



Broadcasting Services Amendment Act 1995

No. 139 of 1995

An Act to amend the *Broadcasting Services Act 1992*

[Assented to 8 December 1995]

The Parliament of Australia enacts:

Short title etc.

1.(1) This Act may be cited as the *Broadcasting Services Amendment Act 1995*.

(2) In this Act, “Principal Act” means the *Broadcasting Services Act 1992*¹.

Commencement

2.(1) Subject to this section, this Act commences on the 28th day after the day on which it receives the Royal Assent.

(2) Sections 1, 2, 8 and 9, subsection 12(1) and sections 13 and 14 commence on the day on which this Act receives the Royal Assent.

Insertion of new section

3.(1) After section 38 of the Principal Act the following section is inserted:

Additional commercial television licences in single markets

Circumstances in which existing licensee may apply for additional licence

“38A.(1) If:

- (a) a particular licence area is the licence area of only one commercial television broadcasting licence (the ‘parent licence’) that is in force; and
- (b) additional commercial television broadcasting licences can be allocated for the licence area;

the existing licensee may apply in writing to the ABA for an additional commercial television broadcasting licence for the licence area.

Circumstances in which ABA must grant additional licence

“(2) The ABA must allocate an additional commercial television broadcasting licence to the existing licensee for the licence area, if the ABA is satisfied that it is unlikely that another person:

- (a) would be interested in operating another commercial television broadcasting service in the licence area; and
- (b) would be in a position to operate that other service.

“(3) If the ABA is not satisfied as mentioned in subsection (2), the ABA must refuse to allocate the additional licence.

Decision period for ABA's decision

“(4) The ABA must make a decision on the application within the period of 45 days after the application is made (the ‘decision period’). If the ABA has not refused to allocate the additional licence by the end of the decision period, the ABA is taken to have decided to allocate the licence, and must allocate it as soon as practicable after the end of the decision period.

“(5) However:

- (a) the ABA is not required to consider the application under this section during the allocation period in relation to an advertisement published by the ABA under section 38 in relation to the same licence area; and
- (b) that allocation period is not to be counted in working out when the decision period ends.

Application for additional licence lapses in certain circumstances

“(6) If a licence for the same licence area is allocated under section 36 after the application is made under this section and before the ABA makes its decision on the application under this section, then the application under this section is taken to have been withdrawn.

Amalgamation of licence areas in some cases

“(7) If:

- (a) more than 30% of the licence area population of a licence area is attributable to an overlap area; or
- (b) a licence area is entirely within another licence area;

this section applies as if the 2 licence areas were one.

Fee for additional licence

“(8) On allocation of the additional licence, the applicant must pay to the ABA a fee determined by the ABA. The fee must not be more than the amount that, in the opinion of the ABA, represents the costs (including planning costs) incurred by the ABA in allocating the additional licence.

Licence conditions

“(9) On the allocation of the additional licence, it becomes a condition of both the parent licence and the additional licence that the licensee will continue to provide services under those licences for at least 2 years after the date of allocation of the additional licence.

Restrictions on transfer of licences

“(10) During the period of 2 years after the date of allocation of the additional licence, any attempt by any person to transfer either the parent licence or the additional licence is of no effect unless both of those licences are transferred at the same time by the same person to the same transferee.

Section 37 restrictions apply

“(11) This section has effect subject to section 37.

Interpretation

“(12) In this section:

‘allocation period’ means the period starting on the day on which the ABA advertises under section 38 for applications for licences and ending on:

- (a) the day on which the last application is determined; or
- (b) if no applications are received—the day specified by the ABA in the advertisement as the day by which applications are to be lodged.”.

(2) If the ABA granted a permission to a licensee under section 73 of the Principal Act before the commencement of this section:

- (a) the ABA must grant an additional licence to the licensee under section 38A of the Principal Act for the same licence area; and

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- (b) the licensee is not required to pay a fee under section 38A of the Principal Act for the additional licence; and
- (c) subsections 38A(9) and (10) of the Principal Act do not apply to the additional licence or parent licence.

Repeal of section 39 and substitution of new section

4. Section 39 of the Principal Act is repealed and the following section is substituted:

Additional commercial radio licences in single markets

Conditions for allocation of additional licence

“39.(1) If:

- (a) a particular licence area is the licence area of only one commercial radio broadcasting licence (the ‘parent licence’) that is in force; and
- (b) a service is being provided under the parent licence; and
- (c) the licence area for the parent licence does not have an excessive overlap area, as determined under subsection (5); and
- (d) the licensee requests the ABA, in writing, to allocate to the licensee, for the same licence area, another commercial radio broadcasting licence that is a broadcasting services bands licence; and
- (e) in the opinion of the ABA, suitable broadcasting services bands spectrum is available for providing another commercial radio broadcasting service in the same licence area;

the ABA must allocate an additional licence to the applicant for the same licence area as soon as practicable.

