

1992

THE PARLIAMENT OF THE COMMONWEALTH
OF AUSTRALIA

SENATE

TRANSPORT AND COMMUNICATIONS LEGISLATION AMENDMENT BILL
(No. 3) 1992

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments and new clauses to be moved on behalf of
the Government

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

THIS MEMORANDUM REPLACES THE SUPPLEMENTARY EXPLANATORY
MEMORANDUM AND THE ADDITIONAL SUPPLEMENTARY EXPLANATORY
MEMORANDUM PREVIOUSLY PRESENTED TO THE SENATE

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OUTLINE

The proposed Government amendments to the Transport and
Communications Legislation Amendment Bill (No. 3) 1992
will:

- . insert a new Part 2A in the Bill to amend the
Australian National Railways Commission Act 1983 to:
 - make it clear that the Australian National Railways
Commission has a duty to co-operate with the
National Rail Corporation in the transfer of
functions and assets to the Corporation; and
 - allow the Minister to request the Commission to
take specific action within a specified period if
the Minister considers that the Commission has not
fulfilled its obligations in this regard;
- . insert new clauses in Part 3 of the Bill to amend the
Broadcasting Services Act 1992 to:
 - change the criteria for narrowcasting services to
ensure that such services can include any service
which is provided during a limited period, not just
a service provided during a limited period to cover
a special event;
 - ensure that the codes of practice adopted by
commercial and community television broadcasters
adopt the Office of Film and Literature
Classification guidelines, consumer advice and
criteria and classification symbol system for
broadcast films, matching the system which
broadcasters have indicated will be adopted for
other programs;
 - require the codes to limit the broadcasting of "M"
classified films by those broadcasters to between
the hours of 8:30 pm and 5 am and, in addition, on
school days between noon and 3 pm. These time
limits reflect the current standards applied by the
ABA for "AO" classified material, which are
intended to remain in force until replaced by codes
or ABA standards;
 - require films with the new classification of "MA",
(ie. the more extreme part of the current "AO"

classification), to only be shown between 9 pm and 5 am;

- require the codes to provide for the methods of modification of material both within the applicable classification and to conform to a different classification;
- prohibit the relevant broadcasters from showing "R" classified films unless they are modified, in accordance with the codes, to a classification suitable for broadcasting, or broadcasting at particular times;
- modify the appointment provisions for members of the ABA to deem any appointment as Chairperson or Deputy Chairperson for a period not exceeding that of the balance of the member's original appointment not to be a re-appointment for the purposes of subsection 157(2) (which allows only a single re-appointment);
- re-impose the 3 day blackout on broadcasting of political advertisements before elections which was formerly imposed under section 116 of the *Broadcasting Act 1942*;

amend clause 8 of the Bill which contains an amendment to the *Broadcasting Services Act 1992* which makes it a reasonable excuse for a journalist to refuse to answer a question from, or produce a document to, the Australian Broadcasting Authority if doing so would disclose the identity of a confidential informant used for a program:

- the amendment will clarify that it is a reasonable excuse for the journalist if the action would 'tend to' disclose the identity of a confidential informant and substitutes a new definition of 'journalist' which makes some minor technical changes;

insert a new clause in Part 7 of the Bill to amend the *Radiocommunications Act 1983* to ensure that licences can be granted under that Act for transmitters used by national broadcasting services in those parts of the broadcasting services bands that have been reserved for those services;

insert a new Part 7A in the Bill to amend the *Special Broadcasting Service Act 1991* to impose on the SBS the same 3 day blackout on broadcasting of political advertisements before elections which applies to other broadcasters; and

