of the ACT by that name and the change of name did not affect the continuity of the Company as a body corporate. Nevertheless, alignment of the incorporated name of the company and references to it in legislation will avoid confusion on the part of the public.

Navigation Act 1912

The amendment to subparagraph 132(2)(a)(i) is a technical amendment to correct an error in the *Seafarers Rehabilitation and Compensation (Transitional Provisions and Consequential Amendments) Act 1992*. That Act amended paragraph 132(1)(a) of the Navigation Act to remove the entitlement to one week's convalescence after recovery from illness, hurt or injury

where a seafarer is left on shore at his or her proper return port. The amendment to subparagraph 132(2)(a)(i) will similarly remove that entitlement where a seafarer is left on shore at a port other than his or her proper return port.

The other amendments to the Navigation Act relate to exemption provisions in the Navigation Act. There are a number of such provisions which frequently overlap. Those provisions (other than exemption provisions relating to the coasting trade) are being repealed and replaced with a single provision - the proposed new section 421.

New section 421 provides that the Minister or the Australian Maritime Safety Authority may direct that the Navigation Act or specified provisions of the Navigation Act do not apply to a particular ship or class of ships or to a particular person or class of persons. Such an exemption may specify that it applies to particular time periods or to particular voyages and may be subject to specified conditions. It is to be an offence if a condition is contravened.

An exemption may not be granted if it would be inconsistent with Australia's international obligations. Before granting an exemption, the Minister or the Australian Maritime Safety Authority must be satisfied that the proposed exemption will not jeopardise the safety of a ship or of persons on board a ship.

Section 377L is amended to provide that an application may be made to the Administrative Appeals Tribunal for review of a decision not to grant an exemption or of a decision to grant an exemption subject to conditions.

Occupational Health and Safety (Maritime Industry) Act 1993

The amendment to this Act will correct an omission by inserting a new section 121 to provide for the making of regulations by the Governor-General.

Protection of the Sea (Civil Liability) Act 1981

The Protection of the Sea (Civil Liability) Act is amended by amending section 22 and by inserting a new section 22A.

Section 22 provides that a ship may be detained if an amount under section 21 of the Act is unpaid. Subsection 22(2) provides that section 22 applies to a foreign ship only while the ship is in Australian waters. To accord with the provisions of United Nations Convention on the Law of the Sea, subsection 22(2) is to be amended to provide that it also applies to a foreign ship while it is in the EEZ.

Section 22 is also to be amended to allow for a ship that has been detained to be escorted to a port. This will ensure

consistency with the amendments proposed to section 27 of the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983*.

New section 22A provides that, where the Australian Maritime Safety Authority suffers loss or damage or incurs costs or expenses in preventing or mitigating or in attempting to prevent or mitigate certain pollution damage, the Authority may recover the amount of the loss, damage, costs or expenses.

The new section will apply where there has been pollution damage resulting from a discharge or disposal from a ship in contravention of the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* or where the Authority has taken action, in accordance with its function to combat pollution from the environment caused by a discharge or disposal from a ship.

The amount of loss, damages, costs or expenses may be recovered from the owner or master of the ship from which the discharge has occurred or from any person whose act caused the discharge or disposal. The amount is recoverable in a court of competent jurisdiction.

***Protection of the Sea (Prevention of Pollution from Ships)
Act 1983***

The main amendments to the *Protection of the Sea (Prevention of Pollution from Ships) Act* (the POTS Act) are the insertion of new sections 26G, 27A, 27B and 27C and the substitution of section 29. There are also a number of minor amendments.

Definitions of "exclusive economic zone", "Law of the Sea Convention" and of "territorial sea" are added to the Interpretation section (section 3) of the POTS Act.

Section 6 of the POTS Act provides that the POTS Act applies both within and outside Australia and extends to every external Territory. That section is amended to make it clear that the POTS Act applies to the EEZ.

Sections 9, 11, 21, 22, 26AB, 26B and 26F of the POTS Act relate to the discharge or disposal of certain substances into the sea and to the reporting of incidents of discharge or disposal. Those sections do not apply to a foreign ship unless the ship is in the sea near a State, the Jervis Bay Territory or an external Territory. Each of those section is being amended so that they will also apply to a foreign ship that is in the EEZ.

A new section 26G is to be inserted into the POTS Act. That section gives power to the Australian Maritime Safety Authority to require the master of a foreign ship in the territorial sea or in the EEZ to provide specified

information if there are clear grounds for believing that a contravention of the POTS Act has occurred in relation to the ship while it was in the EEZ.

Section 27 of the POTS Act provides inspectors with a power of inspection of ships to ascertain if there has been a breach of the POTS Act or other related laws (including a law of a country other than Australia).

New subsection 27A(1) sets out the circumstances in which the Australian Maritime Safety Authority may detain a foreign ship. Those circumstances are:

- (a) the ship is voluntarily at a port and there are clear grounds for believing the ship has caused a pollution breach in the territorial sea or in the EEZ;
- (b) the ship is in the territorial sea and there are clear grounds for believing the ship has caused a pollution breach while navigating in the territorial sea;
- (c) the ship is in the territorial sea or the EEZ and there is clear objective evidence that the ship has caused a pollution breach in the EEZ which has caused or threatens to cause major damage to the coastline of Australia, to related interests of Australia or to any resources of the territorial sea or the EEZ.

