

CHAPTER 2

BACKGROUND

The Provisions of the Bill

2.1 The Broadcasting Services Amendment Bill (No. 4) 1999 amends the *Broadcasting Services Act 1992* (BSA); the *Radiocommunications Act 1992* (RA) and the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act).

2.2 The Bill's primary object is to ensure that international broadcasting services are not provided contrary to Australia's national interest.¹ The Bill is intended to establish a new broadcasting licensing scheme for the regulation of international broadcasting services transmitted from Australia. Currently, there is no regulatory regime governing international broadcasting from Australia.

2.3 In brief, under this new licensing scheme, all international shortwave radio services transmitted from Australia, and all international satellite radio and television broadcasting services originating in and transmitted from Australia, will be required to obtain an international broadcasting licence from the Australian Broadcasting Authority (ABA). The ABA will refer applications for licenses to the Minister for Foreign Affairs for assessment of whether the proposed service would be contrary to the national interest.²

2.4 The Bill introduces a new licensing category for international broadcasting services transmitted from Australia—international broadcasting services—which will require individual licences.³ An international broadcasting service may also fall into other categories of broadcasting service where it is not only delivered to an audience outside Australia but also to persons in Australia. Where an international broadcasting service also falls into a commercial broadcasting, community broadcasting or television broadcasting category or into other broadcasting services category, it is required to have licenses to cover both categories.⁴

2.5 Proposed new section 18A of the BSA identifies the type of services that will be classified as international broadcasting services and thus determines the scope of the regulatory system established by the legislation. The Bill defines international broadcasting services as broadcasting services that are targeted, to a significant extent, to audiences outside Australia and where:

1 Item 2, new paragraph 3(1)(ja).

2 The Hon Peter McGauran, MP Second Reading Speech, *Debates*, House of Representatives, 9 December 1999.

3 Item 11 section 11A 11(f)

4 Item 11. To be added at the end of section 12.

- the means of delivering the services involves the use of a radiocommunications transmitter in Australia (whether alone or in combination with any other means);⁵ and
- the services comply with any determinations or clarifications under section 19 in relation to international broadcasting services. Under section 19 the ABA may determine additional criteria or clarify existing criteria.⁶

2.6 The Explanatory Memorandum made clear that:

The proposed provision is intended to ensure that only those broadcasting services that are targeted to an audience outside Australia and transmitted from Australia, and not those services fortuitously received outside Australia, will be subject to regulation under the BSA as international broadcasting services.⁷

2.7 The Bill clearly stipulates that broadcasting services provided by the Australian Broadcasting Corporation (ABC) and the Special Broadcasting Service Corporation (SBS) do not come under the category of international broadcasting services for the purposes of the Act.⁸

2.8 Also excluded from the definition of international broadcasting services and defined as an ‘exempt broadcasting service’ is a broadcasting service where:

- the service delivers only programs packaged outside Australia (which may include programs produced in Australia); and where:
- all relevant programming decisions are made outside Australia; and
- the service is transmitted from a place outside Australia to an earth station in Australia for the sole purpose of being immediately re-transmitted to a satellite; and
- the satellite is a means of delivering the service (whether alone or in combination with any other means).⁹

2.9 The Explanatory Memorandum points out that this new sub-section is intended to remove from the regulation of the BSA all satellite pass-through broadcasting services where all of the packaging of programs and all of the programming decisions are made outside Australia. This measure is intended to ensure that ‘the amendments do not affect any commercial proposals to make Australia a programming up-link hub for broadcasting services delivered by satellite’.¹⁰

5 A radiocommunications transmitter is defined as a transmitter designed or intended for use for the purpose of radio emission or reception to communicate information between persons or things or anything, other than a wire cable or other physical medium used as a continuous artificial guide for carrying communications by means of guided electromagnetic energy.

6 Item 12, 18A(1).

7 *Explanatory Memorandum*, p. 9.