- . insert new clauses in Part 8 of the Bill to amend the *Telecommunications Act 1991* to ensure that AUSTEL's functions include implementing industry policies relating to the development of an internationally competitive telecommunications industry:
 - this together with other amendments will clarify AUSTEL's authority to make decisions about customer equipment permits in accordance with the Industry Development Arrangements for Customer Equipment (IDA's);
- . insert a new Part 8A in the Bill to clarify that previous notifications to AUSTEL of IDA's are valid:
 - this will ensure that persons who connected customer equipment to networks are not placed in jeopardy of having committed an offence because of a possibly invalid approval issued under the IDA's; and
- . insert a new Part 10 in the Bill to correct errors in the *Broadcasting Services (Transitional Provisions and Consequential Amendments) Act 1992* to:
 - ensure that changes made to the *Broadcasting Act 1942* in legislation passed in Budget sittings 1991 to enable self-assessment of licence fees will operate in relation to licensees whose licences continue in force under the *Broadcasting Services Act 1992*;
 - remove the right former commercial licensees had to require dormant supplementary licence applications under the *Broadcasting Act 1942* to be processed.

FINANCIAL IMPACT STATEMENT

There will be no significant effect on Commonwealth expenditure or revenue resulting from the proposed amendments.

NOTES ON AMENDMENTS

Amendment (1)

Clause 2 of the Bill sets out the commencement of the various provisions of the Bill.

Amendments (1) and (3) inserts new clauses 2(5A) and 2(8) which provide for the commencement of new clauses 7C and 9AA of the Bill on Proclamation or, if not Proclaimed

within 6 months after the date of Royal Assent, on the expiration of that period.

New clauses 7C and 9AA will provide for the new requirements in relation to classification of films. A late commencement is needed because the "MA" classification, recently agreed to by State and Territory heads of Government, will be introduced by Australian Capital Territory Ordinance. Until that occurs, the broadcasting legislation adopting the classification cannot commence.

Amendment (2)

This amendment inserts a new clause 2(5A) which provides that new clauses 23A, 24A, 24B 37A, 37B and 37C, to be inserted by these amendments, commence immediately after the commencement of Part 4 of the *Telecommunications Act 1991* (ie on 1 July 1991).

These amendments commence retrospectively because they will clarify that certain actions taken under the *Telecommunications Act 1991* have been validly done, thereby ensuring that persons who have connected customer equipment to telecommunications networks are not placed in jeopardy of having committed offences if those actions were subsequently found to have been invalid.

Amendment (3)

This amendment provides for automatic commencement of new sections 7C and 9AA 6 months after Royal Assent if those sections have not been proclaimed to commence upon an earlier date. The reasons for this are explained in the notes on Amendment (1).

Amendment (4)

The *Australian National Railways Commission Act 1983* (ANRC Act) provides for the operation of the Australian National Railways Commission (AN) and sets out its functions and powers (sections 5 and 6). Section 18 requires the Commission to conduct its operations in accord with sound commercial practice. Section 19 provides that the Minister may give AN a direction where he considers it is in the public interest, but otherwise AN is not subject to the Minister's direction.

The *National Rail Corporation Agreement Act 1992* approves an agreement made on 30 July 1991 between the Commonwealth and the states of New South Wales, Victoria, Queensland and Western Australia to establish a company, the National Rail Corporation (NR), to carry out interstate rail freight operations. The Agreement forms a schedule to the Act.

Clauses 2 and 5 of the Agreement provide for the transfer of certain functions and assets from AN and the state rail authorities to NR once the Commonwealth and the relevant states have approved the Agreement. However, the obligation to ensure that this occurs at the appropriate time lies with Governments, which are required to 'cause' these transfers to take place; the agreement places no obligations directly on the rail authorities in this matter.

At this stage, the relevant states have approved the agreement, except that Western Australia has passed but not yet proclaimed the relevant legislation. This is expected shortly.

The establishment of NR involves a fundamental change in the role of AN which, in time, will become responsible for a much more limited range of operations.

The establishment of NR will require AN's full co-operation and is likely to require of AN actions which it considers are not in its own commercial interests and therefore contrary to its obligations under section 18 of the ANRC Act. The proposed provisions remove any potential for co-operation to be inconsistent with the requirements imposed on AN by its existing legislation.

This amendment inserts a new Part 2A in the Bill to amend the *Australian National Railways Commission Act 1983*.

Principal Act

New clause 5A provides that, in this Part, 'Principal Act' means the *Australian National Railways Commission Act 1983*.

