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TELEVISION BROADCASTING SERVICES (DIGITAL CONVERSION) BILL 1998

DATACASTING CHARGE (IMPOSITION) BILL 1998

EXPLANATORY MEMORANDUM

(Circulated by authority of Senator the Hon. Richard Alston, Minister for Communications,
the Information Economy and the Art

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OUTLINE

The main purpose of the Television Broadcasting Services (Digital Conversion) Bill 1998 is to provide a regulatory regime for digital television broadcasting.

Commercial and national (ABC and SBS) television programs are currently transmitted to the public in Australia in analog mode, using a channel bandwidth of 7MHz. Analog television channels can transmit one continuous stream of programming and some limited data/text embedded in the main carrier signal.

Digital television is a broadcasting transmission system which uses digital modulation techniques to transmit television programs. Using compression technology and the same amount of bandwidth that is used for analog television, digital television broadcasting transmitters have the technical capacity to transmit a High Definition television (HDTV) picture, or to transmit multiple programs at the same time; and can use residual capacity to transmit data/information (either stand alone or linked to television programs).

The Bill requires the Australian Broadcasting Authority (ABA) to formulate legislative schemes for the conversion, over time, of the transmission of commercial and national (ABC and SBS) television broadcasting services from analog to digital mode (parts 2 and 3 of proposed new Schedule 4 to the *Broadcasting Services Act* 1992 (BSA)). Broadcasters will be required to meet standards relating to HDTV format transmission of television programs in digital mode as well as standards relating to captioning of television programs for the deaf and hearing impaired and such other technical standards as may be determined in regulations (Part 4 of proposed new Schedule 4 to the BSA).

The digital conversion scheme formulated by the ABA in relation to commercial television broadcasting licensees will be required to meet specified policy objectives including that digital transmission commence in metropolitan licence areas on 1 January 2001 and progressively in regional licence areas between 1 January 2001 and 1 January 2004, that the digital transmission of the commercial television service be required to achieve the same level and potential quality of reception as is achieved by analog transmission in each licence area and that commercial television broadcasters be allocated channels for their digital transmitters which occupy the same amount of bandwidth (ie. 7MHz) as analog transmitters (clause 5 of Part 2 of proposed new Schedule 4 to the BSA).

Licensees will be required to transmit in both analog and digital mode for at least an 8 year simulcast period, which may be extended by regulations. At the end of the simulcasting period, analog transmission will cease (clause 5 of Part 2 of proposed new Schedule 4 to the BSA).

The ABA will be able to require commercial television broadcasting licensees to lodge implementation plans (including in relation to the installation and phased operation of digital transmitters in regional areas). Licensees will be required, as a condition of licence, to comply with the digital television conversion scheme and with any implementation plans that are approved by the ABA in accordance with the scheme (clause 10 of Schedule 1 to the Bill).

The digital television conversion scheme formulated by the ABA in relation to the national broadcasters will be required to meet similar statutory objectives (Part 3 of proposed new Schedule 4 to the BSA). However, in recognition that the Minister has overall planning responsibilities for the national broadcasters and is accountable to Parliament for their operation, the Bill empowers the Minister to approve implementation plans lodged by the ABC and SBS in relation to the commencement of digital transmission. Provision is also made in the Bill for the Minister to determine the simulcasting period for digital transmission by the national broadcasters in regional areas, in order to ensure a common end for the simulcasting period in each regional area for commercial and national broadcasters.

Digital conversion schemes formulated by the ABA in relation to commercial television broadcasting licensees and the national broadcasters must make provision requiring the surrender of digital transmitter licences if the licensee or national broadcaster fails to comply with digital service commencement and simulcasting obligations (clauses 7 and 21 of proposed new Schedule 4 to the BSA). Where a licensee or national broadcaster fails to comply with HDTV obligations, there is provision for either requiring surrender of the transmitter licence, or issuing a replacement licence which is sufficient to enable transmission of a digital television service, but which does not enable transmission in HDTV format.

The Bill prevents commercial television broadcasting licensees and the national broadcasters from using their digital transmitters to provide subscription television broadcasting services (clause 10 of Schedule 1 to the Bill and clause 33 of proposed new Schedule 4 to the BSA). Commercial television broadcasting licensees will be prohibited from providing multi-channel services (ie from transmitting **more** than a simulcast of their analog television service), but will be able to be authorised by regulations to broadcast programs that are incidental and directly linked to the programs transmitted at that time in analog mode (clause 10 of Schedule 1 to the Bill). The ABC and SBS will also be able to be authorised by regulations to transmit programming which is incidental and directly linked; and will be able to transmit multi-channel programming if the programs are of a kind exempted by regulations (clause 32 of proposed new Schedule 4 to the BSA). The Bill requires reviews to be conducted by 1 January 2001 into the content of the above regulations and by January 2005 into whether the provisions in the Bill which prevent subscription television and multi-channelling should be amended or repealed (Part 8 of proposed Schedule 4 to the BSA).

The Australian Communications Authority (ACA) will be required by the digital conversion schemes to allocate existing commercial and national television broadcasters additional television spectrum, free of up front charge, to enable them to simulcast their analog television programs in digital mode (clauses 7 and 21 of proposed new Schedule 4 to the BSA). The Bill

permits the existing free to air television broadcasters to use spare transmission capacity in this spectrum to provide certain 'datacasting' (information/data) services, subject to the charging regime in the Datacasting Charge (Imposition) Bill 1998 discussed below.

The Bill also makes provision for the ABA to identify television spectrum which can be used for digital datacasting purposes and which could be allocated under the existing price-based allocation mechanisms in the *Radiocommunications Act 1992* (Radcom Act) (clause 5 of Schedule 1 to the Bill).

The Bill requires owners and operators of broadcasting transmission towers to give digital broadcasters and digital data-casters access to the towers for the purpose of installing or maintaining digital transmitters (Part 5 of proposed new Schedule 4 of the BSA).

As mentioned above, reviews are required to be conducted before 1 January 2001 of certain elements of the digital television regulatory scheme. A further review which is required to be conducted before this date is into the content of regulations which relate to the scope of the definition of a 'datacasting service' (Part 8 of proposed new Schedule 4 to the BSA).

In addition, before 1 January 2001, the Minister is to arrange for a review to be conducted into whether any amendments of Commonwealth laws should be made to ensure that 'underserved' regional licence areas are provided with the same number of commercial television broadcasting services as are provided in metropolitan licence areas. Underserved regional licence areas are those with fewer than 3 commercial television broadcasting services.

The Bill prohibits the ABA from allocating more than 3 commercial television broadcasting licences in any licence area before 31 December 2008 (clause 1 of Schedule 1 of the Bill). A review is to be conducted before 31 December 2005 to determine whether this prohibition should be extended (clause 57 of proposed new Schedule 4 to the BSA).

Further reviews are required to be conducted before 31 December 2005 into the duration of the simulcast period and whether all television spectrum has been identified for broadcasting and datacasting use and has been efficiently structured (clause 57 of proposed new Schedule 4 to the BSA).

The Bill also makes amendments to the BSA and the Radcom Act consequential upon the digital television broadcasting scheme provided for in the Bill (Schedules 1 and 2 to the Bill). The Datacasting Charge (Imposition) Bill 1998 provides for the imposition of a charge in relation to the provision of datacasting services, using residual transmission capacity on channels allocated for digital conversion, by commercial and national free to air television broadcasters. The amount of this charge will be determined by the ACA, having regard to any directions issued by the Minister. Before determining a charge under the Bill, the ACA will be required to provide a report to the Minister on whether the proposed charge meets competitive neutrality principles.

FINANCIAL IMPACT

The digital conversion scheme in the Television Broadcasting Services (Digital Conversion) Bill will provide for the return of 'loaned' spectrum to the Commonwealth at the end of the simulcast period, which could then be allocated for specified purposes in accordance with a price-based allocation system.

The amount of the datacasting charge to be imposed on commercial television broadcasters and national television broadcasters under the Datacasting Charge (Imposition) Bill will be formulated closer to the time of allocation of the spectrum, in accordance with competitive neutrality principles and taking into account the price paid for any additional spectrum which is allocated for datacasting.

REGULATION IMPACT STATEMENT

B1. Problem or Issue Identification

Digital technology has been increasingly used in information and communication technology for more than thirty years. In recent years this technology has advanced to a stage where it is now technologically possible, and relatively affordable, for it to be used for the transmission of television pictures and sound to consumers via terrestrial transmission. Digital compression technology has also enabled the quality of these transmissions to be significantly improved—approaching cinema-like pictures and CD quality surround sound while using the same amount of the broadcast spectrum currently used for analog terrestrial broadcast. The spectrum efficiency of digital transmission can alternatively allow for multiple channels to be carried within the same frequency bandwidth. In addition, the ability to access and transmit digital data (text, pictures, sounds in any combination) into the home opens the door to 'convergence' opportunities where the computer, television and other equipment can all receive data broadcast over terrestrial networks.

Internationally, the US and the UK have already commenced the conversion to digital with many other countries already developing implementation plans for digital terrestrial television broadcasting (DTTB). Increasingly programs and equipment sourced from these markets (whose programs comprise a substantial proportion of those broadcast on Australian networks) will be in digital format.

The introduction of digital television in Australia presents major issues for consumers. To take advantage of the benefits of DTTB, consumers will need to invest in new reception equipment. The cost of digital sets is difficult to predict (and the price could fall rapidly once the market is established) and consumer demand for the range of services offered by DTTB is currently not known. Therefore, the timeframe for consumer take-up of digital technology cannot be estimated. In the meantime, consumers will continue to expect to receive free-to-air analog television programming.

There are also major issues for industry relating to the introduction of DTTB in Australia. The current broadcast 'landscape' consists of free-to-air (terrestrial), and fledgling cable and satellite subscription services. Terrestrial free-to-air broadcasting services are currently received in most Australian homes while around twelve per cent of households are estimated to subscribe to pay TV (provided through cable, satellite or MDS technologies). Infrastructure has been established by commercial and national broadcasters for the production and terrestrial transmission of television programming. This infrastructure represents significant long-term capital investments by these broadcasters.

Outside this traditional landscape are other sectors which, with the advent of digital technology, will be capable of using broadcast spectrum to deliver non-broadcasting services (in particular data services). Long-term investment decisions by all these sectors are required to enable development of television-based and other digital services.

Finally, the introduction of DTTB poses regulatory challenges for Government given the dynamic nature of DTTB developments internationally and the need to allocate broadcasting service bands spectrum for its introduction in Australia. It is important for the Government to put in place a framework that provides clear ground rules to all participants and ensures that the community benefits from the opportunities presented by the development and application of this technology. The Government is faced with determining how this framework should work with key issues being: how digital broadcasting should be used, how much control should be left with the market and what must be regulated by government. These decisions need to be made on the basis of their potential impacts on all affected groups (existing industry participants and new entrants, infrastructure stakeholders, consumers and the public) and with consideration being given to digital broadcasting spectrum as an economic resource.

B2. Objectives of Regulation

Given the issues identified above, the objectives for the introduction of DTTB in Australia could be seen as to:

- improve the technical quality of the Australian television system in line with international technology advances;
- allow for a smooth transition from analog to digital television broadcasting and transmission which avoids disruption to consumers in metropolitan and regional areas;
- maximise the use of existing transmission infrastructure;
- introduce DTTB services within a timetable to ensure that Australia does not fall significantly behind the rest of the world;
- increase viewer choice and diversity of product (recognising the role of community television services and Australian content in this regard);
- seeking competitive neutrality between the commercial and national television broadcasting sector, the pay TV sector and other communications sectors;
- provide an appropriate return to the Commonwealth for the use of television spectrum;
- achieve spectrum efficiency gains to enable new services to be introduced;
- encourage the use of television spectrum to provide a range of new information/data services;
- take into account the rapidly changing commercial and technological environment;
- protect the interests of consumers in regional areas; and

- retain free-to-air analog television services for a period of time to ensure that the interests of consumers are protected.

The Government's announcement of 24 March 1998 provides the authoritative basis for this proposal.

B3. Identification of Options

Commercial free-to-air television broadcasting services are subject to regulation through the *Broadcasting Services Act 1992*. Services of the national broadcasters (the ABC and the SBS) are mainly subject to their enabling legislation—the *Australian Broadcasting Corporation Act 1983* and the *Special Broadcasting Service Act 1991*. Overall spectrum planning is the subject of the *Radiocommunications Act 1992*. The introduction of DTTB services will require amendment to this legislative framework.

Three major options covering critical issues in the introduction of DTTB in Australia were identified in the consultation phase.

Option 1: No limit on new free-to-air television broadcasting entrants and no limit on competition in broadcasting and related services.

By:

- Opening up broadcasting services band spectrum for competitive bids for DTTB services from existing broadcasters and new entrants;
- Replanning the broadcasting system to maximise spectrum available for such allocation;
- Placing no restrictions on spectrum usage (including high definition television, multi-channel, subscription and datacasting services); and
- Placing no requirements on the use of existing infrastructure.

Option 2: No limit on new free-to-air television broadcasting entrants but provide existing commercial and national broadcasters with digital spectrum to replicate their analog broadcasting service. No restrictions on competition in broadcasting and related services in residual spectrum.

By:

- Providing existing commercial and national free-to-air broadcasters with access, free of upfront charge, to only a sufficient additional quantum of spectrum to allow the replication of their analog television programming in standard definition digital mode for a designated period;
- Allowing residual spectrum to be allocated by competitive bids for broadcasting and/or non-broadcasting services;
- Placing restrictions on spectrum usage (including high definition television, multi-channel, subscription and datacasting services); and
- Placing no requirements on the use of existing infrastructure.

Option 3: Enhance the standard of existing free-to-air television broadcasting services and provide access to new services while minimising consumer disruption.

By:

- Providing *only* existing commercial and national free-to-air broadcasters with access, free of upfront charge, to additional spectrum to allow them to start digital television transmission while maintaining their current analog television transmission for a designated period;
- Restricting the types of services which these broadcasters can provide (multichannel, subscription and/or datacasting services);
- Requiring these broadcasters to undertake a proportion of digital programming in high definition television format;
- Allowing residual spectrum to be allocated by competitive bids for non-broadcasting services;
- Requiring that current infrastructure usage be maximised; and
- Enabling the review of such decisions at an appropriate time in the timetable for the introduction of DTTB.

B4. Assessment of Impacts

Impact Group Specification

The Commonwealth Government

- The Commonwealth Government is responsible for the regulation of broadcasting and is the recipient of licence fees paid by the broadcasting sector.

Business

- Existing and potential free-to-air television broadcasting networks (metropolitan and regional)
 - predominantly medium to large businesses, established infrastructure as an outcome of capital investment over many years, Australian controlled and the majority of which are Australian owned due to foreign ownership and control rules applying to broadcasting services;
 - in addition, there are two existing publicly-funded national broadcasters (the ABC and the SBS) and a number of community television stations (small businesses).
- Existing and potential cable and satellite subscription service providers; medium or large businesses, recently introduced services with high levels of capital investment, Australian and foreign;
- Existing and potential communications sector providers of datacasting services; may be small, medium or large businesses, Australian and foreign;
- Owners and operators of existing terrestrial transmission infrastructure;
 - existing commercial free-to-air broadcasters; and
 - one publicly-funded transmission network, currently subject to a privatisation process.

Consumers

- Metropolitan television viewers;
- Regional television viewers; and
- Sub-groups within these broader groups (such deaf and hearing impaired viewers).

Assessment of Benefits and Costs-General

There are some costs and benefits which will apply to each option.

Government

DTTB provides for more efficient use of the broadcasting spectrum. This has the potential for the Commonwealth to raise revenue from allocation of this spectrum to interested players.

Amendment to legislation will impose administrative and enforcement costs above costs currently incurred by existing regulation. There may also be long-term unanticipated costs to the Government if insufficient flexibility is allowed in regulation to take account of future consumer, industry and technological development.

Business

The benefits of digital technology for the industry are threefold: it potentially allows for additional services (and new revenue streams) to be provided; allows for many programs to be produced more efficiently than the current analog technologies; and it provides increased flexibility in the way that content can be manipulated and stored.

Submissions to the Government from existing commercial broadcasters estimate the capital costs of digital conversion to be in excess of \$500 million. In addition, commercial broadcasters estimate that they will incur more than \$600 million in additional operating costs if required to simulcast their analog channel for a prolonged period (costs based on a 15 year simulcasting period). The ABC estimates capital costs of more than \$100 million in the pre-implementation stage and the SBS more than \$20 million. The national broadcasters are yet to complete their long-term planning so final costs of conversion (including any additional costs for simulcasting of analog and digital modes) are not known.

Consumers

The benefits of digital terrestrial television to viewers are substantial. Digital television allows the broadcast of wide screen, cinema quality programs with surround sound. It can also allow the provision of multiple information streams allowing the user access to a more enriching and even interactive television experience. From a technical point of view, it provides clearer, sharper pictures without the interference and ghosting that currently affect many viewers in built-up areas or hilly terrain.

To take advantage of the benefits provided by digital television, consumers will be required to purchase either a new digital television set, or a set top box to convert the incoming digital signal for display on an analog receiver. It is difficult to predict how much sets will cost, and the price could fall rapidly once the market is established. Large widescreen digital sets capable of displaying high definition video will probably cost several thousand dollars, while conventionally sized sets are likely to approach the prices of current sets over time. The price of set top boxes will depend on their functionality, but will probably be a few hundred dollars.

Assessment of Benefits and Costs - Options

Government

Any price based competitive allocation of varying amounts of spectrum for digital transmission has the potential to raise revenue for the Government. Currently, there is no shortage of spectrum. In addition, the spectrum efficiency of digital technology will enable more services to be provided through smaller amounts of spectrum than current analog technologies. Therefore, the amount of potential revenue to the Commonwealth is uncertain. Options 1 and 2 would allow more spectrum to be allocated immediately than option 3. However, options 2 and 3 would enable the recovery of spectrum loaned to existing commercial and national free-to-air broadcasters in the medium term which could then be made available for such allocation. Enforcement costs could be expected to be relatively low due to limited regulation under Option 1.

Costs to Government would include the lack of certainty that spectrum would be ultimately used for DTTB services under the unrestricted allocations process of Option 1 and any potential delay in the introduction of DTTB by new free-to-air television broadcasters provided with access to digital spectrum under Options 1 and 2. There would be increased certainty in regard to the introduction of DTTB under Option 2, as existing commercial and national television broadcasters could replicate their analog service in digital mode, but there would remain no guarantee that the enhanced television services (such as high definition television) offered by digital television technology would be introduced. Option 3 would ensure the introduction of digital services in the medium term (including high definition television) but government would incur the opportunity costs of not allocating spectrum immediately through a price based mechanism.

Option 1 would also impose additional costs to government if: existing commercial television analog licence fees fell as a result of any fall in broadcaster revenue because digital transition was not ensured; and access to digital spectrum by the ABC, the SBS and community broadcasters were to be assured. Administration costs could be relatively higher for replanning the broadcasting spectrum which would be required under Options 1 and 2.

Existing free-to-air broadcasters

If existing commercial and national television broadcasters were able to obtain spectrum, there would be benefits to them of being allowed to use allocated spectrum flexibly under

option 1 and enabling them to adapt programming to suit consumer demand and, therefore, advertiser preference. They would have the flexibility to provide multi-channel, datacasting and subscription services which could provide potential revenue streams.

