



Broadcasting Legislation Amendment Bill (No. 1) 2005

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Law and Bills Digest Section

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Broadcasting Legislation Amendment Bill (No. 1) 2005

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Purpose

This Bill amends the *Broadcasting Services Act 1992* ('BSA') to allow certain commercial television broadcasters in *remote licence areas* to elect to broadcast two commercial television broadcasting services on one channel (ie to multi-channel). If such an election is made, the Bill relieves the broadcasters of the obligation to broadcast high-definition television (HDTV) programs in that remote licence area.

In a remote licence area, where;

- there are only two licensees of commercial television broadcasting services, and
- they elect jointly, or one of them elects individually, to provide a third commercial TV service, as they are currently enabled to do under section 38B of the BSA,

then they can elect to use a single 7MHz channel to broadcast both the new digital commercial service (in standard definition) and the digital simulcast of their usual analog programming (that is, they can multi-channel). That is, they are relieved of the usual prohibition on multi-channelling which applies to commercial TV broadcasters in non-remote licence areas. If the broadcaster makes this election, they are also relieved of the obligation to broadcast in HDTV which applies to commercial TV broadcasters in non-remote licence areas.

Glossary

An explanation of some of the terms and concepts used in this digest appears at the end. This may be helpful for readers unfamiliar with some of the terminology used. The terms explained in the glossary are underlined in the text.

Background

To avoid doubt, this Bill is concerned with the regulation of multi-channelling and high-definition TV broadcasting by *free-to-air commercial TV broadcasters*. It is not concerned with the *national TV broadcasters* (ABC and SBS) or with pay (subscription)

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TV. Furthermore, the Bill is concerned only with the rules affecting those licence areas which the ABA has determined to be 'remote' licence areas.¹ Remote licence areas are different from 'regional' and 'metropolitan' licence areas.

In 1998 the Government introduced legislation which created a scheme to enable the transition from analog 'free-to-air' television broadcasting to digital 'free-to-air' television broadcasting.² The legislation provided for the ABA to formulate a scheme to facilitate this conversion. The legislation required that the scheme consist of Part A and Part B. Part B was to deal with *remote* licence areas and Part A was to deal with *non-remote* licence areas. Non-remote licence areas cover metropolitan and regional areas (other than regional areas that are deemed to be remote). Non-remote areas cover most of the Australian population.

In relation to Part A, dealing with *non-remote* licence areas, Schedule 4 is prescriptive of the objectives that the ABA's scheme is to achieve. These objectives are set out in subclause 6(3) of Schedule 4 to the BSA.

By contrast, in relation to the ABA conversion scheme for *remote* areas (ie Part B), Schedule 4 prescribes only a few objectives. Instead, the ABA was given latitude to work out the elements of the conversion scheme for remote licence areas.

This *Broadcasting Legislation Amendment Bill (No. 1) 2005* deals exclusively with *remote* licence areas. The scheme for remote areas can be more easily understood by identifying the points of distinction with the scheme applying to non-remote areas. Not only is the implementation of the conversion scheme for non-remote areas much further advanced than the scheme for remote areas, but the latter scheme draws extensively on the former. This is explained in a paper setting out what the ABA considers to be the objectives of the remote area scheme, the first draft of which it published in 2003.³

The Digital Conversion scheme for non-remote areas

For *non-remote* licence areas, the main elements of the scheme to convert from analog to digital television transmission are set out in the following paragraphs. This scheme is modified for remote areas. The modifications, and the further amendments made by this Bill, are discussed below.

- There is to be a *simulcast period* during which TV broadcasters must broadcast their programs in both analog mode and standard definition digital mode. This period commenced on 1 January 2001 in metropolitan areas. For regional areas (not remote areas) it was to commence by 31 December 2004. The period was to run for 8 years (ie until 31 December 2008 for metropolitan areas) but would be subject to review. For remote areas, the simulcast period is a matter that the ABA may deal with in Part B of the conversion plan. The policy rationale for having simulcast period was simply that digital television requires different reception equipment from analog televisions

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and the government considers that people should not be forced immediately to purchase new equipment.

