2004-2005-2006

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

BROADCASTING SERVICES AMENDMENT
(SUBSCRIPTION TELEVISION DRAMA AND COMMUNITY
BROADCASTING LICENCES) BILL 2006

EXPLANATORY MEMORANDUM

(Circulated by authority of Senator the Hon. Helen Coonan,
Minister for Communications, Information Technology and the Arts)
The Broadcasting Services Amendment (Subscription Television Drama and Community Broadcasting Licences) Bill 2006 (the Bill) amends the Broadcasting Services Act 1992 (the BSA) to:

- increase flexibility in the operation of the 10% requirement for new spending on drama on subscription television (Schedule 1); and
- give the Australian Communications and Media Authority (ACMA) a discretion to allow the transfer of a community broadcasting licence to another person which represents the same community interest, to more easily deal with changes of corporate arrangements by licensees (Schedule 2).

Schedule 1 – Subscription television drama

The BSA contains expenditure requirements for local drama programs that apply to subscription television services in Australia. Subdivisions B to G of Division 2A of Part 7 of the BSA set out the minimum new eligible drama expenditure requirements for subscription television broadcasting licensees, requiring at least 10% of their program expenditure to be spent on new Australian drama.

Under the present framework, licensees are unable to claim expenditure on script development as expenditure on new eligible drama unless and until the project progresses to principal photography. Licensees are also unable to carry forward excess expenditure incurred in one year to count in the next year’s requirement.

Schedule 1 of the Bill provides for more flexible arrangements for the treatment of pre-production expenditure on script development to count towards the overall expenditure requirement. The intent of this amendment is to encourage greater investment in script development and encourage licensees and content providers to become more involved in the earlier stages of drama production in Australia.

The Bill creates new measures that allow spending in excess of the 10% requirement to be carried over into the following financial year. This provides the subscription broadcasting industry with increased flexibility in its investment decisions and will encourage a higher level of investment in quality local drama productions.

Item 5 of Schedule 1 to the Bill amends the definition of ‘drama program’ for the purposes of the subscription broadcasting expenditure scheme, ensuring that it is consistent with the definition of ‘Australian drama program’ within the Australian Content Standard that applies to free-to-air television broadcasters.
Provision is also made to allow for the retroactive application of Schedule 1, permitting expenditure consistent with the proposed changes incurred after 1 January 2006 to be treated as new eligible expenditure for that financial year.

**Schedule 2 – Transfer of community broadcasting licences**

Part 6 of the BSA provides for the allocation of community broadcasting licences by ACMA. Part 6 currently contains no provision for the transfer of a community broadcasting licence. This can lead to difficulties when a licensee changes its corporate identity, or ceases to exist, leaving ACMA with little alternative but to seek the surrender of the licence and conduct a new allocation process.

Item 1 of Schedule 2 to the Bill inserts a new section 91A into Part 6 to allow ACMA to approve the transfer of community broadcasting licences where there is a change of corporate identity. ACMA must not approve the transfer unless it is satisfied that the new licensee continues to represent the community of interest that the licensee represented either at allocation or most recent renewal, whichever is the later.

Item 2 amends section 204 of the BSA to make any decision by ACMA to refuse to approve a transfer reviewable by the Administrative Appeals Tribunal (AAT).

Item 3 inserts a new subclause 9(2B) into Schedule 2 of the BSA to make it a condition of a community broadcasting licence that has been transferred that the transferee must notify ACMA of the transfer within 7 days.

**FINANCIAL IMPACT STATEMENT**

The Bill is not expected to have a significant financial impact on Commonwealth expenditure or revenue.
NOTES ON CLAUSES

Clause 1 - Short title

Clause 1 provides for the citation of the Act.

Clause 2 - Commencement

The Act would commence on the day after Royal Assent, except for the subscription television drama provisions in Schedule 1. Those provisions will operate from 1 January 2006. This will allow subscription television broadcasting licensees to claim the benefit of the amendments for expenditure incurred on or after 1 January 2006.

Clause 3 - Schedule(s)

By virtue of this clause, provisions of the BSA are amended as set out in the Schedules to the Bill.
Schedule 1 – Subscription television drama

Amendments to Broadcasting Services Act 1992

Schedule 1 amends Division 2A of Part 7 of the BSA. Division 2A consists of a number of Subdivisions, which essentially impose the same requirements in different circumstances. These different circumstances concern the various types of commercial arrangements in the industry for program supply.

