

1996

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

RADIOCOMMUNICATIONS AMENDMENT BILL 1996

EXPLANATORY MEMORANDUM

(Circulated by authority of Senator the Hon. Richard Alston, Minister for
Communications and the Arts)



RADIOCOMMUNICATIONS AMENDMENT BILL 1996

OUTLINE

This Bill amends the *Radiocommunications Act 1992* (the Principal Act) to prepare for changes to the regulation of telecommunications in Australia provided for in the *Telecommunications Bill 1996* and related Bills. It also makes various minor policy changes to improve the mechanisms for management of the radiofrequency spectrum.

The amendments in Schedule 1 of the Bill will:

1. provide a mechanism for the price-based allocation of encumbered radiofrequency spectrum and the later clearance of incumbents (items 1, 4-7, 9-17, 19-22, 24, 33, 41 and 43-46);
2. apply rules in the *Trade Practices Act 1974* (TPA) that relate to anti-competitive acquisitions to the issuing of radiocommunications licences and to third party authorisations under those licences (items 2, 18, 25, 28-31, 38 and 42);
3. enable the Minister to set limits for the acquisition of spectrum or licences in price-based allocation processes (items 21, 35-37, 92 and 93);
4. extend the maximum period for spectrum licences from 10 to 15 years (item 23);
5. support the Spectrum Management Authority's standards making power so that it encompasses, within the limits of Commonwealth constitutional power, a range of devices capable of causing, or being affected by, electromagnetic interference (items 3, 50-63, 66-71 and 80-82);
6. extend the radiocommunications standards making power to allow the setting of health and safety standards to protect people from the operation of radiocommunications devices (items 47, 63-65 and 83);
7. remove provisions for technical licence specifications as these have been found to be an unnecessary regulatory mechanism (items 8, 26, 27, 39, 40, 48, 49, 72-79, 86, 87 and 90); and
8. other minor technical amendments (items 32, 34, 84, 85, 88, 89, 91 and 94).

The Schedule 1 amendments primarily have the objective of making available spectrum for telecommunications services, in particular for mobile services but also for radiocommunications customer access networks (also known as wireless local loop systems). These technologies will be very important for the introduction of further competition in the provision of telephone services, both in the mobile market itself and in competition with fixed-line services. To meet the future demand for mobile services and other telecommunications uses of radiofrequency spectrum and to facilitate the

development of competition in the post 1 July 1997 telecommunications environment, it is necessary to be able to make additional spectrum available as soon as possible. The amendments allow this to be achieved by enabling spectrum to be planned and allocated before current users are cleared. These users can be cleared later as new networks are established.

Access to spectrum is becoming a major competitive factor in telecommunications so the amendments will ensure that the anti-competitive acquisition rules in the TPA are applied to the allocation and issue of licences for the spectrum, in the same way as they currently apply to the trading in those licences. Third party authorisations are another important means of gaining access to spectrum and the amendments will also apply the relevant rules to these authorisations.

To provide opportunities for the growth of competition beyond those which might flow from the application of the TPA, the amendments provide a Ministerial power to set ownership limits on spectrum or licences allocated to any person or a specified person as part of a particular price-based allocation of radiocommunications licences. Such limits would only apply to the issue of licences; after issue, the TPA alone would apply.

FINANCIAL IMPACT STATEMENT

These amendments would not of themselves directly affect resource requirements of the SMA. They are also not expected to significantly affect the amount of revenue to be derived from the allocation of spectrum, although by enabling the allocation of spectrum while encumbered they should bring forward the time at which such revenue is received from when it would otherwise have been received.

NOTES ON CLAUSES

Clause 1 - Short title

This clause provides for the Act to be cited as the *Radiocommunications Amendment Act 1996*.

Clause 2 - Commencement

This clause provides for the commencement of the Act. The Act, including Schedule 1, commences on the day the Act receives the Royal Assent. The early commencement of Schedule 1 will enable the allocation of spectrum for telecommunications services to proceed without delay.

Clause 3 - Schedule(s)

Clause 3 provides for the *Radiocommunications Act 1992* (the Principal Act) to be amended as provided for in the Schedules.

SCHEDULE 1 - AMENDMENTS

Radiocommunications Act 1992

Item 1 - After paragraph 4(c)

Section 4 of the Principal Act provides an outline of the Act as a reading guide. This item inserts a new paragraph 4(ca) to reflect the changes to Chapter 3 of the Principal Act, relating to the re-allocation of spectrum, made by other items of Schedule 1.

Item 2 - Section 5

Section 5 of the Principal Act defines terms used in the Act. This item inserts in section 5 the new term 'ACCC' and defines it as the Australian Competition and Consumer Commission. This new term is used in new provisions inserted by items 21 and 35 relating to application of the TPA to licence allocation, issue and third party authorisations.

Item 3 - Section 5

Section 5 of the Principal Act defines terms used in the Act. The SMA is currently implementing an electromagnetic compatibility (EMC) regime to regulate interference between non-radiocommunications devices or between a non-radiocommunications and a radiocommunications device. As part of this regime, the SMA will need to make standards applying to a wide range of electrical and electronic equipment. Items 50-63, 66-71 and 80-82 insert provisions to support the SMA's power to make such standards so that it encompasses, within the limits of Commonwealth constitutional power, a range of devices capable of causing, or being affected by, electromagnetic

interference for the purposes of the EMC regime (see the notes on those items for a discussion of these powers).

This item inserts a new term into section 5, 'EMC standard', which is defined to mean a standard made solely for the purpose of the EMC standards-making provisions: s.162(3)(b) or s.162(3)(e).

Item 4 - Section 5 (definition of *marketing plan*)

Section 5 of the Principal Act defines terms used in the Act. This item makes a formal amendment to the definition of *marketing plan*, consequential to amendments in other items of Schedule 1, to include a reference to a marketing plan made under new section 39A (see the notes relating to item 46 for a discussion of proposed new section 153M).

Item 5 - Section 5

Section 5 of the Principal Act defines terms used in the Act. This item inserts a new term 're-allocation deadline' (and a self-explanatory definition) into section 5. This new term is used in new provisions inserted by item 46 relating to a new spectrum re-allocation process.

Item 6 - Section 5

Section 5 of the Principal Act defines terms used in the Act. This item inserts a new term 're-allocation period' (and a self-explanatory definition) into section 5. This new term is used in new provisions inserted by items 43, 44 and 46 relating to a new spectrum re-allocation process.

Item 7 - Section 5

Section 5 of the Principal Act defines terms used in the Act. This item inserts a new term 'spectrum re-allocation declaration' (and a self-explanatory definition) into section 5. This new term is used in new provisions inserted by items 41 and 43-46 relating to a new spectrum re-allocation process.

Item 8 - Section 5 (definition of *technical licence specification*)

Section 5 of the Principal Act defines terms used in the Act. All the provisions in the Principal Act relating to technical licence specifications (TLSs) are to be removed as they are an unnecessary regulatory mechanism. There has been some doubt about the appropriate head of power for setting generic licence conditions relating to technical matters, that is, whether it should be done by specifying TLSs, or by determining licence conditions under paragraph 107(1)(g) of the Principal Act. It is considered that the power under paragraph 107(1)(g) would be sufficient authority to impose generic technical requirements on licensees. The SMA is converting all existing TLSs into paragraph 107(1)(g) licence condition determinations.

This item deletes the definition of 'technical licence specification' from section 5.

Item 9 - At the end of subsection 29(3)

Section 29 of the Principal Act provides an outline of Chapter 2 of that Act as a reading guide. This item inserts a new paragraph (c) into subsection 29(3) to reflect the changes to Part 2.2 of the Principal Act, relating to the making of marketing plans for spectrum that is subject to re-allocation, made by other items of Schedule 1.

Item 10 - Subsection 36(2)

Section 36 of the Principal Act enables the Minister to designate parts of the spectrum to be allocated by issuing spectrum licences. This item amends subsection 36(2) to change a discretion, for a designation to specify the area, or areas, to which a designation applies, into a requirement. This will assist in determining whether a section 36 designation overlaps with a re-allocation declaration made under new section 153B (see item 46). It is intended that an area specified in a designation may be the whole of Australia or any part of Australia.

Item 11 - At the end of section 36

This item inserts 3 new subsections, (6), (7) and (8), into section 36 of the Principal Act to provide for the situations where a section 36 designation and a related marketing plan overlap with a re-allocation declaration under proposed new section 153B (see item 46). An overlap can occur where both instruments cover the same part of the spectrum and the same specified area in relation to that spectrum (see new subsection (6) and paragraphs (7)(a), (b) and (c)).