Option 3 would limit this flexibility but provide existing commercial and national television broadcasters with certainty that they will be able to transmit their current analog service in analog and digital mode and provide high definition television and datacasting services.

Option 2 would also technically limit this flexibility through limited spectrum allocation. By limiting competition, option 3 would enable existing commercial television broadcasters to sustain their current revenue base during the transition period while there are dual transmission costs. Under option 3, these broadcasters would also be able to use much of the existing infrastructure resulting in considerable savings.

Option 1 would impose costs of obtaining access to spectrum for digital transmission for existing commercial, national and community television broadcasters. Option 2 would impose costs of obtaining any additional spectrum required to provide services other than current analog service (such as high definition television - a potential main driver for consumer take-up). These options could cause particular concern for regional and community broadcasters which have lower revenue bases.

Under option 1 there would also be costs imposed by investment uncertainty. Long term analog investment, advertising and programming commitments could be undermined if digital spectrum was not assured. Options 1 and 2 may also result in a loss of advertising revenue to other commercial spectrum holders (including other television broadcasters). There is no evidence that this could be offset by the provision of multi-channel services.

Radical replanning of the spectrum required under options 1 and 2 would impose costs to broadcasters for their analog services as they may need to purchase or lease new transmitter equipment, and undertake consumer education to adapt equipment and consumer habit to receive new analog channels. Under option 2 existing television broadcasters may also incur costs of having digital spectrum 'split' if they are required to buy additional spectrum to provide a full high definition television or multi-channel service.

Options 2 and 3 would involve costs for the broadcasters in being required to simulcast their analog programming for a designated period of time as well as providing digital programming and maintaining Australian content levels. This could be particularly difficult for regional and community broadcasters with low revenue bases.

Under Option 3, existing commercial and national television broadcasters would be required to pay fees for datacasting services which they provide. There may be increased compliance costs of this option given a higher level of regulation. The option would also incur opportunity costs for the broadcasters of not being able to provide multi channel and subscription services.

Potential free-to-air television networks

Under Options 1 and 2, potential free-to-air television broadcasters would gain access to the broadcast spectrum for the transmission of a digital television broadcasting service which could be expected to raise advertising, and other revenues. Flexible use of the spectrum would enable these broadcasters to provide services based on consumer and therefore advertiser preference. At this stage, it is not possible to estimate expected revenues which a potential new digital free-to-air television broadcaster would earn.

Under these options, potential free-to-air television broadcasters would incur costs in obtaining spectrum through a competitive process. In addition they would incur the costs of setting up a digital broadcast and transmission system (while not incurring the additional analog transmission costs incurred by existing broadcasters simulcasting in analog and digital) and the opportunity costs which such investment would involve. These costs are not currently quantifiable but could be expected to be significant. Additional costs would be incurred if the broadcaster were unable to use existing infrastructure. Option 2 would provide less spectrum available for new free-to-air television broadcasters which may limit the number of entrants and new services, or the amenity of available spectrum. Under Option 3, these broadcasters would bear the opportunity costs of not being able to obtain broadcasting spectrum to provide a commercial digital television service.

Existing and potential subscription service providers

Options 1 and 2 would allow subscription service providers to compete for unrestricted use of broadcasting services band spectrum which would allow them to provide subscription and other services over the terrestrial network. There could also be expected to be some economies of scale for such operators able to provide programming through a variety of transmission methods. These costs have not been quantified by the sector. Under Option 3 service providers could potentially obtain spectrum to provide datacasting services while, by limiting competition, the revenue base of current subscription services would not be undermined by the introduction of terrestrial subscription services.

Costs, under Options 1 and 2, could be incurred through the ability of existing television broadcasters or potential free-to-air television broadcasters to undertake subscription services and potentially undermine the revenue base of subscription service providers. In addition, subscription service providers would bear the additional cost of introducing any additional terrestrial services while maintaining their current non-terrestrial services. There could also be opportunity costs from not fully using the existing non-terrestrial infrastructure or as a result of the relatively limited capacity available through broadcasting services band spectrum used for free-to-air television broadcasting compared with other transmission technologies. Under Option 3 existing and potential subscription service providers would bear the opportunity costs of not being able to obtain broadcasting services band spectrum to transmit a commercial digital television broadcasting service.

Existing and potential communications sector providers of datacasting services

Under all options, communications service providers would have access to broadcasting services band spectrum to deliver data services. This would enable them to broadcast data services to television receivers which may be more attractive to the consumer than purchasing additional hardware. The commercial returns to be expected from such services are currently not known. There may also be economies of scale in the provision of data services which are already available through other delivery mechanisms.

Under each option, existing and potential communications service providers would incur costs in obtaining spectrum and establishing their digital terrestrial services, the quantum of which is not known. Options 1 and 2 could also involve the establishment costs of new transmission facilities as the use of existing infrastructure is not ensured. Communications service providers may also incur costs of any decline in revenue for their current cable-based services which is not matched by revenues earned through their terrestrial services.

Under Options 2 and 3, there would be less spectrum available for the competitive allocation to these which may limit the number of entrants and new services.

Owners and operators of existing terrestrial transmission infrastructure

Under Options 1 and 2, operators would be able to offer transmission services to potential new players for the digital transmission of television programming. Under all options, operators will be able to offer such services for digital transmission of datacasting services. These services could potentially provide revenue to owners and operators.

Under Option 1, there would be no guarantee that current infrastructure use would be maximised with resulting costs (in terms of uncertainty of investment in current and new infrastructure) for operators. Under options 2 and 3, operators would have greater certainty in regard to the continued use by existing commercial and national television broadcasters of infrastructure. Under option 3, operators would bear the opportunity costs of providing reasonable access to broadcasters and data-casters for the purpose of installing transmitters for use in providing services in digital mode.

Consumers

A highly competitive and unregulated digital television environment such as Option 1 could provide some benefits to consumers in terms of choice of services. Under Option 2, consumers would be assured of receiving a digital television service which would replicate the current analog system as well as potential new services. Under Option 3, consumers will have certainty that digital services, including high definition television, will be made available in the short to medium term with minimal disruption to their current viewing. Consumers will continue to receive current television programming (including that provided by community broadcasters) on their analog sets and will have plenty of time to purchase digital technology, reducing the risk of such investment. Consumers will also be able to receive a range of datacasting services direct into their home through their digital equipment.

Under Option 1, there could be significant costs to consumers in terms of disruption. There would be little certainty that digital television services would be provided while current analog coverage is maintained. New commercial free-to-air digital television broadcasting services may only be received through new equipment requiring immediate investment in an immature market. Viewers may have no guarantee of being able to receive existing free-to-air television broadcasting services in digital mode. Current analog programming (including the level of Australian content) could also be affected. Radical spectrum replanning may affect the analog spectrum requiring viewers to adjust their analog equipment to receive signals. The need for new transmission infrastructure may also have environment or urban amenity cost implications.

While ensuring the transition of existing commercial and national television broadcasters, Option 2 would still impose costs to consumer in terms of disruption. These broadcasters could only offer a simulcast of their analog programming, requiring consumers to invest in digital technology without the prospect of being offered potential main benefits of the technology - high definition television or other enhanced services. Consumers would not be certain that these services would be offered by new entrants either.

Under Option 3, there is an opportunity cost of not having new free-to-air television channels (or current free-to-air channels being multi-channelled) being made available in the short term.

B5. Consultation

In January 1997, an Australian Broadcasting Authority (ABA) Specialist Group (including industry representatives) recommended that adjacent 7 MHz channels to those currently used by the commercial and national television broadcasters for analog television be allocated to them, so that they could transmit high definition quality pictures on a digital channel while simulcasting that programming on existing analog channels. The Group further recommended that additional channels to allow for digital conversion by existing commercial and national television broadcasters be provided free of up front charge by the Commonwealth and that an equivalent amount of spectrum be recovered from these broadcasters at the end of a simulcasting period.

These recommendations, which had been made following a process of public consultation, were accepted by the ABA in a report provided to the Minister in July 1997. The ABA's report was also released to the public and has provided a focus for submissions to Government and public debate on the introduction of DTTB in Australia.

In addition, the Government received formal and informal submissions from a wide variety of industry representatives from the broadcasting, print media and communications sectors.

There was little industry agreement on the appropriate option to be pursued by Government. Existing commercial and national television broadcasters argued strongly that they would

need to bear significant costs to convert to digital while continuing to provide analog services for a simulcast period (to avoid disruption to viewers). This was of particular concern to regional broadcasters. They argued that, for this reason, they should be provided with an additional amount of bandwidth (of the same quantum and within the same range as that provided for their analog broadcasting) free of upfront charge and that they should be allowed flexible usage of such bandwidth. Commercial television broadcasters also argued that any introduction of new free-to-air television broadcasters would seriously undermine their capacity to provide digital and analog services during a simulcast period. Representatives from the pay TV sector, while conceding that existing commercial and national television broadcasters should be provided with spectrum to convert to digital, argued that the amount of spectrum provided should only be sufficient to replicate existing analog broadcasts with remaining spectrum being allocated to broadcasting or non-broadcasting players through a price-based allocation system. They argued that allowing existing commercial television broadcasters to provide subscription services would severely disadvantage the pay TV sector which has been required to bear the costs of an initial spectrum auction and significant infrastructure costs. They also argued that radical replanning of the spectrum should be undertaken to allow for spectrum efficiency gains. Representatives from other sectors argued that an open competitive process should be used for the allocation of all available spectrum with no restrictions on the use of that spectrum.

B6. Conclusion and Recommended Option

Option 1

This option would achieve some short-term spectrum efficiency gains and would provide early financial returns to the Commonwealth through the sale of spectrum (although there is no certainty that the spectrum would be used for DTTB and the start up dates for such services would be uncertain). Existing broadcasters would only be able to be involved in the introduction of DTTB and related services if they successfully bid for auctioned spectrum.

However, this option would result in severe disruption to viewers - new spectrum allocations would not ensure that digital service providers could use existing transmission infrastructure and viewers would have no guarantee of being able to receive broadcasting services in digital mode. The transition from analog to digital television would be uncertain - because there would be no guarantee that existing television broadcasters would be involved. This option would require either that the ABC, SBS or community television groups had no guaranteed right to digital spectrum, or that existing commercial free-to-air television broadcasters were disadvantaged in comparison with new broadcasters.

There would also be a significant risk that the quality of Australia's existing television system would be reduced by the unrestricted introduction of new commercial players.

Option 2

This option would ensure that existing commercial and national television broadcasters have access to digital spectrum to simulcast their current analog programming but would require them to bid for additional spectrum if they wanted to provide enhanced services such as high definition television. The option would overcome concerns by the pay TV sector that it would be unfair to give existing commercial and national television broadcasters free spectrum for any other purpose but would potentially cause delay in the introduction of DTTB (through substantial replanning of spectrum) and not guarantee the availability of services potentially necessary to promote consumer take-up.

This option would not ensure that digital service providers could use current infrastructure and mean that consumers would face the prospect of being denied access to high definition television - a potential main benefit of DTTB. This option would provide some revenue to the Commonwealth through the auction of spectrum but less than available through Option 1.

Option 3

This is the recommended option as it would ensure a smooth, timely transition to DTTB which is built on the experience, expertise and infrastructure of existing television broadcasters and which takes into account the increased costs of investing in DTTB and providing dual digital/analog services. This would not be achieved under Options 1 or 2.

Non-broadcasting uses of broadcasting services band spectrum (datacasting) would be encouraged so that consumers received a wide range of new information/data services. The prohibition on the provision of multi-channel pay TV services would ensure that the developing pay TV sector is not unfairly disadvantaged by digital conversion of existing commercial and national television broadcasters. The proposed sale of broadcast services band spectrum for datacasting would also ensure transmission of community television services.

The multi-channel service/pay TV prohibition would potentially reduce the range of broadcasting services available to viewers, but there are alternative delivery mechanisms (eg, satellite and cable) for these services. The restrictions would be reviewed before the end of the transition period. In addition, this option enables the Government to take into account the rapidly changing commercial and technological environment by allowing flexibility in the future decision-making process.

Under Option 3, the Commonwealth would obtain an early financial return from the allocation of television spectrum for datacasting services and from charging existing commercial and national television broadcasters for the authority to transmit datacasting services from their digital broadcasting transmitters. The immediate financial return may not be as great as under Option 1 or 2. However, there will be further financial returns to the Commonwealth under Option 3 when the loaned spectrum is returned by existing commercial and national television broadcasters at the end of the simulcasting period.

The Government considers that restrictions on competition at this stage in the transition to digital television broadcasting will be required to achieve its objectives to:

- allow for a smooth transition from analog to digital television broadcasting and transmission which avoids disruption to consumers in metropolitan and regional areas;
- maximise the use of existing transmission infrastructure;
- introduce DTTB services within a timetable to ensure that Australia does not fall significantly behind the rest of the world;
- maximise viewer choice and diversity of product (recognising the role of community television services and Australian content in this regard) across free-to-air and subscription services.

The Government considers that these objectives can only be achieved through this option. However, the Government has also aimed at achieving competitive neutrality, as far as practicable, between the free-to-air broadcasting, pay TV and other communications sectors.

The Government will review these issues during the introduction and transition stages.

B7. Implementation and Review

Legislation will require considerable detailed technical planning in areas such as: spectrum identification and allocation; transmission requirements and broadcaster implementation schedules. Under the legislation, the ABA will be required to develop a scheme, after consultation, designed to achieve the Government's objectives including that:

- DTTB be introduced on 1 January 2001 and in regional areas from that date so that all areas have digital services by 1 January 2004;
- Existing commercial and national television broadcasters are required to simulcast their analog broadcasts for a period of 8 years or such longer period prescribed in regulations;
- An equivalent amount of spectrum 'loaned' to commercial and national television broadcasters be recovered by the Commonwealth at the end of the simulcast period; and
- Existing commercial and national television broadcasters will be required to undertake high definition television transmission of a proportion of their programming, and may undertake enhanced programming and datacasting services (subject to a charging regime) but be disallowed from undertaking multi-channel or subscription services.

Legislation will also require regulatory reviews to be undertaken before and during the simulcast phase. Prior to 1 January 2001, there will be a statutory review into:

- regulations which should govern enhanced programming and television datacasting services;
- possible legislative amendments to respond to convergence between broadcasting

- and non-broadcasting services;
- whether the ABC and SBS should be allowed to transmit multi-channel programming (see above); and
- possible legislative amendments governing the retransmission of free-to-air digital broadcasting services on pay TV systems.

In 2005, there will be a statutory review into whether:

- all spectrum available for allocation has been identified and efficiently structured;
- Legislative amendments should allow new commercial television entrants after 31 December 2008;
- Legislative amendments should allow commercial television broadcasters to provide multi-channel and/or pay TV services using digital technology; and
- a simulcasting period longer than 8 years should be prescribed in regulations dependent on an consumer take-up rates.

In addition, the Department of Communications and the Arts will convene a Digital Television Planning and Steering Committee with the ABA, the ACA and all relevant industry sectors which will:

- advise on transmission standards and compatibility requirements (including issues related to conditional access systems);
- commence detailed technical planning; and
- identify broadcasting spectrum not required for the digital conversion of the commercial and national television broadcasters.

Wherever possible, it is expected that there will be co-location of digital and analog transmitters on sites. However, actual transmission requirements will need to be determined as part of the planning process undertaken by the ABA and the Committee.

Spectrum identified through the Committee as not being required for digital conversion of existing free to air broadcasters (see above) will be allocated on a competitive basis (subject to conditions) for television datacasting services in time for services to commence at the same time as free-to-air digital television broadcasting.

The Australian Communications Authority (ACA) and the Australian Broadcasting Authority (ABA) will be required to report on the structure of, and conditions for, the allocation of spectrum not required for the digital conversion of existing commercial and national television broadcasters, as well as any legislative amendments which may be necessary or appropriate.

Conditions of the spectrum sale will preclude existing free to air broadcasters from bidding for this spectrum. Conditions will also ensure digital transmission, free of charge, of a standard definition community television service.

ABBREVIATIONS

The following abbreviations are used in this explanatory memorandum:

ABA: Australian Broadcasting Authority

ACA: Australian Communications Authority

ACCC: Australian Competition and Consumer Commission

BSA: *Broadcasting Services Act 1992*

HDTV: High Definition Television

Radcom Act: *Radiocommunications Act 1992*

NOTES ON CLAUSES

TELEVISION BROADCASTING SERVICES (DIGITAL CONVERSION) BILL 1998

Clause 1 - Short title

Clause 1 provides for the citation of the *Television Broadcasting Services (Digital Conversion) Act 1998*.

Clause 2 - Commencement

Clause 2 provides for the Bill to commence on Royal Assent.

Clause 3 - Schedule(s)

Clause 3 provides for any amendments or repeals to an Act specified in a Schedule to the Bill are to have effect according to their terms.

Schedule 1 to the Bill provides for amendment of the *Broadcasting Services Act 1992* (BSA). Schedule 2 to the Bill provides for amendment of the *Radiocommunications Act 1992* (Radcom Act).

Schedule 1 - Amendment of the Broadcasting Services Act 1992

Item 1 - Amendment of section 28 - Limitation on allocation of commercial television broadcasting licences

Section 28 of the BSA prohibits the Australian Broadcasting Authority (ABA) from allocating more than 3 commercial television broadcasting licences in any broadcasting licence area before a date specified by Proclamation, being a date not earlier than the completion of the review referred to in section 215 of the BSA.

Section 215 of the BSA required the Minister, before 1 July 1997, to conduct a review of the television broadcasting industry to assess the national benefits that would accrue if more than 3 commercial television broadcasting services were permitted in licence areas. As this provision is now spent it is to be repealed by item 8 of Schedule 1 to the Bill.

Item 1 of Schedule 1 to the Bill will amend section 28 of the BSA so as to prohibit the ABA from allocating more than 3 commercial television broadcasting licences in any licence area before a date specified by Proclamation, being a date not earlier than 31 December 2008. This will allow the existing free to air commercial television broadcasters a transition period

in which to meet the initial costs of digital conversion and parallel digital/analog transmission before the licence allocation restriction can be lifted.

Clause 57 of proposed Schedule 4 to the BSA provides that, before 31 December 2005, the Minister is to arrange for a review to be conducted into whether section 28 should be amended or repealed after 31 December 2008.

In addition, paragraph 56(1) (d) of proposed Schedule 4 to the BSA provides that, before 1 January 2001, the Minister is to arrange for a review to be conducted into whether any amendments of Commonwealth laws should be made to ensure that ‘underserved’ regional licence areas are provided with the same number of commercial television broadcasting services as are provided in metropolitan licence areas. Underserved regional licence areas are those with fewer than 3 commercial television broadcasting services.

Items 2 to 5 - Amendments of section 34 - Alternative uses of broadcasting services bands

Subsection 34(1) of the BSA allows temporary alternative uses of broadcasting services bands in circumstances where, in effect, a part of the broadcasting services spectrum bands would be wasted if not temporarily put to some other use. Subsection 34(2) of the BSA provides that in making its decision on alternative uses, the ABA is to have regard to the possible future demand for the use of the relevant part of the radiofrequency spectrum and such other matters as the ABA considers relevant.

‘Broadcasting services bands’ is defined in s. 6 of the BSA to mean that part of the radiofrequency spectrum that is designated under section 31 of the Radcom Act as being primarily for broadcasting purposes and is assigned by the Minister under that Act for the ABA for planning.