(Amendments to Subdivision A)

Item 1 – Section 103A

This item adds a point to the simplified outline of Division 2A of Part 7, which is in section 103A.

The new point outlines the new provisions allowing expenditure to be carried forward to the next financial year.

Item 2 – Section 103B (paragraph (a) of the definition of Australian Content Standard)

This item updates paragraph (a) of the definition of ‘Australian Content Standard’ in section 103B as a result of the replacement of the 1999 standard with a new standard in 2005. This is the Broadcasting Services (Australian Content) Standard 2005 (the ACS) made by ACMA under section 122 of the BSA.

It is convenient to update this reference, even though the definition is drafted in a way that automatically covers any replacement for the 1999 ACS (see paragraph (b) of the definition).

Item 3 – Section 103B

This item inserts a new definition of ‘carry-forward eligible drama expenditure provision’ in section 103B.

The term is a shorthand label for new subsections 103NA(2) (see item 20 below), 103RA(2) (item 29), 103TA(2) (item 35), 103UA(2) (item 40), 103XA(2) (item 49) and 103ZAA(2) (item 55).

Item 4 – Section 103B

This item inserts a new definition of ‘designated script development expenditure’ in section 103B.

The effect of the amendments made by items 4, 7 and 9 is that the type of expenditure on the development of a script outline or screenplay for a program specified in this definition will be able to be counted towards the new eligible drama expenditure requirements before principal photography on the program has commenced.
‘Designated script development expenditure’ is essentially expenditure incurred, before principal photography starts, in engaging an independent Australian or New Zealand screenwriter(s) to develop a screenplay or script outline for a television drama program, where the producer is also an Australian or a New Zealander.

**Item 5 – Section 103B (definition of drama program)**

This item replaces the definition of ‘drama program’ in section 103B with a new definition.

The definition is effectively unchanged except for new paragraphs (b) and (c). The types of partially scripted or fully improvised programs specified in paragraph (b) and (c) will count as a drama programs for the purposes of the drama program expenditure requirements.

This amendment will bring the definition of a ‘drama program’ for the purposes of the subscription television drama expenditure requirements into line with the definition that is used for the Australian drama quota requirements for commercial free-to-air television contained in the ACS.

Item 8 makes a related amendment.

**Item 6 – Section 103B (note to the definition of expenditure)**

This item amends the note to the definition of ‘expenditure’ in section 103B as a consequence of the amendments made to section 103H by item 9.

**Item 7 – Section 103B**

Item 7 adds a new definition of ‘non-designated pre-production expenditure’ to section 103B.

The term is a shorthand label for all ‘pre-production expenditure’ other than ‘designated script development expenditure’ (see item 4). Unless pre-production expenditure is ‘designated script development expenditure’, it will not be able to be counted unless principal photography on the relevant program has commenced (see section 103H as amended by item 9).

**Item 8 – Section 103B (paragraph (a) of the definition of pre-production expenditure)**

Item 5 expands the scope of the expenditure provisions to cover partially scripted programs and improvised programs based on a script outline, as well as fully scripted programs. Partially improvised programs (ie programs that are not fully scripted) would not have a detailed screenplay but may have a more general script outline.

Item 8 therefore amends the definition of ‘pre-production expenditure’ so that it also covers expenditure on developing a script outline for these non-fully scripted
programs, as well as expenditure on developing a screenplay for fully scripted programs.

**Item 9 – Section 103H**

Under section 103H, pre-production expenditure cannot be counted unless principal photography has commenced.

This item amends section 103H so that it only applies to ‘non-designated pre-production expenditure’ (see items 4 and 7). The heading to the section is also amended.

**Item 10 – Section 103J**

Section 103J specifies when expenditure is ‘incurred’ for the purposes of the drama expenditure provisions.

This item amends section 103J so that it only applies to ‘non-designated pre-production expenditure’ (see items 4 and 7). New section 103JA (see item 11) deals with ‘designated script development expenditure’.

**Item 11 – After section 103J**

**New section 103JA – When designated script development expenditure is incurred in relation to an eligible drama program etc.**

New subsection 103JA(1) allows ‘designated script development expenditure’ (see items 3 and 6) for a proposed drama program incurred in a particular financial year to count as new eligible drama expenditure for that year.

However, if principal photography commences in a later financial year, but the program is not at that time an eligible drama program for the purposes of section 103B (eg it is not an Australian program under the ACS), the claim for the later year must be reduced by the amount claimed in the earlier year on script development for the proposed program (new subsections 103JA(2), (3) and (4)).

