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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

Broadcasting Services Amendment (Review of Future Uses of Broadcasting Services Bands Spectrum) Bill 2011

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Broadband, Communications and the Digital Economy, Senator the Honourable Stephen Conroy)
BROADCASTING SERVICES AMENDMENT (REVIEW OF FUTURE USES OF BROADCASTING SERVICES BANDS SPECTRUM) BILL 2011

OUTLINE


The Bill defers the conduct of the initial statutory review of whether to allocate one or more additional commercial television broadcasting licences, and reframes the scope of the review to consider the alternative uses for unassigned broadcasting services bands spectrum. In particular, the review will focus on possible future uses for the sixth and final television channel that will be available for allocation once digital switchover and the restack of digital services necessary to realise the digital dividend is completed.

The Bill amends section 35A of the Broadcasting Services Act 1992 to require the Minister to cause to be conducted the aforementioned statutory review (‘the sixth channel review’) before 1 January 2013. The current provision requires the Minister to cause this review to be conducted before 1 January 2012. The reason for this deferral is to allow the outcomes of the current convergence review, which is scheduled to report to government in early 2012, to be considered in the context of conducting the statutory review.

The Bill also amends section 35A to reframe the scope of the statutory review so that it will consider the possible use of unassigned broadcasting services band spectrum for television broadcasting services and also for non-broadcasting services. It will also amend the matters that must be considered by the review to take into account the impact that the introduction of any new services using the unassigned broadcasting services band spectrum would have on existing broadcasting services and consumers.

Due to the changes to the scope of the statutory review – in that it is no longer exclusively about new commercial television broadcasting services – the Bill will move section 35A into Part 3 of the Broadcasting Services Act 1992, which deals with the planning of the broadcasting services bands.

FINANCIAL IMPACT STATEMENT

The Bill will have no financial impact.
NOTES ON CLAUSES

Clause 1 – Short title

Clause 1 provides for the citation of the Broadcasting Services Amendment (Review of Future Uses of Broadcasting Services Bands Spectrum) Bill 2011 (the Act).

Clause 2 – Commencement

Clause 2 of the Bill provides that the Bill provides for the Act to commence on the day after the Act receives the Royal Assent.

Clause 3 – Schedule(s)

Clause 3 is a machinery provision that provides that each Act specified in a Schedule is amended or repealed in accordance with the items of the Schedule concerned.

There is one Schedule to the Bill that contains amendments to the Broadcasting Services Act 1992.
Schedule 1—Amendments to the *Broadcasting Services Act 1992*

**Item 1 – At the end of Part 3**

**Item 2 – Section 35A**

Item 1 adds a new section 35A at the end of Part 3 of the *Broadcasting Services Act 1992* (the BSA). Part 3 of the BSA deals with the planning of the broadcasting services bands. The broadcasting services bands are those parts of the radiofrequency spectrum designated by the Minister under section 31 of the *Radiocommunications Act 1992* as being primarily for broadcasting purposes or restricted datacasting purposes.

The new section 35A inserted by item 1 will replace existing section 35A of the BSA. The latter is currently contained in Part 4 of the BSA, which deals with, among other things, the allocation of commercial television broadcasting licences. Existing section 35A is to be repealed by item 2 as a consequence of the amendments in item 1.

Existing section 35A of the BSA provides for the Minister to cause a review to be conducted about whether one or more additional commercial television licences should be allocated in any particular area of Australia and, if so, what variations are needed to licence area plans. Existing section 35A provides for the Minister to cause to be conducted the initial review before 1 January 2012, and also sets out arrangements for the conduct of subsequent reviews, as well as specifying procedural and other relevant matters that relate to the conduct of the review. It is important to note that section 35B of the BSA imposes a moratorium on the allocation of additional commercial television licences that use the broadcasting services bands, which is linked to the completion of one or more reviews under section 35A, as amended. Section 35B is not amended by this Bill and the link to the review conducted under section 35A (as amended) will remain.

New section 35A will retain those provisions in existing section 35A that deal with the sequence of the reviews, the need for wide public consultation, the role of the Australian Communications and Media Authority (the ACMA), and the Minister’s obligation to prepare and table in Parliament a report of each review (see subsections 35A(3), and (5) to (8)).

*Initial review*

As amended by item 1, subsection 35A(1) provides that the initial review must be caused to be conducted before 1 January 2013. The initial review will also have broader terms of reference than those set out in existing section 35A.