Item 2 of Schedule 1 to the Bill will amend subsection 34(1) of the BSA so that if the conditions of paragraphs 34(1)(a) to (d) have been satisfied, the ABA will be required to make a written determination that the part or parts of the radiofrequency spectrum concerned is or are available for allocation, for a period specified by the ABA for one or more purposes covered by paragraphs 34(1)(e), (ea), (f) and (g) and proposed paragraph 34(1)(fa) to be inserted by item 3 of Schedule 1 to the Bill.

Item 3 of Schedule 1 to the Bill will amend subsection 34(1) of the BSA to provide that if the conditions of paragraphs 34(1)(a) to (d) have been satisfied, the ABA may decide that a part or parts of the radiofrequency spectrum is or are available for allocation, for a period specified by the ABA, for the transmission of datacasting services on a temporary basis.

Item 5 of Schedule 1 to the Bill inserts a proposed new subsection 34(4) that provides that ‘datacasting service’ has the same meaning as in proposed Schedule 4 to the BSA. The term is defined in clause 2 of that Schedule to mean a service (other than a broadcasting service as defined in s. 6 of the BSA) that delivers information (whether in the form of data, text, speech, images or in any other form) to persons having equipment appropriate for receiving that

information where the delivery of the service uses the broadcasting services bands and the service is not of a kind specified in the regulations. Paragraph 56(1)(a) in proposed Schedule 4 provides that before 1 January 2001 the Minister is to arrange for a review to be conducted to determine the scope of the term 'datacasting service'. Clause 37 of proposed Schedule 4 allows datacasting standards to be made by regulations.

Item 5 also amends section 34 by adding a new subsection 34(3). This new subsection will allow the ABA to determine, in writing, that a part or parts of the broadcasting services bands spectrum is or are available for allocation for the purposes of the transmission of datacasting services. New subsection 34(3) is intended to ensure that television spectrum which is not required for broadcasting purposes (including spectrum required for digital conversion of commercial and national broadcasting services) can be referred to the ACA and allocated on a competitive basis under the Radcom Act for the provision of datacasting services.

Clause 12 of proposed Schedule 4 to the BSA requires the ABA to have regard to its power under new subsection 34(3) in formulating or varying the commercial television conversion scheme.

Item 4 of Schedule 1 to the Bill amends the language of subsection 34(2) to make it consistent with the rest of section 34 as proposed to be amended and makes it clear that a determination under proposed new subsection 34(3) will not be subject to the requirements of subsection 34(2).

Item 6 - Transitional-section 34 of the Broadcasting Services Act 1992

Item 6 of Schedule 1 to the Bill provides that existing decisions of the ABA under subsection 34(1) of the BSA that are in force immediately before the Bill receives the Royal Assent are to be treated as if they had been made in the form of a written determination under subsection 34(1) of the BSA immediately after Royal Assent.

Item 7 - Amendment of section 92F - Licences to accord with alternative planning procedures

Section 92F of the BSA provides that the ABA is not to allocate a temporary community broadcasting licence except in accordance with a decision of the ABA under section 34 of the BSA.

As a consequence of the amendments made by items 2 to 5 of Schedule 1 to the Bill, which require the ABA to make 'determinations' under section 34, item 7 replaces the word 'decision' in section 92F by 'determination'.

Item 8 - Repeal of section 215 - Review of television broadcasting industry

Section 215 of the BSA required the Minister:

- (a) before 1 July 1997, to conduct a review of the television broadcasting industry to assess the national benefits that would accrue if more than

3 commercial television broadcasting services were permitted in licence areas; and

- (b) as soon as practicable, but in any case before 1 July 1997, to conduct a review of Australian content on Pay TV.

As this provision is now spent, it is to be repealed by item 8 of Schedule 1 to the Bill. (See also the discussion on item 1 above.)

Item 9 - Insertion of new section 216A - Schedule 4 (digital television broadcasting)

Item 9 inserts a new section 216A to the BSA which gives effect to proposed Schedule 4 to the BSA which deals with digital television broadcasting. The provisions are discussed in detail in the notes on Schedule 4.

Items 10 and 11- Amendments of clause 7 of Schedule 2 - Standard licence conditions

Subclause 7(1) of Schedule 2 to the BSA sets out the conditions to which each commercial television broadcasting licence is subject (see also s. 42 of the BSA). Item 10 of Schedule 1 to the Bill adds a number of conditions related to digital television broadcasting and the captioning of analog and digital television programs for the deaf and hearing impaired.

Compliance with conversion scheme

The first new licence condition is that a commercial television broadcasting licensee must comply with the requirements of the commercial television conversion scheme in force under clause 5 of proposed Schedule 4 to the BSA, other than the commencement requirements in paragraph 5(2)(a) or (b) (proposed paragraph 7(1)(k) of Schedule 2 to the BSA). Failure to comply with the commencement requirements in paragraph 5(2)(a) and 5(2)(b) will require the licensee to return spectrum under clause 7 of proposed Schedule 4 to the BSA.

Clause 5 of proposed Schedule 4 to the BSA will require the ABA, as soon as practicable after the Bill receives Royal Assent, to formulate in writing a legally binding scheme for the conversion, over time, of the transmission of commercial broadcasting services from analog mode to digital mode.

Compliance with implementation plans

The second new licence condition is that a commercial television broadcasting licensee must comply with an implementation plan (and, having regard to subclause 8(2) of proposed Schedule 4 to the BSA, any variation to such a plan) given by the licensee to the ABA in accordance with the commercial television scheme once the ABA has accepted the plan (proposed paragraph 7(1)(l) of Schedule 2 to the BSA).

Clause 8 of proposed Schedule 4 to the BSA provides that the scheme must require the licensee to prepare, and submit to the ABA, one or more implementation plans relating to digital transmission, where the plans are in accordance with the scheme. It is envisaged that these plans would set out a timetable for the installation and operation of digital transmitters. Clause 8 also allows the scheme to provide for the variation of implementation plans submitted to the ABA by commercial television broadcasting licensees.

Enhanced programming and prohibition on multi-channelling

The third new licence condition is that a commercial television broadcasting licensee must not broadcast a television program in digital mode during the simulcast period for the licence area concerned unless:

- the program is broadcast simultaneously by the licensee in analog mode in that area; or
- under the regulations, the program is treated as ‘incidental and directly linked’ to a program that is broadcast simultaneously by the licensee in analog mode in that area (proposed paragraph 7(1)(m) of Schedule 2 to the BSA).

Subject to the Ministerial review to be conducted to determine the scope of these regulations (see cl. 56 of proposed Schedule 4 to the BSA), it is envisaged that this condition would allow commercial television broadcasting licensees to transmit multiview programming and other incidental video material directly linked to the analog simulcast. The regulations could, for example, permit different visual representations of the same event, filmed within the confines of the event, such as the ability to view the event from different camera angles.

Item 11 of Schedule 1 to the Bill provides that expressions used in connection with this third licence condition (as well as in the sixth licence condition discussed below) and in proposed Schedule 4 to the BSA have the same meaning for the purposes of this condition as they have in Schedule 4. Item 4 of proposed Schedule 4 provides that a television program is broadcast in digital mode if the program is broadcast using a digital modulation technique.

Digital format standards

The fourth new licence condition (proposed paragraph 7(1)(n) of Schedule 2 to the BSA) is that a commercial television broadcasting licensee must comply with standards applicable to the commercial television broadcasting licence under clause 34 of proposed Schedule 4 to the BSA. Under clause 34, regulations will be required to be made to determine standards that require commercial television broadcasting licensees and the ABC and SBS to meet specified goals or targets in relation to the extent to which television programs, or specified kinds of television programs, are transmitted in accordance with a specified High Definition Television (HDTV) format for the transmission of television programs in digital mode. The regulations will also be able to determine other standards that are to be observed by commercial television broadcasting licensees and the ABC and SBS in relation to the format in which television programs are to be transmitted in digital mode.

Captioning of television programs

The fifth new licence condition (proposed paragraph 7(1)(o) of Schedule 2 to the BSA) is that a commercial television broadcasting licensee must comply with standards applicable to the commercial television broadcasting licence under clause 35 of proposed Schedule 4 to the BSA (which deals with captioning of television programs for the deaf and hearing impaired).

It is intended that these standards would be required to be observed by free to air television broadcasters in relation to programs transmitted in both analog and digital mode. The free to air television broadcasters will not, however, be required to observe captioning standards provided for in the regulations before the first occasion on or after 1 January 2001 on which they broadcast television programs in digital mode.

Prohibition on digital transmitters being used to provide pay TV, radio or narrowcasting services

The sixth new licence condition (proposed paragraph 7(1)(p) of Schedule 2 to the BSA) is that if a commercial television broadcasting licensee holds a broadcasting transmitter licence required to be issued under s. 102 of the Radcom Act or under proposed s. 102A of that Act (which deals with broadcasting transmitter licences required to be issued under digital conversion schemes) that authorises the operation of a transmitter, the licensee must not operate, or permit the operation of, that transmitter to transmit in digital mode:

- a commercial broadcasting service that provides radio programs - commercial radio broadcasting is governed by commercial radio broadcasting licences granted by the ABA under Part 4 of the BSA;
- a subscription television broadcasting service - this service is governed by the licensing provisions in Part 7 of the BSA that apply to ‘subscription television broadcasting services’; or
- a subscription radio broadcasting service or an open or subscription narrowcasting service - these services are governed by class licences under Part 8 of the BSA.

Penalties for contravention of licence conditions

A breach of any of these licence conditions will attract, in the case of an individual, a pecuniary penalty of 2,000 penalty units and, in the case of a body corporate, 10,000 penalty units: see BSA s. 139(1) and the *Crimes Act 1914*, s. 4B(3).

Item 12 - Insertion of new Schedule 4 - Digital television broadcasting

Item 12 of Schedule 1 inserts a new Schedule 4 at the end of the BSA dealing with digital television broadcasting. Item 9 of Schedule 1 to the Bill inserts a new section 216A to the BSA which gives effect to proposed Schedule 4.

Part 1 – Introduction

Clause 1 – Simplified outline

Clause 1 of proposed Schedule 4 to the BSA sets out a simplified outline of the Schedule to assist readers.

Clause 2 – Definitions

Clause 2 of proposed Schedule 4 to the BSA sets out the key definitions used in proposed Schedule 4 to the BSA.

An example of a key definition is that of the ‘simulcast period’. One of the policy objectives underlying the commercial and ABC/SBS television digital conversion schemes is that there is to be a transitional period for metropolitan and regional television licence or coverage areas during which the commercial television broadcasting licensees and the ABC and SBS are required to simulcast their television programs in both analog and digital modes. The simulcast period for commercial television broadcasting licensees runs for 8 years or such longer period as is specified in the regulations in relation to a particular licence or coverage area. Provision has been made for the Minister to determine the simulcast period for national broadcasting coverage areas, having regard to the end date for the simulcast period for commercial television broadcasting licensees in those areas.

In the case of a metropolitan commercial television broadcasting licence area, this period is to begin on 1 January 2001. In the case of a regional commercial television broadcasting licence area, the period is to begin on a date determined by the ABA under the conversion scheme during the period beginning on 1 January 2001 and ending immediately before 1 January 2004.

In the case of the ABC and SBS, in a metropolitan coverage area the simulcast period is also to begin on 1 January 2001.

In a regional coverage area, the simulcast period is to begin on or after 1 January 2001 with the aim of ensuring that all regional coverage areas have commenced digital transmission of national broadcasting services by 1 January 2004.

Another example of a key definition is that of a ‘datacasting service’. One of the policy objectives underlying the commercial and ABC/SBS television digital conversion schemes is that commercial television broadcasting licensees and the ABC and SBS should be permitted to use any spare transmission capacity that is available on the digital transmission channels for the purpose of the transmission of datacasting services (see paragraphs 5(2)(1) and 17(2)(1) of proposed Schedule 4 to the BSA). The ABA is also given a new power, in proposed subsection 34(3) of the BSA, to determine that a part or parts of the broadcasting services bands spectrum is or are available for allocation for the purposes of the transmission of datacasting services (see item 5 of Schedule 1 to the Bill).

The term ‘datacasting service’ is defined in clause 2 of Schedule 4 to the BSA to mean a service (other than a broadcasting service as defined in s. 6 of the BSA) that delivers information (whether in the form of data, text, speech, images or in any other form) to persons having equipment appropriate for receiving that information where the delivery of the service uses the broadcasting services bands and the service is not of a kind specified in the regulations.

‘Broadcasting services bands’ is defined in s. 6 of the BSA to mean that part of the radiofrequency spectrum that is designated under section 31 of the Radcom Act as being primarily for broadcasting purposes and is assigned by the Minister under that Act for the ABA for planning.

Clause 3 – Analog mode

Clause 3 of proposed Schedule 4 to the BSA provides that, for the purposes of this Schedule, a program or service is broadcast or transmitted in analog mode if the program or service is broadcast or transmitted using an analog modulation technique.

The term ‘program’, in relation to a broadcasting service, is defined in s. 6 of the BSA to mean:

- (a) matter the primary purpose of which is to entertain, to educate or to inform an audience;
or
- (b) advertising or sponsorship matter, whether or not of a commercial kind.

Commercial and national television broadcasting programs are currently transmitted to the public in Australia with the use of spectrum having a channel bandwidth of 7 MHz. Analog television channels can transmit one continuous stream of programming and some limited data / text embedded in the main carrier signal.

An example of the use of the term ‘analog mode’ is in subclause 5(1) of proposed Schedule 4 to the BSA which deals with the commercial television conversion scheme.

Clause 4 – Digital mode

Clause 4 of proposed Schedule 4 to the BSA provides that, for the purposes of this Schedule, a television program or service is broadcast or transmitted in digital mode if the program or service is broadcast or transmitted using a digital modulation technique.

Using compression technology and the same amount of channel bandwidth that is used for analog television, digital television broadcasting transmitters have the technical capacity to transmit a high definition TV (HDTV) picture, or transmit multiple streams of programming. Digital television broadcasting transmitters can also switch at any time between HDTV and

standard channels and can use residual capacity to transmit data or information services (either stand alone or with integrated links to TV programs).

Examples of the use of the term ‘digital mode’ are subclause 5(1) of proposed Schedule 4 to the BSA which deals with the commercial television conversion scheme and clause 34 of proposed Schedule 4 which deals with digital television format standards.

Part 2 – Commercial television

Clause 5 – Commercial television conversion scheme

Overview

Clause 5 of proposed Schedule 4 to the BSA will require the ABA, as soon as practicable after the Bill receives Royal Assent, to formulate in writing a legally binding scheme for the conversion, over time, of the transmission of commercial broadcasting services from analog mode to digital mode.

A commercial television broadcasting service is defined in clause 2 of proposed Schedule 4 to the BSA to mean a commercial broadcasting service that provides television programs.

‘Commercial broadcasting services’ are defined in s. 14 of the BSA as broadcasting services:

- (a) that provide programs that, when considered in the context of the service being provided, appear to be intended to appeal to the general public; and
- (b) that provide programs that:
 - (i) are able to be received by commonly available equipment; and
 - (ii) are made available free to the general public; and
- (c) that are usually funded by advertising revenue; and
- (d) that are operated for profit or as part of a profit-making enterprise; and
- (e) that comply with any determinations or clarifications made by the ABA under section 19 of the BSA in relation to commercial broadcasting services.

The term ‘broadcasting service’ is defined in s. 6 of the BSA to mean a service that delivers television programs or radio programs to persons having equipment appropriate for receiving that service, whether the delivery uses the radio frequency spectrum, cable, optical fibre, satellite or any other means or a combination of those means, but does not include:

- (a) a service (including a teletext service) that provides no more than data, and no more than text (with or without associated still images); or

- (b) a service that makes programs available on demand on a point-to-point basis, including a dial-up service; or
- (c) a service, or a class of services, that the Minister determines, by notice in the Commonwealth Gazette, not to fall within this definition.

The term 'program', in relation to a broadcasting service, is defined in s. 6 of the BSA to mean:

- (a) matter the primary purpose of which is to entertain, to educate or to inform an audience; or
- (b) advertising or sponsorship matter, whether or not of a commercial kind.

The commercial television scheme to be formulated by the ABA must be directed to ensuring the achievement of the policy objectives set out in subclause 5(2) of proposed Schedule 4 to the BSA.

In formulating the scheme the ABA is required to consult with the public, commercial television broadcasting licensees, the national television broadcasters and the ACA. The scheme, once formulated must be tabled in Parliament and will be subject to Parliamentary disallowance.

Once the scheme is in place, a licensee is required to comply with the requirements of the scheme. This is made a condition of the commercial television broadcasting licence.

The scheme must provide that commercial broadcasters are required to submit implementation plans to the ABA (indicating the stages and a timetable) for the conversion of commercial television services from transmitting in analog to transmitting in digital mode.

The ABA must either approve or refuse to approve a proposed implementation plan. In the event that the ABA refuses to approve the plan, a commercial broadcaster may submit further plans.

In deciding whether to approve the implementation plan, the ABA must have regard to the policy objectives that the commercial television conversion scheme is directed towards achieving and whether the plans submitted are in accordance with the scheme.

Compliance with implementation plans approved by the ABA is made a condition of the commercial television broadcasting licence.

Digital commercial television services in the metropolitan areas of Sydney, Melbourne, Brisbane, Perth and Adelaide must commence by 1 January 2001. In all other areas, these services must start in each regional licence area on a date to be determined by the ABA such date to be between 1 January 2001 and 1 January 2004.

Licensees are required to continue provision of a commercial television broadcasting service throughout a simulcast period which is to run for 8 years or such longer period as is prescribed by regulation. For metropolitan licensees this period is to commence on 1 January 2001 and for regional licensees, this period is to commence on a date as the ABA determines under the scheme.

If a licensee fails to commence or to continue transmission throughout the simulcast period in accordance with an approved implementation plan, then the scheme will provide that a licensee is required to surrender their transmitter licence which authorises digital transmission (unless the licensee can satisfy the ABA that exceptional circumstances exist).

Standards may be made by regulation under clause 34 which will require licensees to meet specified goals or targets for transmission of programs in HDTV. Failure to comply with these standards will be a breach of a licence condition of the commercial television broadcasting licence. The scheme must also make provision for either requiring surrender of the transmitter licence; or issuing a replacement licence which is sufficient to enable transmission of a digital television service, but which does not enable transmission in HDTV format.

Policy objectives

The conversion scheme will be required to be directed to ensuring the achievement of the policy objectives set out in subclause 5(2) of proposed Schedule 4 to the BSA.

Commencement of digital television

The first policy objective of the conversion scheme is that each holder of a commercial television broadcasting licence for a metropolitan licence area will be required to commence transmitting the commercial television broadcasting service concerned in digital mode in that area on 1 January 2001 (paragraph 5(2)(a) of proposed Schedule 4 to the BSA). A metropolitan licence area is defined in clause 2 of proposed Schedule 4 to the BSA to mean, in effect, a licence area that includes the GPO of the capital city of a mainland State.

The second policy objective of the conversion scheme is that each holder of a commercial television broadcasting licence for a regional licence area will be required to commence transmitting the commercial television broadcasting service concerned in digital mode in that area by such date during the period beginning on 1 January 2001 and ending immediately before 1 January 2004 as the ABA determines under the conversion scheme (paragraph 5(2)(b) of proposed Schedule 4 to the BSA). A regional licence area is defined in clause 2 of proposed Schedule 4 of the BSA to mean a licence area that is not a metropolitan licence area. Different commencement dates for different regional licence areas may be specified by the ABA under the scheme.

