Explanatory Statement

Issued by the authority of the Australian Communications and Media Authority

NATIONAL TELEVISION CONVERSION SCHEME VARIATION 2011 (No. 1)

Broadcasting Services Act 1992

Background, purpose and legislative basis

This document provides an explanation of the National Television Conversion Scheme Variation 2011 (No. 1) (the Variation), made under subclause 19(1) of Schedule 4 to the Broadcasting Services Act 1992 (the BSA).

In 1998, the Television Broadcasting Services (Digital Conversion) Act 1998 inserted Schedule 4 into the BSA. Schedule 4 provides for the conversion of transmission of television broadcasting services from analog mode to digital mode.

Subclause 19(1) of Schedule 4 required the Australian Broadcasting Authority (ABA) to formulate a scheme for the gradual conversion of the transmission of national television broadcasting services from analog mode to digital mode.

Consequently, in 1999 the ABA made the National Television Conversion Scheme 1999 (the National Scheme) applicable to national television broadcasting services (as defined in clause 2 of Schedule 4 to the BSA) throughout Australia. An equivalent Conversion Scheme applying to commercial television broadcasting services, the Commercial Television Conversion Scheme 1999 (the Commercial Scheme), was also made in the same year.

From 1 July 2005, the Australian Communications and Media Authority (the ACMA) was formed, and took over the performance of the powers and functions under the BSA previously performed by the ABA, including all powers and functions in relation to the two schemes.

The National Scheme is divided into two Parts (Part A and Part B). Part A applies to national television broadcasting services in non-remote (i.e. regional and metropolitan) coverage areas, and Part B applies to remote coverage areas. Each part contains rules for:

- the creation of digital channel plans (DCPs) by the ACMA, which allot digital channels to national broadcasters for the transmission of television services in digital mode;
- the creation of implementation plans by national broadcasters which outline the roll-out process for digital television services by national broadcasters;
- test transmissions of digital services; and
- other matters necessary for the conversion of the transmission of television broadcasting services from analog to digital mode.

Over time, both Schedule 4 to the BSA and the National Scheme have been varied in response to the changing broadcasting environment. The amendments made by the Variation are intended to update the Scheme to reflect recent amendments to Schedule 4 to the BSA, and the Radiocommunications Act 1992 (RA) by the Broadcasting Legislation Amendment (Digital Dividend and Other Measures) Act 2011 (the Amendment Act).
Amendments made by the Broadcasting Legislation Amendment (Digital Dividend and Other Measures) Act 2011

The Amendment Act commenced on 26 May 2011. The Amendment Act makes a number of amendments to provisions the BSA and RA including provisions that relate to the National Scheme. These include amendments that require the ACMA to make ‘television licence area plans’ (TLAPs)\(^1\) commencing after the end of the analog/digital simulcast period, and that otherwise affect the switchover from analog to digital television.

The amendments in the Variation are consequential on the changes made by the Amendment Act. In summary, the Variation will amend the National Scheme so that the ACMA is no longer required to:

- vary or make a new DCP at the end of a simulcast period (this is because DCPs now persist until they are replaced by a TLAP and can be varied by the ACMA at any time before this occurs – even after the end of the simulcast period);
- enforce the surrender and re-issue of analog and digital transmitter licences at the end of a simulcast period (instead, analog transmitter licences are to automatically convert into and replace existing digital licences, which will be cancelled); and
- enforce the surrender of analog transmitter licences when a digital-only local market area (DOLMA)\(^2\) is made (instead, pursuant to relevant provisions in the BSA, national broadcasters will be required to cease transmitting in analog mode using a transmitter located in so much of a coverage area as is a DOLMA).

Consultation

Section 17 of the Legislative Instruments Act 2003 (the LIA) provides that where a legislative instrument is likely to have a direct, or substantial indirect, effect on business, or to restrict competition, the ACMA must be satisfied that any consultation it considers to be appropriate and that is reasonably practicable to undertake has been undertaken. Additionally, under clause 33 of Schedule 4 to the BSA, the ACMA must make provision for consultation with the public, national broadcasters, commercial television broadcasting licensees and owners and operators of broadcasting transmission towers when varying the National Scheme.

Normally, clause 33 of Schedule 4 to the BSA would apply to any variation of the National Scheme. However, Schedule 3 of the Amendment Act excludes from the operation of this provision any variations to the National Scheme that deal with transitional and/or consequential matters in connection with amendments made by the Amendment Act, provided that they are made within 90 days from the day of commencement. Instead, the Amendment Act requires the ACMA to make a copy of the proposed variations available on the ACMA’s website for at least ten business days.

