Explanatory Statement

Issued by the authority of the Australian Communications and Media Authority

COMMERCIAL TELEVISION CONVERSION SCHEME VARIATION 2011 (No. 1)

Broadcasting Services Act 1992

Background, purpose and legislative basis

This document provides an explanation of the Commercial Television Conversion Scheme Variation 2011 (No. 1) (the Variation), made under subclause 6(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 broadcasting services from analog mode to digital mode.

Subclause 6(1) of Schedule 4 required the Australian Broadcasting Authority (ABA) to formulate a scheme for the gradual conversion of the transmission of commercial television broadcasting services from analog mode to digital mode.

Consequently, in 1999 the ABA made the Commercial Television Conversion Scheme 1999 (the Commercial Scheme) applicable to commercial television broadcasting services (as defined in clause 2 of Schedule 4 to the BSA) throughout Australia. An equivalent Conversion Scheme applying to national television broadcasting services, the National Television Conversion Scheme 1999 (the National 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 Commercial Scheme is divided into two Parts (Part A and Part B). Part A applies to commercial television broadcasting services in non-remote (i.e. regional and metropolitan) licence areas, and Part B applies to remote licence areas. Each part contains rules for:

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

Over time, both Schedule 4 to the BSA and the Commercial Scheme have been varied in response to the changing broadcasting environment. The amendments made by this Variation are intended to update the Commercial 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 in the BSA and RA including provisions that relate to the Commercial 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 would amend the Commercial 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 the relevant BSA broadcasting service licence conditions, licensees will be required to cease transmitting in analog mode using a transmitter located in so much of a licence area as is a DOLMA).

The Amendment Act also clarified how licence conditions relating to HDTV services are to apply to remote area commercial broadcasters. This includes the addition of a reference to HDTV requirements in an existing BSA provision specifying how certain licence conditions are to be enforced by the Commercial Scheme. Consistent with that amendment, it is also proposed to insert new provisions into the Commercial Scheme requiring a remote area commercial television broadcaster to surrender its analog and/or digital transmitter licences if it does not comply with a licence condition to provide an HDTV service during the simulcast period.

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 18 of Schedule 4 to the BSA, the ACMA must make provision for consultation with the public, commercial television broadcasting licensees, national broadcasters and owners and operators of broadcasting transmission towers when varying the Commercial Scheme.

Normally, clause 18 Schedule 4 to the BSA would apply to any variation of the Commercial Scheme. However, Schedule 3 of the Amendment Act excludes from the operation of this provision any variations to the Commercial 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.

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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.
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 commercial television broadcasting licensees, national broadcasters, 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 National Scheme. No submissions were received.

In these circumstances, the ACMA is satisfied that the publication of the Variation in draft form on its website in accordance with clause 6 of Schedule 3 to the Amendment Act amounted 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**

In accordance with section 2 of the Variation, the Variation 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 *Commercial 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 *Commercial Variation* varies the Commercial 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 licence area may allot channels to commercial television broadcasting licence holders after the end of the simulcast period for the area.

Item [1] replaces subsection 7(1A) of the Commercial Scheme. The item provides that, subject to subsection 7(1B) (which is inserted by item [2]), a DCP may allot channels to commercial broadcasting licence holders in a licence area after the end of the simulcast period for that area.
Item [2] inserts new subsection 7(1B) into the Commercial Scheme. Subsection 7(1B) provides that a DCP must not allot channels to commercial broadcasting licence holders in a licence area if a TLAP has come into force for the area.

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

- specify that the Commercial Scheme, and a DCP, to the extent to which they allot channels for a particular licence area, cease to have effect when a TLAP for that licence area comes into force (clause 7AA of Schedule 4 to the BSA); and
- insert new policy objectives for Part A of the Commercial Scheme requiring that after the end of a simulcast period for a licence area, each commercial television broadcasting licence holder must transmit its commercial 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 6(3)(ha) to (hc) of Schedule 4 to the BSA).

Item [3] – Subsection 13(1)

Item [3] varies the Commercial Scheme to remove references to sections 53B and 55. This item is consequential to variations made at items [5] and [10].