Simulcast period

The third policy objective of the conversion scheme is that there should be a transitional period for metropolitan and regional television licence areas throughout which the commercial television broadcasting licensees will be required to simulcast their television programs in both analog and digital modes. The simulcast period will run for 8 years or such longer period as is specified in the regulations in relation to a particular licence area.

In the case of a metropolitan licence area, this period is to begin on 1 January 2001. In the case of a regional licence area it is to begin on a date determined by the ABA under the conversion scheme during the period beginning on 1 January 2001 and ending immediately before 1 January 2004 (paragraph 5(2)(c) of proposed Schedule 4 to the BSA).

Additional channels

The fourth policy objective of the conversion scheme is that, throughout the simulcast period for a licence area, the holder of a commercial television broadcasting licence for that area should be authorised, under one or more transmitter licences, to use additional spectrum to transmit the commercial television broadcasting service in digital mode in that area (paragraph 5(2)(d) of proposed Schedule 4 to the BSA).

The fifth policy objective of the conversion scheme is that the additional channels should occupy the same amount of bandwidth as the channels used by the licensee for a particular coverage area to transmit the commercial television broadcasting service concerned in analog mode in that area (paragraph 5(2)(e) of proposed Schedule 4 to the BSA).

Commercial television broadcasting programs are currently transmitted to the public in Australia with the use of an analog channel with a bandwidth of 7 MHz. The intention underlying these policy objectives is that existing commercial free to air television broadcasters are to be allocated 7MHz of additional television spectrum, free of upfront charge (except for minor charges to cover the administrative costs of the ABA) to enable them to simulcast their analog television programs in digital mode.

Coverage and potential reception quality

The sixth policy objective of the conversion scheme is that throughout the simulcast period for a metropolitan licence area the transmission of a commercial television broadcasting service in digital mode in that area should achieve the same level of coverage and potential reception quality as is achieved by the transmission of that service in analog mode in that area (paragraph 5(2)(f) of proposed Schedule 4 to the BSA).

Reception quality can only be specified as ‘potential’ as the actual reception quality will depend on the quality of the receiver and antennae being used.

The seventh policy objective of the conversion scheme is that, as soon as is practicable after the start of the simulcast period for a regional licence area, and throughout the remainder of

that period, the transmission of a commercial television broadcasting service in digital mode in that area should achieve the same level of coverage and potential reception quality as is achieved by the transmission of that service in analog mode in that area (paragraph 5(2)(g) of proposed Schedule 4 to the BSA).

A further policy objective in paragraph 5(2)(k) of proposed Schedule 4 to the BSA is aimed at ensuring that coverage and reception quality objectives applying throughout the simulcast period will continue to apply after the end of the simulcast period.

Co-location

The eighth policy objective of the conversion scheme is that, during the simulcast period for a licence area, there should, as far as practicable, be co-location of digital and analog transmitters (paragraph 5(2)(h) of proposed Schedule 4 to the BSA). This is intended to ensure that licensees can use existing transmission infrastructure to transmit their commercial television programs in digital mode. The access regime in Part 5 of proposed Schedule 4 to the BSA is intended to further this objective.

This policy objective is expressed as being required to be achieved ‘as far as is practicable’ because it is recognised that there are certain circumstances where co-location of analog and digital transmitters is not technically possible. The conversion scheme is intended to provide sufficient flexibility to allow broadcasters to elect to locate their digital transmitter at a different site if the ABA is satisfied that other objectives of the scheme are being achieved, in particular, the objective that transmissions in digital mode should achieve the same level of coverage and potential reception quality as is achieved by the transmission in analog mode (see paragraphs 5(2)(e) and (f) of proposed Schedule 4 to the BSA).

End of simulcast period

The ninth policy objective of the conversion scheme (paragraph 5(2)(j) of proposed Schedule 4 to the BSA) is that at the end of the simulcast period analog transmissions of a commercial television broadcasting service are to cease and each commercial television broadcasting licensee for a particular licence area is either:

- (a) to continue transmitting the service in digital mode in that area using the additional channels that were used for digital transmission during the simulcast period (ie retain its digital transmitter licence) and surrender its analog transmitter licence; or
- (b) to transmit the commercial television broadcasting service concerned in digital mode in that area using the channels that were used during the simulcast period to transmit that service in analog mode and surrender its digital transmitter licence.

If the licensee elects to surrender its digital transmitter licence, subclause 7(8) of proposed Schedule 4 to the BSA will require the conversion scheme to make provision for the ACA to vary the conditions of the licensee’s analog transmitter licence to ensure that the licence authorises digital transmission of television programs in the area concerned after the end of the simulcast period.

Continuation of coverage and potential reception quality

The tenth policy objective of the digital conversion scheme is that, after the end of the simulcast period for a licence area, the transmission of a commercial television broadcasting service in digital mode in that area should achieve the same level of coverage and potential reception quality as was achieved by the transmission of that service in analog mode in that area immediately before the end of that period (paragraph 5(2)(k) of proposed Schedule 4 to the BSA).

Datacasting services

The eleventh policy objective of the digital conversion scheme is that commercial television broadcasting licensees should be permitted to use any spare transmission capacity that is available on the digital transmission channels for the purpose of the transmission of datacasting services (paragraph 5(2)(1) of proposed Schedule 4 to the BSA).

The term ‘datacasting service’ is defined in clause 2 of proposed Schedule 4 to the BSA to mean a service (other than a broadcasting service as defined in s. 6 of the BSA) that delivers information (whether in the form of data, text, speech, images or in any other form) to persons having equipment appropriate for receiving that information where the delivery of the service uses the broadcasting services bands and the service is not of a kind specified in the regulations. Paragraph 56(1)(a) in proposed Schedule 4 to the BSA provides that before 1 January 2001 the Minister is to arrange for a review to be conducted to determine the scope of the term ‘datacasting service’. Clause 37 of proposed Schedule 4 to the BSA allows datacasting standards to be determined by the regulations.

Consultation

The twelfth policy objective of the digital conversion scheme is that the ABA is to consult commercial television broadcasting licensees about the implementation of the scheme (paragraph 5(2)(m) of proposed Schedule 4 to the BSA). This is supplemented by the consultation requirements contained in clause 16 of proposed Schedule 4 to the BSA in connection with the formulation or variation of the scheme.

Early commencement of digital transmission in regional licence areas

Subclause 5(3) of proposed Schedule 4 to the BSA makes it clear that nothing in subclause 5(2) prevents the digital conversion scheme from allowing a commercial television broadcasting licensee for a regional licence area to transmit its television programs in digital mode in that area during the whole or a part of the period beginning on 1 January 2001 and ending immediately before the start of the simulcast period for that area, provided the transmission complies with such requirements as are ascertained in accordance with the scheme. This provision is intended to ensure that there is sufficient flexibility in the digital conversion scheme to allow a regional licensee to commence digital transmission before the formal simulcast period begins.

Clause 6 – Scheme may confer administrative powers on the ABA

Clause 6 of proposed Schedule 4 to the BSA enables the commercial television conversion scheme to make provision with respect to a matter by conferring on the ABA a power to make a decision of an administrative character.

Clause 7 – Transmitter licences

Grant of additional spectrum for digital transmission

Subclause 7(1) of proposed Schedule 4 to the BSA provides that the commercial television conversion scheme must make provision for requiring the ACA to issue transmitter licences authorising transmissions of commercial television broadcasting services in digital mode. The issue of these licences is dealt with in proposed section 102A of the Radcom Act (see item 8 of Schedule 2 to the Bill).

Return of spectrum if digital transmission does not begin

Subclause 7(2) of proposed Schedule 4 to the BSA provides that the commercial television conversion scheme must make provision for requiring a commercial television broadcasting licensee to surrender its digital transmitter licence or licences if:

- (a) the licensee does not commence digital transmission in accordance with paragraph 5(2)(a) or of proposed Schedule 4 to the BSA; or
- (b) the holder commences digital transmission in accordance with those requirements but does not continue digital transmission throughout the simulcast period for the licence area concerned;

and the licensee does not satisfy the ABA that there are exceptional circumstances (eg. circumstances beyond the licensee's control).

Return of spectrum at end of simulcast period

At the end of the simulcast period, analog transmissions of a commercial television broadcasting service are to cease and each commercial television broadcasting licensee for a particular licence area is either:

- (a) to continue transmitting the service in digital mode in that area using the additional channels that were used for digital transmission during the simulcast period (ie retain its digital transmitter licence) and surrender its analog transmitter licence; or
- (b) to transmit the commercial television broadcasting service concerned in digital mode in that area using the channels that were used during the simulcast period to transmit that service in analog mode and surrender its digital transmitter licence.

In these circumstances, subclause 7(8) of proposed Schedule 4 to the BSA will require the scheme to make provision to require the ACA to vary the conditions of the analog licence to allow digital transmission.

Subclauses 7(3) and (4) of proposed Schedule 4 to the BSA provide that the commercial television conversion scheme must make provision for requiring the surrender of a transmitter licence or transmitter licences in accordance with paragraphs (a) or (b) above.

Subclause 7(5) of proposed Schedule 4 to the BSA provides that the commercial television conversion scheme must provide that, if a commercial television broadcasting licensee for a licence area fails to notify the ABA, at least 6 months before the end of the simulcast period for that area, whether the licensee intends to pursue the outcome referred to in paragraph (a) or (b) above, the holder is taken to have pursued the outcome referred to in paragraph (a).

Return of spectrum if High Definition Television (HDTV) standards contravened

Subclause 7(6) of proposed Schedule 4 to the BSA provides that the commercial television conversion scheme must make provision for requiring the commercial television broadcasting licensee for a licence area who breaches an HDTV standard under subclause 34(1) of proposed Schedule 4 to the BSA to surrender its digital transmitter licence or digital transmitter licences for that area, unless the licensee satisfies the ABA that there are exceptional circumstances (eg. circumstances beyond the licensee's control).

If a licensee has failed to meet HDTV standards and is required to surrender a digital transmitter licence, the scheme may make provision for requiring the ACA to issue a replacement transmitter licence provided the amount of bandwidth covered by the replacement licence is less than the amount covered by the surrendered licence (subclause 7(7) of proposed Schedule 4 to the BSA). The intention behind this provision is to enable the legislative scheme formulated by the ABA to require a licensee who has breached HDTV standards to operate a digital transmitter that will only be sufficient to provide television programs in standard definition format. In accordance with clause 11 of proposed Schedule 4 to the BSA (which deals with ancillary or incidental provisions), the commercial television conversion scheme will be able to contain rules about how much bandwidth is to be covered by the replacement licence.

Variation of analog transmitter licence to allow digital transmission

Subclause 7(8) of proposed Schedule 4 to the BSA will require the conversion scheme to make provision for requiring that, if a commercial television broadcasting licensee surrenders its digital transmitter licence for a particular licence area at the end of the simulcast period, the ACA must vary the conditions of the licensee's analog transmitter licence to ensure that the licence authorises digital (but not analog) transmission of television programs in the area concerned after the end of the simulcast period.

Clause 8 – Submission of implementation plans to the ABA

Subclause 8(1) of proposed Schedule 4 to the BSA will require the commercial television conversion scheme to make provision for requiring the commercial television broadcasting licensee to prepare, and submit to the ABA, one or more implementation plans relating to digital transmission, where the plans are in accordance with the scheme. It is envisaged that these plans would set out a timetable for the installation and operation of digital transmitters.

Subclause 8(2) will allow the scheme to provide for the variation of implementation plans submitted to the ABA.

Clause 9 – Amendment of certain plans and guidelines

Subclauses 9(1) and (2) of proposed Schedule 4 to the BSA will permit the commercial television conversion scheme to amend:

- (a) the frequency allotment plan or a licence area plan; or
- (b) technical planning guidelines in force under section 33 of the BSA.

In this way, the scheme can operate to amend the key instruments of ‘analog’ planning and maintain consistency between these instruments and the conversion scheme.

Subclause 9(3) of proposed Schedule 4 to the BSA provides that subclauses 9(1) and (2) will not limit the ABA’s powers under sections 25, 26 and 33 of the BSA.

Subsection 26(1) of the BSA requires the ABA to prepare licence area plans determining the number and characteristics, including technical specifications, of broadcasting services that are to be available in particular areas of Australia with the use of the broadcasting services bands. The following are included in the ‘precise detail’ of each licence area plan:

- the areas covered by the licence area;
- the nominal carrier frequencies of the services;
- the nominal transmitter sites for each service;
- the nominal technical conditions for each service, including operating power and radiation pattern.

Licence area plans must be consistent with the relevant frequency allotment plan. (Section 25 of the BSA provides that where the Minister has, under section 31 of the Radcom Act, referred a part of the radio frequency spectrum to the ABA for planning, the ABA must prepare a frequency allotment plan that determines the number of channels that are to be available in particular areas of Australia to provide broadcasting services using that part of

the radiofrequency spectrum. In preparing or varying this plan, the ABA must comply with any directions given to it by the Minister.)

Section 33 of the BSA requires the ABA to develop written guidelines for the technical planning of individual services that use the broadcasting services bands as a means of delivery.

The ABA may therefore make technical planning guidelines that apply to individual services under the commercial television conversion scheme. Compliance with these guidelines and with technical specifications determined by the ABA under subsection 26(1) of the BSA is made a condition of a transmitter licence by reason of paragraphs 109(1)(d) and (e) of the Radcom Act.

Clause 10 – Reviews and reports

Clause 10 of proposed Schedule 4 to the BSA permits the commercial television conversion scheme to provide for the ABA to conduct reviews, and report to the Minister, on specified matters.

Clause 11 – Ancillary or incidental provisions

Clause 11 of proposed Schedule 4 to the BSA permits the commercial television conversion scheme to contain such ancillary or incidental provisions as the ABA considers appropriate.

Clause 12 – ABA to have regard to datacasting allocation power

Subclause 12 of proposed Schedule 4 to the BSA provides that in formulating or varying the commercial television conversion scheme, the ABA will be required to have regard to its power under proposed subsection 34(3) of the BSA (see item 5 of Schedule 1 to the Bill). New subsection 34(3) will allow the ABA to decide that a part or parts of the broadcasting services bands spectrum is or are available for allocation for the purposes of the provision of datacasting services. This provision is designed to allow the ABA, in formulating the spectrum planning phase of the scheme, to provide for mechanisms to identify spectrum which would be suitable for allocation for the purposes of the provision of datacasting services.

Subclause 12(2) provides that subclause 12(1) does not limit the matters to which the ABA may have regard.

Clause 13 – Minister may give directions to the ABA

Subclause 13(1) of proposed Schedule 4 to the BSA requires the ABA, in formulating or varying the commercial television conversion scheme, to comply with any written Ministerial directions given to it.

Subclause 13(2) provides that a Ministerial direction may be of a general or specific nature. Any Ministerial direction will need to be consistent with the policy objectives of the conversion scheme set out in clause 5 of proposed Schedule 4 to the BSA. This is because in formulating or varying the scheme the ABA cannot act in a way contrary to these objectives.

Subclause 13(3) requires the Minister to arrange for a copy of a direction under subclause 13(1) to be published in the Commonwealth *Gazette* within 14 days after the direction is given.

Clause 14 – Variation of scheme

Subclause 14(1) of proposed Schedule 4 to the BSA permits the commercial television conversion scheme to be varied, but not revoked, in accordance with subsection 33(3) of the *Acts Interpretation Act 1901*. This will permit variations of the scheme in the same manner and subject to the same conditions applying to the formulation of the original scheme.

Subclause 14(2) of proposed Schedule 4 to the BSA provides that subclause 14(1) will not limit the application of subsection 33(3) of the *Acts Interpretation Act 1901* to other instruments under the BSA (see, for example, cls. 48 and 58 of proposed Schedule 4 to the BSA). This will allow the ABA to revoke or vary any such instruments in the same manner and subject to the same conditions (if any) as applied to the making of the original instruments.

Clause 15 – Scheme to be a disallowable instrument

Clause 15 of proposed Schedule 4 to the BSA provides that the commercial television conversion scheme formulated by the ABA under subclause 5(1) of that Schedule is a disallowable instrument. The scheme must therefore be notified in the Commonwealth *Gazette*, tabled in the Parliament and will be subject to Parliamentary disallowance.

Clause 16 – Processes to be public

Clause 16 of proposed Schedule 4 to the BSA provides that in formulating or varying the commercial television conversion scheme, the ABA must make provision for public consultation as well as consultation with the free to air television broadcasters and the ACA. It is intended that the requirement for public consultation would include consultation with those persons interested in providing datacasting services. It is also intended that all those consulted would be given an adequate opportunity to comment.

Part 3 - ABC/SBS television

Clause 17 – National television conversion scheme

Overview

Clause 17 of proposed Schedule 4 to the BSA will require the ABA, as soon as practicable after the Bill receives Royal Assent, to formulate in writing a legally binding scheme for the conversion, over time, of the transmission of national television broadcasting services from analog mode to digital mode.

The scheme to be formulated by the ABA must be directed to ensuring the achievement of the policy objectives set out in subclause 17(2) of proposed Schedule 4 to the BSA.

In formulating the scheme the ABA is required to consult with the public, the free to air television broadcasters and the ACA.

The scheme, once formulated must be submitted by the ABA to the Minister for approval. Once approved the scheme must be tabled in Parliament and will be subject to Parliamentary disallowance.

Clause 29 of proposed Schedule 4 to the BSA provides that the national television conversion scheme, or a variation of the scheme, will not take effect unless and until it is approved by the Minister.

Clause 31 of proposed Schedule 4 to the BSA requires a national broadcaster to comply with the national television scheme. Paragraph 8(1)(d) of the *Australian Broadcasting Corporation Act 1983* provides that one of the duties of the ABC Board is to ensure that the ABC does not contravene, or fail to comply with, any of the provisions of a Commonwealth Act that are applicable to the ABC (see also subsection 38(1) of the *Acts Interpretation Act 1901*). Paragraph 10(1)(d) of the *Special Broadcasting Service Act 1991* provides that one of the duties of the SBS Board is to ensure that the SBS does not contravene any Commonwealth Act. Accordingly, it is part of the duties of the ABC Board and the SBS Board to comply with clause 31 of proposed Schedule 4 to the BSA.

Once the scheme is in place, the ABC and SBS will be able, of their own volition or if directed to do so by the Minister, to submit an implementation plan to the Minister indicating the stages and a timetable for the conversion of ABC or SBS television services from transmitting in analog to transmitting in digital mode.

The Minister must either approve or refuse to approve the proposed plan. In the event that the Minister refuses to approve the plan, the ABC or SBS may submit further plans.

In deciding whether to approve the plan, the Minister must have regard to the objectives for the national television conversion scheme, the objective that the ABC and SBS should be required to commence transmitting television in digital mode on 1 January 2001 in

metropolitan areas and on or after 1 January 2001 but before 1 January 2004 in regional areas and such other matters that the Minister considers relevant (taking into account the Minister's overall planning responsibilities for national broadcasting services and the Minister's accountability to Parliament for the operation of the ABC and SBS).

Once the implementation plan is approved by the Minister, it comes into force and the boards of the SBS and the ABC will be bound to comply with the plan (see paragraph 8(1)(d) of the *Australian Broadcasting Corporation Act 1983* and paragraph 10(1)(d) of the *Special Broadcasting Service Act 1991*).