8 Item 12, 18(A), (2).

9 Item 12, 18(A)(3).

10 *Explanatory Memorandum*, p. 10

2.10 As noted earlier, the Bill is primarily concerned with ensuring that the content of international broadcasts from Australia is not contrary to the national interest. The mechanism for safeguarding Australia's national interest in this regard is through a new licensing system. The Bill enables the Minister for Foreign Affairs to determine whether an international broadcasting service is likely to be contrary to the national interest. In determining whether a service is likely to harm the national interest, the Minister must have regard to the likely effect of the service on Australia's international relations.

2.11 The Bill requires a person wishing to provide an international broadcasting service to apply to the ABA for an international broadcasting licence. If the ABA is not satisfied that an applicant is a company formed in Australia or is a suitable applicant, it must refuse to allocate an international broadcasting licence to the applicant. In assessing the suitability of an applicant, the ABA will assess whether the applicant poses a significant risk of committing an offence against the Act or regulations under the Act or of a breach of licence conditions. In deciding whether such a risk exists, the ABA is to take into account:

- the business record of the company; and
- the company's record in situations requiring trust and candour; and
- the business record of each person who is, or who would be, if international broadcasting licence were allocated to the company, in a position to control the licence; and
- the record in situations requiring trust and candour of each person likely to be in a position to control the licence; and
- whether the company, or a person likely to be in position to control the licence, has been convicted of an offence against this Act or the regulations.¹¹

2.12 Should the ABA refuse to allocate an international broadcasting licence, it must provide written notice of the refusal to the applicant. This Bill makes provision for a company to appeal to the Administrative Appeals Tribunal on an ABA's decision that the company is an unsuitable applicant for an international broadcasting licence.

2.13 If the ABA is satisfied that the applicant is a company formed in Australia and 'does not decide that the applicant is an unsuitable applicant', the ABA must refer the application to the Minister for Foreign Affairs. The Minister will make an assessment on the grounds of national interest.¹²

2.14 The ABA is required to provide the Minister with a report on whether the proposed international broadcasting service complies with the international broadcasting guidelines. The international broadcasting guidelines will be formulated by the ABA.

2.15 The Minister, in determining whether a proposed international broadcasting service is likely to be contrary to Australia's national interest, must have regard to the likely effect of

11 Item 22, 121FC(2).

12 Item 22, 121FB(1)(b).

the proposed service on Australia's international relations. He or she may take into consideration the report provided by the ABA.¹³

2.16 If, in the opinion of the Minister, the proposed international broadcasting service is likely to be contrary to Australia's national interest, he or she may direct the ABA to refuse to allocate an international broadcasting licence to the applicant.¹⁴

2.17 On the other hand, if the Minister decides that the proposed international broadcasting service is unlikely to be contrary to Australia's national interest, the Minister will inform the ABA that he or she has no objection to the allocation of an international broadcasting licence to the applicant. The ABA must then allocate the licence to the applicant.¹⁵

2.18 After an application has been referred to the Minister by the ABA, the Minister must make reasonable efforts within 60 days to either inform the ABA that he or she has no objections to the application or direct the ABA to refuse a licence to the applicant.¹⁶

2.19 The Bill also confers on the Minister for Foreign Affairs an on-going power to take action to protect the national interest in relation to international broadcasting services after a licence has been issued. The Minister for Foreign Affairs is empowered to direct the ABA to issue formal warnings, or to suspend or cancel an international broadcasting licence if the Minister is of the opinion that the service is contrary to the national interest. Again, the Minister, in determining whether an international broadcasting service is contrary to Australia's national interest, must have regard to the effect of the service on Australia's international relations.¹⁷

2.20 If, on the direction of the Minister, the ABA suspends a licence, it must suspend the licence for the period specified in the Minister's direction.¹⁸ If the Minister proposes to direct the ABA to cancel an international broadcasting licence, he or she must direct the ABA to:

- give the licensee written notice of his or her intention; and
- give the licensee a reasonable opportunity to send a submission to the ABA in relation to the proposed direction; and
- forward any such submission to the Minister for Foreign Affairs.¹⁹

2.21 This new subsection provides a mechanism to ensure that before the Minister for Foreign Affairs may direct the ABA to cancel an international broadcasting licence on national interest grounds, the holder of the licence will have the opportunity to raise any

13 Item 22, 121FD(3) and (4).

14 Item 22, 121FD(1).

15 Item 22, 121FD(2) and 121FE.

16 Item 22, 121FD(5).

17 Item 22, 121FL(8).

18 Item 22; 121FL(1); 121FL(3) and 121FL(5).

19 Item 22, 121FL(6).

relevant matters that should be taken into account by the Minister before he or she proceeds to direct the ABA to cancel the licence.

2.22 The Scrutiny of Bills Committee took note of this provision and raised the following matter:

There seems to be no obligation on the Minister to actually consider the submission, and no similar procedure for making a submission where a licence is suspended rather than cancelled.

2.23 Furthermore, the Scrutiny of Bills Committee was concerned that:

Where a licence is refused, suspended or cancelled, it is also not clear whether there is any right of appeal to the courts, and whether any such right of appeal extends to a consideration of the merits of the Minister's decision.²⁰

2.24 The Bill sets down specific conditions to be observed by international broadcasting services, which require the licensee to keep records of programs broadcast on the international broadcasting service. It also provides for penalties for persons providing an international broadcasting service without a licence as well as for licensees found in breach of the conditions of the international broadcasting licence.

2.25 The Bill provides for the ABA to assist the Minister for Foreign Affairs. The Minister may, by written notice to the ABA, direct the ABA to prepare a report about whether a specified international broadcasting service complies with the international broadcasting guidelines and to provide that report to the Minister. The Minister may also, by written notice given to the ABA, direct the ABA to obtain specified records of programs broadcast on the international broadcasting service from an international broadcasting licensee and to provide these records to the Minister.²¹

2.26 The provision is intended to ensure that, if the Minister for Foreign Affairs wishes to review specific broadcasts which he or she is concerned may be contrary to the national interest, the Minister may direct the ABA to acquire the relevant records of broadcasts. The Bill requires, as a condition of international broadcasting licences, a licensee to retain in its custody a record of programs broadcast on the international broadcasting service for 90 days after the broadcast.²²

2.27 The ABA must formulate written guidelines relating to international broadcasting services but such guidelines may deal with matters other than Australia's national interest.²³

2.28 The Bill ensures that only persons who have an international broadcasting licence allocated by the ABA under the BSA may be issued with a transmitter licence authorising operation of a transmitter for transmitting an international broadcasting service by the Australian Communications Authority (ACA).

20 *Alert Digest*, 1/00, p. 12

21 Division 5—ABA to assist the Minister for Foreign Affairs, Section 121FM and 121FN

22 Item 22, 121FF.

23 Item 22, Division 6—Miscellaneous, section 121FP.

2.29 Finally the Bill amends the *Administrative Decisions (Judicial Review) Act 1977* to exempt the Minister for Foreign Affairs from having to provide a statement of reasons for a decision made under the new international broadcasting scheme.²⁴

2.30 The Scrutiny of Bills Committee was concerned about the apparent finality of such decisions. It stated:

If there is no obligation to provide reasons under the *Administrative Decisions (Judicial Review) Act 1977*, it is not clear what other rights of review or appeal (if any) are available to licensees where the Minister makes such a decision.²⁵

2.31 The Scrutiny of Bills Committee has sought advice from the Minister for Communications, Information Technology and the Arts but has not yet reported any response.

24 Item 1 of the Bill. To be added to the end of Schedule 2 of the *Administrative Decisions (Judicial Review) Act 1977*.

25 *Alert Digest*, 1/00, p. 13.