- At the end of the simulcast period, analog transmissions are to cease.
- There are to be no new commercial broadcasting licences issued until the end of 2006.⁴ This is subject to review. This measure is to protect the incumbent commercial broadcasters during the period when they have to invest significantly in digital transmission and other equipment.
- In order to broadcast in digital mode, commercial and national broadcasters were ‘lent’ another 7MHz channel free of upfront charge. This is additional to the 7 MHz channel that they use for analog transmissions. Because digital broadcast technology is capable of conveying sound and pictures more efficiently than analog mode, it uses less bandwidth than the equivalent analog broadcast. The new 7MHz channel given to broadcasters is more than is required for a standard definition digital TV broadcast. Such a channel is technically capable of carrying, for example, several standard definition TV (SDTV) broadcasts (ie multi-channelling) or, say, one or two SDTV broadcasts and a high definition TV (HDTV) broadcast. After doing so, there may still be spare capacity in the channel.
- The way in which the new channel could be used was the subject of a good deal of debate and negotiation. The manner in which the debate is presently resolved is this:
 - as has been already described, national and commercial TV broadcasters had to use part of their new channel to broadcast, in SDTV, the same programming as they were broadcasting in analog (i.e. simulcasting).
 - in addition, both national and commercial broadcasters were required to meet quotas for the broadcast of (digital) HDTV. This is presently 1040 hours per year (on average, 20 hours per week).
 - commercial broadcasters are prevented from using their channel capacity to broadcast a second SDTV service (ie multi-channelling) except in very limited circumstances. For instance, where a live sporting event overlaps with a scheduled program, the end of the event can be multi-channelled. In addition, commercial broadcasters can provide ‘program enhancements’ for their digitally transmitted program.
 - the national broadcasters are permitted to multi-channel, but the second SDTV service is subject to genre restrictions.⁶
 - both commercial and national broadcasters, and new entrants, were also permitted to provide ‘datacasting’ services using the part of the newly loaned spectrum which was not required for standard or high definition television. New entrants were permitted to acquire such spectrum which was to be allocated on a competitive basis. Datacasters must pay a fee to the government.

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- neither the national or the commercial TV broadcasters are permitted to provide pay (subscription) TV using their existing or new 7MHz channels.

Particular issues in relation to remote areas

The BSA expressly defines *metropolitan* areas and provides that all other areas, other than *remote* areas, are *regional* areas. The legislation provides that the ABA may determine which licence areas are remote areas.

The legislation recognises that the special circumstances of remote areas may make the policy considerations for metropolitan and regional areas inapt. Remote areas are the least well served by commercial broadcasters. Additionally, commercial broadcasters in remote areas commonly broadcast to many areas of low population density and therefore may require more retransmission sites and more costly satellite feeds to reach their audiences.

These factors, amongst others, create different policy considerations which would make the objectives of Part A of the Conversion scheme inappropriate. For instance, licensees in regional areas were required to commence transmission in SDTV by 1 January 2004, are required to simulcast for 8 years and must satisfy HDTV quotas. It was considered that these requirements may have been inappropriate for remote areas and so the legislation created a different framework which enabled the ABA to work out a more appropriate conversion plan for these areas.

For this reason, the ABA was to develop the Part B conversion scheme, for remote licence areas, over time, taking into account its observations about the operation of Part A of the scheme in non-remote areas. The amendments in this Bill reflect some of the elements of that Part B conversion scheme.

Modifications of the scheme for under-served licence areas – the current position

There are already measures in place to encourage the delivery of additional broadcasting services in licence areas with fewer than three licensees, the maximum number of commercial broadcasters for any licence area. These under-served areas tend to be in regional and remote licence areas. The aim of these schemes is to encourage the provision of more broadcasting *services* in under-served areas without the need for more *licensees* in those areas. There cannot be more licensees because the number of commercial TV broadcasting licences has been frozen until 2006.⁷

The schemes for under-served areas are set out in sections 38A and 38B of the BSA. The essence of these schemes is that they allow an additional broadcasting service (ie another ‘channel’ in colloquial terms) to be transmitted by an existing licensee (or licensees jointly). These provisions pre-date the introduction of digital television and so deal with analog as well as digital television.

