THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

COMMUNICATIONS LEGISLATION AMENDMENT (MISCELLANEOUS MEASURES) BILL 2008

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Broadband, Communications and the Digital Economy, Senator the Honourable Stephen Conroy)
The Communications Legislation Amendment (Miscellaneous Measures) Bill 2008 (the Bill) amends the Broadcasting Services Act 1992 (the BSA) to give the Australian Communications and Media Authority (the ACMA) the discretion to consider late applications for renewals of community broadcasting licences up to the expiry date of the licence.

FINANCIAL IMPACT STATEMENT

There is no financial impact on the Commonwealth.
NOTES ON CLAUSES

Clause 1 – Short title

Clause 1 provides for the citation of the Communications Legislation Amendment (Miscellaneous Measures) Act 2008 (the Act).

Clause 2 – Commencement

Clause 2 of the Bill provides that sections 1 to 3 of the Act (and anything not elsewhere covered in the Table) commence on the day on which the Act receives the Royal Assent.

Schedule 1 to the Act commences on the day after the Act receives the Royal Assent.

Clause 3 – Schedule(s)

Clause 3 provides that each Act that is specified in Schedule 1 to the Act is amended or repealed as set out in that Schedule, and that any other item in a Schedule has effect according to its terms.

Schedule 1—Amendments

Renewal of community broadcasting licences

Broadcasting Services Act 1992

Item 1 – Section 89

Section 89 specifies that, subject to Part 10, community broadcasting licences remain in force for five years. Part 10 of the BSA provides for the imposition of criminal and civil penalties for breaches of licensing provisions by licensees.

The amendments in item 3 (below) would give the Australian Communications and Media Authority (the ACMA) the discretion to consider late applications for the renewal of a community broadcasting licence in certain circumstances (see new subsection 90(1C)). If the ACMA exercised its discretion to consider a late application, and did not make a decision on the application before the expiry date of the licence, new subsection 90(1E) provides that the community broadcasting licence would remain in force until the ACMA made a decision on the late application.

Item 1 amends section 89 of the BSA by inserting a reference to new subsection 90(1E) so that the five year duration rule would not apply to those licences (which would have otherwise expired) under consideration by the ACMA pursuant to new subsections 90(1C) and 90(1E).
**Item 2 – Subsection 90(1A)**

Section 90 of the BSA empowers the ACMA to renew a community broadcasting licence if the licensee makes an application for renewal in accordance with an approved form.

Subsection 90(1A) sets out the general rule that renewal applications must be made no earlier than one year before the licence is due to expire, but no later than either 26 weeks before the expiry date or at a time notified in writing by the ACMA (whichever is the earlier).

The amendments in item 3 (below) will allow the ACMA to consider late applications for the renewal of a community broadcasting licence in certain circumstances.

Consequently, item 2 would amend subsection 90(1A) by making the general rule subject to new subsection 90(1C), which allows the submission to the ACMA of late applications by licensees in certain circumstances.

**Item 3 – After subsection 90(1B)**

Part 6 of the BSA provides for the allocation and renewal of community broadcasting licences by the ACMA. Section 90 gives the ACMA a discretion to renew a community broadcasting licence provided a renewal application is made no earlier than one year before the licence is due to expire and no later than 26 weeks before the expiry date, or at a time notified in writing by the ACMA (whichever is the earlier).

However, it is not uncommon for community broadcasting licensees to lodge renewal applications up to three months late. While most community broadcasters will have adequate administrative processes in place to ensure that their licence renewal applications are submitted within time, many operate without paid staff and have little administrative support.

The ACMA currently has no discretion to consider late applications, regardless of the circumstances giving rise to the late application. Consequently, a good community broadcasting licensee, providing a valuable public service, could lose its licence as a result of making a late application – even in circumstances where the licensee can show good reasons as to why its application is late.

The purpose of the amendments in item 3 is to give the ACMA the discretion to consider late applications while ensuring that the regulator still has adequate time to consider the merits of the renewal application.