Digital national television broadcasting services in the metropolitan areas of Sydney, Melbourne, Brisbane, Perth and Adelaide must commence by 1 January 2001. In all other areas, these services must start in each regional licence area on a date to be approved by the Minister in the implementation plan such date to be after 1 January 2001 but so that all other areas have digital transmission of the service by 1 January 2004.

National broadcasters are required to continue provision of a national television broadcasting service throughout a simulcast period for a particular coverage area which is to run for a period of time to be determined by the Minister. The Minister is to have regard to the end of the simulcast period for commercial television broadcasting services in that particular area when determining the simulcast period.

If a national broadcaster fails to commence or to continue transmission throughout the simulcast period in accordance with an approved implementation plan, then the scheme will provide that a national broadcaster is required to surrender their transmitter licence which authorises digital transmission (unless the national broadcaster can satisfy the ABA that exceptional circumstances exist).

Standards may be made by regulation under clause 34 which will require a national broadcaster to meet specified goals or targets for transmission of programs in HDTV. The scheme must make provision for either requiring surrender of the transmitter licence; or issuing a replacement licence which is sufficient to enable transmission of a digital television service, but which does not enable transmission in HDTV format.

Policy objectives

The national television conversion scheme will be required to be directed to ensuring the achievement of the policy objectives set out in subclause 17(2) of proposed Schedule 4 to the BSA.

Commencement of digital television

The first policy objective of the conversion scheme is that the ABC and SBS will be required to commence transmitting the national television broadcasting service concerned in digital mode in metropolitan coverage areas on 1 January 2001 (paragraphs 17(2)(a) and 18(3)(a) of proposed Schedule 4 to the BSA). A metropolitan coverage area is defined in clause 2 of

proposed Schedule 4 to the BSA to mean an area that corresponds to a metropolitan licence area. A metropolitan licence area is defined in clause 2 of proposed Schedule 4 to the BSA to mean, in effect, a licence area that includes the GPO of the capital city of a mainland State.

The second policy objective of the conversion scheme is that the ABC and SBS be required to commence transmitting the national television broadcasting service concerned in digital mode in regional coverage areas on or after 1 January 2001 so that all such areas have digital transmission of the service by 1 January 2004 (paragraphs 17(2)(b) and 18(3)(a) of proposed Schedule 4 to the BSA). A regional coverage area is defined in clause 2 of proposed Schedule 4 to the BSA to mean an area that corresponds to a regional licence area. A regional licence area is defined to mean a licence area that is not a metropolitan licence area.

Simulcast period

The third policy objective of the conversion scheme is that there should be a transitional period for metropolitan and regional coverage areas throughout which the ABC and SBS will be required to simulcast their television programs in both analog and digital modes.

Subclause 17(4) of proposed Schedule 4 to the BSA requires that, for each coverage area, the Minister must make a written determination specifying the duration of the simulcast period for that area. Subclause 17(5) provides that in making such a determination, the Minister must have regard to the end of the simulcast period that is applicable to commercial television broadcasting services in the licence area that corresponds to the coverage area concerned and such other matters as the Minister considers relevant.

In a metropolitan coverage area the simulcast period is also to begin on 1 January 2001. In a regional coverage area, the simulcast period is to begin on or after 1 January 2001 with the aim of ensuring that all regional coverage areas have digital transmission of national broadcasting services by 1 January 2004 (paragraph 17(2)(c) of proposed Schedule 4 to the BSA).

Clause 32 deals with additional simulcasting requirements for the ABC and SBS.

Additional channels

The fourth policy objective of the conversion scheme is that, throughout the simulcast period for a coverage area, the ABC and SBS should be authorised, under one or more transmitter licences, to use additional spectrum to transmit the national television broadcasting service concerned in digital mode in that area (paragraph 17(2)(d) of proposed Schedule 4 to the BSA).

The fifth policy objective of the conversion scheme is that the additional channels should occupy the same amount of bandwidth as the channels used by the ABC and SBS for a particular coverage area to transmit the national broadcasting service concerned in analog mode in that area (paragraph 17(2)(e) of proposed Schedule 4 to the BSA).

The intention underlying these policy objectives is that the ABC and SBS are to be required to be allocated sufficient additional television spectrum to enable them to simulcast their analog television programs in digital mode.

Coverage and potential reception quality

The sixth policy objective of the conversion scheme is that throughout a simulcast period for a metropolitan coverage area the transmission of a national television broadcasting service in digital mode in that area should achieve the same level of coverage and potential reception quality as is achieved by the transmission of that service in analog mode in that area (paragraph 17(2)(f) of proposed Schedule 4 to the BSA).

Reception quality can only be specified as ‘potential’ as the actual reception quality will depend on the quality of the receiver and antennae being used.

The seventh policy objective of the conversion scheme is that, as soon as practicable after the start of the simulcast period for a regional coverage area, and throughout the remainder of that period, the transmission of a national television broadcasting service in digital mode in that area is to achieve the same level of coverage and potential reception quality as is achieved by the transmission of that service in analog mode in that area (paragraph 17(2)(g) of proposed Schedule 4 to the BSA).

A further policy objective in paragraph 17(2)(k) of proposed Schedule 4 to the BSA is aimed at ensuring that coverage and reception quality objectives applying throughout the simulcast period will continue to apply after the end of the simulcast period.

Co-location

The eighth policy objective of the conversion scheme is that, during the simulcast period for a licence area, there should, as far as practicable, be co-location of digital and analog transmitters (paragraph 17(2)(h) of proposed Schedule 4 to the BSA). The access regime in Part 5 of proposed Schedule 4 to the BSA is intended to further this objective.

This policy objective is expressed as being required to be achieved ‘as far as is practicable’ because it is recognised that there are certain circumstances where co-location of analog and digital transmitters is not technically possible. The conversion scheme is intended to provide sufficient flexibility to allow national broadcasters to elect to locate their digital transmitter at a different site if the ABA is satisfied that other objectives of the scheme are being achieved, in particular, the objective that transmissions in digital mode should achieve the same level of coverage and potential reception quality as is achieved by the transmission in analog mode (see paragraphs 17(2)(e) and (t) of proposed Schedule 4 to the BSA).

End of simulcast period

The ninth policy objective of the conversion scheme (paragraph 17(2)(j) of proposed Schedule 4 to the BSA) is that at the end of the simulcast period for a coverage area,

analog transmissions of national television broadcasting services are to cease and the ABC and SBS are either:

- (a) to continue transmitting the service concerned in digital mode in that area using the additional channels that were used for digital transmission during the simulcast period (ie retain their digital transmitter licences) and surrender their analog transmitter licences; or
- (b) to transmit the national television broadcasting service concerned in digital mode in that area using the channels that were used during the simulcast period to transmit that service in analog mode and surrender their digital transmitter licences.

If the ABC or SBS surrenders its digital transmitter licence, subclause 21(8) of proposed Schedule 4 to the BSA will require the conversion scheme to make provision for the ACA to vary the conditions of the ABC's or SBS's analog transmitter licence to ensure that the licence authorises digital (but not analog) transmission of the national broadcasting service concerned in the area concerned after the end of the simulcast period.

Continuation of coverage and potential reception quality

The tenth policy objective of the digital conversion scheme is that, after the end of the simulcast period for a coverage area, the transmission of a national television broadcasting service in digital mode in that area should achieve the same level of coverage and potential reception quality as was achieved by the transmission of that service in analog mode in that area immediately before the end of that period (paragraph 17(2)(k) of proposed Schedule 4 to the BSA).

Datacasting services

The eleventh policy objective of the digital conversion scheme is that the ABC and SBS should be permitted to use any spare transmission capacity that is available on the digital transmission channels for the purpose of the transmission of datacasting services (paragraph 17(2)(1) of proposed Schedule 4 to the BSA).

The term 'datacasting service' is defined in clause 2 of proposed Schedule 4 to the BSA to mean a service (other than a broadcasting service as defined in s. 6 of the BSA) that delivers information (whether in the form of data, text, speech, images or in any other form) to persons having equipment appropriate for receiving that information where the delivery of the service uses the broadcasting services bands and the service is not of a kind specified in the regulations. Paragraph 56(1)(a) of proposed Schedule 4 to the BSA provides that before 1 January 2001 the Minister is to arrange for a review to be conducted to determine the scope of the term 'datacasting service'. Clause 37 of proposed Schedule 4 to the BSA allows datacasting standards to be determined by the regulations.

Consultation

The twelfth policy objective of the national television conversion scheme is that the ABA is to consult the ABC and SBS about the implementation of the scheme (paragraph 17(2)(m) of

proposed Schedule 4 to the BSA). This is supplemented by the consultation requirements contained in clause 30 of proposed Schedule 4 to the BSA in connection with the formulation or variation of the scheme.

Early commencement of digital transmission in regional coverage areas

Subclause 17(3) of proposed Schedule 4 to the BSA makes it clear that nothing in subclause 17(2) prevents the national television conversion scheme from allowing the ABC or SBS to transmit its television programs in digital mode in a regional coverage area during the whole or a part of the period beginning on 1 January 2001 and ending immediately before the start of the simulcast period for that area provided the transmission complies with such requirements as are ascertained in accordance with the scheme. This provision is intended to ensure that there is sufficient flexibility in the digital conversion scheme to allow the ABC and SBS to commence digital transmission in a regional coverage area before the formal simulcast period begins.

Clause 18 – National broadcasters to give implementation plans to the Minister

The ABC and SBS:

- (a) will be able, of their own volition; and
- (b) will be required, if and when required to do so by the Minister;

to give the Minister one or more implementation plans relating to the conversion, over time, of the transmission of the national television broadcasting service concerned from analog mode to digital mode (subclause 18(1) of proposed Schedule 4 to the BSA).

It is envisaged that these plans would set out a timetable for the installation and operation of digital transmitters.

The Minister must either approve or refuse to approve an implementation plan given to him under clause 18 (subclause 18(2)).

In deciding whether to approve an implementation plan, the Minister must have regard to the following matters:

- (a) whether the implementation plan is directed towards ensuring the achievement of the following policy objectives:
 - (i) the objective that the ABC and SBS should be required to commence transmitting the national broadcasting service concerned in digital mode in each metropolitan coverage area on 1 January 2001;
 - (ii) the objective that the ABC and SBS should be required, on or after 1 January 2001, to commence transmitting the national television broadcasting service concerned in digital mode to regional coverage areas so that all digital transmission is commenced in regional coverage areas by 1 January 2004; and

- (b) the policy objectives mentioned in subclause 17(2); and
- (c) such other matters (if any) as the Minister considers relevant (subclause 18(3)).

Before deciding whether to approve an implementation plan, the Minister may direct the ABA to give the Minister a report about the matter (subclause 18(4)).

An implementation plan comes into force once it is approved by the Minister (subclause 18(5)).

If the Minister refuses to approve an implementation plan, the Minister may require the ABC and SBS to give him a fresh implementation plan (subclause 18(6)).

If the implementation plan is to be varied, subclauses 18(1) to (6) apply to the giving or approval of a variation of the plan in a corresponding way to the way in which they apply to the giving or approval of a plan (subclause 18(7)).

Clause 19 – Compliance with implementation plans

Clause 19 of proposed Schedule 4 to the BSA provides that if an implementation plan given to the Minister by the ABC or SBS is in force, the ABC or SBS must comply with the plan.

Paragraph 8(1)(d) of the *Australian Broadcasting Corporation Act 1983* provides that one of the duties of the ABC Board is to ensure that the ABC does not contravene, or fail to comply with, any of the provisions of a Commonwealth Act that are applicable to the ABC (see also subsection 38(1) of the *Acts Interpretation Act 1901*).

Paragraph 10(1)(d) of the *Special Broadcasting Service Act 1991* provides that one of the duties of the SBS Board is to ensure that the SBS does not contravene any Commonwealth Act.

Accordingly, it will be part of the duties of the ABC Board and the SBS Board to comply with its implementation plan in accordance with clause 19 of proposed Schedule 4 to the BSA.

Clause 20 – Scheme may confer administrative powers on the ABA

Clause 20 of proposed Schedule 4 to the BSA enables the national television conversion scheme to make provision with respect to a matter by conferring on the ABA a power to make a decision of an administrative character.

Clause 21 – Transmitter licences

Grant of additional spectrum for digital transmission

Subclause 21 (1) of proposed Schedule 4 to the BSA provides that the national television conversion scheme must make provision for requiring the ACA to issue transmitter licences

authorising transmissions of national television broadcasting services in digital mode. The issue of these licences is dealt with in proposed section 100B of the Radcom Act (see item 6 of Schedule 2 to the Bill).

Return of spectrum if digital transmission does not begin

Subclause 21(2) of proposed Schedule 4 to the BSA provides that the national television conversion scheme must make provision for requiring the ABC and SBS to surrender their digital transmitter licence or licences if:

- (a) they do not commence digital transmission in accordance with paragraph 17(2)(a) or (b) of proposed Schedule 4 to the BSA; or
- (b) they commence digital transmission in accordance with those requirements but do not continue digital transmission throughout the simulcast period for the coverage area concerned;

and the ABC and SBS do not satisfy the ABA that there are exceptional circumstances (eg. circumstances beyond their control).

Return of spectrum at end of simulcast period

At the end of the simulcast period, analog transmissions of national television broadcasting services are to cease and the ABC and SBS are either:

- (a) To continue transmitting these services in digital mode using the additional channels that were used for digital transmission during the simulcast period (ie retain their digital transmitter licences) and surrender their analog transmitter licences; or
- (b) To transmit these services in digital mode using the channels that were used during the simulcast period to transmit that service in analog mode and surrender their digital transmitter licences.

Subclauses 21(3) and (4) of proposed Schedule 4 to the BSA provide that the national television conversion scheme must make provision for requiring the surrender of a transmitter licence or transmitter licences in accordance with paragraphs (a) or (b).

Subclause 21(5) of proposed Schedule 4 to the BSA provides that the national television conversion scheme must provide that, if a national broadcaster fails to notify the ABA, at least 6 months before the end of the simulcast period for a coverage area, whether the broadcaster intends to pursue the outcome referred to in paragraph (a) or (b) above, the broadcaster is taken to have pursued the outcome referred to in paragraph (a).

Return of spectrum if High Definition Television (HDTV) standards contravened

Subclause 21(6) of proposed Schedule 4 to the BSA provides that the national television conversion scheme must make provision for requiring a national broadcaster who breaches an HDTV standard under subclause 34(1) of proposed Schedule 4 to the BSA to surrender its

digital transmitter licence or digital transmitter licences for the coverage area concerned, unless the broadcaster satisfies the ABA that there are exceptional circumstances (eg. circumstances beyond the national broadcaster's control).

If the ABC or SBS has failed to meet HDTV standards and is required to surrender a digital transmitter licence, the scheme may make provision for requiring the ACA to issue a replacement transmitter licence, provided the amount of bandwidth covered by the replacement licence is less than the amount covered by the surrendered licence (subclause 21(7) of proposed Schedule 4 to the BSA). The intention behind this provision is to enable the legislative scheme formulated by the ABA to require a licensee who has breached HDTV standards to operate a digital transmitter that will only be sufficient to provide television programs in standard definition format. In accordance with clause 24 of proposed Schedule 4 to the BSA (which deals with ancillary or incidental provisions), the national television conversion scheme will be able to contain rules about how much bandwidth is to be covered by the replacement licence.

Variation of analog transmitter licence to allow digital transmission

Subclause 21 (8) of proposed Schedule 4 to the BSA will require the conversion scheme to make provision for requiring that, if the ABC or SBS surrenders its digital transmitter licence for a particular coverage area at the end of the simulcast period, the ACA must vary the conditions of the ABC's or SBS's analog transmitter licence to ensure that the licence authorises digital transmission of television programs in the area concerned after the end of the simulcast period.

Clause 22 – Amendment of certain plans and guidelines

Subclauses 22(1) and (2) of proposed Schedule 4 to the BSA will permit the national television conversion scheme to amend:

- (a) the frequency allotment plan or a licence area plan; or
- (b) technical planning guidelines in force under section 33 of the BSA.

Subclause 22(3) of proposed Schedule 4 to the BSA provides that subclauses 22(1) and (2) will not limit the ABA's powers under sections 25, 26 and 33.

Subsection 26(1) of the BSA requires the ABA to prepare licence area plans determining the number and characteristics, including technical specifications, of broadcasting services that are to be available in particular areas of Australia with the use of the broadcasting services bands. The following are included in the 'precise detail' of each licence area plan:

- the areas covered by the licence area;
- the nominal carrier frequencies of the services;

- the nominal transmitter sites for each service;
- the nominal technical conditions for each service, including operating power and radiation pattern.

Licence area plans must be consistent with the relevant frequency allotment plan. (Section 25 of the BSA provides that where the Minister has, under section 31 of the Radcom Act, referred a part of the radiofrequency spectrum to the ABA for planning, the ABA must prepare a frequency allotment plan that determines the number of channels that are to be available in particular areas of Australia to provide broadcasting services using that part of the radiofrequency spectrum. In preparing or varying this plan, the ABA must-comply with any directions given to it by the Minister.)

Section 33 of the BSA requires the ABA to develop written guidelines for the technical planning of individual services that use the broadcasting services bands as a means of delivery.

Clause 23 - Reviews and reports

Clause 23 of proposed Schedule 4 to the BSA permits the national television conversion scheme to provide for the ABA to conduct reviews, and report to the Minister, on specified matters.

Clause 24 - Ancillary or incidental provisions

Clause 24 of proposed Schedule 4 to the BSA permits the national television conversion scheme to contain such ancillary or incidental provisions as the ABA considers appropriate.

Clause 25 - ABA to have regard to datacasting allocation power

Subclause 25(1) of proposed Schedule 4 to the BSA provides that in formulating or varying the national television conversion scheme, the ABA will be required to have regard to its power under proposed subsection 34(3) of the BSA (see item 5 of Schedule 1 to the Bill). New subsection 34(3) will allow the ABA to decide that a part or parts of the broadcasting services bands spectrum is or are available for allocation for the purposes of the provision of datacasting services. This provision is designed to allow the ABA, in formulating the spectrum planning phase of the scheme, to provide for mechanisms to identify spectrum which would be suitable for allocation for the purposes of the provision of datacasting services.

Subclause 25(2) provides that subclause 25(1) does not limit the matters to which the ABA may have regard.

Clause 26 - Minister may give directions to the ABA

Subclause 26(1) of proposed Schedule 4 to the BSA requires the ABA, in formulating or varying the national television conversion scheme, to comply with any written Ministerial directions given to it.

Subclause 26(2) provides that a Ministerial direction may be of a general or specific nature. Any Ministerial direction will need to be consistent with the policy objectives of the conversion scheme set out in clause 17 of proposed Schedule 4 to the BSA. This is because in formulating or varying the scheme the ABA cannot act in a way contrary to these objectives.

Subclause 26(3) requires the Minister to arrange for a copy of a direction under subclause 26(1) to be published in the *Commonwealth Gazette* within 14 days after the direction is given.

Clause 27 - Variation of scheme

Subclause 27(1) of proposed Schedule 4 to the BSA permits the national television conversion scheme to be varied, but not revoked, in accordance with subsection 33(3) of the *Acts Interpretation Act 1901*. This will permit variations of the scheme in the same manner and subject to the same conditions applying to the formulation of the original scheme.