Consequently, the ACMA released a consultation draft of the Variation for public comment on its website on 7 July 2011. The closing date for submissions was 22 July 2011. The ACMA also sought comment from national broadcasters, commercial television broadcasting licensees, owners and operators of broadcasting transmission towers, and broadcasting industry representative groups (Free TV Australia and Regional Broadcasting Australia). A similar consultation process was undertaken for a concurrent variation to the Commercial Scheme. No submissions were received.

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\(^1\) Television licence area plans are new instruments for the planning of digital television services (including for the purposes of restack) that replace licence area plans (in so far as they relate to TV services) and DCPs.

\(^2\) Digital-only local market areas are areas determined by the Minister in which commercial and national television services transmitted in analog mode during a simulcast period are to cease.
In these circumstances, the ACMA is satisfied that the publication of the Variation in draft form on its website in accordance with clause 7 of Schedule 3 to the Amendment Act amounts to appropriate consultation for the purposes of section 17 of the LIA.

**Regulatory Impact**

The ACMA has considered whether a regulatory impact analysis process is required by undertaking a preliminary assessment, and based on this preliminary assessment the Office of Best Practice Regulation (OBPR) has determined that the proposed regulatory change is minor or machinery in nature and has therefore verified that no further regulatory impact analysis is required – OBPR reference number 2011/12723.

**Commencement**

Clause 32 of Schedule 4 to the BSA specifies that a variation of the National Scheme does not take effect unless and until it is approved, in writing, by the Minister. However, Schedule 3 of the Amendment Act excludes the operation of clause 32 for variations to the National Scheme that deal with transitional and/or consequential matters in connection with amendments made by the Amendment Act, provided that they are made within 90 days from commencement.

Consequently, and in accordance with section 2 of the Variation, the *National Television Conversion Scheme Variation 2011 (No. 1)* will commence the day after it is registered on the Federal Register of Legislative Instruments.

**Notes on the Instrument**

**Section 1 – Name of Instrument**

This section sets out the title of the Variation which is the *National Television Conversion Scheme Variation 2011 (No. 1).*

**Section 2 – Commencement**

This section provides that the Variation commences the day after it is registered on the Federal Register of Legislative Instruments.

**Section 3 – Variation of the Scheme**

This section sets out that the Schedule to the Variation varies the National Scheme.

**Schedule 1**

**Amendments to Part A of the Scheme**

**Item [1] – Subsection 7(1A)**

**Item [2] – After subsection 7(1A)**

Items [1] and [2] set out the circumstances in which a DCP for a non-remote coverage area may allot channels to national broadcasters after the end of the simulcast period for the area.
Item [1] replaces subsection 7(1A) of the National Scheme. The item provides that, subject to subsection 7(1B) (which is inserted by item [2]), a DCP may allot channels to national broadcasters in a coverage area after the end of the simulcast period for that area.

Item [2] inserts new subsection 7(1B) into the National Scheme. Subsection 7(1B) provides that a DCP must not allot channels to national broadcasters in a coverage area if a TLAP for the licence area that corresponds to the coverage area has come into force.

These variations reflect the amendment of Schedule 4 to the BSA by the Amendment Act to:

- specify that the National Scheme, and a DCP, to the extent to which they allot channels for a particular coverage area, cease to have effect when a TLAP for that licence area that corresponds to the coverage area comes into force (clause 22AA of Schedule 4 to the BSA); and
- insert new policy objectives for Part A of the National Scheme requiring that after the end of a simulcast period for a coverage area, each national broadcaster is to transmit the national television broadcasting service using such channel or channels as are allotted either under the TLAP for that area, or prior to the making of a TLAP, under the DCP for the area (paragraphs 19(3)(ha) to (hc) of Schedule 4 to the BSA).


Item [3] varies the National Scheme to remove references to sections 49B and 51. This item is consequential to variations made at items [5] and [10].

Item [4] – Section 49A

Item [5] – Section 49B

Item [6] – Subsection 49C(1)

Item [7] – Subsections 49C(2), 49C(3) and 49C(4)

Item [8] – Section 49D

Items [4] to [8] vary Part A of the National Scheme to change the provisions surrounding the making of DOLMAs to reflect amendments made to the BSA and RA by the Amendment Act.

Following the passage of the Amendment Act, DOLMAs no longer require the cessation of national television broadcasting services broadcast in analog mode in the DOLMA where broadcast of the service in the DOLMA occurs either accidentally or as a necessary result of the provision of national television broadcasting services outside the DOLMA (subclause 35A(2) of Schedule 4 to the BSA).

The Amendment Act also amends the policy objective at paragraph 19(3)(ga) of Schedule 4 to the BSA, so that the objective now requires Part A of the National Scheme to ensure that no transmissions of a national television broadcasting service are to be made using a transmitter located in so much of a coverage area as is a DOLMA (previously the National Scheme was required to ensure that no analog transmissions from any national television broadcasting service were to be made in the DOLMA).