New subsection (6) provides that the Minister must not make a section 36 designation that overlaps wholly or partly with a re-allocation declaration during the re-allocation period.

New subsection (7) provides for a section 36 designation to cease to have effect where it overlaps with a re-allocation declaration. The designation and related marketing plan cease to have effect at the beginning of the re-allocation period, but only to the extent that they overlap with the re-allocation declaration (paragraphs (d) and (f)).

However, new subsection (8) provides that new subsection (7) does not prevent an apparatus licensee from accepting an offer of a spectrum licence under section 56 of the Principal Act (relating to the conversion of apparatus licences to spectrum licences) where the offer was made before the beginning of the re-allocation period referred to in subsection (7).

It should be noted that where the SMA has already allocated a spectrum licence to a person under subsection 62(1) of the Principal Act prior to the commencement of the re-allocation period, the SMA will be able to issue that spectrum licence to the person (see new section 153P under item 46).

Note also that should the Minister revoke or vary a re-allocation declaration so that any overlap between a section 36 designation and a re-allocation declaration is

removed, the revocation or variation will not have the effect of reviving any part of a section 36 designation which previously overlapped with the declaration and had therefore ceased to have effect.

Item 12 - Paragraph 38(1)(b)

Section 38 of the Principal Act deals with the preparation of conversion plans. This item is consequential to the amendment at item 11 and replaces paragraph 38(1)(b) with a new paragraph to require conversion plans to specify the areas in which operation of radiocommunications devices would be authorised by spectrum licences issued in accordance with the plan.

Item 13 - Paragraph 39(1)(b)

Section 39 of the Principal Act deals with the preparation of marketing plans. This item is consequential to the amendment at item 11 and replaces paragraph 39(1)(b) with a new paragraph to require marketing plans to specify the areas in which operation of radiocommunications devices would be authorised by spectrum licences issued under the plan.

Item 14 - After section 39

39A - Marketing plans - re-allocation of spectrum

This item inserts a new section 39A into the Principal Act to provide for the SMA to make a marketing plan for issuing spectrum licences for spectrum and areas covered by a spectrum re-allocation declaration under new section 153B (see item 46).

The requirement to make a marketing plan under new section 39A (subsection (2)) will only arise if a re-allocation declaration states that part of the spectrum should be re-allocated through issuing spectrum licences (subsection (1)).

The marketing plan may relate to the issue of spectrum licences which do not apply to the whole of the area to which the declaration applies (subsection (4)). The matters that may be indicated in a marketing plan include the same matters that, under subsection 39(4), may be indicated under a marketing plan made under section 39 of the Principal Act (subsection (5)).

A marketing plan may also indicate the procedures that are to be followed in issuing spectrum licences, for example, by a form of auction, tender, or for a pre-determined or pre-negotiated price (subsection (7)). This allows flexibility in setting the allocation procedures to take account of different characteristics of different parts of the spectrum and consequent differences in the market interest for the licences to be issued.

A marketing plan must be consistent with the spectrum plan made under section 30 of the Principal Act, or any frequency band plan made under section 32 of the Principal Act that relates to the same spectrum (subsection (8)).

Item 15 - Subsection 41(2)

This item provides for a cross-reference amendment to subsection 41(2) of the Principal Act consequential to the insertion of new section 39A under item 14.

Item 16 - After subsection 45(6)

Section 45 of the Principal Act provides an outline of Chapter 3 of the Act as a reading guide. This item inserts a new subsection (6A) into section 45 to reflect the insertion of new Part 3.6 under item 46 relating to the making of re-allocation declarations.

Item 17 - Paragraph 51(2)(b)

Section 51 of the Principal Act provides an outline of Part 3.2 of the Act as a reading guide. This item omits the reference to 'unencumbered spectrum' from paragraph 51(2)(b), to reflect amendments made by other items of Schedule 1 relating to the re-allocation of encumbered spectrum by issuing spectrum licences.

Item 18 - At the end of subsection 51(2)

Section 51 of the Principal Act provides an outline of Part 3.2 of the Act as a reading guide. This item inserts a new paragraph (d) into subsection 51(2) of the Principal Act to reflect the insertion of new Subdivision D relating to the application of section 50 of the TPA to the issue of spectrum licences, and third party authorisations under those licences (see items 25 and 28).

Item 19 - Paragraph 52(1)(b)

Section 52 of the Principal Act applies Subdivision A of Division 1 of Part 3.2 (relating to the issuing of spectrum licences in substitution for apparatus licences) to apparatus licences covered by a conversion plan. This item is consequential to the amendment at item 12 and replaces paragraph 52(1)(b) with a new paragraph to take into account that conversion plans will be required to specify the areas in which operation of radiocommunications devices would be authorised by spectrum licences issued in accordance with the plans.

Item 20 - Subdivision B of Division 1 of Part 3.2 (heading)

This item is a formal consequential amendment.

Item 21 - At the end of section 60

Section 60 of the Principal Act provides for the SMA to determine procedures for allocating spectrum licences. This item inserts a new subsection (5) into section 60 to allow allocation procedures to impose limits on what a person, or a group of persons, may be allocated under the price-based allocation procedures. The purpose for setting limits can be for competition policy reasons, for example to promote competition or avoid adverse effects on competition. Any limits set may relate to the same factors taken into consideration in the application of the TPA. The anti-competitive

provisions of the TPA alone would apply to any post-allocation trading in licences or spectrum.

For all the limits, in determining the application of the limit to a person, the person's current holdings may be taken into account, that is, all the spectrum covered by spectrum licences and apparatus licences (if the limit is so expressed) that authorise the person to operate a radiocommunications device.

Limits may be imposed on:

- the aggregate parts of the spectrum that may be used by any one person, or a specified person, as a result of the allocation of spectrum licences under the procedures (paragraph (a))
 - in determining the application of this limit to a person, what will be taken into account will include not only those licences for which the person is the licensee, but also any authorisations the person has from other licensees to operate under their licences;
- the aggregate parts of the spectrum that may be used by the members of a specified group of persons (paragraph (b))
 - the same factors will be taken into account as for paragraph (a).

New subsection (6) makes it clear that limits may be expressed in relation to particular parts of the spectrum so that different limits may be specified for different parts of the spectrum ((a)); specified geographical areas ((b)); and/or a specified population reach ((c)). The limits do not have to apply across the whole spectrum.

New subsection (7) allows procedures determined under subsection (1) to provide for the SMA to give the ACCC specified information. This supports the application of section 50 of the TPA to the allocation and issue of licences (see item 28) by allowing the SMA to provide information to the ACCC during an allocation procedure. The ACCC will then be better informed when considering whether the issue, or proposed issue, of a licence to a particular person would be a contravention of section 50 of the TPA.

New subsection (8) puts it beyond doubt that new subsections (5), (6) and (7) are not meant to limit what may be specified in the allocation procedures.

New subsections (9) and (10) make it clear that the power to impose limits under new subsection (5) may only be exercised at the direction of the Minister. New subsection (9) prevents the SMA from imposing any limits unless directed to do so by the Minister under new subsection (10). New subsection (10) allows the Minister to give the SMA a written direction in relation to the power to impose limits.

New subsection (11) requires a ministerial direction under new subsection (10) to be Gazetted.

New subsection (12) requires the SMA to exercise its powers under subsection (1), in determining allocation procedures, consistently with any directions from the Minister under new subsection (10).

New subsection (13) makes it clear that new subsection (10) is not meant to limit any of the Minister's other powers of direction under the Act.

New subsection (14) requires the SMA to consult with the ACCC on the types of information provision requirements that might be specified in the allocation procedures under new subsection (7).

Item 22 - At the end of section 62

Section 62 of the Principal Act relates to the allocation and issue of spectrum licences. This item inserts a new subsection (3) into section 62 to provide that where the SMA has allocated a spectrum licence under new section 153M (which relates to the re-allocation of spectrum as spectrum licences) it may defer the issue of the licence to the new licensee until the frequencies to be covered by the licence become available for use by the new licensee. The purpose for this new provision is to assist new licensees. If the licence were to be issued at allocation time, part of the period of the licence would be of no real value to the new licensee because of the time it could take for existing services to vacate the spectrum. In some cases the use of the licence would not become viable until towards the end of that licence period.