Time limit for applications

“(2) An application under subsection (1) must be made within 60 days after:

- (a) the commencement of this section; or
- (b) the time when paragraphs (1)(a), (b) and (c) are first satisfied in relation to the parent licence;

whichever is later.

“(3) If the conditions in paragraphs (1)(a), (b), (c) and (e) are not all satisfied at the time when the application is made, but at a later time they are all satisfied, then the ABA is under an obligation at that later time to allocate the additional licence (unless the application has been withdrawn).

Matters that ABA must take into account

“(4) The matters that the ABA must take into account in forming an opinion for the purposes of paragraph (1)(e) include the following:

- (a) any relevant plan under section 25;

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- (b) any relevant plan under section 26;
- (c) any relevant capacity that has been reserved under section 31.

Excessive overlap area

“(5) The licence area for the parent licence has an excessive overlap area if:

- (a) more than 30% of the licence area population of the licence area of the parent licence is attributable to an area that overlaps with the licence area of another commercial radio broadcasting licence; and
- (b) at least one of the following situations exists:
 - (i) more than 30% of the licence area population of the licence area of that other licence is also attributable to the area that overlaps with the licence area of the parent licence;
 - (ii) more than one commercial radio broadcasting licence is in force with the same licence area as that other licence.

Technical specifications for additional licence

“(6) The ABA must make a determination in writing setting out the technical specifications that apply to the additional licence. The ABA is not required to make the determination if a plan under section 26 applies to the licence area of the additional licence.

“(7) For the purposes of this Act and section 109 of the *Radiocommunications Act 1992*, the technical specifications are taken to have been determined under section 26 of this Act.

Fee for additional licence

“(8) On allocation of the additional licence, the applicant must pay to the ABA a fee determined by the ABA. The fee must not be more than the amount that, in the opinion of the ABA, represents the costs (including planning costs) incurred by the ABA in allocating the additional licence.

Licence conditions

“(9) On the allocation of the additional licence, it becomes a condition of both the parent licence and the additional licence that the licensee will continue to provide services under those licences for at least 2 years after the date of allocation of the additional licence.

Restrictions on transfer of licences

“(10) During the period of 2 years after the date of allocation of the additional licence, any attempt by any person to transfer either the parent licence or the additional licence is of no effect unless both of those licences are transferred at the same time by the same person to the same transferee.

Section 37 restrictions apply

“(11) This section has effect subject to section 37.

Section 29 does not apply in some cases

“(12) If the licence area of the parent licence is not provided for under a licence area plan under section 26, then section 29 does not apply to the allocation of the additional licence.”.

Foreign person not to be in position to control commercial television broadcasting licence

5. Section 57 of the Principal Act is amended by omitting subsection (2).

Repeal of section 73 and substitution of new section

6. Section 73 of the Principal Act is repealed and the following section is substituted:

Additional licence under section 38A not to result in breach of ownership limits

Exemption from ownership limits

“73.(1) If an additional licence has been allocated under section 38A to the holder of an existing licence, the existing licence and additional licence are to be treated for the purposes of this Part as being only one licence during the following periods:

- (a) the period of 5 years after the date of allocation of the additional licence; and
- (b) any additional period granted by the ABA under this section.

Cessation of exemption

“(2) This section does not apply to the licences at any time after the licences are first held by different persons (whether or not they continue to be held by different persons).

Extension of exemption period

“(3) The licensee may apply to the ABA in writing for an additional period. The application must be made between 3 and 6 months before the end of the current period that applies under subsection (1).

“(4) If the ABA is satisfied that it is unlikely that another person:

- (a) would be interested in operating a second commercial television broadcasting service in the same licence area; and
 - (b) would be in a position to operate that second service;
- the ABA may, in writing, grant an additional period of not more than 5 years.

“(5) If, within 45 days after the application is made, the ABA does not either:

- (a) refuse to grant an extension; or
 - (b) grant an extension of a specified period;
- the ABA is taken to have granted an additional period of 5 years.

“(6) There is no limit to the number of additional periods that may be granted.”.

Register of matters under this Part

7. Section 75 of the Principal Act is amended:

- (a) by inserting before paragraph (1)(a) the following paragraph:
“(aa) licences granted under section 38A; and”;
- (b) by omitting from paragraph (1)(f) “approvals given” and substituting “additional periods granted”.

Minister may protect the free availability of certain types of programs

8. Section 115 of the Principal Act is amended:

- (a) by omitting from subsection (1) “, or the live televising of which,”;
- (b) by omitting subsection (2) and substituting the following subsections:

“(1A) The Minister may, by notice published in the *Gazette*, amend a notice under subsection (1) to specify an additional event, or events of a kind, the televising of which should, in the opinion of the Minister, be available free to the public.

