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**BROADCASTING LEGISLATION AMENDMENT (DIGITAL TELEVISION)
BILL 2010**

EXPLANATORY MEMORANDUM

(Circulated by authority of the
Minister for Broadband, Communications and the Digital Economy,
Senator the Hon. Stephen Conroy)

BROADCASTING LEGISLATION AMENDMENT (DIGITAL TELEVISION) BILL 2010

OUTLINE

The Broadcasting Legislation Amendment (Digital Television) Bill 2010 (the Bill) amends the *Broadcasting Services Act 1992* (the BSA) and the *Copyright Act 1968* to enable provision of a satellite solution to areas of terrestrial digital television signal deficiency (black spots) and to address a range of related matters.

Licensing arrangements for the new satellite digital television broadcasting service

The primary purpose of the Bill is to amend various provisions of the BSA and the *Copyright Act 1968* to facilitate the delivery of digital television services by satellite to viewers who cannot receive an adequate terrestrial signal for the digital television services licensed for the area in which they live.

Commercial television channels provided through the new satellite digital television service would be delivered in three satellite licence areas which are:

- South Eastern Australia TV3 (comprising New South Wales, Victoria, Tasmania, South Australia and the Australian Capital Territory and the Jervis Bay Territory);
- Northern Australia TV3 (comprising Queensland and the Northern Territory); and
- Western Australia TV3.

The Australian Communications and Media Authority (the ACMA) will declare the commencement date for the South Eastern Australia TV3 licence area no later than 90 days after the allocation of a satellite service licence. The ACMA will declare the date of commencement of the satellite service in the Northern Australia TV3 and Western Australia TV3 licence areas to be no later than 90 days before the earliest applicable terrestrial digital television switch-over date for the satellite licence area. The separate commencement arrangement for the South Eastern Australia TV3 licence area addresses the immediacy of switch-over in the Mildura/Sunraysia, Riverland, Mt Gambier/South East, Spencer Gulf and Broken Hill licence areas.

In the first instance, all remote area commercial broadcasting licensees would be considered eligible to form a joint venture company or a special purpose company for the purposes of applying for a satellite service licence, under the proposed section 38C of the BSA, in one of the three satellite licence areas.

In the South Eastern Australia TV3 licence area and Northern Australia TV3 licence area, the eligible joint venturers would be those remote area commercial broadcasters licensed for the following terrestrial licence areas:

- Remote Central and Eastern Australia TV1;
- Remote Central and Eastern Australia TV2; and
- Mt Isa TV1.

In Western Australia TV3 licence area, the eligible joint venturers would be the following remote area commercial broadcasters licensed for the following terrestrial licence areas:

- Remote and Regional WA TV1;
- Western Zone TV1;
- Kalgoorlie TV1;
- Geraldton TV1; and
- South West and Great Southern TV1.

National digital television services provided by satellite

The Bill puts in place a licensing arrangement for the provision of commercial broadcasting channels.

The main standard definition services offered by the national broadcasters, the Australian Broadcasting Corporation (ABC) and the Special Broadcasting Service (SBS), ABC1 and SBS ONE, would be delivered by satellite by the national broadcasters on an individual state and territory basis (with the exception of the Australian Capital Territory which is served by the New South Wales services). The five secondary multi-channels offered by the national broadcasters, ABC2, ABC3, ABCHD, SBS TWO, SBSHD, would be delivered by satellite to five areas on a time-zoned basis as follows:

- South Eastern Australia (comprising New South Wales, Victoria, Tasmania, and the ACT);
- South Australia;
- Queensland;
- the Northern Territory; and
- Western Australia.

No legislative amendments are required to achieve these national broadcaster satellite arrangements.

The digital television services of the national broadcasters will be delivered by satellite using the same satellite platform as that used to deliver the commercial digital television services provided by satellite broadcasting service licensees. The national satellite digital television services will be accessible using the same reception equipment as that used to access the commercial digital television services provided by satellite broadcasting service licensees.

Allocation of a satellite broadcasting service licence to a joint venture company

Two or more eligible joint venturers may provide the ACMA with a joint written notice stating that the joint venture company intends to apply for a satellite service licence in a particular satellite licence area and that it is registered as a company under Part 2A.2 the *Corporations Act 2001*.

For the South Eastern Australia TV3 licence area, eligible joint venture companies must give notice within 28 days after the Act commences. For the Northern Australia TV3 licence area and the Western Australia TV3 licence area, eligible joint venture companies must give notice no later than 180 days before the end of the earliest applicable terrestrial digital television switch-over date for the licence area.

For the Northern Australia TV3 and the Western Australia TV3 licence areas, an applicable terrestrial digital television switch-over date is calculated as follows:

- If a terrestrial licence area, which is included in those satellite licence areas, has a simulcast period but does not contain a local market area - the last day of the simulcast period for the relevant terrestrial licence area.
- If a terrestrial licence area, which is included in these satellite licence areas, has a simulcast period and contains a local market area - the day on which the local market area becomes a digital-only local market area.