Item 23 - Subsection 65(3)

Subsection 65(3) of the Principal Act allows spectrum licences to be issued for a period of up to 10 years. This item amends subsection 65(3) to allow a maximum period of 15 years. This has been done in response to concerns that 10 years is an inadequate period to recover the investment in the necessary infrastructure.

Item 24 - At the end of section 66

Section 66 of the Principal Act imposes requirements for core conditions of spectrum licences. This item inserts a new subsection (5) into section 66 to provide that where the SMA has allocated a spectrum licence under new section 153M (which relates to the re-allocation of spectrum as spectrum licences) it may provide for the progressive operation of radiocommunications devices under the licence. This provision has been included because when a spectrum licence is issued under the spectrum re-allocation process, the suite of frequencies covered by the licence may include some frequencies that will not become available for use by the new licensee until they are vacated by the incumbent licensee. In these cases, instead of multiple licences having to be issued in a piecemeal fashion as those frequencies become available, a single licence may be issued which takes account of the dates on which the frequencies covered by the licence will become available to the new licensee.

Item 25 - After section 68

Part 3.2 of the Principal Act deals with spectrum licences. Section 68 provides for a spectrum licensee to authorise other persons to operate under the authority of the licensee's spectrum licence. This item inserts a new section 68A to provide for the application of parts of the TPA to such authorisations.

68A - Authorisation under spectrum licence is to be treated as acquisition of asset

New section 68A deems the authorisation, under subsection 68(1) of the Principal Act, of a person to operate a radiocommunications device under a spectrum licence to be the acquisition of an asset by that person for the purposes of section 50 and subsections 81(1), and (1A) and 88(9), 89(5A) and 90(9) of the TPA. These TPA provisions are concerned respectively with: prohibiting asset acquisitions that have the effect of substantially lessening competition in a market (section 50), divestiture orders where there has been a contravention of section 50 (section 81); the granting by the ACCC of authorisations to acquire assets where such acquisition would otherwise be in breach of section 50 (subsection 88(9)), the confidentiality of information regarding the cash consideration for the acquisition of an asset (subsection 89(5A)); and the public benefit in an authorisation under subsection 88(9) being granted to allow a person to acquire an asset which would otherwise be a contravention of section 50 (subsection 90(9)). New section 68A has been inserted in recognition that authority to operate under radiocommunications licences can be an important aspect of commercial strategy in dynamic communications markets.

Item 26 - Section 70

Section 70 of the Principal Act provides for TLSs to be specified in spectrum licences. As all references to TLSs are being removed from the Act (see notes on item 8), this item repeals section 70.

Item 27 - Subsection 71(2)

Section 70 of the Principal Act is to be repealed by item 25. As a consequence, the reference to section 70 in subsection 71(2) of the Act is to be omitted by this item.

Item 28 - After section 71

Part 3.2 of the Principal Act deals with spectrum licences. This item inserts a new Subdivision D into Division 1 of this Part to provide for certain matters concerning the application of the TPA to allocation and issue of spectrum licences.

Subdivision D - Rules about section 50 and related provisions of the Trade Practices Act

71A - Issue of spectrum licence is to be treated as acquisition of asset

New section 71A deems the issue of a spectrum licence to a person to be the acquisition of an asset for the purposes of section 50 and subsections 81(1), 88(9),

89(5A) and 90(9) of the TPA. These TPA provisions are concerned respectively with: prohibiting asset acquisitions that have the effect of substantially lessening competition in a market (section 50); divestiture orders where there has been a contravention of section 50 (subsection 81(1)); the granting by the ACCC of authorisations to acquire assets where such acquisition would otherwise be in breach of section 50 (subsection 88(9)); the confidentiality of information regarding the cash consideration for the acquisition of an asset (subsection 89(5A)); and the public benefit in an authorisation under subsection 88(9) being granted to allow a person to acquire an asset which would otherwise be a contravention of section 50 (subsection 90(9)). New section 71A has been inserted in recognition that the acquisition of radiocommunications licences can be an important aspect of commercial strategy in dynamic communications markets.

It should be noted that items 25 and 42 apply subsection 81(1A) of the TPA to third party authorisations under spectrum and apparatus licences respectively. Subsection 81(1A) of the TPA allows a court in a divestiture action to declare that the acquisition of an asset in contravention of section 50 of the TPA is void from the day the acquisition occurred, whereupon the vendor is required to repay to the acquirer any amount paid to the vendor for the acquisition. It would be inappropriate to apply such a declaration to a situation where: the SMA has collected fees from a licensee, where the fees are the aggregate of amounts imposed as tax and of other amounts which are to recover the SMA's costs in processing the licence application; and the licensee has already held the licence for part of the period covered by the tax. It would also be unacceptable to subject the Commonwealth to the further costs of having to re-allocate the licence the issue of which would be treated as void because of a subsection 81(1A) declaration. For these reasons subsection 81(1A) of the TPA has not been applied to the issue of a licence under the Principal Act.

While the insertion of section 71A affects licence issue in terms of the application of the TPA, it does not have the effect of applying the TPA to the SMA when it issues licences. The SMA's immunity from the TPA is maintained.

Item 29 - Section 83

Section 83 of the Principal Act applies the content provisions of Subdivision C of Division 1 to re-issued spectrum licences. This item amends section 83 to apply also new Subdivision D of Division 1, relating to the application of the TPA to the issue of spectrum licences (inserted by item 28), to re-issued spectrum licences.

Item 30 - Section 83

This item is a formal amendment consequential to item 29.

Item 31 - After subsection 87(2) (before the note)

Section 87 of the Principal Act provides for the issue of new spectrum licences by the SMA to facilitate the trading in spectrum licences. Where one licensee sells part of its licence to another person, it would be necessary to issue a new licence to that person with conditions that reflect that part of the licence it has acquired.

This item amends section 87 by inserting a new subsection (3) to apply new Subdivision D of Division 1, relating to the application of the TPA to the issue of spectrum licences (inserted by item 28), to the issue of new licences under section 87.

Item 32 - After subsection 98(2)

Section 98 of the Principal Act provides for the SMA to determine types of transmitter and receiver licences for the purposes of issuing apparatus licences. This assists in the administration of apparatus licensing by allowing the categorisation of apparatus licences. This item inserts a new subsection (2A) into section 98 to make it clear that any references in the Act to 'types' of apparatus licences means types of licences as determined under section 98.

Item 33 - At the end of subsection 100(5)

Subsection 100(5) of the Principal Act allows the SMA, in deciding whether to issue an apparatus licence to a person, to take into account whether the person has had an apparatus licence cancelled in the 2 years before the licence application.

This item qualifies subsection 100(5) by inserting words to the effect that the SMA may not take into account any cancellations done under new section 153J (to be inserted by item 46) at the end of a re-allocation period. New section 153J provides for the automatic cancellation of affected licences at the end of the relevant re-allocation period.

Item 34 - Subsection 106(1)

This item amends subsection 106(1) of the Principal Act to insert words that allow a distinction to be drawn between 'allocating' and 'issuing' an apparatus licence under a price-based allocation system. Essentially, 'allocation' means identifying the successful applicant or bidder for a licence under the allocation system; whereas 'issuing' means administratively providing the licence to that successful applicant or bidder. Such a distinction is already recognised in sections 60 and 62 which relate to the price-based allocation, and subsequent issue, of spectrum licences.

Item 35 - After subsection 106(2)

Section 106 of the Principal Act provides for the SMA to determine a price-based allocation system for issuing apparatus licences. This item inserts a new subsection (3) to permit allocation procedures to impose limits on what a person, or a group of persons, may be allocated under the price-based allocation procedures - this is similar to the effect of item 21. The purpose for setting limits can be for competition policy reasons, for example to promote competition or avoid adverse effects on competition. Any post-allocation trading in licences would be subject to the TPA.

For all the limits, in determining the application of the limit to a person, the person's current holdings can be taken into account, that is, all apparatus licences and spectrum

licences (if the limit is so expressed) which authorise the person to operate a radiocommunications device (including by means of a third party authorisation).

Limits may be imposed on:

- the number of transmitter licences that may be allocated to any person, or a specified person (paragraph (a)); and
- the total number of transmitter licences that may be allocated to members of a specified group of persons (paragraph (b))
 - this limit is not applied to members of the group individually, but applies to the group as a whole. As an example, a limit of 5 licences for groups would not allow each person in a group to hold 5 licences. The number of licences held by each member would be added to the number of licences held by other members so that the total could not exceed 5.