Item 3 would insert new subsections 90(1C), (1D), (1E) and (1F) after existing subsection 90(1B).

New subsection 90(1C) would give the ACMA the discretion to consider a late application for the renewal of a community broadcasting licence if:

a) the licensee makes the application before the license’s expiry date; and
b) the application is accompanied by a written statement setting out the licensee’s reasons for the lateness of the application; and

c) the ACMA considers that there are exceptional circumstances that warrant the consideration of the application.

In deciding whether there are exceptional circumstances that warrant the consideration of the late application, new subsection 90(1D) would require the ACMA to have regard to the following matters:

a) how late the application is; and

b) the reasons given by the licensee for the lateness of the application; and

c) the number of paid staff (if any) employed by the licensee; and

d) such other matters (if any) as the ACMA considers relevant.

The fact ‘exceptional circumstances’ must exist (see paragraph 90(1C)(c)) means that the amendments provide a limited exception to the general rule set down in section 90 of the BSA about the timeliness of renewal applications. Licensees that submit late renewal applications in circumstances the ACMA does not consider ‘exceptional’ would not benefit from the new amendments.

Examples of factors that might justify consideration of a late application include:

- unforeseeable events beyond the control of the licensee;
- prolonged absences (e.g., sick leave) of key staff or members of the management committee; or
- loss of records due to theft or vandalism.

If the ACMA exercises its discretion to consider a late application under new subsection 90(1C), but does not make a decision on the application before the expiry date of the licence, new subsection 90(1E) would provide that the licence remains in force until the ACMA makes a decision on the application for renewal of the licence.

If ACMA considers a late application under new subsection 90(1C), but has not made a decision within 26 weeks after accepting the renewal application, new subsection 90(1F) would deem the ACMA to have made a decision to refuse to renew the licence under section 91 of the BSA at the end of the 26 week period.

The combined effect of new subsections 90(1E) and 90(1F) is to ensure that the ACMA has appropriate time to consider the licensee’s performance in serving the community before deciding whether to renew the licence.
The new amendments to section 90 do not provide for review by the Administrative Appeals Tribunal of an ACMA decision under the new subsection 91(1C) regarding whether to consider a late application for renewal of a community broadcasting licence.

The existing legislative regime does not provide for ACMA decisions regarding whether to exercise its discretion to renew a community broadcasting licence under subsection 90(1) to be subject to review by the Administrative Appeals Tribunal. Given that ACMA’s substantive decisions on licence renewal are not subject to merit review, it is appropriate for ACMA’s preliminary decisions on whether to consider a late application should be similarly excluded from merits review.

Item 3 also inserts the heading ‘Notification’ to subsection 90(2), which requires the ACMA to notify in the Gazette, upon receipt, the making of a renewal application.

**Item 4 – Subsection 91(1)**

Subsection 91(1) currently allows the ACMA to renew a community broadcasting licence for a period of five years. Item 4 would amend subsection 91(1) by omitting the words ‘for a period of five years’ and substituting new paragraphs (a) and (b).

In circumstances where:

- a) the ACMA renews a licence after its expiry date; and
- b) under subsection 90(1E), the licence remained in force until the ACMA made a decision on the application;

new paragraph 91(1)(a) would require the ACMA to renew the licence from the period beginning immediately after the time when the ACMA made a decision on an application (subparagraph 91(1)(a)(iii)), and ending at the end of the 5 year period that began immediately after the expiry date (subparagraph 91(1)(a)(iv)).

In all other circumstances, the ACMA may renew a licence for a period of five years beginning immediately after its expiry date (paragraph 91(1)(b)).

**Item 5 – Application of amendments – sections 90 and 91 of the Broadcasting Services Act 1992**

Item 5 clarifies that the amendments made to sections 90 and 91 of the BSA by Schedule 1 to this Act, apply to an application for renewal made after the commencement of item 5. The amendments, therefore, will not apply retrospectively to late renewal applications made before the commencement of item 5.

Item 5 would commence on the day after this Act receives the Royal Assent (see clause 2).