The proposed new subsection 27(2) will authorise the inspection of a foreign ship in relation to an act or omission in the EEZ if 2 conditions are met. Those conditions are:

- (a) that there are clear grounds for believing that the act or omission was a substantial discharge or disposal causing or threatening to cause significant pollution of the marine environment; and
- (b) a requirement under the proposed new section 26G has not been complied with, or information purportedly in compliance with such a requirement is manifestly at variance with the evident factual situation.

The above restrictions on inspection of foreign ships will apply only while the ship is navigating in the territorial sea or the EEZ; that is, there is no such restrictions on the inspection of a foreign ship while it is at a port.

New subsection 27A(3) sets out the grounds on which a detained ship must be released from detention. Those grounds are:

- (a) security, in a form acceptable to the Australian Maritime Safety Authority, is provided. A security must be sufficient to cover the maximum amount of penalties and other payments that could be payable in respect of the pollution breach;

- (b) all proceedings instituted in respect of the pollution breach have been discontinued;
- (c) all proceedings in relation to the pollution breach have concluded without a person being convicted of an offence or being found liable to pay an amount of money;
- (d) all proceedings in relation to the pollution breach have concluded and all penalties and any other amounts required to be paid in relation to the breach have been paid;
- (e) the Australian Maritime Safety Authority forms the belief that the pollution breach did not occur or it was not caused by the ship;
- (f) the Australian Maritime Safety Authority determines for any other reason that the ship should be released.

Subsection 27A(5) provides that the master and owner of a ship are guilty of an offence if:

- (a) the ship is detained in a port and leaves the port before it is released;
- (b) the ship is detained in the territorial sea and leaves the outer limits of the territorial sea before it is released;
- (c) the ship is detained in the EEC and leaves the outer limits of the EEC before it is released.

The maximum penalty for a breach of the above is 2,000 penalty units (currently equivalent to \$200,000).

New subsection 27A(6) defines a number of terms for purposes of the new section 237A.

New section 27B requires the Australian Maritime Safety Authority to comply with the requirements of article 231 of the United Nations Convention on the Law of the Sea in relation to any measures taken under the POTS Act or under the new Part IVA of the *Protection of the Sea (Civil Liability) Act 1981*. By virtue of article 231, the Authority will be required to inform the flag State of measures taken against a foreign vessel and to provide the flag State with all official reports in relation to those measures.

A new section 27C, which relates to the failure to comply with requirements for information under foreign laws, is being inserted. Paragraph 3 of article 220 of the United Nations Convention on the Law of the Sea relates to a violation of international rules and standards for the prevention, reduction and control of pollution from ships. If the master or owner of an Australian ship, which is in the waters of a foreign country, fails to give to that foreign country information relating to the identity and port of registry of the ship, last and next port of call and other

relevant information required to establish if there has been a violation of that foreign country's laws relating to pollution, the master and owner are liable to a maximum penalty of a fine of 500 penalty units (currently \$50,000). This proposed penalty is the same as that provided in existing subsection 11(1) for failure to report certain incidents involving oil or oily mixtures.

Section 29 is repealed and substituted to provide that a prosecution in relation to an act or omission against the POTS Act involving a foreign ship must not be brought more than 3 years after the act or omission. Such a prosecution must be suspended if action in relation to the act or omission is brought in the flag State of the ship and must be terminated when the action in the flag State has been brought to a conclusion.

Telecommunications Act 1991

Section 288 of the Telecommunications Act sets out the universal service obligation, which essentially provides that access to, and supply of the standard telephone service must be provided throughout Australia (see also sections 290 and 292). Subsection 288(6) defines Australia to exclude the external territories to which this Act extends. This Act currently extends to the Indian Ocean Territories, the Christmas and Cocos (Keeling) Islands by virtue of these territories being prescribed by regulation. Thus currently, section 288 does not extend to these territories. Consistent with Government policy that the Indian Ocean Territories be treated as part of Australia for the purposes of Commonwealth law, and a 1992 amendment to the Acts Interpretation Act to provide that Australia includes these territories, it is no longer necessary for the territories to be prescribed in the regulations. The regulation will be amended consequent upon this Bill being enacted. Amendment of section 288(6) is still necessary to allow for other external territories to be prescribed so that section 288 does not extend in relation to any that are prescribed.

SCHEDULE 2

The Schedule makes a number of further amendments to the *Australian and Overseas Telecommunications Corporation Act 1991* consequential upon the change of name of the Australian and Overseas Telecommunications Corporation Limited to Telstra Corporation Limited.

SCHEDULE 3

The Schedule amends a number of Acts consequential upon the change of name of the Australian and Overseas Telecommunications Corporation Limited to Telstra Corporation Limited.