“(1B) Subject to subsection (2), an event specified in a notice under subsection (1) is taken to be removed from the notice 168 hours after the end of the event, unless the Minister publishes in the *Gazette* before that time a declaration that the event continues to be specified in the notice after that time.

“(2) The Minister may, by notice published in the *Gazette*, amend a notice under subsection (1) to remove an event from the notice.

Note: The following are examples of situations in which the Minister might exercise the power to remove an event from a notice:

Example 1

The national broadcasters and commercial television broadcasting licensees have had a real opportunity to acquire the right to televise an event, but none of them has acquired the right within a reasonable time. The Minister is of the opinion that removing the event from the notice is likely to have the effect that the event will be televised to a greater extent than if it remained on the notice.

Example 2

A commercial television broadcasting licensee has acquired the right to televise an event, but has failed to televise the event or has televised only an unreasonably small proportion of the event. The Minister is of the opinion that removing that event, or another event, from the notice is likely to have the effect that the removed event will be televised to a greater extent than it would be if it remained on the notice.”;

- (c) by omitting subsection (3) and substituting:

“(3) Notices and declarations under this section are disallowable instruments for the purposes of section 46A of the *Acts Interpretation Act 1901*.”.

Certain arrangements not to result in control or in persons being associates

9. Section 116 of the Principal Act is amended by omitting subsections (1) and (2) and substituting the following subsections:

“(1) A person who is in a position to exercise control of a satellite subscription television broadcasting licence is not taken to be in a position to exercise control of another satellite subscription television broadcasting licence only because of a provision of a contract, arrangement or understanding under which all or any of the following things are done:

- (a) a subscriber management system is provided for subscribing to either or both of the subscription television broadcasting services being provided under those licences;
- (b) the subscription television broadcasting services being provided under those licences are marketed on a joint basis;
- (c) joint use is made of facilities for:
 - (i) transmitting programs; or
 - (ii) the operation of disabling devices for restricting access to certain programs;
- (d) such other things as are prescribed.

“(2) Subsection (1) does not apply to a contract, arrangement or understanding under which, or as a result of which, a person who is in a position to exercise control of a satellite subscription television broadcasting service comes to be in a position to exercise control (whether directly or indirectly) of the selection or provision of a significant proportion of the programs broadcast by another satellite subscription television broadcasting licensee.”.

Appeals to the Administrative Appeals Tribunal

10. Section 204 of the Principal Act is amended:

- (a) by inserting the following row after the row in the table that relates to subsection 6(3):

“

Refusal to allocate an additional licence	Section 38A	The licensee
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 ”;

- (b) by omitting from the table the rows that relate to subsections 73(2) and 73(3) and substituting the following row:

“

Refusal to grant an additional period	Section 73	The licensee
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 ”.

Review of television broadcasting industry

11. Section 215 of the Principal Act is amended by omitting subsection (2) and substituting:

“(2) The Minister must, as soon as is practicable, but in any case before 1 July 1997, conduct a review of Australian content on subscription television broadcasting services, including into the feasibility of increasing to 20% the level of expenditure required under section 102.”.

Control—general

12.(1) Schedule 1 to the Principal Act is amended:

- (a) by inserting in the first paragraph of subclause 1(1) “subscription television broadcasting licences,” after “radio broadcasting licences,”;
- (b) by omitting from the second paragraph of subclause 1(1) “commercial broadcasting”.

(2) Schedule 1 to the Principal Act is amended:

- (a) by omitting the 4th, 5th and 6th paragraphs of subclause 1(1) and substituting:

“A person who has company interests exceeding 15% in a company is regarded as being in a position to control the company.”;
- (b) by omitting from subclause 6(1) “, in the absence of proof to the contrary,”;
- (c) by omitting subclause 6(2);
- (d) by omitting from clause 7 “can still be expected to be” and substituting “is to be regarded as being”;
- (e) by omitting from clause 7 “could ordinarily be expected to be” and substituting “is to be regarded as being”;
- (f) by omitting from clause 7 all the words from and including “This would, of course” to the end of the clause;
- (g) by omitting from clause 8 “*prima facie*”.