This item also inserts new subsection (4), to make it clear that limits may be expressed in relation to: particular parts of the spectrum so that different limits may be specified for different parts of the spectrum, that is, the limits do not have to apply across the whole spectrum (paragraph (a)); different specified areas (paragraph (b)); and/or specified population reaches (paragraph (c)). Paragraphs (b) and (c) reflect the expectation that limits will be imposed for reasons related to competition policy, so that these paragraphs will allow different limits to be imposed in relation to different markets.

This item also inserts a new subsection (5) into section 106 to provide that a price-based allocation system, determined for the allocation of apparatus licences covered by new section 153N (which relates to the re-allocation of spectrum as apparatus licences) may allow the SMA to defer the issue of a licence to a new licensee until the frequency to be covered by the licence becomes available for use by the new licensee. The purpose for this new provision is to assist new licensees. If the licence were to be issued at allocation time, part of the period of the licence would be of no real value to the new licensee because of the time it would take for existing services to vacate the spectrum. In some cases the licence would not become viable until towards the end of that licence period.

New subsection (6) allows a system determined under subsection (1) to provide for the SMA to give the ACCC specified information. This supports the application of section 50 of the TPA to the issue of licences (see item 38) by allowing the SMA to provide information to the ACCC during an allocation procedure. The ACCC will then be better informed when considering whether the issue, or proposed issue, of a licence to a particular person would be a contravention of section 50 of the TPA.

Another new subsection inserted by this item, subsection (7), puts it beyond doubt that subsection (2) and new subsections (3), (4) and (5) are not meant to limit what may be specified in a price-based allocation system.

New subsections (8) and (9) make it clear that the power to impose limits under new subsection (3) may only be exercised at the direction of the Minister. New subsection

(8) prevents the SMA from imposing any limits unless directed to do so by the Minister under new subsection (9). New subsection (9) allows the Minister to give the SMA a written direction in relation to the power to impose limits.

New subsection (10) requires a ministerial direction under new subsection (9) to be Gazetted.

New subsection (11) requires the SMA to exercise its powers under subsection (1), in determining allocation procedures, consistently with any directions from the Minister under new subsection (9).

New subsection (12) requires the SMA to consult with the ACCC on the types of information provision requirements that might be specified in the allocation procedures under new subsection (6).

Item 36 - Subsection 106(3)

This item is a formal amendment consequential upon the previous item.

Item 37 - At the end of section 106

Section 106 of the Principal Act provides for the SMA to determine a price-based allocation system for issuing apparatus licences. This item inserts a new subsection (14) to permit the Minister to direct the SMA, in determining an allocation system, to restrict the eligibility of applicants under such a system to a particular class of applicants. The class of applicants that may be the subject of such a direction is restricted to that where the Principal Act or another law requires a person who operates a transmitter, of the type to be issued under the system, to be within a specified class of persons.

New subsections (15) and (16) require the SMA to comply with any such direction from the Minister, and provide for a direction to be a disallowable instrument.

New subsection (17) makes it clear that new subsections (9) and (14) are not meant to limit any of the Minister's other powers of direction under the Act.

Item 38 - After section 106

This item inserts a new section into the Principal Act to provide for certain matters concerning the application of the TPA to the allocation and issue of apparatus licences.

106A - Issue of apparatus licence is to be treated as acquisition of asset of a person for the purposes of section 50 of the Trade Practices Act

New subsection 106A(1) deems the issue of an apparatus licence to a person to be the acquisition of an asset for the purposes of section 50 and subsections 81(1), 88(9), 89(5A) and 90(9) of the TPA. These TPA provisions are concerned respectively with: prohibiting asset acquisitions that have the effect of substantially lessening competition in a market (section 50); divestiture orders where there has been a contravention of

section 50 (subsection 81(1)); the granting by the ACCC of authorisations to acquire assets where such acquisition would otherwise be in breach of section 50 (subsection 88(9)); the confidentiality of information regarding the cash consideration for the acquisition of an asset (subsection 89(5A)); and the public benefit in an authorisation under subsection 88(9) being granted to allow a person to acquire an asset which would otherwise be a contravention of section 50 (subsection 90(9)). The insertion of new subsection 106A(1) recognises that the acquisition of radiocommunications licences can be an important aspect of commercial strategy in dynamic communications markets.

It should be noted that items 25 and 42 apply subsection 81(1A) of the TPA to third party authorisations under spectrum and apparatus licences respectively. Subsection 81(1A) of the TPA allows a court in a divestiture action to declare that the acquisition of an asset in contravention of section 50 of the TPA is void from the day the acquisition occurred, whereupon the vendor is required to repay to the acquirer any amount paid to the vendor for the acquisition. It would be inappropriate to apply such a declaration to a situation where: the SMA has collected fees from a licensee, where the fees are the aggregate of amounts imposed as tax and of other amounts which are to recover the SMA's costs in processing the licence application; and the licensee has already held the licence for part of the period covered by the tax. It would also be unacceptable to subject the Commonwealth to the further costs of having to re-allocate the licence the issue of which would be treated as void because of a subsection 81(1A) declaration. For these reasons subsection 81(1A) of the TPA has not been applied to the issue of a licence under the Principal Act.

While new subsection 106A(1) affects licence issue in terms of the application of the TPA, it does not have the effect of applying the TPA to the SMA when it issues licences. The SMA's immunity from the TPA is maintained.

New subsection 106A(2) provides that the application of the TPA to the issue of apparatus licences under new subsection 106A(1) is not to extend to the issue, under section 102 of the Principal Act, of a transmitter licence to a broadcasting services bands licensee within the meaning of the *Broadcasting Services Act 1992*. Essentially, the issue of a licence under section 102 is automatic because the SMA is required to issue a transmitter licence to a person who has been granted a broadcasting services bands licence.

New section 106A does not, however, apply to the renewal of an apparatus licence (new subsection 106A(3)). The renewal of a licence is no more than maintaining the status quo; it is other changes in circumstances such as the trading in licences that are more likely to raise competition issues.

Item 39 - Paragraph 107(1)(e)

Paragraph 107(1)(e) of the Principal Act provides that it is a standard condition of an apparatus licence that the operation of radiocommunications devices under the licence must be in accordance with any TLS specified in the licence. All references to TLSs are being repealed - see item 8. This item repeals paragraph 107(1)(e).

Item 40 - Subsection 107(2)

This item is a formal amendment consequential to the amendment at item 39.

Item 41 - At the end of section 107

Section 107 of the Principal Act relates to the standard licence conditions of apparatus licences. This item inserts a new subsection (5) into section 107 to provide that where the SMA has allocated an apparatus licence under new section 153N (which relates to the re-allocation of spectrum as apparatus licences) it may provide for the progressive operation of radiocommunications devices under the licence. This provision has been included because sometimes when an apparatus licence is issued under the spectrum re-allocation process, the frequency or suite of frequencies covered by the licence will include a frequency or some frequencies that will not become available for use by the new licensee until they are vacated by the incumbent licensee. In these cases, instead of multiple licences having to be issued in a piecemeal fashion as those frequencies become available, a single licence may be issued which takes account of the dates on which the frequencies covered by the licence will become available to the new licensee.

New subsection (6) makes it clear that new subsection (5) is not meant to limit the operation of subsection 107(1).

Item 42 - After section 114

This item inserts a new section into the Principal Act to provide for certain matters concerning the application of the TPA to third party authorisations under apparatus licences.

114A - Authorisation under apparatus licence is to be treated as acquisition of asset of person for the purposes of section 50 of the Trade Practices Act

New subsection 114A(1) deems the authorisation of a person, under subsection 114(1) of the Principal Act, to operate a radiocommunications device under an apparatus licence, to be the acquisition of an asset for the purposes of section 50 and subsections 81(1), and (1A) and 88(9), 89(5A) and 90(9) of the TPA. These TPA provisions are concerned respectively with: prohibiting asset acquisitions that have the effect of substantially lessening competition in a market (section 50), divestiture orders where there has been a contravention of section 50 (section 81); the granting by the ACCC of authorisations to acquire assets where such acquisition would otherwise be in breach of section 50 (subsection 88(9)), the confidentiality of information regarding the cash consideration for the acquisition of an asset (subsection 89(5A)); and the public benefit in an authorisation under subsection 88(9) being granted to allow a person to acquire an asset which would otherwise be a contravention of section 50 (subsection 90(9)).