The Amendment Act also amends the RA to the effect that at the end of the simulcast period for a coverage area, existing analog transmitter licences for national television broadcasting services held by national television broadcasting licensees are automatically converted into digital transmitter licences (section 100AA of the RA), while the digital transmitter licences are cancelled (subsection 100B(2C) of the RA). As a consequence, although services under these analog transmitter licences...
are to cease during a DOLMA, existing provisions requiring the surrender of these licences would compromise the operation of the RA provisions following the passage of the Amendment Act.

Additionally, following the amendments to DOLMA provisions in the BSA, it is no longer considered necessary for the National Scheme to require the ACMA to consider whether to vary DCPs to replan services in areas covered by DOLMAs, although the ACMA may use its ordinary power to vary a DCP in this circumstance if it decides to do so.

Item [4] omits section 49A of the National Scheme, which requires the ACMA to consider whether to vary a DCP where the Minister determines that a specified area in a coverage area is a local market area that will become a DOLMA.

Item [5] omits section 49B, which imposes certain obligations on the ACMA if it makes a decision to vary a DCP in the circumstances set out in section 49A.

Item [6] amends subsection 49C(1) to be consistent with the policy objective in paragraph 19(3)(ga) of Schedule 4 to the BSA, as amended by the Amendment Act (and discussed above). Subsection 49C(1) of the National Scheme now provides that no transmissions of national television broadcasting services in analog mode are to be made using a transmitter located in so much of that area as is a DOLMA.

Item [7] omits subsections 49C(2), 49C(3) and 49C(4) of the National Scheme. Subsection 49C(2) provides for a national broadcaster to surrender to the ACMA all transmitter licences that authorised transmission of the national television broadcasting service in the local market area in analog mode, once a local market area becomes a DOLMA. Subsection 49C(3) requires that where a national broadcaster is affected by a variation to a DCP under section 49B to also surrender to the ACMA transmitter licences authorising transmission in digital mode in the area. This subsection is omitted consequent to the omission of section 49B by Item [5]. Subsection 49C(4) stipulates that the national broadcaster must comply with any requirements of the ACMA when surrendering a transmitter licence. This omission is consequent to the omission of subsection 49C(3).

Item [8] omits section 49D, which provides for the ACMA to issue one or more new transmitter licences to a national broadcaster affected by a variation to a DCP under section 49B. This section is omitted consequent to the omission of section 49B by item [5].

Item [9] – Section 50

Item [10] – Section 51 (including the note)


Items [9] to [11] vary Part A of the National Scheme to remove the obligation on the ACMA to consider whether to vary or make a new DCP before the end of a simulcast period for a coverage area, for the purposes of allotting channels for the transmission of a national television broadcasting service in digital mode after the simulcast period.

This variation is prompted by the following amendments made to Schedule 4 of the BSA by the Amendment Act:
• the replacement of the former Part A policy objective at paragraph 19(3)(ha) with the new policy objectives at paragraphs 19(3)(ha) to (hc) (discussed above with respect to items [1] and [2]); and
• the insertion of clause 22AA specifying that a DCP for a coverage area ceases to have effect when a TLAP for that area comes into force.

Following these amendments, Part A of the National Scheme is no longer required to ensure that the ACMA considers whether the ongoing channel allotment for national television broadcasting services is in place by the end of the simulcast period for the coverage area. Instead, the ACMA may continue to use its planning powers via DCPs or TLAPs, as appropriate, after the end of the simulcast period. The ACMA is intending to undertake this task as part of the digital television restack program to be undertaken throughout Australia using the new TLAP powers inserted into the BSA by the Amendment Act.

Item [9] omits section 50 so that the ACMA is no longer required to consider whether to vary or remake a DCP for a coverage area at the end of the simulcast period for that area.

Item [10] omits section 51, and the subsequent note, which, consequent to the variation at item [9], are no longer required.

Item [11] omits section 52, which, consequent to the variation at item [9], is no longer required.

Item [12] – Subsections 53(2) and 53(3)

Item [13] – Section 54 (including the note)

Items [12] and [13] vary provisions in Part A of the National Scheme for the treatment of analog and digital transmitter licences at the end of the simulcast period, reflecting amendments made to the BSA and RA by the Amendment Act. The Amendment Act repeals the provisions at subclause 23(4) of Schedule 4 to the BSA that required Part A of the National Scheme to ensure that, with effect from the end of the simulcast period for a coverage area:

• a national broadcaster surrenders its analog and digital transmitter licences; and
• the ACMA issues new transmitter licences that authorise the transmission of the national television broadcasting service in digital mode (using channels allotted in DCPs).