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The scheme for under-served areas is described in the next section. Following that, is a description of the way in which this scheme is modified for remote areas.

Additional licences under sections 38A and 38B of the BSA

Single licensee markets – any licence area

Under section 38A of the BSA, commercial television broadcasting licensees in licence areas with only *one* existing commercial television broadcasting licence can apply to the ACMA for a licence to operate a second commercial service in that market. Licensees are required to simulcast the original and second services in analog and digital mode for the duration of the simulcast period (at least 8 years) in each single licence area. Such licensees can elect to multi-channel the digital transmission of the original and second service on a single 7 MHz channel. If they elect to do so, they will be exempted from HDTV the obligations which they would otherwise have.

Two licensee markets – any licence areas

Section 38B of the BSA provides for incumbent commercial television broadcasting licensees in markets with *two* existing commercial television services to elect to operate a third commercial television broadcasting service, in digital standard definition mode only. The licensees may do this in one of two ways:

- they can form a joint venture company to provide the third service; or
- one of the licensees may individually provide the third service.

Currently, if a joint venture company is used, the additional digital service will be provided in a new 7MHz channel. The existing licensees are not permitted to multi-channel the new channel with their existing services. Also, the licensees will have to satisfy any HDTV quotas in relation to their existing services.

If, instead, one of the two licensees individually provides the additional service, that licensee can elect to provide that third service on the same channel as it provides its simulcast standard definition digital broadcast; that is, to multi-channel. If it elects to multi-channel, it will not have to satisfy any HDTV quotas.

The scheme described above applies to under-served licence areas. These tend to be regional and remote licence areas. Special rules are created by this Bill in relation to *remote* areas only. This is dealt with in the next sections.

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What this Bill does

Election to multi-channel third digital service under s38B & exemption from HDTV quota

In short, the Bill amends the BSA and the *Radiocommunications Act 1992* to allow commercial television broadcasting licensees in remote licence areas to multi-channel their digital services where they elect jointly, or one elects individually, to provide a third commercial service under section 38B of the BSA. By doing so, they will also be relieved of the obligation to satisfy any HDTV quotas.

Extension of the scope of s38B for remote areas overlapping other remote areas.

Because all the licence areas determined by the ACMA to be remote licence areas have only one licensee, and section 38B applies only to licence areas with two licensees, some modification of section 38B was required to extend its scope so that it can apply to remote areas.

Some remote licence areas may overlap with, or be entirely within, another remote licence area. This is the case in Western Australia. As the Explanatory Memorandum says, there is a single remote licence area covering the majority of the state (excluding Perth). There is a single licensee for this remote area. In addition, there are four other remote licence areas which together cover the same geographical area as the larger licence area. Each of these smaller remote licence areas also has only one licensee. So, for any of these remote licence areas, there is only one licensee (even though, for *geographical area* covered by the smaller licence areas there may be two licensees transmitting services). To take advantage of section 38B, however, there must be two licensees in a licence area (not just two licensees operating in the same geographical area). In the example given, there is only one licensee in each licence area and so s38B cannot be used.

The Bill deals with this shortcoming by providing that where a remote licence area is entirely within another remote licence area, the two licence areas can be treated as one. The boundary of that deemed single licence area is the smaller of the two areas. This has the effect that there would then be two licensees in one licence area so that an additional licence under section 38B could be issued.

Timetable for additional services in remote licence areas in Western Australia

An existing licensee (or a joint venture company on behalf of two existing licensees) can apply for an additional licence under section 38B within 12 months of the 'designated date' for that licence area. The designated date for non-remote areas is set out in the BSA. The designated date for remote licence areas is to be determined by the ACMA.

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The Bill amends the BSA to provide that for the remote licence areas in Western Australia, the date determined by the ACMA as the designated date must not be later than 1 January 2006. The effect of this amendment is to bring forward the possibility that existing licensees in remote licence areas in Western Australia will elect to provide an additional digital service in their licence areas.