New subsection 114A(1) has been inserted in recognition that the acquisition of radiocommunications licences can be an important aspect of commercial strategy in dynamic communications markets. It is also in recognition that a third party authorisation can be just as important as the holding of a radiocommunications licence in such a strategy.

Item 43 - After subsection 130(2)

Section 130 of the Principal Act provides for the renewal of apparatus licences. This item inserts a new subsection (2A) into section 130 to provide that where a licence is affected by a re-allocation declaration under new section 153E, and the licence is due to expire after the end of the re-allocation period, the licence must not be renewed (see item 46 regarding the new re-allocation process provisions). The reason for this amendment is that in these situations, ordinarily, the new licence covering the same part of spectrum allocated under the re-allocation process, will authorise operation on the relevant frequency or frequencies upon the expiry of the old licence.

Item 44 - After subsection 130(4)

Section 130 of the Principal Act provides for the renewal of apparatus licences. This item inserts a new subsection (4A) into section 130 to provide that where a licence is affected by a re-allocation declaration under new section 153E, the licence must not be renewed for a period that extends beyond the end of the re-allocation period (see item 46 regarding the new re-allocation process provisions). The reason for this is that new section 153J provides that such a licence will automatically be cancelled at the end of the re-allocation period.

Item 45 - At the end of subsection 147(1)

Subsection 147(1) of the Principal Act requires certain details to be specified, in relation to each issued apparatus licence, in a Register of Radiocommunications Licences that the SMA is required to establish and maintain under section 143.

This item inserts a new paragraph (f) into subsection 147(1) to require the SMA to include a note against each apparatus licence that is affected by a re-allocation declaration that the licence is so affected.

Item 46 - After Part 3.5

This item inserts a new Part 3.6 into the Principal Act to provide for the re-allocation of spectrum that is occupied by apparatus licences. The new Part is to allow for the smooth and timely removal of apparatus licences from parts of spectrum that are needed for new, or different, and higher priority uses or users. Rather than having to clear spectrum before allocating it to other uses or users, the SMA will be able to re-allocate occupied spectrum while providing a period by which the incumbent licences have to move. This will avoid the delays incurred by clearing spectrum prior to re-allocation, and the risks of clearing spectrum unnecessarily or too early in relation to the demand for its new use.

PART 3.6 - RE-ALLOCATION OF ENCUMBERED SPECTRUM

153A - Outline of this Part

New section 153A provides an outline of Part 3.6 to assist the reader.

153B - Spectrum re-allocation declaration

New section 153B allows the Minister to make a written declaration that a part, or parts of the spectrum, is subject to re-allocation in relation to a specified area or areas (new subsections (1) and (3)).

The declaration must be made in relation to a specified period, the 're-allocation period', which runs for at least 2 years, and which must commence within 28 days after the date of the declaration (new subsection (4)). The 're-allocation period' is relevant as the time at the end of which the old licences, which were issued after the commencement of new Part 3.6, will automatically be cancelled. Any old licences issued before the commencement of new Part 3.6 will expire at the end of their term (and not be renewed) even if the term extends beyond the end of the re-allocation period.

The declaration must also specify a 're-allocation deadline' (new subsection (5)) which is relevant as the time by which the spectrum covered by the declaration must be re-allocated, otherwise, the declaration lapses (see new section 153L).

However, spectrum which is occupied by spectrum licences may not be the subject of a re-allocation declaration (new subsection (7)). Only spectrum occupied by apparatus licences, or unoccupied spectrum, may be covered by a re-allocation declaration (new subsection (8)). The reason for allowing unoccupied spectrum to be covered is to facilitate the re-allocation of contiguous blocks of spectrum, rather than fragmented parts that are separated by intervals of unoccupied spectrum.

The declaration must state what form of licences are to be issued when re-allocating the spectrum, which may be spectrum or apparatus licences, or a combination of these (new subsection (6)).

New subsection (9) has been included to make it clear that separate parts of the spectrum may be covered by the one declaration even if those parts adjoin. This becomes relevant for provisions such as new section 153L which provides that if a part of spectrum covered by a declaration has not been re-allocated by the re-allocation deadline, the declaration is automatically revoked in respect of that part of the spectrum, but only that part - any adjoining part or other part covered by the same declaration is not affected and will still be subject to the declaration. It is also relevant for new section 153K which prevents the Minister from revoking or varying a declaration in relation to a part of the spectrum where the SMA has begun to allocate that part.

153C - Spectrum re-allocation declaration - special provisions relating to the 900 MHz Band Plan

The 900 MHz Band Plan (the Plan), Statutory Rules 1992 No 47 is a frequency band plan made under section 32 of the Principal Act. Frequency band plans specify the purpose for which parts of the spectrum covered by the band plan may be used, and conversely, purposes for which they may not be used (after certain dates). The Plan

provides that certain blocks of frequencies in the 800 MHz bands, currently used for AMPS mobile phone services provided by Telstra, must cease to be used for that purpose by certain specified dates, the principal date being 1 January 2000 (see Table 4 of the Plan). The SMA is developing a plan for the clearance of these bands by certain dates before that specified in the Plan. The SMA proposes to amend the Plan to change the cessation dates specified in Table 4 to accord with the clearance plan when agreed.

During public consultation on a draft of this Bill, there was general industry support for the sale of the recovered 800 MHz spectrum at around the same time as the allocation of the 1.8 GHz spectrum (which is proposed to be the subject of the first re-allocation declaration made under new section 153B). It is therefore proposed that the recovered 800 MHz spectrum be able to be re-allocated under new Part 3.6.

The purpose of the new section 153C is to allow the cessation dates specified in Table 4 to be taken to be the end of the re-allocation period for the relevant recovered spectrum, even where this would result in a re-allocation period of less than 2 years.

New subsection 153C(1) applies new section 153C to a part of the spectrum covered by Table 4 of the Plan where that part is also specified in a re-allocation declaration.

New subsection 153C(2) requires that a declaration referred to in new subsection (1) should not specify any other part of the spectrum unless it is also covered by Table 4 of the Plan and is subject to the same cessation date. The reason for this is that the scheme under new Part 3.6 is based on there being only one re-allocation period specified in a re-allocation declaration, particularly for the purposes of new sections 153J, 153K and new subsection 153Q(2).

New subsection 153C(3) requires the re-allocation period specified in the declaration referred to in subsection (1) to cease immediately before the cessation date specified in Table 4 of the Plan.

New subsection 153C(4) provides that the requirement in new subsection 153B(5) that a re-allocation deadline be specified in the declaration does not apply to a declaration referred to in new subsection (1).

New subsection 153C(5) defines terms for the purposes of new section 153C.

153D - Spectrum re-allocation declaration - ancillary provisions

New section 153D(1) requires the Minister to give the SMA a copy of the re-allocation declaration made under new subsection 153B(1).

When the SMA receives a copy of a declaration from the Minister, it must notify affected licensees (defined in new section 153E) that the declaration has been made either by giving each licensee a notice or by publishing the notice in the major newspapers, and make copies of the declaration available (new subsection (2)).

Re-allocation declarations are disallowable instruments (new subsection (3)).

153E - Affected apparatus licences and licensees

New section 153E defines the term 'affected apparatus licensee' (new subsection (2)), and provides an explanation of when an apparatus licence is taken to be 'affected' by a re-allocation declaration (new subsection (1)).

153F - Minister may make a spectrum re-allocation declaration only after receiving the SMA's recommendation

The Minister may not make a re-allocation declaration unless the SMA has given the Minister a recommendation that the Minister make a declaration (new subsection 153F(1)). The SMA's recommendation must have been given to the Minister within 180 days prior to the Minister making a declaration. The Minister is not bound by the SMA's recommendation (new subsection (3)), but must take it into account in deciding whether to make a declaration (new subsection (2)).

153G - SMA may recommend that the Minister make a spectrum re-allocation declaration

New subsection 153G(1), allows the SMA to make a recommendation to the Minister to make a declaration, and, if it does so, it must specify the re-allocation period the SMA proposes (new subsection (2)). The SMA is not limited in the matters that may be covered by the recommendation (new subsection (3)).

153H - Comments by potentially-affected apparatus licensees on recommendation

New section 153H requires the SMA to consult with potentially-affected licensees before recommending that the Minister make a re-allocation declaration. The SMA is required to give those licensees at least 28 days in which to comment on the terms of the proposed recommendation (new subsection (2)), details of which must be included in the SMA's notice to the licensees (new subsection (1)). In preparing the final version of the recommendation, the SMA is required to have regard to any comments made by affected licensees (new subsection (3)). The SMA is not limited in the matters that may be covered by the final recommendation (new subsection (4)).