As discussed above with respect to items [4] to [8], the Amendment Act also amends section 100AA and subsection 100B(2C) of the RA to provide for an automatic process by which analog transmitter licences are automatically converted to digital transmitter licences at the end of the simulcast period, and digital transmitter licences are cancelled.

Consistent with this new process, item [12] omits subsections 53(2) and (3), thereby removing the requirement for national broadcasters to surrender their transmitter licences at the end of a simulcast period.

Item [13] omits section 54 (requiring the ACMA to issue new digital transmitter licences) and the subsequent note which, consequent to the variation at Item [12], are no longer required.

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3 The former policy objective at paragraph 19(3)(ha) of Schedule 4 to the BSA required Part A of the National Scheme to ensure that, after the end of the simulcast period for a coverage area, each national broadcaster was to transmit its service in digital mode using channels allotted under a DCP.
Amendments to Part B of the Scheme

Item [14] – Paragraph 84(ha)

Item [15] – After paragraph 84(i)

Section 84 of the National Scheme sets out policy objectives that Part B of the National Scheme (which deals with remote coverage areas) will be directed towards achieving. Many of these objectives mirror the policy objectives for Part A of the National Scheme, which are set out in subclause 19(3) of Schedule 4 to the BSA.

Under clause 28 of Schedule 4 to the BSA, when formulating or varying Part B to the National Scheme, the ACMA must have regard to the special circumstances that apply to the transmission of national television broadcasting services in remote coverage areas. Having had regard to those special circumstances and to the amendments made by the Amendment Act, the ACMA considers it appropriate to apply the variations made in Part A of the National Scheme to Part B. Consequently, the policy objectives in section 84 of the National Scheme are to be updated to reflect the Part A policy objectives.

Item [14] varies the policy objective in paragraph 84(ha) (relating to the transmission of national television broadcasting services in analog mode within a DOLMA) to reflect the amendment of paragraph 19(3)(ga) of Schedule 4 to the BSA. This variation provides that, as with Part A of the National Scheme, Part B of the National Scheme is directed to ensure that, during the simulcast period, no transmissions of a national television broadcasting service are to be made using a transmitter located in so much of a coverage area as is a DOLMA.

Item [15] inserts three new policy objectives into Part B of the National Scheme, which are equivalent to the new policy objectives introduced by the Amendment Act at paragraphs 19(3)(ha), (hb) and (hc) of Schedule 4 to the BSA. These policy objectives require Part B of the National Scheme to ensure that, after the end of a simulcast period for a remote coverage area, each national broadcaster is to transmit the national television broadcasting service using such channel or channels as are allotted either under the TLAP for that area, or prior to the making of a TLAP, under the DCP for the area.

Item [16] – Subsection 86(2)

Item [17] – After subsection 86(2)

Items [16] and [17] set out the circumstances in which a DCP for a remote coverage area may allot channels to national broadcasters after the end of the simulcast period for the area. The items make equivalent variations to Part B of the National Scheme to those made to Part A by items [1] and [2].

Item [18] – Subsection 92(1)

Item [18] varies the National Scheme to remove references to sections 130B and 132. This item is consequential to variations made at items [20] and [25].
Item [19] – Section 130A

Item [20] – Section 130B

Item [21] – Subsection 130C(1)

Item [22] – Subsections 130C(2), 130C(3) and 130C(4)

Item [23] – Section 130D

Items [19] to [23] vary Part B of the National Scheme to change the provisions surrounding the making of DOLMAs to reflect amendments made to the BSA and RA by the Amendment Act. The items make equivalent variations to Part B of the National Scheme to those made to Part A by items [4] to [8].

Item [24] – Section 131

Item [25] – Section 132 (including the note)

Item [26] – Section 133

Items [24] to [26] vary Part B of the National Scheme to remove the obligation on the ACMA to consider whether to vary or make a new DCP before the end of a simulcast period for a coverage area, for the purposes of allotting channels for the transmission of a national television broadcasting service in digital mode after the end of the simulcast period. The items make equivalent variations to Part B of the National Scheme to those made to Part A by items [9] to [11].

Item [27] – Subsections 133A(2) and 133A(3)

Item [28] – Section 133B (including the note)

Items [27] and [28] vary provisions in Part B of the National Scheme for the treatment of analog and digital transmitter licences at the end of the simulcast period. These variations reflect amendments made to section 100AA and subsection 100B(2C) of the RA by the Amendment Act, and also ensure that the treatment of transmitter licences held by national broadcasters in remote coverage areas is consistent with the treatment of transmitter licences in non-remote coverage areas.

These items make equivalent variations to Part B of the National Scheme to those made to Part A by items [12] and [13].