Subclause 27(2) of proposed Schedule 4 to the BSA provides that subclause 27(1) will not limit the application of subsection 33(3) of the *Acts Interpretation Act 1901* to other instruments under the BSA (see, for example, cls. 48 and 58 of proposed Schedule 4 to the BSA). This will allow the ABA to revoke or vary any such instruments in the same manner and subject to the same conditions (if any) as applied to the making of the original instruments.

Clause 28 - Scheme to be a disallowable instrument

Clause 28 of proposed Schedule 4 to the BSA provides that the national television conversion scheme formulated by the ABA under subclause 17(1) of that Schedule is a disallowable instrument. The scheme must therefore be notified in the *Commonwealth Gazette*, tabled in the Parliament and will be subject to Parliamentary disallowance.

Clause 29 - Scheme does not take effect until approved by the Minister

Clause 29 of proposed Schedule 4 to the BSA provides that the national television conversion scheme, or a variation of the scheme, will not take effect unless and until it is approved by the Minister.

Clause 30 - Processes to be public

Clause 30 of proposed Schedule 4 to the BSA provides that in formulating or varying the national television conversion scheme, the ABA must make provision for public consultation as well as consultation with the free to air television broadcasters and the ACA.

It is intended that those consulted will be given an adequate opportunity to comment.

Clause 31 - Compliance with scheme

Clause 31 of Schedule 4 to the BSA requires a national broadcaster to comply with the national television conversion scheme. In accordance with paragraph 8(1)(d) of the *Australian Broadcasting Corporation Act 1983* and paragraph 10(1)(d) of the *Special Broadcasting Service Act 1991* it will be part of the duties of the ABC Board and the SBS Board to comply with the scheme.

Clause 32 - Simulcasting requirements

Clause 32 of proposed Schedule 4 to the BSA provides that the ABC or SBS will not be able to broadcast a television program in digital mode during the simulcast period for a coverage area unless:

- (a) the program is broadcast simultaneously by the ABC or SBS in analog mode in that area; or
- (b) under the regulations, the program is treated as incidental and directly linked to a program
- (c) that is broadcast simultaneously by the ABC or SBS in analog mode in that area; or
- (d) the program is of a kind that is declared by the regulations to be exempt from clause 32.

A Ministerial review is to be conducted before 1 January 2001 to determine the scope of the regulations referred to in paragraph (b) above (see paragraph 56(1)(a) of proposed Schedule 4 to the BSA). Subject to this review, it is envisaged that this condition would allow the ABC and the SBS to transmit multi-view programming and other incidental video material directly linked to the analog simulcast. The regulations could, for example, permit different visual representations of the same event, filmed within the confines of the event, such as the ability to view the event from different camera angles. The concept of programs being 'incidental' and 'directly linked' will be able to be more closely defined in the regulations, in order to prevent de facto multi-channelling.

Regulations will also be able to be made under paragraph (c) above to exempt a specified kind of program from the operation of clause 32. This is intended to enable regulations to be made which authorise the provision of multi-channel programming which is consistent with the national broadcasters' Charter and functions and which will not unfairly compete with multi-channel programming provided by subscription television broadcasting licensees. The statutory review referred to in paragraph 56(1)(a) of proposed Schedule 4 to the BSA will include a review into the appropriate content of regulations under paragraph (c) above.

Clause 33 - Digital transmitter not to be used to provide a subscription television broadcasting service etc.

Clause 33 of proposed Schedule 4 to the BSA contains a prohibition on the use of digital

transmitters by national broadcasters that corresponds to the prohibition to be imposed on commercial television broadcasting licensees under proposed paragraph 7(1)(p) of Schedule 2 to the BSA).

Under clause 33, if a national broadcaster holds a broadcasting transmitter licence required to be issued under s. 100B of the Radcom Act (which deals with NBS transmitter licences required to be issued under digital conversion schemes) that authorises the operation of a transmitter for transmitting the national broadcasting service concerned in digital mode, the national broadcaster must not operate, or permit the operation of, that transmitter to transmit in digital mode:

- a commercial broadcasting service that provides radio programs -commercial radio broadcasting is governed by commercial radio broadcasting licences granted by the ABA under Part 4 of the BSA;
- a subscription television broadcasting service -this service is governed by the licensing provisions In Part 7 of the BSA that apply to ‘subscription television broadcasting services’, or
- a subscription radio broadcasting service or an open or subscription narrowcasting service - these services are governed by class licences under Part 8 of the BSA.

Part 4 -Standards

Clause 34 - Digital television format standards

Under clause 34 of proposed Schedule 4 to the BSA, regulations will be required to be made to determine standards that require free to air television broadcasters to meet specified goals or targets in relation to the extent to which television programs, or specified kinds of television programs, are transmitted in accordance with a specified High Definition Television (HDTV) format for the transmission of television programs in digital mode (proposed subclause 34(1)). The regulations will also be able to determine other standards that are to be observed by free to air television' broadcasters in relation to the format in which television programs are to be transmitted in digital mode (proposed subclause 34(2)). The ABC and SBS will be required to comply with digital television format standards (proposed subclause 34(3)). In accordance with paragraph 8(1)(d) of the *Australian Broadcasting Corporation Act 1983* and paragraph 10(1)(d) of the *Special Broadcasting Service Act 1991* it will be part of the duties of the ABC Board and the SBS Board to comply with such standards.

Under proposed paragraph 7(1)(n) of Schedule 2 to the BSA (see item 10 of Schedule 1 to the Bill) it will be a standard licence condition of a commercial television broadcasting licence that the licensee comply with standards applicable to the licence under clause 34 of proposed Schedule 4 to the BSA. A breach of this licence condition will attract, in the case of an individual, a pecuniary penalty of 2,000 penalty units and, in the case of a body corporate, 10,000 penalty units: see BSA s. 139(1) and the Crimes Act 1914, s. 4B(3).

Clause 35 - Captioning standards

Subclause 35(1) of proposed Schedule 4 to the BSA requires regulations to be developed to determine standards that are to be observed by free to air television broadcasters in relation to the captioning of television programs for the deaf and hearing impaired. It is intended that these standards would be required to be observed by free to air television broadcasters in relation to programs transmitted in both analog and digital mode.

Without limiting the generality of subclause (1), captioning standards must require free to air broadcasters to meet specified goals or targets in relation to the extent to which television programs, or specified kinds of television programs, are captioned for the deaf and hearing impaired (proposed subclauses 35(2) and (3)).

Captioning standards are to be directed towards ensuring the achievement of the objectives that, as far as is practicable, the free to air television broadcasters should:

- (a) provide a captioning service for television programs transmitted during prime viewing hours; and
- (b) provide a captioning service for television news programs, and television current affairs programs, transmitted outside prime viewing hours (proposed subclause 35(4)).

The captioning standards requirement has been formulated in a way which takes into account possible practical difficulties in providing a captioning service for all program material (eg. television programs transmitted 'live to air').

For the purposes of subclause 35(4), 'prime viewing hours' are the hours:

- (a) beginning at 6pm each day or, if another time is prescribed by the regulations, beginning at that prescribed time each day; and
- (b) ending at 10.30pm on the same day or, if another time is prescribed by the regulations, ending at that prescribed time on the same day (proposed subclause 35(5)).

Subclause 35(6) makes it clear, however, that a particular free to air television broadcaster will not be required to observe captioning standards provided for in the regulations before the first occasion on or after 1 January 2001 on which the broadcaster broadcasts television programs in digital mode.

Captioning may be either 'open' or 'closed'. Closed captioning constitutes teletext based supertext subtitles on television programs for the benefit of people with a hearing loss. Closed captions are more extensive than subtitles, because they give a written description of background noises as well as what is actually being said. Being a teletext service, closed captioning is not a broadcasting service for the purposes of the BSA. Closed captions require a decoder in order for the captions to be seen. By contrast, open captions are 'burned in' to program footage and can be seen at any time.

Closed captioning is currently dealt with in industry codes of practice developed by representatives of commercial broadcasting licensees in consultation with the ABA. Codes of practice may relate, amongst other things, to captioning of programs for the hearing impaired (paragraph 123(2)(i) of the BSA).

It is envisaged that these current Codes of Practice will remain and will elaborate upon the standards set out in the regulations.

The ABC and SBS will be required to comply with captioning standards (proposed subclause 35(7)). In accordance with paragraph 8(1)(d) of the *Australian Broadcasting Corporation Act 1983* and paragraph 10(1)(d) of the *Special Broadcasting Service Act 1991* it will be part of the duties of the ABC Board and the SBS Board to comply with such standards.

Under proposed paragraph 7(1)(o) of Schedule 2 to the BSA (see item 10 of Schedule 1 to the Bill) it will be a standard licence condition of a commercial television broadcasting licence that the licensee comply with standards applicable to the licence under clause 35 of proposed Schedule 4 to the BSA. A breach of this licence condition will attract, in the case of an individual, a pecuniary penalty of 2,000 penalty units and, in the case of a body corporate, 10,000 penalty units: see BSA s. 139(1) and the *Crimes Act 1914*, s. 4B(3).

Clause 36 - Technical standards for digital transmission of television broadcasting services

Subclause 36(1) of proposed Schedule 4 to the BSA enables regulations to determine standards that:

- (a) relate to the transmission of free to air television programs in digital mode; and
- (b) are to be followed by the ABA in formulating or varying the commercial television conversion scheme or the national television conversion scheme.

Subclauses 36(2) and (3) require the commercial television scheme and the national television conversion scheme to be consistent with any technical standards determined under subclause 36(1).

Clause 37 - Datacasting standards

Subclause 37(1) of proposed Schedule 4 to the BSA allows the regulations to determine standards to be observed by the free to air television broadcasters and others in relation to the provision by them of datacasting services transmitted in digital mode.

The term 'datacasting service' is defined in clause 2 of proposed Schedule 4 to the BSA to mean a service (other than a broadcasting service as defined in s. 6 of the BSA) that delivers information (whether in the form of data, text, speech, images or in any other form) to persons having equipment appropriate for receiving that information where the delivery of the service uses the broadcasting services bands and the service is not of a kind specified in the regulations. Paragraph 56(1)(a) in proposed Schedule 4 to the BSA provides that before 1 January 2001 the Minister is to arrange for a review to be conducted to determine the scope of the term 'datacasting service'.

Subclause 37(2) of proposed Schedule 4 to the BSA provides that if a transmitter licence authorises the transmission of datacasting services in digital mode, then, in addition to any conditions to which that licence is subject under the *Radiocommunications Act 1992*, the licence is taken to be subject to a condition that the licensee and any person authorised by the licensee, must comply with datacasting standards under subclause 37(1).

Clause 38 - Standards may incorporate other instruments

Clause 38 of proposed Schedule 4 to the BSA provides that section 589 of the *Telecommunications Act 1997* will apply to regulations made for the purposes of Part 4 of proposed Schedule 4 to the BSA in a corresponding way to the way in which it applies to an instrument under the *Telecommunications Act*.

This means that notwithstanding anything in the *Acts Interpretation Act 1901* (see in particular s. 49A of that Act) or in the proposed *Legislative Instruments Act 1997*, regulations made for the purposes of Part 4 of proposed Schedule 4 to the BSA will be able to make provision in relation to a matter by applying, adopting, or incorporating (with or

without modifications) provisions of any Commonwealth Act as in force at a particular time or as in force from time to time.

In addition, notwithstanding anything in the Acts Interpretation Act or in the proposed Legislative Instruments Act, regulations made for the purposes of Part 4 of proposed Schedule 4 to the BSA will be able to make provision in relation to a matter by applying, adopting or incorporating (with or without modifications) matter contained in any other instrument or writing whatever as in force or existing at a particular time or from time to time even if the other instrument or writing does not yet exist when the regulations under Part 4 of proposed Schedule 4 to the BSA are made. The reference to ‘writing’ will include any mode of representing or reproducing words, figures, drawings or symbols in a visible form (see s. 25 of the *Acts Interpretation Act 1901*).

The reference in the preceding paragraph to any other instrument or writing is defined widely in subsection 589(3) of the *Telecommunications Act 1997* to include a reference to an instrument or writing made by any person or body in Australia or elsewhere (including, for example, the Commonwealth, a State or Territory or one of its officers or authorities or an overseas entity) whatever its nature and whether or not it has legal force or effect. Examples will include:

- regulations or rules under a Commonwealth Act;
- a State Act, a Territory law or regulations or any other instrument made under such an Act or law;
- an international technical standard or performance indicator; or
- a written agreement such as a contract or an arrangement or an instrument or writing made unilaterally.

Part 5 -Transmitter access regime

Part 5 of proposed Schedule 4 to the BSA imposes obligations on the owner or operator of a broadcasting transmission tower to provide:

- commercial television broadcasting licensees and the ABC and SBS with access to the tower, and the site of the tower, for the purpose of installing or maintaining a transmitter and associated facilities for use in transmitting television broadcasting services in digital mode; and
- a datacaster with access to the tower, and the site of the tower, for the purpose of installing or maintaining a transmitter and associated facilities for use in providing datacasting services in digital mode.

Part 7 of proposed Schedule 4 to the BSA provides an access seeker or the ABA with a right to seek an injunction from the Federal Court if the access requirements of Part 5 have been contravened, are being contravened, or are proposed to be contravened.

The Part 5 access regime is based on the relatively simple and robust access regime in Part 5 of Schedule 1 to the *Telecommunications Act 1997*, which gives telecommunications carriers rights of access to other carriers' transmission towers and sites.

The National Transmission Network Sale Bill uses a different access regime based on Part XIC of the *Trade Practices Act 1974*. The National Transmission Network Sale Bill access regime gives access rights to certain public interest users for both:

- access to transmission services for the carriage of signals; and
- access to sites and towers to install facilities.

Rather than applying two different access regimes for access to services and facilities, the National Transmission Network access regime used the access to services model in Part XIC of the Trade Practices Act as that model was more appropriate to apply in the context of provisions giving access to services and as a means of simplifying the legislation involved.

Clause 39 - Simplified outline

Clause 39 of proposed Schedule 4 to the BSA provides a simplified outline of Part 5 of that Schedule to assist readers.

Clause 40 - Definitions

Clause 40 of proposed Schedule 4 to the BSA sets out the key definitions used in Part 5.

A 'broadcasting transmission tower' is defined to mean any tower, pole, mast or similar structure that is used to supply a broadcasting service by means of radiocommunications. 'Radiocommunications' is to have the same meaning as in the *Radiocommunications Act 1992* (Radcom Act). This concept is dealt with in s. 6 of the RadcomAct.

A 'datacaster' is defined to mean a person who provides a datacasting service. 'Datacasting service' is defined in clause 2 of Schedule 4 to mean a service (other than a broadcasting service as defined in s. 6 of the BSA) that delivers information (whether in the form of data, text, speech, images or in any other form) to persons having equipment appropriate for receiving that information where the delivery of the service uses the broadcasting services bands and the service is not of a kind specified in the regulations. Paragraph 56(1)(a) in proposed Schedule 4 provides that before 1 January 2001 the Minister is to arrange for a review to be conducted to determine the scope of the term 'datacasting service'.

'Facility' is defined to include apparatus, equipment, a structure or a line. Section 6 of the BSA provides that unless the contrary intention appears 'line' has the same meaning as in the *Telecommunications Act 1997*. That Act defines 'line' to mean a wire, cable, optical fibre, tube, conduit, waveguide or other physical medium used, or for use, as a continuous artificial guide for or in connection with carrying communications by means of guided or unguided electromagnetic energy.

A 'site' is defined to mean land or a building or structure on land.

Clause 41 - Extended meaning of access

Clause 41 of proposed Schedule 4 to the BSA provides an extended meaning of the word 'access' for the purposes of Part 4. It is not intended that access to a tower be refused on the grounds that proposed modifications to the tower are not technically feasible where access could be achieved by an existing tower on a site being replaced with another tower located on the site and access being given to the replacement tower. Note, however, that any such access must be on agreed terms or conditions or, failing agreement, determined by arbitration (see clause 44 of proposed Schedule 4 to the BSA).

Clause 42 - Access to broadcasting transmission towers

Clause 42 of proposed Schedule 4 to the BSA requires the owner or operator of a broadcasting transmission tower, on the request of a commercial television broadcasting licensee or the ABC or SBS (an 'access seeker'), to provide access to the tower where:

- the access is provided for the sole purpose of enabling the access seeker to install or maintain a transmitter and/or associated facilities used, or for use, wholly or principally in connection with the transmission of a television broadcasting service in digital mode;
- the access seeker gives reasonable notice that it requires access; and
- the ABA has not certified that the proposed access is not technically feasible.

Clause 42 also requires the owner or operator of a broadcasting transmission tower, on the request of a datacaster, to provide access to the tower where:

- the access is provided for the sole purpose of enabling the access seeker to install or maintain a transmitter and/or associated facilities used, or for use, in connection with the provision of datacasting services in digital mode;
- the datacaster gives reasonable notice that it requires access; and
- the ABA has not certified that the proposed access is not technically feasible.

Subclause 42(5) deals with the ability of the ABA to certify that, in its opinion, compliance with the above access requirements is not technically feasible.

Subclause 42(6) sets out matters to which the ABA must have regard in determining whether compliance is technically feasible. These matters include whether compliance is likely to result in significant technical or engineering difficulties or in a significant threat to the health or safety of persons who operate, or work on, the tower.

Subclause 42(7) requires the ABA to use its best endeavours to decide whether to issue such a certificate within 10 business days after being requested to issue the certificate.

Clause 43 - Access to sites of broadcasting transmission towers

Clause 43 of proposed Schedule 4 to the BSA requires the owner or operator of a broadcasting transmission tower, on the request of a commercial television broadcasting licensee or the ABC or SBS (an 'access seeker'), to provide access to a site if the tower is situated on the site and:

- the access is provided for the sole purpose of enabling the access seeker to install or maintain a transmitter and/or associated facilities used, or for use, wholly or principally in connection with the transmission of a television broadcasting service in digital mode;
- the access seeker gives reasonable notice that it requires access; and
- the ABA has not certified that the proposed access is not technically feasible.

Clause 43 also requires the owner or operator of a broadcasting transmission tower, on the request of a datacaster, to provide access to the tower if the tower is situated on the site and:

- the access is provided for the sole purpose of enabling the access seeker to install or maintain a transmitter and/or associated facilities used, or for use, in 'connection with the provision of datacasting services in digital mode';
- the datacaster gives reasonable notice that it requires access; and
- the ABA has not certified that the proposed access is not technically feasible.

Subclause 43(5) deals with the ability of the ABA to certify that, in its opinion, compliance with the above access requirements is not technically feasible.

Subclause 43(6) sets out matters to which the ABA must have regard in determining whether compliance is technically feasible. These matters include whether compliance is likely to result in significant technical or engineering difficulties or in a significant threat to the health or safety of persons who operate, or work on, a facility situated on the site.

Subclause 43(7) requires the ABA to use its best endeavours to decide whether to issue such a certificate within 10 business days after being requested to issue the certificate.

Clause 44 - Terms and conditions of access

Clause 44 of proposed Schedule 4 to the BSA provides that the terms and conditions on which the owner or occupier of a broadcasting transmission tower under subclauses 42(1) and (3) and subclauses 43(1) and (3) of proposed Schedule 4 to the BSA are to be as agreed between the owner or occupier and an access seeker (being a commercial television broadcasting licensee, the ABC, the SBS or a datacaster), or, where agreement cannot be reached, determined by an arbitrator appointed by the parties. Where the parties cannot agree on an arbitrator, the Australian Competition and Consumer Commission (ACCC) is to be the arbitrator.