The SMA has been engaged in ongoing consultations with apparatus licensees operating in the 1.8 GHz band. These licensees are likely to be affected by the first re-allocation declaration proposed to be made in order to make that spectrum available for the expansion of mobile and other telecommunications services. New subsection (5) allows the Minister to exempt the SMA from the requirements set out in new subsections (1) to (4) where the Minister is satisfied that any consultation undertaken by the SMA, from 1 July 1996 to the commencement of new section 153H, may reasonably be regarded as equivalent to the requirements of those new subsections. This will expedite the re-allocation process in relation to the 1.8 GHz band and facilitate making that spectrum available in time to allow the new services to be established by late 1998 or early 1999.

New subsection 153H(6) defines terms used in this new section.

153J - Effect of spectrum re-allocation declaration

New section 153J provides that an apparatus licence affected by a re-allocation declaration ceases to have effect at the end of the re-allocation period (subsection (2)). This applies only to a licence where the licence continues to be affected by the declaration at the end of that period (subsection (1)). Thus, where a licence is affected by a declaration, and, before the end of the re-allocation period, the conditions of the licence are varied so that the licence is no longer affected (eg. by a change in operating frequency), the licence will run for its normal term, it will not be cancelled under this clause.

However, not all affected licences will automatically be cancelled under this provision. This new section applies only to licences that were issued after new Part 3.6 comes into effect (paragraph (1)(b)); it does not apply to licences that were issued before new Part 3.6 comes into effect. The reason for this distinction is that, for the former licences, the licensees would be aware that the issue of their licences were subject to the possibility that a re-allocation declaration could be made in respect of the spectrum in which they operate under their licences at any time during the term of the licences. Whereas, in the case of the latter licences, the licensees could not have been aware of such a possibility because at the time their licences were issued, there was no statutory power to make a re-allocation declaration with the resulting automatic cancellation of the affected licences at the end of the re-allocation period.

153K - Revocation and variation of spectrum re-allocation declaration

New section 153K provides for timing limitations on the revocation and variation of spectrum re-allocation declarations.

The Minister is prevented from revoking a declaration where the SMA has begun allocating licences in respect of a part of the spectrum covered by the declaration (new subsection (1)) (see the notes relating to the meaning of 'part of the spectrum' in new subsection 153B(9)).

The Minister is prevented from varying a declaration where the SMA has begun allocating licences in respect of an area covered by the declaration, and the variation relates to that area (subsection (2)).

The SMA is taken to have begun allocating licences if it has published advertisements relating to the auction or tender of the licences, or invites applications for the allocation of the licences (subsection (3)). This limitation has been imposed on the Minister's power to revoke or vary re-allocation declarations because it is recognised that considerable resources may be expended by persons in preparing applications for participation in auctions, tenders or other methods of allocating licences. The limitation will ensure that such resources are not wasted because of changes to declarations after the allocation processes have commenced.

However, the Minister is not prevented from varying a declaration by extending the re-allocation deadline where the Minister considers there are special circumstances

warranting such an extension (subsection (4)). This provision has been included because it is recognised that there may be some unforeseen circumstances which cause delays in a re-allocation process, but which should not result in the frustration of that process.

153L - Automatic revocation of spectrum re-allocation declaration if no licence allocated by re-allocation deadline

New section 153L provides for the automatic revocation of a spectrum re-allocation declaration if the SMA has not allocated a licence in respect of a part of the spectrum covered by the declaration before the re-allocation deadline (subsections (1) and (2)). Where a declaration is revoked under this clause, the SMA must notify the affected licensee(s) in writing as soon as practicable after the revocation (subsection (3)). This will ensure that, where re-allocation is to proceed, affected licensees will have at least 12 months in which to negotiate an agreement with the new licensee to remain in the spectrum, or arrange relocation to another part of the spectrum, before the affected licensee's licence is cancelled automatically under new section 153J at the end of the re-allocation period, or expires at the end of its term.

The restriction on revocation provided by new section 153K does not affect the operation of an automatic revocation under this new section (subsection (4)).

Subsection 33(3) of the *Acts Interpretation Act 1901* would allow the Minister to revoke a declaration. New subsection (5) makes it clear that new section 153L is not to be taken to limit the operation of subsection 33(3). Consequently, it will be possible for the Minister to revoke a declaration in relation to a part of the spectrum covered by the declaration as long as the SMA has not begun to re-allocate that part (see new section 153K).

153M - Re-allocation by means of issuing spectrum licences

New section 153M provides that, where a re-allocation declaration requires spectrum to be re-allocated as spectrum licences (subsection (1)), those licences must be issued according to the marketing plan made under new section 39A (subsection (2)).

153N - Re-allocation by means of issuing apparatus licences

New section 153N provides that, where a re-allocation declaration requires spectrum to be re-allocated as apparatus licences (subsection (1)), those licences must be issued according to a price-based allocation system determined under section 106, as amended by items 34 to 37 (subsection (2)).

153P - Restriction on issuing spectrum licences for parts of the spectrum subject to re-allocation

New section 153P places restrictions on the issue of spectrum licences for spectrum affected by a re-allocation declaration (subsection (1)). The SMA is prevented from issuing a licence in relation to affected spectrum during the re-allocation period unless the licence is issued under new section 153M in accordance with a marketing plan

made under new section 39A (paragraphs (2)(a), (b) and (c)). However, this restriction does not apply where the SMA has already allocated a spectrum licence to a person under section 62 of the Principal Act before the beginning of the re-allocation period, as a result of a previously conducted allocation procedure determined under section 60 of the Principal Act (paragraph (2)(d)).

153Q - Restriction on issuing apparatus licences for parts of the spectrum subject to re-allocation

New section 153Q places restrictions on the issue of apparatus licences for spectrum affected by a re-allocation declaration (subsection (1)). During the re-allocation period the SMA is prevented from issuing an apparatus licence in relation to spectrum specified in the declaration unless the licence is issued under new section 153N in accordance with a price-based allocation system determined under section 106 of the Principal Act (paragraphs (2)(a), (b) and (c)). However, this restriction does not apply to the renewal of an apparatus licence under Division 7 of Part 3.3 of the Principal Act (paragraph (2)(d)) or where special circumstances justify the issuing of the licence (paragraph (2)(e)).

After the end of the re-allocation period, the SMA is prevented from issuing an apparatus licence in relation to the specified spectrum unless the SMA considers there are special circumstances to justify doing so (subsection (3)).

Item 47 - At the end of subsection 155(2)

Section 155 of the Principal Act sets out the objects of Part 4.1 of the Act which is concerned with a system for technical regulation of equipment that uses, or is affected by, radio transmissions.

This item inserts a new paragraph (f) into subsection 155(2) to provide that it is intended that the system protect the health and safety of persons operating, working on, using services supplied by, or likely to be affected by, radiocommunications transmitters or receivers. This provision is related to the amendment at item 63 which inserts a new paragraph into subsection 162(3) of the Principal Act to allow the SMA to make standards for the purpose of protecting the health and safety of such persons.

Item 48 - Paragraph 156(e)

This item removes paragraph 156(e) which is concerned solely with TLSs. All references to TLSs are being removed from the Principal Act (see item 8).

Item 49 - Paragraph 156(f)

This item removes the reference to TLSs in paragraph 156(f). All references to TLSs are being removed from the Principal Act (see item 8).

Item 50 - After subsection 157(1)

Section 157 of the Principal Act makes it an offence for a person, without reasonable excuse, to cause a radio emission to be made by a transmitter the person knows is a non-standard transmitter, that is, a transmitter that does not comply with a standard that applies to the transmitter.

Item 63 amends section 162 of the Principal Act to allow the SMA, in combination with paragraph 162(3)(b), to make standards for the purposes of an electromagnetic compatibility (EMC) regime. The regime is intended to apply to all devices, that is, radiocommunications transmitters, other transmitters, radiocommunications receivers, and any other things any use or function of which is capable of being interfered with by radio emission.

However, to ensure that the regime does not extend beyond the limits of the Commonwealth's constitutional power, the enforcement action that can be taken in relation to breaches of those standards is limited to situations within the limits of that power.