Interpretation

New clause 5B provides definitions of a number of terms used in this Part.

General Powers of the Commission

New clause 5C makes it clear that the general powers of the Commission include all things necessary for the performance of its duties as well as its functions.

Commission must take action to facilitate National Rail Corporation agreement etc.

New clause 5D spells out the further duty of the Commission to co-operate in the establishment of NR and provides for the Minister to require the Commission to take specified actions promptly.

Amendment (5)

Part 3 of the Transport and Communications Legislation Amendment Bill (No. 3) 1992 amends the *Broadcasting Services Act 1992*.

This Amendment will insert new clauses 7A and 7B in Part 3 of the Bill.

New clauses 7A and 7B will amend subparagraphs 17(a) (iii) and 18(a) (iii) of the Broadcasting Services Act respectively. These subparagraphs set out one of the criteria for subscription narrowcasting and open narrowcasting services respectively, namely that the reception of the service is limited by its being provided during a limited period to cover a special event.

The requirement that a narrowcasting service which is provided for a limited period must be for the purpose of covering a special event has caused an unnecessary limitation to the scope of the definition. Narrowcasting services should be able to encompass services that are limited in time, but which are established for purposes other than special events. The amendments will ensure that narrowcasting services can have their reception limited by being provided during a limited period or to cover a special event.

An example where a problem has arisen in relation to the operation of the definition of an open narrowcasting service, is with aspiring community broadcasters. During the period when an aspiring community broadcaster is developing a proposal for a full time community broadcasting service, it is commonly desired to provide short term transmissions on an ad hoc basis unrelated to any special event. For example, the community group may propose to broadcast several times during a year for a limited period of several weeks on each occasion. It is considered desirable that in such circumstances, the community group should be able to broadcast under a class licence as an open narrowcasting service.

Amendment (6)

Subsection 123(2) of the *Broadcasting Services Act 1992* (the Act) provides for broadcasters to develop codes of practice relating, amongst other things, to:

- "(a) preventing the broadcasting of programs that, in accordance with community standards, are not suitable to be broadcast by [the relevant] section of the industry; and
- (b) methods of ensuring that the protection of children from exposure to program material which may be harmful to them is a high priority; and

(c) methods of classifying programs that reflect community standards;"

the intention being that a readily understood and consistent method of classification of programs, and strict rules about what constitutes material suitable to be broadcast and what time limits should be placed on adult material, should be developed.

Under subsection 123(4) of the Act, if a code fails to satisfy the Australian Broadcasting Authority (ABA) that it "provides appropriate community safeguards", is "endorsed by the majority of the providers of broadcasting services" in the relevant section of the industry and that "members of the public have had an adequate opportunity to comment on the code", the ABA may refuse to register the code. The ABA may develop its own mandatory program standards under section 125 of the Act. The Act has also recently been amended to give the Parliament the power to amend codes of practice and standards. These measures ensure appropriate protection of the public on programming classification and display times, but special concern has been expressed about films.

These amendments will ensure that the codes of practice adopted by commercial and community television broadcasters specifically require adoption of the Office of Film and Literature Classification (OFLC) guidelines, consumer advice and classification symbol system for broadcast films, matching the system which broadcasters have indicated will be adopted for other programs.

In addition, the codes must limit the broadcasting of "M" classified films by those broadcasters to the between the hours of 8:30 pm and 5 am and, in addition, on school days between noon and 3 pm. These time limits reflect the current standards applied by the ABA for "AO" classified material, which are intended to remain in force until replace by codes or ABA standards.

Films with the new classification of "MA", basically the more extreme part of the current "AO" classification, will only be shown between 9 pm and 5 am.

The relevant time will measured at the transmitter site, as provided for in the current standard.

The codes will allow modification of material both within the applicable classification and to conform to a different classification. Material modified to conform to another classification will reflect the rules applicable to that other classification.

Specific provision will be made to ensure that the relevant broadcasters do not show "R" classified films unless they

are modified, in accordance with the codes, to a classification suitable for broadcasting, or broadcasting at particular times (see Amendment (10)).