Subsections (2), (3) and (4) impose the same rule:

- Subsection (2) applies where the same person who incurs the expenditure nominates it. This provision applies where a channel provider supplies a channel (section 103N), the licensee supplies a channel (section 103T), a part-channel provider supplies a package of programs (section 103U), or the licensee supplies part of the program material (section 103Z).

- Subsection (3) applies where a pass-through provider supplies a channel (section 103R). In this case it is the licensee who nominates expenditure.

- Subsection (4) applies where a part-pass-through provider supplies a package of programs (section 103X). In this case too the licensee nominates expenditure.
Item 12 – After subsection 103L(4)

Under section 103L, ACMA may make written general determinations setting out
general rules about what expenditure is, and what expenditure is not, expenditure
incurred on program material or new eligible drama programs.

This item amends section 103L so that the power clearly extends to determining what
types of expenditure is, or is not, ‘designated script development expenditure’ (see
items 4 and 7).

Item 13 – Subsection 103L(7)

Subsection 103L(7) makes ACMA program expenditure determinations disallowable
instruments. A disallowable instrument is automatically a legislative instrument
under section 6 of the Legislative Instruments Act 2003 (the LIA), and is therefore
disallowable under Part 5 of the LIA in any event.

This item replaces subsection 103L(7) with a provision expressly identifying an
ACMA program expenditure determination as a legislative instrument under the LIA,
for ease of reference. It does not change the current legal position.

Item 14 – Paragraph 103M(1)(c)

Section 103M is intended to prevent double counting of expenditure under multiple
provisions in Division 2A.

Subsection 103M(1) applies where there is a channel-provider or part-channel
provider who nominates expenditure, and prevents expenditure being nominated
under more than one provision of Division 2A. This item amends subsection
103M(1) so that the new mechanism for expenditure to be carried forward can
operate.

Item 15 – Paragraph 103M(3)(c)

This item amends subsection 103M(3) to the same effect as item 14. Subsection
103M(3) applies where it is the licensee who nominates expenditure.

(Amendments to Subdivision B)

Subdivision B imposes licence conditions on a licensee who is supplied with a
channel of programs by a ‘channel provider’ (see section 103C).

Item 16 – Subsection 103N(1)

Subdivision B (sections 103N to 103Q) applies where a channel provider supplies a
channel to a licensee. Items 16 to 24 amend provisions in Subdivision B.
Subsection 103N(1) is the basic rule imposing a licence condition requiring the channel provider’s new eligible drama expenditure each financial year to be at least 10% of their total program expenditure.

This item replaces subsection 103N(1) with a new provision. The new provision includes a mechanism for excess expenditure to be carried forward to the next financial year (see new paragraph 103N(1)(d)). Otherwise, the existing provision is re-enacted in substance.

For channel providers, the central provision allowing expenditure to be carried forward is new section 103NA (see item 20). For licensees, part-channel providers, pass-through providers and part-pass-through providers, the equivalent provisions are new sections 103RA (item 29), 103TA (item 35), 103UA (item 40), 103XA (item 49) and 103ZAA (item 55).

**Item 17 – Subsection 103N(2)**

This item defines the term ‘channel provider’s carry-forward eligible drama expenditure’ that is used in new subsection 103N(1) (see item 16). The definition links to new section 103NA (see item 20).

**Item 18 – After subsection 103N(2)**

This item amends section 103N so that designated script development expenditure can only be 10% or less of new eligible drama expenditure.

**Item 19 – Subsection 103N(3) (note)**

This item amends a note as a result of the amendments allowing expenditure to be carried forward (items 14, 15, 16, 17 and 20 where there is a channel provider).

**Item 20 – After section 103N**

**New section 103NA – Carry-forward eligible drama expenditure**

This item adds new section 103NA. If a channel provider’s new eligible drama expenditure exceeds the minimum 10% proportion of total program expenditure for a particular financial year, the excess may be nominated as the ‘channel provider’s carry-forward eligible drama expenditure’ for the next financial year.

This excess nominated expenditure can then be claimed under section 103N in the next year (see items 16 and 17).

**Item 21 – Paragraph 103P(1)(d)**

If a licensee does not meet the minimum 10% expenditure condition in section 103N, sections 103P and 103Q require it to make-up any shortfall in the next financial year. (Section 103P applies where a channel provider supplies a channel exclusively to a licensee. Section 103Q applies where a channel provider supplies a channel to multiple licensees.)
Subsection 103P(1) sets out when section 103P applies. One of those elements is that the channel provider’s new eligible drama expenditure for a financial year is less than 10% of the channel provider’s total program expenditure for that year, ie there is a shortfall (paragraph 103P(1)(d)).