This item inserts a new subsection (2) into section 157 to give the offence the maximum scope under available heads of constitutional power in situations where there is a breach solely because of non-compliance with an EMC standard ie. when the requirements in the standard are not included for the purposes of paragraph 162(3)(a), (c), (d) or (f).

Item 51 - Subsection 157(2)

This item is a formal amendment consequential to the insertion of new subsection 157(2) under item 50.

Item 52 - Subsection 158(1)

Section 158 of the Principal Act makes it an offence for a person, without reasonable excuse, to possess for the purposes of operation a transmitter the person knows to be non-standard.

This item is a formal amendment which applies the offence provision in section 158 to breaches relating to devices generally, not just transmitters. The amendment complements the amendment at item 63 which amends section 162 of the Principal Act to allow the SMA, in combination with paragraph 162(3)(b), to make standards for the purposes of an electromagnetic compatibility (EMC) regime. The EMC regime is to apply to all devices, that is, radiocommunications transmitters, other transmitters, radiocommunications receivers, and any other things any uses or functions of which are capable of being interfered with by radio emission.

Item 53 - After subsection 158(1)

Section 158 of the Principal Act makes it an offence for a person, without reasonable excuse, to possess for the purposes of operation a transmitter the person knows to be non-standard.

Item 63 amends section 162 of the Principal Act to allow the SMA, in combination with paragraph 162(3)(b), to make standards for the purposes of an electromagnetic compatibility (EMC) regime. The regime is to apply to all devices, that is, radiocommunications transmitters, other transmitters, radiocommunications receivers, and any other things any use or function of which is capable of being interfered with by radio emission.

However, to ensure that the regime does not extend beyond the limits of the Commonwealth's constitutional power, the enforcement action that can be taken in relation to breaches of those standards is limited to situations within the limits of that power.

This item inserts a new subsection (2) into section 158 to give the offence the maximum scope under available heads of constitutional power in situations where there is a breach solely because of non-compliance with an EMC standard ie. when the requirements in the standard are not included for the purposes of paragraph 162(3)(a), (c), (d) or (f).

Item 54 - Subsection 158(2)

This item is a formal amendment consequential to the insertion of new subsection 158(2) under item 53.

Item 55 - Subsection 158(2)

This item is a formal amendment that complements the amendment at item 56.

Item 56 - Subsection 158(2)

This item is a formal amendment which applies the offence provision in section 158 to breaches relating to devices generally, not just transmitters. The amendment complements the amendment at item 63 which amends section 162 of the Principal Act to allow the SMA, in combination with paragraph 162(3)(b), to make standards for the purposes of an electromagnetic compatibility (EMC) regime. The EMC regime is to apply to all devices, that is, radiocommunications transmitters, other transmitters, radiocommunications receivers, and any other things any use or function of which is capable of being interfered with by radio emission.

Item 57 - Subsection 158(2)

This item is a formal amendment that complements the amendment at item 56.

Item 58 - Section 159

Section 159 of the Principal Act supplements the offence provision in section 158 relating to possession of non-standard transmitters.

Section 158 is amended by item 53 to apply the offence in that section to breaches relating to EMC standards (see item 63 which inserts a new power into section 162 of the Principal Act to make standards relating to an EMC regime). Section 158 is also amended by item 56 to apply the offence provision in section 158 to breaches relating to devices generally, not just transmitters.

This item is a formal amendment that complements the amendment at item 56.

Item 59 - Subsection 159(1)

This item is a formal amendment that complements the amendment at item 56.

Item 60 - After subsection 160(1)

Section 160 of the Principal Act makes it an offence for a person, without reasonable excuse, to supply a device that the person knows to be non-standard.

Item 63 amends section 162 of the Principal Act to allow the SMA, in combination with paragraph 162(3)(b), to make standards for the purposes of an electromagnetic compatibility (EMC) regime. The regime is to apply to all devices, that is, radiocommunications transmitters, other transmitters, radiocommunications receivers, and any other things any use or function of which is capable of being interfered with by radio emission.

However, to ensure that the regime does not extend beyond the limits of the Commonwealth's constitutional power, the enforcement action that can be taken in relation to breaches of those standards is limited to situations within the limits of that power.

This item inserts a new subsection (2) into section 160 to give the offence the maximum scope under available heads of constitutional power in situations where there is a breach solely because of non-compliance with an EMC standard ie. when the requirements in the standard are not included for the purposes of paragraph 162(3)(a), (c), (d) or (f).

Item 61 - Subsection 160(2)

This item is a formal amendment consequential to the insertion of new subsection 160(2) under item 60.

Item 62 - Paragraph 162(3)(c)

Paragraph 162(3)(c) of the Principal Act allows the SMA to make standards establishing for the operation of radiocommunications devices an adequate level of

immunity from electromagnetic disturbance caused by the use of devices other than radiocommunications devices.

Item 63 amends subsection 162(3) of the Principal Act by inserting a new paragraph (e) to allow the SMA, in combination with paragraph 162(3)(b), to make standards for the purposes of an electromagnetic compatibility (EMC) regime. The regime is to apply to all devices, that is, radiocommunications transmitters, other transmitters, radiocommunications receivers, and any other things any use or function of which is capable of being interfered with by radio emission. As a consequence, paragraph 162(3)(c) is to be amended so it will not overlap with the new paragraph (e). The reference in paragraph 162(3)(c) to 'radiocommunications devices' is to be replaced by 'radiocommunications transmitters or radiocommunications receivers'.

Item 63 - At the end of subsection 162(3)

Section 162 of the Principal Act allows the SMA to make standards concerning the performance of, and the maximum permitted level of radio emissions from, devices.

Subsection 162(3) places restrictions on what requirements may be included in standards.

In this item, the SMA's standards-making power is supported so that it encompasses within the limits of Commonwealth Constitutional power, a range of devices capable of causing, or being subject to, electromagnetic interference (EMI), through compliance of equipment with EMC-based technical standards. This will enable the SMA, subject to constitutional limitations, to regulate interference between non-radiocommunications devices or between a non-radiocommunications device and a radiocommunications device.

This item inserts 2 new paragraphs (e) and (f) into subsection 162(3) to allow standards to include requirements which: establish for devices adequate levels of immunity from electromagnetic disturbance caused by other devices (paragraph (e)); and protect the health and safety of persons operating, working on, using services supplied by, or reasonably likely to be affected by, radiocommunications transmitters or receivers (paragraph (f)).

EMC standards

New paragraph (e) will support the full implementation of an EMC regime by the SMA for the control of EMI between electronic and electrical devices offered for sale in Australia. The regime is modelled on recently introduced European Community Directives aimed at limiting EMI.

The effects of EMI can be dramatic, causing poor performance in affected equipment and even elimination of function. The manifestations of EMI can range from disturbance to television and radio reception to malfunctioning of industrial equipment. The request by airlines to refrain from mobile phone and laptop PC use in flight is to avoid EMI to aircraft navigation systems.

The EMC regime seeks to ensure that electronic devices and appliances operate as intended, and do not cause interference to other devices. Under the regime devices would be required to conform to standards made under current s.162(3)(b) and new paragraph (e) which respectively limit the amount of unintentional electromagnetic radiation emitted, and require minimum levels of immunity from electromagnetic disturbances.

Health and safety standards

New paragraph (f) will allow the SMA to make standards for radiocommunications transmitters or receivers to protect the health and safety of persons operating, working on, using services supplied by, or are reasonably likely to be affected by, radiocommunications transmitters or receivers.

The CSIRO has reported to the SMA that the long-term human health effects of extended exposure to low levels of electromagnetic radiation (EMR) are not known. Under the Principal Act, the SMA has no power to enforce compliance with any standard for exposure to EMR. New paragraph (f) will enable the SMA to make standards to protect the health and safety of persons in relation to radiocommunications transmitters or receivers.

Item 64 - At the end of subsection 163(1)

This item inserts a note after subsection 163(1) of the Principal Act as a reading aid to alert the reader to the fact that the standards making procedures required by section 163 can be overridden by the SMA in cases of urgency under proposed section 163A.

Item 65 - After section 163

Section 163 of the Principal Act requires the SMA to comply with certain specified procedures for making standards. The procedures basically require a process of public consultation on a proposed standard.

This item inserts a new section 163A into the Principal Act to exempt the SMA from having to comply with the consultation procedures required by section 163 where the SMA is satisfied that it is necessary to make a standard as a matter of urgency to protect the health or safety of persons in relation to the operation of radiocommunications transmitters or receivers.