This amendment inserts a new clause 7C in the Bill which will insert a new subsection 123(3A) in the *Broadcasting Services Act 1992*. The new subsection will require commercial television broadcasting licensees and community television broadcasting licensees, in developing codes of practice under section 123 in relation to films, to ensure that those codes:

- (a) apply the guidelines, consumer information and criteria and the classification symbols of the system administered by the Office of Film and Literature Classification;
- (b) ban the broadcast of "M" films, except between 8.30 pm and 5.00 am, and noon and 3.00 pm on school days, and of "MA" films except between 9.00 pm and 5.00 am (the relevant time measured at the transmitter site);
- (c) provide for the methods of modification of films in accordance with the guidelines, criteria, etc. applied under paragraph (a) above either within an applicable classification or to comply with a different classification -

This allows broadcasters to remove material which, although complying with the relevant criteria, is seen as unacceptable for broadcast. It also allows films classified as "R" or lower (but not "X") to be modified to conform to the criteria for another classification and displayed at the relevant times for that other classification. This supports a common practice among broadcasters of modifying material for television so that it complies with prevailing community expectations of broadcasters (generally of a higher standard than for cinema operators because of the greater audience reach and the difficulty of confining viewing to target audiences.); and

- (d) provide for advice to consumers on the reasons for films receiving a particular classification.

Amendments (7) and (8)

Clause 8 of the Bill amends section 202 of the *Broadcasting Services Act 1992* (the BSA) to include two new subsections which:

- make it a reasonable excuse for a journalist to refuse to answer a question from, or produce a document to, the Australian Broadcasting Authority if doing so would

disclose the identity of a confidential informant used for a program; and

provide a definition of the term 'journalist' for the purpose of the provision.

Amendment (7) makes a minor drafting change to new paragraph 202(4)(b) of the BSA, to be inserted by clause 8 of the Bill, to clarify that it is a reasonable excuse for the journalist if the action would 'tend to' disclose the identity of a confidential informant.

Amendment (8) omits the proposed definition of 'journalist' and substitutes a new definition. The new definition will remove the reference to a person engaged in the practice of 'producing' programs and replace it with a reference to a person recording or making programs. This is because the term 'producing' has a specific meaning in the industry related to financing of production, which does not need to be covered by new subsection 202(4).

The new definition will also widen the category of programs listed in recognition that journalists may also work on information and documentary programs as well as news and current affairs. The reference to information should be read in the context of the other types of programs covered, ie. news, current affairs and documentaries. It is intended that this reference would cover programs such as 'The Investigators', which provides consumer information.

Amendment (9)

This amendment will modify the appointment provisions for members of the ABA. Currently, members are allowed to serve for up to 5 years and, with one renewal, for up to another 5 years. However, appointment of an ordinary member to the position of Chairperson or Deputy Chairperson has effect as a "re-appointment" for the purposes of subsection 157(2) of the Act. Since that subsection allows only one re-appointment, such a member may be able to serve for less than the intended maximum of 10 years and ordinary members who have been re-appointed will be debarred from appointment as Chairperson or Deputy Chairperson. This would deprive the ABA of the services of its most experienced members in its leading positions without serving the policy objective of ensuring that members do not serve for more than 10 years.

The amendment will insert a new clause 8A in the Bill which will insert new subsections 157(2A) and (2B) in the Broadcasting Services Act.

New subsections 157(2A) and (2B) will deem any appointment as Chairperson or Deputy Chairperson, for a period not exceeding that of the balance of the member's original

appointment, not to be a re-appointment for the purposes of subsection 157(2).

Amendment (10)

Schedule 2 of the Broadcasting Services Act sets out standard conditions which apply to broadcasting services.

This amendment inserts a new clause 9AA in the Bill which inserts a new paragraph 7(1)(g) and 9(1)(g) in Schedule 2 to place a further condition on commercial television broadcasting and community broadcasting licences.