Conditions applicable to subscription television broadcasting licences

13. Clause 10 of Schedule 2 to the Principal Act is amended:

- (a) by omitting paragraph (1)(e) and substituting:

“(e) the licensee will not acquire the right to televise, on a subscription television broadcasting service, an event that is specified in a notice under subsection 115(1) unless:

 - (i) a national broadcaster has the right to televise the event on its broadcasting service; or
 - (ii) the television broadcasting services of commercial television broadcasting licensees who have the right to televise the event cover a total of more than 50% of the Australian population;”;

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(b) by inserting after subclause (1):

“(1A) For the purposes of subparagraph (1)(e)(ii), the percentage of the Australian population covered by the television broadcasting service of a commercial television broadcasting licensee is the percentage most recently specified by the ABA under paragraph 30(5)(a) for the licence area of the licensee’s licence.

“(1B) For the purposes of subparagraph (1)(e)(ii), if a program supplier for a commercial television broadcasting licensee has a right to televise an event, the licensee is taken also to have the right. For this purpose, ‘**program supplier**’ means a person who:

- (a) has an agreement to supply the licensee with program material that can be televised on the licensee’s commercial television broadcasting service (whether or not the program material includes matter showing the event); and
- (b) supplies the licensee with a substantial proportion of all the program material that is televised on the licensee’s commercial television broadcasting service (whether or not the material is supplied under the agreement mentioned in paragraph (a)).”

Application

14. The amendments of clause 10 of Schedule 2 of the Principal Act extend to subscription television broadcasting licences issued before the commencement of this Act.

Grandfathering for changes to the control rules

15.(1) If:

- (a) apart from this section, a person (the “**relevant person**”) would be in breach of a particular control rule at a particular time (the “**test time**”) after the commencement of this section; and
- (b) all the circumstances that are relevant to the breach were in existence at the end of 27 June 1995 (the “**grandfather time**”); and
- (c) the relevant person would not be in breach of that control rule at the test time if the amendments made by section 5 and subsection 12(2) of this Act had not been made; and
- (d) the relevant person was not in breach of that control rule immediately before the grandfather time;

then the relevant person is taken not to be in breach of that control rule at the test time.

(2) If:

- (a) particular circumstances that are relevant to the breach arose after the grandfather time; and

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- (b) the relevant person was not in a position to prevent those circumstances arising;

those circumstances are taken for the purposes of subsection (1) to have been in existence at the grandfather time.

(3) If:

- (a) particular circumstances (the “**new circumstances**”) that are relevant to the breach resulted from the allotment or issue, after the grandfather time, of shares (the “**new shares**”) in a company to a person (the “**recipient**”) who, immediately before the grandfather time, held shares (the “**old shares**”) in the company; and
- (b) the recipient received the new shares in accordance with rights of a kind enjoyed by the recipient in common with other holders of shares of the same class as the old shares;

the new circumstances are taken for the purposes of subsection (1) to have been in existence at the grandfather time.

(4) If:

- (a) particular circumstances that are relevant to the breach consist of the holding by a person of company interests in a company that are greater than the company interests in that company that were held by that person at the grandfather time; and
- (b) that person was in a position to control that company immediately before the grandfather time, and at all times from the grandfather time to the test time;

those circumstances are taken for the purposes of subsection (1) to have been in existence at the grandfather time. For the purposes of this subsection, the question whether a person is in a position to control a company is to be determined in accordance with the Principal Act as in force immediately before the commencement of this section, but without regard to clause 6 of Schedule 1 to the Principal Act.

(5) In this section:

“**circumstances that are relevant to the breach**” includes the holding of all company interests in any company by any person, so far as the company interests can be relied on in establishing the breach, including company interests that do not have to be relied on to establish the breach;

“**control rule**” means:

- (a) a provision of Division 2, 3, 4 or 5 of Part 5 of the Principal Act; and
- (b) a provision of Division 3 of Part 7 of the Principal Act (other than section 109);

“**shares**” means shares in, or debentures of, a company.

Compensation for acquisition of property

16.(1) If:

- (a) this Act, or the Principal Act as amended by this Act, would result in an acquisition of property; and
- (b) the whole or any part of this Act, or of the Principal Act as amended by this Act, would not be valid (apart from this section) because a particular person has not been compensated;

the Commonwealth must pay the person:

- (c) a reasonable amount of compensation agreed on between the person and the Commonwealth; or
- (d) failing agreement—a reasonable amount of compensation determined by a court of competent jurisdiction.

(2) Any damages or compensation recovered, or other remedy given, in a proceeding begun otherwise than under this section must be taken into account in assessing compensation payable in a proceeding begun under this section and arising out of the same event or transaction.

(3) In this section:

“**acquisition of property**” has the same meaning as in paragraph 51(xxxi) of the Constitution.

NOTE

- 1. No. 110, 1992, as amended. For previous amendments, see Nos. 167, 171, 216 and 218, 1992; Nos. 1 and 2, 1993; and Nos. 32 and 88, 1995.

*[Minister's second reading speech made in—
Senate on 7 December 1994
House of Representatives on 29 November 1995]*