The inclusion of new section 163A is one of the measures being taken to align the technical regulation of radiocommunications under the Principal Act with that of telecommunications under the proposed Telecommunications Bill 1996. The Telecommunications Bill will include a clause based on section 248 of the *Telecommunications Act 1991* which provides for the making of technical standards in an emergency. The insertion of new section 163A is also consistent with the power under subsection 33(6) of the Principal Act to make a spectrum plan or frequency band plan in urgent circumstances.

Item 66 - Division 4 of Part 4.1 (heading)

This item (as well as items 67 to 71 (inclusive)) is a formal amendment consequential to the amendments at items 52 to 57 (inclusive) which relate to the introduction of an EMC standards regime. The amendment in this item has the effect of deleting the reference to 'transmitters' in the heading to Division 4 of Part 4.1 and substituting it with 'devices'.

Item 67 - Paragraph 166(b)

Item 68 - Section 166

Item 69 - Subsections 167(2) and (3)

Item 70 - Section 172

Item 71 - Paragraph 173(1)(a)

These items are formal amendments consequential to the amendments at items 52 to 57 (inclusive) which relate to the introduction of an EMC standards regime. The amendments in items 67 to 71 delete references to 'transmitter' (and its derivatives) and substitute them with references to 'device' and its derivatives.

Item 72 - Division 6 of Part 4.1

This item repeals Division 6 of Part 4.1 which provides for the SMA to determine technical licence specifications (TLSs).

Some doubt had arisen as to which was the appropriate statutory power to be exercised in order to impose conditions relating to technical matters on licences. The range of options were the making of standards under section 162; the imposition and variation of licence conditions under sections 107, 108 or 111; or the specification in a licence of a TLS (see paragraph 107(1)(e)). In order to remove this doubt it was decided to remove all references to TLSs from the Principal Act on the basis that the powers under sections 107, 108, 111 and 162 provide the SMA with all the necessary tools requiring compliance with technical matters.

Item 73 - Subsection 182(1)

This item is a formal amendment consequential to the amendment at item 74.

Item 74 - Paragraph 182(1)(b)

Item 75 - Subsection 182(1B)

Item 76 - Paragraph 182(1B)(b)

Item 77 - Paragraph 182(4A)(b)

Item 78 - Subsection 184(1)

Item 79 - Paragraph 184(2)(a)

These items are formal amendments consequential to the amendment at item 72 which removes the power of the SMA to make TLSs.

Item 80 - At the end of section 186

Item 81 - At the end of section 187

Item 82 - At the end of section 187A

These items amend sections 186, 187 and 187A to provide for additional, effectively separate, modes of operation that may be relied on if those sections were found to be unconstitutional. The items insert new subsections 186(2) to (4); 187(2) to (4); and 187A(2) to (4) (respectively) to allow the application of the offences in sections 186, 187 and 187A to breaches relating to EMC standards to be severable by a court. This will mean that where a court has found those sections to be constitutional, they would operate by virtue of section 15A of the *Acts Interpretation Act 1901* as a 'consistent workable and effective body of provisions', even where the original provisions were invalid (see *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 469; per Barwick CJ, 492-493; per Menzies J, 503-506; Walsh J, 516-519).

Item 83 - At the end of section 190(2)

Subsection 190(1) of the Principal Act allows the SMA to make a declaration that the operation or supply, or the possession for the purpose of operation or supply, of a specified device is prohibited for the reasons set out in the declaration. Subsection 190(2) restricts the range of devices that may be declared to devices that are designed to have an adverse effect on radiocommunications; or would be likely substantially to interfere with radiocommunications or disrupt or disturb radiocommunications.

This item supplements the amendment at item 63 which allows the making of standards to protect the health or safety of persons in relation to the operation of radiocommunications transmitters or receivers. This item inserts a new paragraph (c) into subsection 190(2) to allow a radiocommunications transmitter or radiocommunications receiver to be declared where its operation would be reasonably likely to have adverse effect on the health or safety of persons.

Item 84 - After paragraph 233(k)

Section 233 of the Principal Act sets out the functions of the SMA.

This item inserts a new paragraph (ka) into section 233 to provide that another function of the SMA is to provide services or facilities, on a commercial basis, where the provision of the services or facilities: relates to radiocommunications (subparagraph (ka)(i)); utilises the SMA's spare capacity (subparagraph (ka)(ii)); or maintains or improves the specialised technical skills of the SMA's staff in relation to radiocommunications or telecommunications (subparagraph (ka)(iii)). This will enable for example the SMA to charge a commercial rate for the use of its conference rooms when those rooms are available for non-SMA use, and to charge for the staff used to assist in the provision of training for commercial organisations.

However, the provision of services or facilities under this new paragraph (ka) is not permitted to impede the performance of any of the SMA's other functions (see item 85).

Item 85 - At the end of section 233

This item supplements the amendment at item 84 which permits the SMA to provide services and facilities on a commercial basis. This item inserts new subsection 233(2) to provide that the provision of services and facilities under new subsection 233(1)(ka) is not permitted to impede the performance of any of the SMA's other functions.

This item also inserts new subsection 233(3) to provide a definition of 'telecommunications' as used in new subparagraph 233(1)(ka)(iii).

Item 86 - Subsection 238(2)

Item 87 - Paragraph 262(2)(a)

These items are formal amendments consequential to the amendment at item 72 which removes the power of the SMA to make TLSs.

Item 88 - Section 293

This item supplements the amendment at item 89 which inserts a new subsection into section 293 of the Principal Act to make it clear that charges determined under that section must reasonably relate to expenses incurred or to be incurred by the SMA, and not amount to taxation. This item removes the requirement that charges be restricted to cost recovery.

Item 89 - At the end of section 293

Section 293 of the Principal Act allows the SMA to make determinations fixing charges for certain matters.

This item inserts a new subsection 293(2) to make it clear that any charges determined must reasonably relate to the expenses incurred or to be incurred by the SMA in relation to those matters, and must not amount to taxation.

This item also inserts a new subsection 293(3) to make it clear that any charges the SMA makes on a commercial basis, as permitted by new paragraph 233(1)(ka) (see item 84), are not subject to the restrictions or requirements of section 293.

Item 90 - Paragraph 303(h)

This item is a formal amendment consequential to the amendment at item 72 which removes the power of the SMA to make TLSs.

Item 91 - Section 312

This is a formal consequential cross-reference amendment.

Item 92 - Continuity of section 60 determinations

This item supplements the amendment at item 21 which amends section 60 of the Principal Act relating to the determination of allocation procedures for allocating spectrum licences.

This item makes it clear that the amendments to section 60 are not to affect the continuity of any section 60 determination in force immediately before the commencement of this item.

Item 93 - Continuity of section 106 determinations

This item supplements the amendments at items 34 to 37 which amend section 106 of the Principal Act relating to the determination of price-based allocation systems for allocating apparatus licences.

This item makes it clear that the amendments to section 106 are not to affect the continuity of any section 106 determination in force immediately before the commencement of this item.

Item 94 - Continuity of section 293 determinations

This item supplements the amendments at items 88 and 89 which amend section 293 of the Principal Act relating to the determination of charges by the SMA for certain matters.

This item makes it clear that the amendments to section 293 are not to affect the continuity of any section 293 determination in force immediately before the commencement of this item.

1996-97

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

Radiocommunications Amendment Bill 1996

Schedule of the amendments made by the Senate

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- (1) Schedule 1, item 46, page 16 (lines 15 and 16), omit "This subsection has effect subject to section 153C (which deals with the 900 MHz Band Plan).".
 - (2) Schedule 1, item 46, page 16 (lines 19 and 20), omit "This subsection has effect subject to section 153C (which deals with the 900 MHz Band Plan).".
 - (3) Schedule 1, item 46, page 17 (line 13) to page 18 (line 4), omit section 153C.
 - (4) Schedule 1, item 46, page 18 (line 14), omit "either", substitute "both".
 - (5) Schedule 1, item 46, page 18 (line 15), omit "give", substitute "as far as practicable, make reasonable efforts to give".
 - (6) Schedule 1, item 46, page 18 (line 16), omit "or", substitute "and".
 - (7) Schedule 1, item 46, page 20 (line 9), omit "either", substitute "both".
 - (8) Schedule 1, item 46, page 20 (line 10), omit "give", substitute "as far as practicable, make reasonable efforts to give".
 - (9) Schedule 1, item 46, page 20 (line 11), omit "or", substitute "and".

HARRY EVANS
Clerk of the Senate