Within 28 days of providing the joint written notice to the ACMA, the joint venture company would apply in writing to the ACMA for a satellite service licence under the proposed section 38C in the satellite licence area stipulated in the notice. The ACMA would then allocate a satellite broadcasting service licence to the joint venture company for the specified satellite licence area within 28 days after receipt of the application.

Allocation of a satellite broadcasting service licence to a special purpose company

If eligible joint venturers do not provide a written notice to the ACMA of their intention to form a joint venture company during the initial 28 day period after the Act commences, then an eligible joint venturer may establish a special purpose company for the purpose of applying for a satellite broadcasting service licence under the proposed section 38C in a particular satellite licence area.

Should an eligible joint venturer choose to do this, then the eligible joint venturer may, within 28 days after the end of the initial period, provide the ACMA with a written notice. This must state that the special purpose company intends to apply for a satellite broadcasting service licence in a satellite licence area, that the special purpose company is a wholly-owned subsidiary (as defined in the *Corporations Act 2001*) of the eligible joint venturer and is registered under Part 2A.2 of the *Corporations Act 2001* and has a share of capital.

If an eligible joint venturer provides the ACMA with a notice of its intention to apply for a satellite broadcasting service licence as a special purpose company, then the special purpose company must apply to the ACMA for a satellite broadcasting service licence within 28 days.

If only one special purpose company applies for a satellite broadcasting service licence in a particular licence area, the ACMA would allocate the satellite broadcasting service licence to the special purpose company within 28 days of receiving the application. Where two or more special purpose companies apply for a satellite broadcasting service licence in a satellite licence area, then the ACMA would allocate a satellite broadcasting service licence to one of the applicants in accordance with a price-based system.

The ACMA would determine the price-based system by written instrument, (which is not a legislative instrument). The Minister may, by legislative instrument, provide specific directions to the ACMA in relation to their powers in determining the price-based system, including specified reserve prices for licences which may be different in different satellite licence areas.

If the price-based allocation system was not a public process then, at the outcome of the price-based allocation process, the ACMA would be required to publish in the *Gazette* the name of the successful applicant and the amount the applicant agreed to pay the Commonwealth for the allocation of the licence.

Should an eligible joint venturer or special purpose company(ies) not give the ACMA notice of its intention to apply for a satellite broadcasting service licence, or the joint venture company or special purpose company(ies) not apply for a satellite broadcasting service licence, then the ACMA would be required to advertise for applications for a satellite broadcasting service licence in the same manner as if a satellite broadcasting service licence had been cancelled.

Satellite broadcasting service licences will be allocated for a period of ten years from the date of the initial licence allocation. Satellite broadcasting service licensees will be restricted from transferring the satellite broadcasting service licence to another person during the first two years after the allocation of the licence.

Commencement of a satellite broadcasting service licence

The ACMA may declare a date by which satellite digital television services are to commence in a particular licence area.

Separate arrangements apply to the declaration of a start date by the ACMA for the South Eastern Australia TV3 licence area given the proximity of switch-over to digital television of the Mildura/Sunraysia, Riverland, Mt Gambier/South East, Spencer Gulf and Broken Hill licence areas. The ACMA must declare a start date no later than 90 days after the first or only allocation of a satellite broadcasting service licence.

For the Northern Australia TV3 and Western Australia TV3, the start dates must not be later than 90 days before the end of the earliest terrestrial digital television switch-over date for a region which is served by the satellite licence area.

Cancellation of a satellite broadcasting service licence

If a satellite broadcasting service licensee fails to provide any of the core/primary or non core/primary commercial broadcasting services required under the satellite broadcasting service licence conditions after the start date for the licence area, and the ACMA is satisfied that the failure to provide these services is not due to technical or unforeseen circumstances beyond the licensee's control or circumstances specified in regulations, the ACMA must provide the satellite broadcasting service licensee with a written warning that, should the service failure continue for 30 days, the satellite broadcasting service licence may be cancelled.

Should the contravention of these licence conditions continue beyond the 30 day warning period, the ACMA must cancel the satellite broadcasting service licence,

effective either when the cancellation notice is given to the satellite broadcasting service licensee or at a later time as specified in the written notice.

To minimise additional service disruption for satellite viewers, the ACMA would be able to determine a satellite broadcasting service licence cancellation date which would coincide with a start date for a re-allocated satellite broadcasting service licence in the satellite licence area. The satellite broadcasting service licensee may make an application to the Administrative Appeals Tribunal for the cancellation of a licence.