Pros and cons

Pros

The Bill provides a framework which;

- may provide people in remote licence areas with more television services by permitting a 3rd digital service to be broadcast where there are only two at present;
- may accelerate the conversion to digital broadcasting in remote areas, particularly those in Western Australia;
- may relieve commercial TV broadcasters in remote licence areas from the obligation to broadcast high definition TV and to purchase expensive high definition equipment;
- may lead to more efficient use of spectrum in remote areas by permitting multi-channelling.

Cons

- the additional channel will not be broadcast in analog (the object of the legislation is to encourage the take-up of digital television, so this is not surprising). This means that people in remote areas without televisions capable of receiving digital TV, will not be able to receive the third commercial channel which is digital only.
- people in remote areas will not be able to receive high definition TV if broadcasters elect to take advantage of this initiative because, by electing to multi-channel a third service, broadcasters are relieved of the obligation to broadcast in HDTV.

Main Provisions

Items 1 to 8 in Schedule 1 amend the BSA.

Item 1 inserts a new subsection 38B(14A) in the BSA with the effect that, if a remote licence area (ie with one licensee) is entirely within another remote licence area (with one licensee), the area of overlap can be treated as a single licence area with two licensees instead of one. This enables either or both of the licensees operating in the smaller licence

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area to apply to provide a third digital service in that area under section 38B. See the explanation above in the section titled 'Extension of scope of section 38B'.

Item 2 inserts new subsections 21A and 21B. These do not apply to remote areas in particular. These provisions fix a possible shortcoming in the section 38B scheme. These amendments have the effect that if an additional digital service is provided by a joint venture company under section 38B, and the company elects to multi-channel, a party to whom that licence is transferred must continue to broadcast the parent service in relation to which the election is in force. A *parent service* is the original service provided by the licensee and not the additional service provided under section 38B.

Item 3 sets the last date which the ACMA may determine the designated date for remote licence areas in Western Australia. Licensees must apply for an additional licence within 12 months of the designated date. The effect of this is to set a limit on the time that licensees in remote licence areas of Western Australia can choose whether or not to apply for the right to broadcast an extra digital service under section 38B.

Items 4 to 6 insert new definitions. **Item 4** defines *exempt licence* as a commercial television broadcasting licence allocated under section 38B for a remote licence area. **Item 5** defines *exempt remote area service* as the additional service provided under section 38B, together with the existing services provided by the two existing licensees in a remote area. Exempt remote area services are subject to relief from multi-channelling restrictions and HDTV obligations if the licensee or licensees have an exempt licence and they elect to multi-channel.

Item 7 sets out the special rules described above which enable certain licensees of exempt licences to elect to multi-channel and to be exempted from any HDTV quota.

Item 8 provides the exemption from any HDTV quota in relation to exempt remote service areas where there is an election in force.

Items 9 to 11 in **Schedule 2** amend the *Radiocommunications Act 1992*

Items 9, 10 and 11 amend the *Radiocommunications Act 1992* to regulate the operation of transmitters under the new regime for remote licence areas.

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Glossary

The following abbreviations and expressions are used in this digest. The meanings of the expressions given here do not necessarily correspond to the wording in the legislation as they are intended only to explain the concepts involved.

Abbreviations

ABA means the Australian Broadcasting Authority, which, on 1 July 2005, was merged with the Australian Communications Authority to form the Australian Communications and Media Authority (ACMA)

ACMA means the Australian Communications and Media Authority

BSA means the *Broadcasting Services Act 1992*

Expressions

Channel in this context means a part of the radio spectrum that is used to broadcast free air television. In Australia, a channel is a band of spectrum about 7MHz wide. People commonly speak of, say, ‘channel’ 2, 7, 9 or 10. This is not the sense in which the word is used here or in the *Broadcasting Services Act*. This colloquial usage makes some sense in relation to analog broadcasts because each of those television services (ABC, 7, 9, 10) uses up one 7MHz channel. However, this usage is apt to confuse when speaking of digital television because, when those services are broadcast in standard definition digital mode, it is possible to ‘fit’ 2 or more services in one 7MHz channel. So, in theory, it would be possible to broadcast ‘channels’ (in the colloquial sense) 7, 9 and 10 in SDTV in the 7Mhz channel used by any one of them for analog transmission.