Clause 44 further provides that regulations may be made for the conduct of an arbitration under this clause. These include regulations that may deal with the constitution of the ACCC for the purposes of such an arbitration.

Clause 45 - Code relating to access

Clause 45 of proposed Schedule 4 to the BSA provides for a Code to be made by the ACCC setting out conditions that access seekers and owners and operators of a broadcasting transmission tower are to comply with in relation to the provision of access under Part 5 of proposed Schedule 4 to the BSA.

If the Code is not complied with, an access seeker or the ABA will be able to seek injunctions from the Federal Court under Part 7 of proposed Schedule 4 to the BSA.

A Code is a disallowable instrument which must be notified in the Commonwealth *Gazette*, tabled in the Parliament and is subject to Parliamentary disallowance.

Clause 46 – Arbitration - acquisition of property

Clause 46 of proposed Schedule 4 to the BSA provides that any provision of Part 5 of proposed Schedule 4 to the BSA that authorises the conduct of arbitration by the ACCC or another person (see clause 44 of proposed Schedule 4 to the BSA) will have no effect to the extent (if any) to which it purports to authorise the acquisition of property otherwise than on just terms in contravention of paragraph 51 (xxxi) of the Constitution.

Clause 47 - Relationship between this Part and the *National Transmission Network Sale Act 1998*

Part 5 of the proposed Schedule 4 to the BSA provides an access regime for commercial television broadcasting licensees, national broadcasters and datacasters to gain access to broadcasting transmission towers and tower sites for the purpose of installing or maintaining digital transmitters.

Part 3 of the proposed *National Transmission Network Sale Act 1998* provides access to certain sites or telecommunications transmission towers for certain nominated customers for certain nominated purposes.

The nominated customers and purposes include:

- (a) access by the ABC and SBS for purposes connected with national broadcasting services (paragraph 15(2)(b)); and
- (b) access by commercial broadcasting licensees for purposes connected with providing commercial broadcasting services in declared remote areas (subclause 15(5)).

The ABC, the SBS and commercial broadcasting licensees providing commercial television broadcasting services in declared remote areas will also have access rights under the proposed digital access regime to some or all of the same sites and towers for:

- (a) the purpose of installing or maintaining a transmitter for use in transmitting television broadcasting services in digital mode; or
- (b) the purpose of installing or maintaining a transmitter for use in providing datacasting services in digital mode (if they are also datacasters).

The relevant principle governing access should be that the digital access rules displace the NTN Sale access rules to the extent of any overlap.

Accordingly, clause 47 of proposed Schedule 4 to the BSA provides that Part 3 of the proposed *National Transmission Network Sale Act 1998* does not apply in relation to an access seeker seeking access to a broadcasting transmission tower or site to the extent to which Part 5 of proposed Schedule 4 to the BSA applies in relation to the access seeker seeking access to that tower or site.

Part 6 - Collection of datacasting charge

Part 6 of proposed Schedule 4 to the BSA provides for the charge determined by the ACA (and any late payment penalty determined by the ABA) to be payable to the ABA on behalf of the Commonwealth. The ABA is to determine when a charge is due and payable. It is anticipated that the ABA will consult with the ACA in making this determination.

Clause 48 - Collection of datacasting charge

Clause 48 of proposed Schedule 4 to the BSA provides for the collection of a charge imposed by the proposed *Datacasting Charge (Imposition) Act 1998*. That Act imposes a charge in relation to the provision of datacasting services by the ABC, SBS and commercial television licensees.

The term ‘datacasting service’ is defined in clause 2 of proposed Schedule 4 to the BSA to mean a service (other than a broadcasting service as defined in s. 6 of the BSA) that delivers information (whether in the form of data, text, speech, images or in any other form) to persons having equipment appropriate for receiving that information where the delivery of the service uses the broadcasting services bands and the service is not of a kind specified in the regulations. Paragraph 56(1)(a) in proposed Schedule 4 provides that before 1 January 2001 the Minister is to arrange for a review to be conducted to determine the scope of the term ‘datacasting service’.

Subclause 48(1) defines terms used in clause 48.

Subclauses 48(2) and (9) provide that datacasting charge is due and payable in accordance with a disallowable written determination made by the ABA. As the determination is a disallowable instrument, it must be notified in the Commonwealth *Gazette*, tabled in the Parliament and will be subject to Parliamentary disallowance.

Subclauses 48(3) and (9) allow the ABA to make a disallowable written determination determining penalties for the late payment of datacasting charge at the rate of up to a maximum of 20% per annum on the amount unpaid. Such a determination will have effect accordingly (subclause 48(4)).

Subclause 48(5) makes it clear that a determination of late payment penalties may also provide for the ABA to grant remissions of the whole or a part of those penalties.

Subclause 48(6) makes it clear that datacasting charge is payable to the ABA on behalf of the Commonwealth.

Subclause 48(7) provides that datacasting charge, and any late payment penalties incurred, are debts due the Commonwealth and may be recovered as such by the ABA.

Subclause 48(8) provides that amounts received by way of charge or late payment penalty must be paid into the Consolidated Revenue Fund.

The provisions in subsections 33(3), (3A) and (3B) of the *Acts Interpretation Act 1901* in relation to instruments will also apply to an ABA determination. This will allow the ABA, for example, to revoke or vary any such determination in the same manner and subject to the same conditions (if any) as applied to the making of the original determination (see subclause 14(2) of proposed Schedule 4 to the BSA).

Clause 49 - Cancellation of certain exemptions from datacasting charge

Clause 49 of proposed Schedule 4 to the BSA ceases the exemptions from payment of a charge payable under the proposed *Datacasting Charge (Imposition) Act 1998* (subclause 49(1)) where the exemptions are provided by any Act or provision enacted before the commencement of this clause (subclause 49(2)).

The ABC and SBS have exemptions from taxation laws under section 71 of the *Australian Broadcasting Corporation Act 1983* and section 68 of the *Special Broadcasting Service Act 1991*. The effect of clause 49 is to modify these exemptions so that the ABC and SBS will be required to pay any charge payable under the proposed *Datacasting Charge (Imposition) Act 1998*. That Act will provide for the imposition of a charge in relation to the provision of datacasting services by both commercial and national free to air television broadcasters.

Clause 50 - ACA to report to the Minister on principles for determining the amount of datacasting charge

Subclause 50(1) of proposed Schedule 4 to the BSA provides that before the ACA makes its first determination of the amount of datacasting charge under section 7 of the proposed *Datacasting Charge (Imposition) Act 1998*, the ACA will be required to prepare, and give to the Minister a written report about proposals that are to be embodied in that determination.

Subclause 50(2) provides that the report must contain a statement setting out the extent to which the ACA had regard to competitive neutrality principles in formulating those proposals.

Subclause 50(3) requires the Minister to arrange for copies of the ACA's report to be tabled before each House of Parliament within 15 sitting days of that House after receiving the report.

Part 7- Injunctions

Part 7 of proposed Schedule 4 to the BSA enables the Federal Court to grant injunctions in relation to contraventions or proposed contraventions of:

- (a) implementation plans which commercial television broadcasting licensees have given to the ABA in accordance with the commercial television conversion scheme and which have been accepted by the ABA; or
- (b) Part 5 of proposed Schedule 4 to the BSA, which deals with the transmitter access regime.

Clause 51 - Injunctions

If:

- (a) a commercial television broadcasting licensee has engaged, is engaging or is proposing to engage in any conduct in contravention of an implementation plan given to the ABA in accordance with the commercial television conversion scheme dealt with in clause 5 of proposed Schedule 4 to the BSA, and that plan has been accepted by the ABA; or
- (b) a person has engaged, is engaging or is proposing to engage in any conduct in contravention of Part 5 of proposed Schedule 4 to the BSA (eg. by refusing to give an access seeker reasonable access to a broadcasting transmission tower);

the ABA (in the case of paragraph (a) above) and the ABA or the access seeker, being a free to air broadcaster or the provider of a datacasting service (in the case of paragraph (b) above) will be able to apply to the Federal Court for an injunction to restrain the licensee or person from engaging in the conduct. If, in the Federal Court's opinion, it is desirable to do so, the Court will also be able to require the licensee or person to do something (subclauses 51(1) and (2)).

If a commercial television broadcasting licensee has refused or failed, or is refusing or failing, or is proposing to refuse or fail, to do an act or thing and the refusal or failure was, is or would be a contravention of the implementation plan given to the ABA in accordance with the commercial television conversion scheme and accepted by the ABA, the ABA will be able to apply to the Federal Court for an injunction requiring the person to do that act or thing (subclause 51(3)).

If a person has refused or failed, or is refusing or failing, or is proposing to refuse or fail, to do an act or thing and the refusal or failure was, is or would be a contravention of Part 5 of proposed Schedule 4 to the Act (dealing with the transmitter access regime), the ABA or the access seeker (being a free to air television broadcaster or a datacaster) will be able to apply to the Federal Court for an injunction requiring the person to do that act or thing (clause 51(4)).

Clause 52 - Interim injunctions

Provision is also made for the Federal Court to grant interim injunctions before the Court considers an application for an injunction (subclause 52(1)).

The Federal Court will not be able to require an applicant for an injunction under clause 52, as a condition of granting an interim injunction, to give any undertakings as to damages (subclause 52(2)).

Clause 53 - Discharge etc. of injunctions

The Federal Court will be able to discharge or vary an injunction granted under Part 7 of proposed Schedule 4 to the BSA (clause 53).

Clause 54 - Certain limits on granting injunctions not to apply

The power of the Federal Court to grant an injunction restraining a person from engaging in conduct or requiring a person to do an act or thing will be able to be exercised whether or not:

- it appears to the Court that the person intends:
 - to engage again, or continue to engage, in conduct of that kind; or
 - to refuse or fail again, or to continue to refuse or fail, to do that act or thing;
- the person has previously engaged in conduct of that kind or has previously refused or failed to do that act or thing; and
- there is an imminent danger of substantial damage to any person if the first-mentioned person engages in conduct of that kind or refuses or fails to do that act or thing (clause 54).

Clause 55 – Other powers of the court unaffected

The powers conferred on the Federal Court under Part 7 of proposed Schedule 4 to the BSA will not limit any other powers of the Court, whether conferred by the Bill or otherwise (clause 55).

Part 8 - Reviews

Clause 56 - Reviews before 1 January 2001

Subclauses 56(1) and (2) of proposed Schedule 4 to the BSA provide that before 1 January 2001 the Minister will be required to arrange for a review to be conducted into the following matters:

- (a) the content of regulations made for the purposes of the provisions dealing with programming during the simulcast period and the scope of the term 'datacasting service';
- (b) whether any amendments of Commonwealth laws should be made:
 - (i) to deal with convergence between broadcasting services and other services;
 - (ii) to deal with the re-transmission, on subscription television broadcasting services, of commercial television broadcasting services transmitted in digital mode;
 - (iii) to ensure that 'underserved' regional licence areas are provided with the same number of commercial television broadcasting services as are provided in metropolitan licence areas -underserved regional licence areas are defined in subclause 56(5) to mean those with fewer than 3 commercial television broadcasting services;
- (c) the regulatory arrangements that should apply to:
 - (i) the allocation of spectrum in the broadcasting services bands for the provision of datacasting services -a review into this matter is to be conducted on the basis that free to air television broadcasters should not be eligible for the allocation of the spectrum; and
 - (ii) the digital transmission of a community television service, free of charge, using spectrum in the broadcasting services bands allocated for use for the provision of datacasting services.

The Minister will be required to arrange for the preparation of a report of a review under subclause 56(1) (subclause 56(3)).

The Minister will also be required to arrange for copies of the report to be laid before each House of the Commonwealth Parliament within 15 sitting days of that House after the completion of the report (subclause 56(4)).

Clause 57 - Reviews before 31 December 2005

Subclause 57(1) of proposed Schedule 4 to the BSA provides that before 31 December 2005 the Minister will be required to arrange for a review to be conducted of the following matters:

- (a) whether section 28 of the BSA, as proposed to be amended by item 1 of Schedule 1 to the Bill, should be amended or repealed after 31 December 2008 to allow new commercial television entrants;
- (b) whether the simulcast requirements introduced by the Bill should be amended or repealed;
- (c) whether the prohibitions on digital transmitters being used to provide subscription television broadcasting services, radio or narrowcasting services should be amended or repealed;
- (d) the content of any regulations made in connection with the duration of the simulcast period;
- (e) whether all parts of the broadcasting services bands that are available for allocation for broadcasting services or datacasting services have been so identified;
- (f) whether the parts of the broadcasting services bands that have been allocated for use for broadcasting services or datacasting services have been efficiently structured.

The Minister will be required to arrange for the preparation of a report of a review under subclause 57 (1) (subclause 57(2)).

The Minister will also be required to arrange for copies of the report to be laid before each House of the Commonwealth Parliament within 15 sitting days of that House after the completion of the report (subclause 57(3)).

Part 9 - Charges relating to ABA's costs

Clause 58 - Charges relating to ABA's costs

Subclause 58(1) provides that the ABA will be able to make written determinations:

- (a) fixing charges for any matter in relation to which expenses are incurred by the ABA under the commercial television conversion scheme provided for in clause 5 of proposed Schedule 4 to the BSA or the ABC/SBS television conversion scheme provided for in clause 17 of that Schedule; and
- (b) specifying the persons by whom, and the times when, the charges are payable.

Subclause 58(2) provides that a charge fixed under subclause (1) must not be such as to amount to taxation.

Subclause 58(3) provides that a determination made by the ABA under subclause (1) is a disallowable instrument. As such, it must be notified in the Commonwealth *Gazette*, tabled in the Parliament and will be subject to Parliamentary disallowance.

The provisions in subsections 33(3), (3A) and (3B) of the *Acts Interpretation Act 1901* in relation to instruments will also apply to an ABA determination. This will allow the ABA, for example, to revoke or vary any such determination in the same manner and subject to the same conditions (if any) as applied to the making of the original determination (see subclause 14(2) of proposed Schedule 4 to the BSA).

With regard to transmitter licence tax payable under the *Radiocommunications (Transmitter Licence Tax) Act 1983*, it is proposed to make a regulation in accordance with section 8 of the *Radiocommunications Taxes Collection Act 1983* to exempt a digital transmitter licence from tax during the simulcast period.

Part 10 - Review of decisions

Clause 59 - Review by the AAT

Clause 59 of proposed Schedule 4 to the BSA sets out the decisions made by the ABA under Schedule 4 to the BSA (including references to the provisions under which they were made) in respect of which a nominated person may apply to the Administrative Appeals Tribunal ('the AAT') for review.

Commercial television licensees

Paragraphs 59(1)(a) to (c) identify three categories of decisions that may be made by the ABA under the commercial television conversion scheme for which only a commercial television broadcasting licensee may apply to the AAT for review (see subclause 59(2)).

These are:

- (a) a decision to refuse to accept an implementation plan, or a variation of an implementation plan, given to the ABA by a commercial television broadcasting licensee;
- (b) a decision that a commercial television broadcasting licensee has failed to satisfy the ABA that exceptional circumstances exist such that the ABA should not treat the licensee's transmitter licence as surrendered for a failure either:
 - (i) to continue to transmit in digital mode throughout the simulcast period; or
 - (ii) to meet mandatory commencement dates for transmission; or
 - (iii) to meet specified goals or targets, set down by standards, in relation to the extent to which certain television programs are transmitted in HDTV; and
- (c) a decision by the ABA that the ACA is required to issue a replacement transmitter licence to a commercial television broadcasting licensee where the amount of bandwidth covered by the replacement licence is less than the amount covered by the surrendered licence - this can only occur in circumstances where a licensee has failed to meet specified goals or targets, set down by standards, in relation to the extent to which certain television programs are transmitted in HDTV.

Paragraph 59(1)(d) also enables regulations to prescribe other decisions that relate to a commercial television broadcasting licensee. This provision is intended to enable further decisions which may be made by the ABA under the commercial television conversion scheme to be specified in regulations if it is appropriate that they be subject to merits review.

National broadcasters

Subclause 59(3) identifies two categories of decisions that may be made by the ABA under the national television conversion scheme for which only a national broadcaster may apply to the AAT for review (see subclause 59(4)).

These are:

- (a) a decision that a national broadcaster has failed to satisfy the ABA that exceptional circumstances exist such that the ABA should not treat the licensee's transmitter licence as surrendered for a failure either:
 - (i) to meet mandatory commencement dates for transmission; or
 - (ii) to continue to transmit in digital mode throughout the simulcast period; or
 - (iii) to meet specified goals or targets, set down by standards, in relation to the extent to which certain television programs are transmitted in HDTV; and
- (b) a decision by the ABA that the ACA is required to issue a replacement transmitter licence to a national broadcaster where the amount of bandwidth covered by the replacement licence is less than the amount covered by the surrendered licence - this can only 'occur in circumstances where a national broadcaster has failed to meet specified goals or targets, set down by standards, in relation to the extent to which certain television programs are transmitted in HDTV.

Paragraph 59(3)(c) also enables regulations to prescribe other decisions that relate to a national broadcaster. This provision is intended to enable further decisions which may be made by the ABA under the national television conversion scheme to be specified in regulations if it is appropriate that they be subject to merits review.

Transmitter access regime

Subclause 59(5) identifies two decisions that may be made by the ABA under the transmitter access regime for which only an access seeker concerned may apply to the AAT for review (see subclause 59(6)). The access seekers concerned are the commercial and national free to air television broadcasters and datacasters.

The first is a decision by the ABA under subclause 42(5) to issue a certificate stating that, in the opinion of the ABA, it is not technically feasible for the owner or operator of a broadcasting transmission tower to give an access seeker access to that tower.

The second is a decision by the ABA under subclause 43(5) to issue a certificate stating that, in the opinion of the ABA, it is not technically feasible for the owner or operator of a broadcasting transmission tower to give an access seeker access to a site if a tower is situated on that site.

Subclauses 59(7) and (8) enable the owner or operator of the broadcasting transmission tower concerned to apply to the AAT for a review of a decision of the ABA to refuse to issue a certificate under subclauses 42(5) or 43(5).

Clause 60 - Notification of decisions to include notification of reasons and appeal rights

Clause 60 of proposed Schedule 4 to the BSA requires the ABA, when notifying a person of any one of the decisions set out in clause 59, to include in the notification:

- (a) a statement of reasons for the decision; and
- (b) advice to the effect that the person may apply to the AA T for review of that decision

Schedule 2 - Amendment of the Radiocommunications Act 1992

Item 1 - Amendment of section 5 - Definitions

Item 1 of Schedule 2 to the Bill inserts a new definition of ‘datacasting service’ in section 5 of the Radcom Act. This term will have the same meaning as in proposed Schedule 4 to the BSA. The term is defined in clause 2 of that Schedule to mean a service (other than a broadcasting service as defined in s. 6 of the BSA) that delivers information (whether in the form of data, text, speech, images or in any other form) to persons having equipment appropriate for receiving that information where the delivery of the service uses the broadcasting services bands and the service is not of a kind specified in the regulations. Paragraph 56(1)(a) in proposed Schedule 4 provides that before 1 January 2001 the Minister is to arrange for a review to be conducted to determine the scope of the term ‘datacasting service’.