This item amends paragraph 103P(1)(d) so that expenditure carried forward from a previous year is taken into account in assessing whether there is a shortfall.

**Item 22 – Subsection 103P(3) (definition of shortfall amount)**

Subsection 103P(2) imposes a licence condition on licensees requiring them to make-up any ‘shortfall amount’.

This item amends the definition of ‘shortfall amount’ in subsection 103P(3) so that it takes into account any carry-forward expenditure from the previous year.

**Item 23 – Paragraph 103Q(1)(d)**

Section 103Q imposes essentially the same make-up condition on licensees as section 103P. The difference is that section 103Q applies where a channel provider supplies a channel to multiple licensees, whereas if the channel is supplied to just one licensee then section 103P applies.

This item amends paragraph 103Q(1)(d) to the same effect as the amendment to paragraph 103P(1)(d) made by item 21.

**Item 24 – Subsection 103Q(3) (definition of shortfall amount)**

This item amends subsection 103Q(3) to the same effect as the amendment made to subsection 103P(3) by item 22.

(Amendments to Subdivision C)

Subdivision C of Division 2A applies where a ‘pass-through provider’ supplies a channel to a licensee. A ‘pass-through provider’ is essentially an overseas-based ‘channel provider’ (see section 103E).

**Item 25 – Subsection 103R(1)**

**Item 26 – Subsection 103R(2)**

**Item 27 – After subsection 103R(2)**

**Item 28 – Subsection 103R(4) (note)**

Section 103R imposes a licence condition corresponding to section 103N (which applies where there is a channel provider rather than a pass-through provider).

These items amend section 103 to the same effect as the amendments made to section 103N by item 16 to 19.
Item 29 – After section 103R

New section 103RA – Carry-forward eligible drama expenditure

This item adds new section 103RA to the same effect as new section 103NA added by item 20.

Item 30 – Paragraph 103S(1)(c)
Item 31 – Subsection 103S(3) – definition of *shortfall amount*

These items amend section 103S to the same effect as the amendment to section 103P made by items 21 and 22.

*(Amendments to Subdivision D)*

Subdivision D of Division 2A applies where the licensee supplies all program material on their service.

Item 32 – Subsection 103T(1)
Item 33 – Subsection 103T(2)
Item 34 – At the end of section 103T

These items amend section 103T to the same effect as the amendments made to section 103N by items 16 to 18.

Item 35 – After section 103T

New section 103TA – Carry-forward eligible drama expenditure

New section 103TA corresponds to new section 103NA (see item 20 above).

*(Amendments to Subdivision E)*

Subdivision E applies where a licensee is supplied with a package of programs assembled by a ‘part-channel provider’ (see section 103D).

Item 36 – Subsection 103U(1)
Item 37 – Subsection 103U(2)
Item 38 – After subsection 103U(2)
Item 39 – Subsection 103U(3) (note)

These items amend section 103U to the same effect as the amendment made to section 103N by items 16 to 19.

Item 40 – After section 103U

New section 103UA – Carry-forward eligible drama expenditure
New section 103UA corresponds to new section 103NA (see item 20 above).

**Item 41 – Paragraph 103V(1)(d)**

**Item 42 – Subsection 103V(3) (definition of *shortfall amount*)**

These items amend section 103V to the same effect as the amendments made to section 103P by items 21 and 22.

**Item 43 – Paragraph 103W(1)(d)**

**Item 44 – Subsection 103W(3) (definition of *shortfall amount*)**

These items amend section 103W to the same effect as the amendments made to section 103Q by items 23 and 24.

**(Amendments to Subdivision F)**

Subdivision F applies where a licensee is supplied with a package of programs assembled by a ‘part-pass-through provider’ (see section 103F). A ‘part-pass-through provider’ is essentially a ‘part-channel provider’ (see section 103D) not based in Australia.

**Item 45 – Subsection 103X(1)**

**Item 46 – Subsection 103X(2)**

**Item 47 – After subsection 103X(2)**

**Item 48 – Subsection 103X(4) (note)**

These items amend section 103X to the same effect as the amendments made to section 103N by items 16 to 19.

**Item 49 – After section 103X**

**New section 103XA – Carry-forward eligible drama expenditure**

New section 103XA corresponds to new section 103NA (see item 20 above).