Item [4] – Section 53A

Item [5] – Section 53B

Item [6] – Subsection 53C(1)

Item [7] – Subsections 53C(2), 53C(3) and 53C(4)

Item [8] – Section 53D

Items [4] to [8] vary Part A of the Commercial 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 commercial 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 commercial television broadcasting services outside the DOLMA (subclause 7(4B) of Schedule 2 to the BSA).

The Amendment Act also amends the policy objective at paragraph 6(3)(ga) of Schedule 4 to the BSA, so that the objective now requires Part A of the Commercial Scheme to ensure that no transmissions of a commercial television broadcasting service are to be made using a transmitter located in so much of a licence area as is a DOLMA (previously the Commercial Scheme was required to ensure that no analog transmissions from any commercial 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 licence area, existing analog transmitter licences for commercial television broadcasting services held by commercial television broadcasting licensees are automatically converted into digital transmitter licences (sections 102AC and 102AD of the RA), while the digital transmitter licences are cancelled (subsection 102A(6) 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 Commercial 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 53A of the Commercial Scheme, which requires the ACMA to consider whether to vary a DCP where the Minister determines that a specified area in a licence area is a local market area that will become a DOLMA.

Item [5] omits section 53B, which imposes certain obligations on the ACMA if it makes a decision to vary a DCP in the circumstances set out in section 53A.

Item [6] amends subsection 53C(1) to be consistent with the policy objective in paragraph 6(3)(ga) of Schedule 4 to the BSA, as amended by the Amendment Act (and discussed above). Section 53C(1) of the Commercial Scheme now provides that no transmissions of commercial 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 53C(2), 53C(3) and 53C(4) of the Commercial Scheme. Subsection 53C(2) provides for a licensee to surrender to the ACMA all transmitter licences that authorised transmission of that service in the local market area in analog mode, once a local market area becomes a DOLMA. Subsection 53C(3) requires a licensee affected by a variation to a DCP under section 53B 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 53B by Item [5]. Subsection 53C(4) stipulates that the licensee must comply with any requirements of the ACMA when surrendering a transmitter licence. This omission is consequent to the omission of subsection 53C(3).

Item [8] omits section 53D, which provides for the ACMA to issue one or more new transmitter licences to a licensee affected by a variation to a DCP under section 53B. This section is omitted consequent to the omission of section 53B by Item [5].

Item [9] – Section 54

Item [10] – Section 55 (including the note)


Items [9] to [11] vary Part A of the Commercial 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 licence area, for the purposes of allotting channels for the transmission of a commercial television broadcasting service in digital mode after the end of 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 6(3)(ha)\(^3\) with the new policy objectives at paragraphs 6(3)(ha) to (hc) (discussed above with respect to items [1] and [2]); and
- the insertion of clause 7AA specifying that a DCP for a licence area ceases to have effect when a TLAP for that area comes into force.

Following these amendments, Part A of the Commercial Scheme is no longer required to ensure that the ACMA considers whether the ongoing channel allotment for commercial television broadcasting services is in place by the end of the simulcast period for the licence 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.

\(^3\) The former policy objective at paragraph 6(3)(ha) of Schedule 4 to the BSA required Part A of the Commercial Scheme to ensure that, after the end of the simulcast period for a licence area, each commercial television broadcasting licence holder was to transmit its relevant service in digital mode using channels allotted under a DCP.
Item [9] omits section 54 so that the ACMA is no longer required to consider whether to vary or remake a DCP for a licence area at the end of the simulcast period for that area.

Item [10] omits section 55, and the subsequent note, which, consequent to the variation at item [9], is no longer required.

Item [11] omits section 56, which, consequent to the variation at item [9], is no longer required.

**Item [12] – Subsections 57(2) and 57(3)**

**Item [13] – Section 58 (including the note)**

Items [12] and [13] vary provisions in Part A of the Commercial 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 8(4) of Schedule 4 to the BSA that required Part A of the Commercial Scheme to ensure that, with effect from the end of the simulcast period for a licence area:

- a commercial television broadcasting licence holder surrenders its analog and digital transmitter licences; and
- the ACMA issues new transmitter licences that authorise the transmission of the commercial 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 sections 102AC and 102AD, and subsection 102A(6) 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 57(2) and (3), thereby removing the requirement for commercial television broadcasting licensees to surrender their transmitter licences at the end of a simulcast period.