Examples of the use of the term ‘datacasting service’ are in proposed new sections 100A, 100B and 102A of the Radcom Act (see items 6 and 8 of Schedule 2 to the Bill).

Item 2 - Insertion of new section 9B - Digital mode

Item 2 of Schedule 2 to the Bill provides that, for the purposes of the Radcom Act, a service is broadcast or transmitted in digital mode if the service is broadcast or transmitted using a digital modulation technique.

Examples of the use of the term ‘digital mode’ are in proposed new sections 100A, 100B and 102A of the Radcom Act (see items 6 and 8 of Schedule 2 to the Bill).

Items 3 to 5 - Amendment of section 100 - Issuing apparatus licences

Item 3 of Schedule 2 to the Bill makes a consequential amendment as a result of amendments made by items 6 and 8 of that Schedule. The effect of this amendment is that the discretion that the ACA has under section 100 of the Radcom Act to decide whether or not to issue an apparatus licence will not apply to a digital NBS transmitter licence required to be issued to the ABC or SBS under proposed new section 100B of the Act or a digital transmitter licence required to be issued to a commercial television broadcasting licensee under proposed new section 102A of the Act or under section 102 of the Act as proposed to be amended.

Items 4 and 5 make amendments to subsection 100(2) consequential upon the amendments to section 34 of the BSA contained in items 2 to 5 of Schedule 1 to the Bill.

Item 6 - Insertion of new sections

100A - NBS transmitter licences - authorisation of datacasting services

100B - NBS transmitter licences required to issued under digital conversion schemes

Item 6 of Schedule 2 to the Bill adds new sections 100A and 100B to the Radcom Act to deal with NBS transmitter licences issued or required to be issued to the ABC or SBS authorising datacasting and the operation of one or more specified digital transmitters.

The ABC and SBS transmit television programs in accordance with transmitter licences issued by the ACA under section 100 of the Radcom Act.

The National Transmission Network Sale (Consequential Amendments) Bill 1997 currently before Parliament amends the Radcom Act to provide for the concept of an 'NBS transmitter licence' issued under section 100 of the Radcom Act. This is a transmitter licence for a transmitter that is for use for transmitting, to the public, a national broadcasting service within the meaning of the BSA. It is intended that this term mean only those transmitters which transmit the relevant signal to the public directly, including transmitters that transmit both to the public and to another transmitter or translator which then transmits directly to the public, whether the relevant transmitters are transmitting a signal in the broadcasting services bands or not.

Proposed subsection 100(3A) of the Radcom Act (to be inserted by that Bill) provides that an NBS transmitter licence cannot be issued to any person other than the ABC, SBS or the Commonwealth. After the sale of the national transmission network, the national broadcasters, rather than the purchasers of the network, are to hold licences under section 100 of the Radcom Act to operate transmitters for the purpose of providing national broadcasting services to the public. This is to ensure that the national broadcasters retain access in the long-term to frequencies for the provision of their national broadcasting services and to ensure the national broadcasters are in a reasonable position to negotiate with other transmission service providers after the sale of the network.

Proposed section 100A of the Radcom Act (to be inserted by item 6 of Schedule 2 to the Digital Conversion Bill) will have effect on or after 1 January 2001. Proposed section 100A provides that if an NBS transmitter licence is or was issued under section 100 of the Radcom Act and the licence authorises the operation of one or more specified radiocommunications transmitters for transmitting the national broadcasting service concerned in digital mode, the licence is also taken to authorise the operation of the transmitter or transmitters concerned for transmitting datacasting services in digital mode using those channels.

Proposed section 100B of the Radcom Act to be inserted by item 6 of Schedule 2 to the Digital Conversion Bill provides that if the ACA is required under a national television conversion scheme (see clause 100 of proposed Schedule 4 to the BSA) to issue an NBS transmitter licence to a national broadcaster (ie the ABC and SBS), the ACA must issue to the broadcaster an NBS transmitter licence that authorises the operation of one or more specified

radiocommunications transmitters for transmitting the national broadcasting service concerned in digital mode.

If an NBS transmitter licence is issued under proposed section 100B, the licence is also taken to authorise the operation of the transmitter or transmitters concerned for transmitting datacasting services in digital mode using the channel or channels concerned.

Item 7 - Amendment of section 102 -Transmitter licences for certain broadcasting services

Under section 102 of the Radcom Act, the ACA is required to issue a transmitter licence to entities that are allocated a broadcasting services band licence by the ABA under Part 4 or Part 6 of the BSA. (Part 4 of the BSA deals with commercial television broadcasting licences and commercial radio broadcasting licences and Part 6 of the BSA deals with community broadcasting service licences.) This transmitter licence authorises operation of one or more specified radiocommunications transmitters for transmitting the broadcasting service concerned in accordance with the broadcasting services bands licence.

Item 7 of Schedule 2 to the Bill amends section 102 of the Radcom Act by adding a new subsection 102(3). This will provide that if a transmitter licence is or was issued under section 102 of the Radcom Act and the licence authorises the operation of one or more specified radio communications transmitters for transmitting the broadcasting service concerned in digital mode using one or more channels, the licence is also taken to authorise the operation of the transmitter or transmitters concerned for transmitting datacasting services in digital mode using those channels.

Item 8 - Insertion of new section 102A - Transmitter licences required to be issued under digital conversion schemes

Proposed section 102A of the Radcom Act to be inserted by item 8 of Schedule 2 to the Bill provides that if the ACA is required under a commercial television conversion scheme (see clause 5 of proposed Schedule 4 to the BSA) to issue a transmitter licence to a commercial television broadcasting licensee, the ACA must issue to the licensee a transmitter licence that authorises the operation of one or more specified radiocommunications transmitters for transmitting the broadcasting service concerned in digital mode in accordance with the commercial television broadcasting licence.

If the commercial television broadcasting licence is transferred, the transmitter licence will be taken to be issued to the person to whom the commercial television broadcasting licence is transferred.

If a transmitter licence is issued under proposed section 102A, the licence is also taken to authorise the operation of the transmitter or transmitters concerned for transmitting datacasting services in digital mode using the channel or channels concerned.

Item 9 - Amendment of section 103 - Duration of apparatus licences

Item 9 of Schedule 2 to the Bill makes a consequential amendment as a result of amendments made by item 8 of that Schedule. The effect of this amendment is that a digital transmitter licence issued under section 102 of the Radcom Act (as proposed to be amended) or under section 102A of that Act under a digital conversion scheme will continue in force while the related commercial television broadcasting licence remains in force and will not have effect while that licence is suspended.

Item 10 - Amendment of section 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

Subsection 106A(1) of the Radcom Act provides that for the purposes of section and related sections of the *Trade Practices Act 1974*, the issue of an apparatus licence to a person is taken to be an acquisition by the person of an asset of another person. Section 50 of the Trade Practices Act prohibits the acquisition of an asset by a person if the acquisition would have the effect, or is likely to have the effect, of substantially lessening competition in a market.

Subsection 106A(2) provides that subsection 106A(1) does not apply to a transmitter licence issued under section 102. Item 10 of Schedule 2 to the Bill amends subsection 106A(2) to provide that subsection 106A(1) will also not apply to a transmitter licence issued under a digital conversion scheme under proposed section 102A.

Item 11 - Amendment of section 107 - General conditions

Section 107 of the Radcom Act sets out the general conditions to which an apparatus licence is subject. Subsection 107(3) provides, however, that this section does not apply to transmitter licences issued under section 101A (transmitters for temporary community broadcasting) or under section 102 (transmitter licences for certain broadcasting services).

Item 11 of Schedule 2 to the Bill amends subsection 107(3) to provide that section 107 will also not apply to transmitter licences issued under proposed section 102A (transmitter licences required to be issued under digital conversion schemes). These transmitter licences will be subject to the conditions set out in section 109 of the Radcom Act (see item 13 below).

Item 12 - Amendment of section 108 - Additional conditions of transmitter licences

Section 108 of the Radcom Act sets out conditions for transmitter licences additional to those set out in section 107 of that Act. Subsection 108(5) provides, however, that this section does not apply to transmitter licences issued under section 101A (transmitters for temporary community broadcasting) or under section 102 (transmitter licences for certain broadcasting services).

Item 12 of Schedule 2 to the Bill amends subsection 108(5) to provide that section 108 will also not apply to transmitter licences issued under proposed section 102A (transmitter

licences required to be issued under digital conversion schemes). These transmitter licences will be subject to the conditions set out in section 109 of the Radcom Act (see item 13 below).

Item 13 - Amendment of section 109 - Conditions of transmitter licences for certain broadcasting services

A broadcasting transmitter licence issued under section 102 of the Radcom Act is subject to conditions specified in section 109 of the Radcom Act. These conditions include:

- a condition that the licensee, and any person authorised to operate a radio communications transmitter under the licence, must not operate, or permit operation of, such a transmitter otherwise than in accordance with any technical specifications determined by the ABA under subsection 26(1) of the BSA; and
- a condition that the licensee, and any person so authorised, must comply with technical guidelines developed by the ABA under section 33 of the BSA (see paragraphs 109(1)(d) and (e)) - these guidelines deal with the planning of individual services which use the broadcasting services bands as a means of delivery and are intended to cover matters such as emission standards applying to services, minimum field strength required within services' licence areas and permitted maximum field strength of services' transmissions outside their licence areas.

The conditions of a transmitter licence issued under section 102 of the Radcom Act, including any further conditions imposed under paragraph 111 (a) of that Act, must not be inconsistent with a related broadcasting services bands licence (subsection 109(2) of the Radcom Act).

Item 13 of Schedule 2 to the Bill amends subsections 109(1) and (2) to provide that a digital transmitter licence issued under proposed section 102A (transmitter licences required to be issued under digital conversion schemes):

- is subject to the conditions set out in subsection 109(1) of the Radcom Act; and
- the conditions of the digital transmitter licence, including any further conditions imposed under paragraph 111(a), must not be inconsistent with the related commercial television broadcasting licence referred to in proposed section 102A.

Items 14 and 15 - Amendment of section 111 - Changes to licence conditions

Paragraph 111(1)(d) of the Radcom Act provides that the ACA may vary certain section 108 licence conditions to which a transmitter licence is subject other than a licence issued under section 101A (transmitter licences for temporary community broadcasting) or section 102 (transmitter licences for certain broadcasting services). Transmitter licences issued under sections 101A and 102 are not subject to section 108 licence conditions (see subsection 108(5) of the Radcom Act).

Item 14 of Schedule 2 to the Bill amends paragraph 111(1)(d) of the Radcom Act to provide that that paragraph will also not apply to a digital transmitter licence issued under section

102A (transmitter licences required to be issued under digital conversion schemes).

Item 15 inserts a new subsection 111(5) to the Radcom Act. This provides that if the ACA is required to vary the conditions of a transmitter licence under a commercial television conversion scheme (see clause 5 of proposed Schedule 4 to the BSA) or a national television conversion scheme (see clause 17 of proposed Schedule 4 to the BSA), the ACA must, by written notice given to the licensee, vary those conditions accordingly.

Item 16 - Amendment of section 125 - Application of Division 6 of Part 3.3 - Suspending and cancelling apparatus licences

Section 125 of the Radcom Act deals with the application of Division 6 of Part 3.3 of that Act, which deals with suspending and cancelling apparatus licences. Subsection 125(2) provides that Division 6 does not apply to transmitter licences issued under section 101A (transmitter licences for temporary community broadcasting) or section 102 (transmitter licences for certain broadcasting services).

Item 16 of Schedule 2 to the Bill provides that Division 6 will also not apply to digital transmitter licences issued under proposed section 102A (transmitter licences required to be issued under digital conversion schemes).

Item 17 - Amendment of section 129 - Applications for renewal of apparatus licences

Section 129 of the Radcom Act deals with applications for renewal of apparatus licences. This section does not apply to transmitter licences issued under section 101A (transmitter licences for temporary community broadcasting) or section 102 (transmitter licences for certain broadcasting services). These licences continue in force while the related broadcasting licence remains in force and do not have effect while the related licence is suspended.

Item 17 of Schedule 2 to the Bill amends section 129 to provide that it also will not apply to digital transmitter licences issued under proposed section 102A (transmitter licences required to be issued under digital conversion schemes).

A digital transmitter licence issued under section 102 of the Radcom Act (as proposed to be amended) or under section 102A of that Act under a digital conversion scheme will continue in force while the related commercial television broadcasting licence remains in force and will not have effect while that licence is suspended (see item 9 of Schedule 2 to the Bill).

Item 18 - Amendment of section 130 - Renewing apparatus licences

Section 130 of the Radcom Act empowers the ACA to renew an apparatus licence by issuing the applicant with a new apparatus licence. Subsection 130(3) provides that, in deciding whether to renew the licence, the ACA:

- (a) must have regard to the same matters to which it must have regard under subsections 100(4) and (6) of the Act in deciding whether to issue an apparatus licence - these matters include all matters the ACA considers relevant, including interference, health and safety issues; and
- (b) may have regard to the same matters to which it may have regard under subsection 100(5) in deciding whether to issue an apparatus licence ie. whether in the past 2 years the applicant's apparatus licence has been cancelled (except as a result of a spectrum re-allocation declaration under Part 3.6 of the Act).

Item 18 of Schedule 2 to the Bill amends section 130 to provide that these requirements will not apply in the case of a licence issued under proposed section 100B of the Radcom Act. Section 100B deals with NBS transmitter licences required to be issued under ABC/SBS digital conversion schemes. As a result of item 3 of Schedule 2 to the Bill, the discretions that the ACA has under section 100 of the Radcom Act to decide whether or not to issue an apparatus licence will not apply to a digital NBS transmitter licence required to be issued under proposed section 100B. Accordingly, it is not appropriate for the ACA to have similar discretions in deciding whether to renew a section 100B licence.

In deciding whether to renew a section 100B licence, the ACA will, however, be required to have regard to the national television conversion scheme in force under clause 100 of proposed Schedule 4 to the BSA.

Item 19 - Amendment of section 131AB - Transfer of apparatus licences

Section 131AB of the Radcom Act deals with applications for transfer of apparatus licences.

Subsection 131AB(2) provides that, in deciding whether to transfer an apparatus licence, the ACA:

- (a) must have regard to the same matters to which it must have regard under subsections 100(4) and (6) of the Act in deciding whether to issue an apparatus licence - these matters include all matters the ACA considers relevant, including interference, health and safety issues; and
- (b) may have regard to the same matters to which it may have regard under subsection 100(5) in deciding whether to issue an apparatus licence ie. whether in the past 2 years the applicant's apparatus licence has been cancelled (except as a result of a spectrum re-allocation declaration under Part 3.6 of the Act).

Item 19 amends section 131AB by adding new subsection 131AB(2). This will provide that the above requirements will not apply in the case of a licence issued under proposed section 100B of the Radcom Act. Section 100B deals with NBS transmitter licences required to be issued under digital conversion schemes. As a result of item 3 of Schedule 2 to the Bill, the discretions that the ACA has under section 100 of the Radcom Act to decide whether or not to issue an apparatus licence will not apply to a digital NBS transmitter licence required to be

issued under proposed section 100B. Accordingly, it is not appropriate for the ACA to have similar discretions in deciding whether to transfer a section 100B licence.

In deciding whether to transfer a section 100B licence, the ACA will, however, be required to have regard to the national television conversion scheme in force under clause 100 of proposed Schedule 4 to the BSA.

DATACASTING CHARGE (IMPOSITION) BILL 1998

The Datacasting Charge (Imposition) Bill 1998 provides for the imposition of a charge in relation to the provision of datacasting services, using residual transmission capacity on channels allocated for digital conversion, by commercial and national free to air television broadcasters. The amount of this charge will be determined by the ACA, having regard to any directions issued by the Minister. Before determining a charge under the Bill, the ACA will be required to provide a report to the Minister on whether the proposed charge meets competitive neutrality principles.

Clause 1 - Short title

Clause 1 provides for the citation of the *Datacasting Charge (Imposition) Act 1998*.

Clause 2 - Commencement

Clause 2 provides for the Bill to commence on Royal Assent.

Clause 3 - Interpretation

Clause 3 sets out definitions of key terms used in the Bill.

One of these key terms is 'datacasting service'. This is defined to have the same meaning as in proposed Schedule 4 to the BSA. The term is defined in clause 2 of that Schedule to mean a service (other than a broadcasting service as defined in s. 6 of the BSA) that delivers information (whether in the form of data, text, speech, images or in any other form) to persons having equipment appropriate for receiving that information where the delivery of the service uses the broadcasting services bands and the service is not of a kind specified in the regulations. Paragraph 56(1)(a) in proposed Schedule 4 provides that before 1 January 2001 the Minister is to arrange for a review to be conducted to determine the scope of the term 'datacasting service'.

Clause 4 - Digital mode

Clause 4 provides that, for the purposes of the Bill, a datacasting service is transmitted in digital mode if the service is transmitted using a digital modulation technique.

Clause 5 - External Territories

Clause 5 provides for the Bill to extend to all the external Territories.

Clause 6 - Imposition of charge

Clause 6 imposes charge on a transmitter licence in respect of a financial year if:

- (a) the licence authorises the holder to transmit datacasting services in digital mode; and

- (b) the licence is held by a free to air television broadcaster; and
- (c) the licence is in force throughout the whole or a part of a particular financial year; and
- (d) at any time during the whole or the part of that year, as the case may be, the transmitter or transmitters concerned were used by the licence holder, or by a person authorised by the licence holder, to transmit datacasting services in digital mode; and
- (e) an ACA determination under proposed section 7 is in force at the beginning of the financial year.

Clause 7 - Amount of charge

Clause 7 provides that the amount of charge imposed on a transmitter licence in respect of a financial year is the amount ascertained in accordance with a written determination made by the ACA.

Given the ACA's responsibilities for the setting of other charges relating to the use of the radiofrequency spectrum, it will be best placed to determine the appropriate datacasting charge to be imposed. Because of the uncertainties surrounding the uses and value of the radiofrequency spectrum in 2001, no upper limit has been set in relation to the datacasting charge.

Section 12 of the *Australian Communications Authority Act 1997* will empower the Minister to give the ACA directions in relation to the setting of the charge.

The ACA's determination will be a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*. As such it must be notified in the *Commonwealth Gazette*, tabled in the Parliament and will be subject to Parliamentary disallowance.

Clause 50 of proposed Schedule 4 to the BSA (contained in Schedule 1 to the Television Broadcasting Services (Digital Conversion) Bill 1998) provides that before the ACA makes its first determination of the amount of datacasting charge under clause 7, the ACA will be required to prepare, and give to the Minister, a written report about proposals that are to be embodied in that determination. The report will be required to contain a statement setting out the extent to which the ACA had regard to competitive neutrality principles in formulating those proposals. The Minister is required also to arrange for copies of the ACA's report to be tabled before each House of Parliament within 15 sitting days of that House after receiving the report.

Part 6 of proposed Schedule 4 to the BSA provides for the charge determined by the ACA (and any late payment penalty determined by the ABA) to be payable to the ABA on behalf of the Commonwealth. The ABA is to determine when a charge is due and payable. It is anticipated that the ABA will consult with the ACA in making this determination.

Clause 8 - By whom charge is payable

Clause 8 provides that charge imposed on a transmitter licence is payable by the holder of the licence.

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