**Item 50 – Paragraph 103Y(1)(c)**

**Item 51 – Subsection 103Y(3) (definition of *shortfall amount*)**

These items amend section 103Y to the same effect as the amendments made to section 103P by items 21 and 22.

**(Amendments to Subdivision G)**
Subdivision G applies where a licensee supplies part of the program material on their service, and the remainder is supplied by a ‘part-channel provider’ (see section 103D) or a ‘part-pass-through provider’ (see section 103F).

Item 52 – Subsection 103Z(1)
Item 53 – Subsection 103Z(2)
Item 54 – At the end of section 103Z

These items amend section 103Z to the same effect as the amendments made to section 103N by items 16 to 18.

Item 55 – After section 103Z
New section 103ZAA – Carry-forward eligible drama expenditure

New section 103ZAA corresponds to new section 103NA (see item 20 above).

(Amendments to Subdivision I)

Section 103ZE provides for ACMA to issue compliance certificates relating to whether the minimum expenditure requirements have been met.

Item 56 – Subparagraph 103ZE(1)(d)(i)
Item 57 – After subsection 103ZE(1)
Item 58 – Paragraph 103ZE(2)(d)
Item 59 – Subparagraph 103ZE(3)(d)(i)
Item 60 – After subsection 103ZE(3)
Item 61 – Paragraph 103ZE(4)(d)

These items amend section 103ZE to incorporate the amendments made to other provisions of Division 2A relating to carrying forward excess expenditure:

- items 56 and 57 apply to channel providers;
- item 58 applies to pass-through providers;
- items 59 and 60 apply to part-channel providers;
- item 61 applies to part-pass-through providers.

(Application of amendments)

Item 62 – Application of amendments

This item is an application provision.
The amendments made by Schedule 1 will commence on 1 January 2006 (clause 2 of the Bill). However, because the provisions operate on a financial year basis, the amendments made by Schedule 1 will generally apply to financial years from 2005-06 onwards (subitem 62(1)).

However, this is subject to an exception, relating to the expansion of the definition of ‘drama program’ to cover partially scripted and improvised programs as well as fully scripted programs (see items 5 and 8 of Schedule 1).

The effect of subitems 62(2) and (3) is that expenditure on these partially scripted or improvised programs can only be claimed if it is incurred on or after 1 January 2006.
Schedule 2 – Transfer of community broadcasting licences

Amendments to Broadcasting Services Act 1992

Item 1 – After section 91

New section 91A – Transfer of community broadcasting licences

This item adds new section 91A to the BSA.

Currently there is no provision allowing a community broadcasting licence to be transferred. Section 91A will introduce a mechanism for ACMA to approve the transfer of a licence in certain circumstances.

There must be an application by the licensee (subsections 91A(1) and (2)). ACMA must then decide the application (subsection 91A(3)).

ACMA can only approve a transfer of a licence for services in the broadcasting services bands if:

- the proposed transferee is a company of the sort that would be eligible to be allocated such a licence in the first place under subsections 80(1) and 81(1) (paragraph 91A(4)(a)); and
- ACMA has not decided that the transferee would not a suitable licensee under section 83 (paragraph 91A(4)(b) and subsection 91A(5)).

In all cases, ACMA may only approve a transfer if it is satisfied that the proposed transferee represents the same community interest that the licensee represented at the time of initial allocation or most recent renewal, whichever is the later (subsection 91A(6)).

Even if ACMA is satisfied on the community interest question, it retains an overall discretion in approving or refusing a transfer. ACMA must consider the general principle that transfers should not be approved if the transfer is essentially part of a commercial arrangement (paragraph 91A(7)(a)). This is because the transfer mechanism is designed to cater for changes in corporate arrangement by licensees representing an unchanged community interest. It is not designed to facilitate trading in community broadcasting licences.

In deciding a transfer application, ACMA will also consider any other matter that is relevant either generally or in the particular case (paragraph 91A(7)(b)).

If ACMA approves a transfer, the licensee has 90 days to arrange the transfer (subsection 91A(8)).
Item 2 – Section 204 (after table item dealing with variation of licence conditions or imposition of new conditions (Community))

This item amends section 204 to make refusal to approve a transfer application reviewable in the Administrative Appeals Tribunal, on the application of either the licensee or the proposed transferee.

Item 3 – After subclause 9(2A) of Schedule 2

This item creates a new standard licence condition for all community broadcasting licences. The new condition is that if a licence is transferred, the new licensee must notify ACMA of the transfer within 7 days. A notice must be in accordance with any form approved in writing by ACMA for the purpose.