The new paragraph will ban broadcasting of unmodified films classified as "R". Those films will be able to be broadcast, but only if modified to comply with the "MA" classification, at the highest. "X" rated material cannot be modified for broadcasting.

Amendment (11)

This amendment will insert a new clause 9A in Part 3 of the Bill.

New clause 9A amends Schedule 2 of the Broadcasting Services Act, which contains conditions which are imposed on various kinds of broadcasting services provided under the Act.

New clause 9A(a) inserts a new clause 3A in Schedule 2 which sets out a special condition in relation to broadcasting of election advertisements and new clauses 9A(b) to (f) amend other clauses of that Schedule to apply that special condition to the various kinds of broadcasting services provided under the Act.

New clause 3A will ensure that a broadcaster cannot broadcast election advertisements on a service that is normally received by persons in an area in which a Commonwealth, State or Territory election is being held during the relevant period. The relevant period is defined in clause 1 of Schedule 2 to mean the period that commences at the end of the Wednesday before the polling day for the election and ends at the close of the poll on that polling day.

In effect, the amendment will re-enact the substance of the rule in subsections 116(4) and (4A) of the Broadcasting Act 1942 which imposed the 3 day election advertising blackout in relation to Commonwealth, State and Territory elections.

Provisions for a political advertisement election blackout have been in place for some 50 years. Their purpose was to provide a "cooling off period" for electors to consider their stance on the issues without the influences of electronic media advertising.

The provisions were not included in the Broadcasting Services Act because they were unnecessary, due to the complete ban on political advertising during election periods contained in Part IIID of the *Broadcasting Act 1942*, which continued to have effect in relation to the new Act. Part IIID has since been declared invalid by the High Court. Accordingly, the amendment re-enacts the pre-existing blackout period.

Amendment (12)

Part 7 of the Transport and Communications Legislation Amendment Bill (No. 3) 1992 amends the *Radiocommunications Act 1983*.

This amendment will insert a new clause 19A in Part 7 of the Bill.

Paragraph 31(1)(a) of the *Broadcasting Services Act 1992* enables the Minister to notify the Australian Broadcasting Authority that capacity in the broadcasting services bands is to be reserved for national broadcasting services.

Subsection 24(1A) of the *Radiocommunications Act* prevents the Minister from granting a licence under that section that uses a frequency within the broadcasting services bands.

New clause 19A ensures that licences can be granted under section 24 of the *Radiocommunications Act* for transmitters used by national broadcasting services in those parts of the broadcasting services bands that have been reserved for those services.

Amendment (13)

This amendment will insert a new Part 7A in the Bill which will provide for amendments of the *Special Broadcasting Service Act 1991*. The amendments will ensure that the 3 day election advertising blackout which applies to other broadcasting services will also apply to the SBS.

Principal Act

New clause 20A provides that in Part 7A, 'Principal Act' means the *Special Broadcasting Service Act 1991*.

Advertising and sponsorship

New clause 20B makes a minor amendment to section 45 of the Principal Act to make the SBS's power to advertise subject to the rule in new section 70C.

Insertion of new section

New clause 20C inserts a new section 70C in the Principal Act.

New section 70C prevents the SBS broadcasting election advertisements during the relevant period on a radio or television service which would normally be received in the area of Australia in which the election is being held. The relevant period is defined in new subsection 70C(2) to mean the period that commences at the end of the Wednesday before the polling day for the election and ends at the close of the poll on that polling day.

Amendment (14)

This amendment inserts a new clause 23A in Part 8 of the Bill, which contains amendments to the *Telecommunications Act 1991*.

Paragraph 36(a) of the Telecommunications Act sets out some of the general functions of AUSTEL.

This clause omits paragraph 36(a) and substitutes a new paragraph in similar terms, but which clarifies that AUSTEL's responsibility for the implementation of the Commonwealth Government's industry policies relating to telecommunications includes such policies which relate to the development of an internationally competitive telecommunications industry.

This change ensures that any such industry policies, to be valid, do not need to be directed at domestic industry goals. The IDA's have been developed with the goal of assisting the telecommunications equipment manufacturing industry to become internationally competitive.