There may be instances where the transmission of a digital television service, including a standard or high definition multi-channel, is delayed on the satellite broadcasting service. Such a delay may occur for technical reasons or from delays associated with program supply due to the negotiation of appropriate affiliation agreements. Where such a delay impacts on the satellite broadcasting service licensee's ability to provide the digital television service on the satellite broadcasting service, the ACMA would disregard the delay so long as the delay is as short as practicable.

Re-allocation of satellite broadcasting service licences after cancellation

If the ACMA notifies the satellite broadcasting service licensee of the cancellation of the satellite broadcasting service licence, then within 45 days of the notice being given, the ACMA would be required to advertise for applications for a satellite broadcasting service licence.

Prior to advertising, the ACMA would be required to determine eligibility requirements that must be met by applicants, including that the applicant has the capacity to provide the satellite services as required under the conditions of the satellite broadcasting service licence. The Minister may, by legislative instrument, direct the ACMA in relation to its powers to determine eligibility requirements.

The ACMA would be required to include in the advertisement the following details:

- a description of the contravention or the reason why the satellite service licence is being cancelled;
- the date on or before which applications must be received by the ACMA; and
- a statement specifying how details of the licence area, the eligibility requirements and conditions applying to the licence may be obtained.

The ACMA would be required to set the application closing date as the 90th day after the day the first advertisement is published.

If the ACMA is satisfied that one or more of the applicants meet the eligibility requirements, then the ACMA would be required to allocate a satellite broadcasting service licence to one of the applicants within 90 days after the application closing date. Should the ACMA refuse to allocate a satellite broadcasting service licence, the applicant would have right of appeal to the Administrative Appeals Tribunal.

Commercial digital television programming on the satellite broadcasting service

Services authorised on the satellite broadcasting service

The intent of the Bill is to enable the new commercial satellite services to provide viewers in signal deficient areas with access to an equivalent range of digital television services to those received by metropolitan viewers.

The measures in this Bill do not require the satellite broadcasting service licensees to provide digital television services that are identical to the digital television services provided to metropolitan markets. Instead, the licensees of the satellite service would be authorised to transmit the network-affiliated multi-channelled services provided by remote area commercial broadcasters in the related terrestrial licence area (the *related terrestrial licensee*), or, in cases where remote commercial services are not available, a replacement multi-channelled service provided by a commercial broadcaster in a metropolitan licence area.

Satellite broadcasting service licensees would be authorised to provide the following services in its satellite licence area:

- a core/primary standard definition service with the same, or substantially the same, program content as the core/primary standard definition commercial television service provided by the related terrestrial licensee or provided by a commercial licensee for a metropolitan licence area;
- a standard definition multi-channelled commercial television service which is not a core/primary standard definition service with the same, or substantially the same, program content as the standard definition multi-channelled commercial television service which is not the core/primary standard definition service provided by the related terrestrial licensee or provided by a commercial licensee for a metropolitan licence area;
- a high definition multi-channelled commercial television service with the same, or substantially the same, program content as the high definition multi-channelled commercial television service provided by the related terrestrial licensee or provided by a commercial licensee for a metropolitan licence area; and
- one or more standard definition multi-channels the program content of which is wholly or mostly of local news and information programs, provided by all regional commercial broadcasting licensees as required in the relevant condition to their terrestrial regional licence.

Related terrestrial licensees for the South Eastern Australia TV3 and Northern Australia TV3 licence areas are the broadcasters licensed for the Mt Isa TV1 and Remote Central and Eastern Australia TV1 and TV2 licence areas. Related terrestrial licensees for the Western Australia TV3 licence area are those broadcasters licensed for Remote and Regional WA TV1, Western Zone TV1, Kalgoorlie TV1, Geraldton TV1 and South West and Great Southern TV1.

A metropolitan licence area would be a licence area in which is situated the General Post Office of the capital city of New South Wales, Victoria, Queensland, Western Australia or South Australia.

For the purpose of determining whether a particular satellite service is the same, or substantially the same, as the terrestrial commercial television service in a related terrestrial licence area or a metropolitan licence area, particular program content will be disregarded. This content includes advertising and promotional content, weather bulletins, news programs, sports programs that relate to events on the anti-siphoning list (subject to them being replaced with a similar event on the anti-siphoning list), programs whose broadcast would be illegal outside the place of origin (for example, due to court suppression orders) and programs as prescribed in regulations.

Commercial services that must be provided on the satellite broadcasting service at commencement

From the commencement of the new satellite broadcasting service, the satellite broadcasting service licensees in each of the satellite licence areas must provide digital television services equivalent in range to commercial digital terrestrial television services in metropolitan licence areas.