As amended, the initial review will inquire into the matters set out in paragraphs 35A(1)(a) to (d).

Paragraph 35A(1)(a) is about whether broadcasting services bands spectrum that is, or may become, available for allocation should be used for a particular area of Australia to provide television broadcasting services.
Paragraph 35A(1)(c) is about whether broadcasting services bands spectrum that is, or may become, available for allocation should be used for a particular area of Australia to provide services other than broadcasting services.

Together these two paragraphs are intended to facilitate a review of the most appropriate use of the broadcasting services bands spectrum that is currently known as ‘the sixth television channel’.

If additional television services are considered appropriate, paragraph 35A(1)(b) requires the review to inquire into what variations (if any) are needed to one or more licence area plans in force under section 26 of the BSA.

If other new services that are considered appropriate, paragraph 35A(1)(d) requires the review to inquire into the licensing requirements that should apply to those services.

Subsequent reviews

The same terms of reference will also apply to any subsequent review that the Minister causes to be conducted (subsection 35A(2) refers).

Conduct of a review

In conducting the review, subsection 35A(4) provides a list of matters that must be taken into account. The relevant matters are:

- (a) the objects of the BSA;
- (b) the planning criteria set out in paragraphs 23(a) to (f) of the BSA;
- (c) the availability of broadcasting services bands spectrum;
- (d) the impact (if any) that the introduction of any new television or other service may have, or (particularly in relation to the conduct of subsequent reviews) has had, on existing uses of the broadcasting services bands;
- (e) the impact (if any) that the introduction of any new television or other service may have, or (particularly in relation to the conduct of subsequent reviews) has had, on consumers;
- (f) any other relevant matters.

The addition of matters that consider the impact of new services on incumbent users and consumers allows for the best uses of the broadcasting services bands spectrum to be assessed, while also considering the consequences that may flow from enabling other uses for the available spectrum.

Availability of broadcasting services bands spectrum

New subsection 35A(9) defines what is meant by the phrase ‘available for allocation’, as used in proposed subsections 35A(1) and (2) of the BSA.

Broadcasting services bands spectrum is considered available for allocation if the ACMA has made, or may make, a determination under section 34 of the BSA in relation to that spectrum. This is the mechanism by which the scope of the review will be narrowed to focus on the ‘sixth television channel’.
There are currently seven frequency channels of broadcasting services bands spectrum available to be used to deliver television services. However, over time this will be reduced to six channels as a result of the ACMA’s planning activities undertaken in accordance with the Minister’s Australian Communications and Media Authority (Realising the Digital Dividend) Direction 2010. As a result of the government’s decisions in relation to the digital dividend only six channels will be available for television broadcasting. Two of these channels are planned for use by national broadcasting services (the ABC and the SBS), while three are planned for use by commercial television licensees in a licence area.

The review required by new section 35A is not intended to revisit the availability of broadcasting services bands spectrum to enable the delivery of national or commercial television broadcasting services in an area. Nor is it intended to cover that part of the broadcasting services bands spectrum that is going to be re-allocated under Part 3.6 of the Radiocommunications Act 1992 in order to achieve the ‘digital dividend’. These parts of the broadcasting services bands spectrum are not available for allocation in the intended sense.

In a practical sense, this leaves one channel of broadcasting services bands spectrum that is generally available to other television broadcasting services, or services other than broadcasting services.

The sixth channel is currently used in different areas of Australia to provide a variety of services. In some areas of Australia, the channel has been planned for use by community television broadcasting services in accordance with the Minister’s Notice of Reservation of Capacity for Community Broadcasting Television Services (No. 1 of 1999).

In other areas, there is no particular planned use, but the ACMA can make that spectrum available for others to use on a temporary or discretionary basis. Temporary uses may include temporary community television broadcasting services (within the meaning of Part 6A of the BSA), BSA class licensed services (such as narrowcasting), re-transmission services (within the meaning of section 212 of the BSA), or a service that is not broadcasting at all (such as for the purpose of scientific trials or datacasting).

The temporary uses described above will usually depend on the ACMA making a determination under section 34 of the BSA. By making the determination under section 34 the ACMA needs to be satisfied that there is broadcasting services bands spectrum that is available to be put to alternative uses, by reference to one of the paragraphs contained in subsection 34(1).