Amendment (15)

This amendment inserts new clauses 24A and 24B in Part 8 of the Bill.

New clause 24A makes a minor amendment to paragraph 48(a) of the Telecommunications Act consequential upon the amendment in new clause 24B.

Section 49 of the Telecommunications Act enables the Minister to notify AUSTEL of general policies of the Commonwealth Government that are to apply in relation to AUSTEL. It is uncertain whether the industry development arrangements, which are in effect policies developed in the portfolio of Industry, Technology and Commerce, are sufficiently general in character to be notified as 'general policies'.

New clause 24B(a) removes any doubt on this point by inserting a new subsection 49(1A) which specifically enables the Minister to notify AUSTEL of policies of the Commonwealth Government relating to the development of an internationally competitive customer equipment industry.

New clause 24B(b) makes a minor consequential amendment to subsection 49(3) of the Telecommunications Act.

Amendment (16)

This amendment inserts new clauses 37A, 37B and 37C in Part 8 of the Bill.

New clauses 37A, 37B and 37C respectively amend sections 258, 260 and 263 of the Telecommunications Act to make it clear that AUSTEL must comply with IDA's notified under new subsection 49(1A) when making decisions to issue, vary or cancel customer equipment permits.

Amendment (17)

This clause inserts a new Part 8A in the Bill which makes certain that the notifications of the Industry Development Arrangements are taken to have been valid.

The first notification occurred under section 28 of the *Telecommunications Act 1989* on 1 December 1989. Decisions were made to issue customer equipment permits to persons on the basis of those IDA's and those IDA's as later amended.

New subsection 39A(1) provides that that notification of policies and any notification of an amendment of the policies or notification of an amended version of the policies are taken to have been valid notifications under section 28 of the 1989 Act.

New subsection 39A(2) ensures that AUSTEL is taken to have had all the powers necessary to give effect to the notifications of policies in issuing, varying or cancelling permits under the customer equipment provisions of the 1989 Act.

Amendment (18)

This amendment will insert a new Part 10 in the Bill which will provide for amendments of the *Broadcasting Services (Transitional Provisions and Consequential Amendments) Act 1992*.

Principal Act

New clause 42 provides that in Part 10, 'Principal Act' means the *Broadcasting Services (Transitional Provisions and Consequential Amendments) Act 1992*.

Pending applications for grant of licences under the Broadcasting Act

Subsection 12(2) of the Principal Act contains a savings provision which ensures that at the time the Broadcasting Services Act commenced, any pending applications for the grant of a supplementary radio licence may proceed as if the Broadcasting Act continued on foot with the ABA taking over the role of the ABT.

New clause 43 inserts a new subsection 12(2A) in the Principal Act to end the application of subsection 12(2) from the date of Royal Assent of the Bill if an application has not been referred to the Tribunal or the ABA before that date.

When the supplementary licence scheme was introduced in 1981, a number of eligible licensees put in applications to protect their position without any intention that they should be processed. All the applications for supplementary licences that are being actively pursued have been either already referred to the ABA or will have been already dealt with, by the time the amendment commences.

The amendment will ensure that the dormant applications will no longer taken to be on foot.

Application of provisions of the Broadcasting Act in relation to keeping accounts and unpaid licence fees

Section 22 of the Principal Act is a transitional provision which ensures that notwithstanding the repeal of the Broadcasting Act, the provisions relating to the keeping of accounts and unpaid licence fees continue to apply in relation to certain former licences continued in force under the new Act.

Sections 19, 20 and 21 of the *Broadcasting Amendment Act (No. 2) 1991* are intended to modify the provisions of the Broadcasting Act which provided for the keeping of accounts and unpaid licence fees, and introduced a new provision to provide for licensee self-assessment of licence fees. These provisions are to commence upon 31 December 1992.

New clause 44 inserts 2 new subsections in section 22 and makes some minor consequential amendments to ensure that the amendments made by sections 19, 20 and 21 will have their original intended effect in relation to the former licences continued in force under the new Act.



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