Commercial television broadcasting services are, in colloquial terms, television ‘channels’ — known, in Sydney, for example, as ‘channels’ 7, 9 and 10.

National television broadcasting services means the ABC and SBS.

Datacasting is a uniquely Australian artifice. It is the creation of the *Broadcasting Services Act*. When it was originally announced, in 1998, it was not known what sort of service datacasting would be. It was simply conceived as a way for new entrants to provide services using broadcasting spectrum (which could be freed up by the use of digital broadcasting) but without the issue of any new commercial TV licences. It could, for instance, have looked exactly like a broadcasting service (ie, television). In the end, however, it came to differ from a broadcasting service because the kind of material that can be ‘datacast’ is tightly restricted by later amendments to the *Broadcasting Services Act*. In very general terms, datacasting cannot look and feel like what we know as

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television. In a technical sense, though, it is just like broadcasting in that it uses the same spectrum as the television broadcasters (ie the ‘broadcasting services bands’).

Free to air television means commercial TV broadcasting services (eg ‘channels’ 7, 9, and 10 in Sydney) and national TV broadcasting services (ABC, SBS). It is different from subscription, or ‘pay’ TV.

Multi-channelling means the broadcast of two digital televisions services in one 7MHz channel.

Metropolitan, Regional and Remote licence areas.

metropolitan licence area means a licence area in which is situated the General Post Office of the capital city of:

- (a) New South Wales; or
- (b) Victoria; or
- (c) Queensland; or
- (d) Western Australia; or
- (e) South Australia.

regional licence area means a licence area that is not a metropolitan licence area.

remote licence area means a licence area which the ACMA determines to be a remote licence area.⁸

The remote areas and licensees in such areas are:

Regional Television Pty Limited	Mt Isa TV1
Imparja Television Pty. Ltd.	Remote Central and Eastern Australia TV2
QQQ Regional Television Pty Limited	Remote Central and Eastern Australia TV1
WOW WIN Television WA Pty Ltd	Remote and Regional WA TV1
WAW Golden West Satellite Communications Pty. Ltd.	Western Zone TV1
VEW Mid-Western Television Pty Ltd	Kalgoorlie TV1
SSW Golden West Network Pty. Limited	South West and Great Southern TV1
GTW Geraldton Telecasters Pty Ltd	Geraldton TV1

Program enhancements - Commercial television broadcasters are not permitted to use their new spectrum to multi-channel. However, they are permitted to provide ‘program enhancements’. Arguably there is little technical difference between the two. ‘Enhancements’ include broadcast material that is directly linked to, and contemporaneous with, the main program and does not amount to a separate multi-channel program.

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The example given in the BSA is a case where the primary program is live coverage of a tennis match. In that case, the digital program-enhancement content could consist of any or all of the following:

- (a) the match from different camera angles;
- (b) each player's results in past matches;
- (c) video highlights from those past matches;
- (d) each player's ranking and career highlights.⁹

Endnotes

- 1 ACMA, 'Determination of Remote Licence Areas – Sub clause 5(1) of Schedule 4 to the Broadcasting Services Act 1992' available at:
http://www.acma.gov.au/acmainterwr/aba/tv/licence/digitaltv/legislation/documents/rla_determination.pdf
- 2 The *Television Broadcasting Services (Digital Conversion) Act 1998* amended the BSA by inserting Schedule 4 into the Act. Schedule 4 is concerned with Digital Television Broadcasting.
- 3 The *Commercial Television Conversion Scheme Variation 2003 No 1* varied the Commercial Television Conversion Scheme 1999 by inserting Part B (the conversion scheme for remote areas). The objectives for the Part B scheme are discussed in an Explanatory Paper published by the ABA. Both documents are available here:
http://www.acma.gov.au/ACMAINTER.2163012:STANDARD:712077960:pc=PC_91843
- 4 Broadcasting Services Act, s. 28
- 6 Schedule 4, clause 6(5A), BSA sets out the genre restriction on multi-channelling.
- 7 Broadcasting Services Act s. 28
- 8 see note 1
- 9 *Broadcasting Services Act*, Schedule 4, clause 6(14)

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