Item [13] omits section 58 (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.

**Amendments to Part B of the Scheme**

**Item [14] – Paragraph 90(ja)**

**Item [15] – After paragraph 90(ja)**

Section 90 of the Commercial Scheme sets out policy objectives that Part B of the Commercial Scheme (which deals with remote coverage areas) is directed towards achieving. Many of these objectives mirror the policy objectives for Part A of the Commercial Scheme, which are set out in subclause 6(3) of Schedule 4 to the BSA.

Under clause 14 of Schedule 4 to the BSA, when formulating or varying Part B to the Commercial Scheme, the ACMA must have regard to the special circumstances that apply to the transmission of commercial television broadcasting services in remote licence 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 Commercial Scheme to Part B. Consequently, the policy objectives in section 90 of the Commercial Scheme are to be updated to reflect the Part A policy objectives.

Item [14] varies the policy objective in paragraph 90(ja) of the Commercial Scheme (relating to the transmission of commercial television broadcasting services in analog mode within a DOLMA) to reflect the amendment of the policy objective at paragraph 6(3)(ga) of Schedule 4 to the BSA. This variation provides that, as with Part A of the Commercial Scheme, Part B of the Commercial Scheme...
is directed to ensure that, during the simulcast period, no transmissions of a commercial television broadcasting service are to be made using a transmitter located in so much of a licence area as is a DOLMA.

Item [15] inserts three new policy objectives into Part B of the Commercial Scheme, which are equivalent to the new policy objectives introduced by the Amendment Act at paragraphs 6(3)(ha), (hb) and (hc) of Schedule 4 to the BSA. These policy objectives require Part B of the Commercial Scheme to ensure that, after the end of a simulcast period for a remote licence area, each commercial television broadcasting licensee is to transmit the commercial 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 92(2)

Item [17] – After subsection 92(2)

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

Item [18] – Subsection 98(1)

Item [18] varies the Commercial Scheme to remove references to sections 143B and 145. This item is consequential to variations made at items [22] and [27].

Item [19] – Paragraph 142(1)(a)

Item [20] – After paragraph 142(1)(a)

Items [19] and [20] amend subsection 142(1) to reflect amendments made to the BSA to clarify how licence conditions relating to HDTV services are to apply to remote area commercial broadcasters. A reference to HDTV requirements has been added to an existing BSA provision relating to enforcement of licence conditions in the Commercial Scheme (subclause 8(10) of Schedule 4 to the BSA). Consistent with that amendment, items [19] and [20] amend the Commercial Scheme to also refer to the HDTV requirement provided for in paragraph 7(1)(ma) of Schedule 2 to the BSA. The effect of this variation is that the Commercial Scheme will require a remote area commercial television broadcaster to surrender its analog and/or digital transmitter licences if it does not comply with a licence condition to provide an HDTV service during the simulcast period.

Item [21] – Section 143A

Item [22] – Section 143B

Item [23] – Subsection 143C(1)

Item [24] – Subsections 143C(2), 143C(3) and 143C(4)

Item [25] – Section 143D

Items [21] to [25] vary Part B of the Commercial 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 Commercial Scheme to those made to Part A by items [4] to [8].
Item [26] – Section 144

Item [27] – Section 145 (including the note)

Item [28] – Section 146

Items [26] to [28] vary Part B of the Commercial 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 licence area, for the purposes of allotting channels for the transmission of a commercial television broadcasting service in digital mode after the end of the simulcast period. The items make equivalent variations to Part B of the Commercial Scheme to those made to Part A by items [9] to [11].

Item [29] – Subsections 147(2) and 147(3)

Item [30] – Section 148 (including the note)

Items [29] and [30] vary provisions in Part B of the Commercial Scheme for the treatment of analog and digital transmitter licences at the end of the simulcast period. These variations reflect amendments made to sections 102AC and 102AD and subsection 102A(6) of the RA by the Amendment Act, and also ensure that the treatment of transmitter licences held by commercial television broadcasting licensees in remote licence areas is consistent with the treatment of transmitter licences in non-remote licence areas.

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