The satellite broadcasting service licensee must transmit three core/primary digital television services of the remote commercial broadcasters broadcast in the related terrestrial licence areas relevant to the satellite broadcasting service licence area. The satellite broadcasting service licensee must also transmit all standard definition and high definition multi-channel services provided by the remote commercial broadcasters licensed in the related terrestrial licence areas relevant to the satellite licence area. Core/primary services and multi-channel services provided on the satellite must not be the same as another core/primary or multi-channel service provided on the satellite.

Where fewer than three core/primary digital television services or fewer multi-channelled services are provided by related terrestrial licensees than in the relevant metropolitan licence areas, the satellite broadcasting service licensee would be required to replace the 'missing' core/primary or multi-channel service with a core/primary or multi-channel service from a metropolitan licensee. If a missing digital television service is subsequently provided by a related terrestrial licensee, then the satellite broadcasting service licensee would be required to replace the metropolitan service with the service of the related terrestrial licensee.

Satellite broadcasting service licensees would not be required to simultaneously retransmit the programming provided by the relevant metropolitan broadcasters. The scheduling of program content provided by the metropolitan broadcasters would be a matter for the satellite broadcasting service licensees. These measures would provide the licensees of the satellite service with the flexibility to tailor and localise the digital television services they provide in their satellite licence area to the needs of their audience while still providing substantially the same programming available in metropolitan areas.

Temporary exemption from services provided on the satellite service after commencement of the satellite service

It is possible that, after the satellite service has already commenced, a remote commercial broadcasting licensee may cease to provide its network-affiliated core/primary service or multi-channelled services in the remote licence areas. In such

a case, the satellite broadcasting service licensee would continue to be authorised to provide replacement metropolitan network services for the core/primary service and multi-channel network services affiliated with the insolvent licensee but would not be required to do so. The satellite broadcasting service licensee would be temporarily exempted from the requirement to provide all 'Freeview' services on the satellite service until such time as a new remote broadcasting licensee commences in the relevant related terrestrial licence area.

Should a satellite broadcasting service licensee choose to replace the services formerly provided by a remote commercial licensee with services provided by a commercial broadcaster in a metropolitan licence area, then when the core/primary service or multi-channelled services commence to be provided by a new remote broadcasting licensee in the related terrestrial licence area, the satellite broadcasting service licensee must then transmit the services provided by the new remote licensee.

Exemption from providing certain multi-channel services with the same content on the satellite service

There may also be circumstances where two or more multi-channelled services are providing the same program content but not in the same format. For example, it could be possible to provide a digital multi-channel in both high definition and standard definition formats, but the content would be the same.

In these cases, the Minister would have the power to exempt a satellite broadcasting service licensee from providing a particular service where the Minister is satisfied, after consultation with the ACMA and the satellite broadcasting service licensee, that the multi-channel service provides the same program content as another multi-channel on the satellite service.

Such an exemption would remain in force for no longer than two years, subject to a discretionary extension, until the Minister is satisfied that the multi-channel service no longer provides the same content as another multi-channel service on the satellite service.

Exemption from providing certain multi-channel services on the satellite which are not technically feasible

A condition of a satellite broadcasting service licence is that new commercial multi-channel services which commence after the start of the satellite service will be provided on the satellite unless the ACMA determines it is not technically feasible. Where additional satellite capacity would be required, the ACMA may consider that it is not technically feasible for the satellite broadcasting service licensee to provide a multi-channel service.

When this is the case, the ACMA may determine, by legislative instrument, that the satellite broadcasting service licensee is not required to provide the new multi-channel commercial service.

New or multiple multi-channelled digital television services after the end of the simulcast period

After the switch-over to digital television has been completed in a terrestrial licence area, the restrictions on the number of multi-channelled services end as do any applicable high definition quota obligations. This will mean that commercial broadcasters will be able to provide additional multi-channelled digital services as allowed in their spectrum allocation in their terrestrial licence areas after the end of the simulcast period. For example, a commercial broadcaster may choose not to provide a high definition multi-channel after the end of the simulcast period in order to provide one or more standard definition multi-channels subject to the space available within their spectrum allocation.

The provision of new multi-channelled services on the satellite services may be limited by satellite capacity. New multi-channelled services could also have financial implications for the Government, which is funding the satellite delivery for the current number of digital multi-channels.

For these reasons, satellite broadcasting service licensees would not be required to provide new multi-channel services which commence following the conclusion of a simulcast period in the relevant metropolitan licence areas. Rather, satellite broadcasting service licensees would be authorised to provide the new multi-channel service, should they choose to do so.

Conditions on the satellite broadcasting service licence

The statutory licence conditions set out in the proposed Bill provide that each satellite broadcasting service licensee would be required to do the following:

- broadcast at least three core/primary services with program content which is the same, or substantially the same, as programs provided by the remote commercial broadcasters in the related terrestrial licence area. These must be distinct from each other to avoid the prospect of duplicate services;
- broadcast the program content of the Nine Network, Network Seven and Network Ten affiliated standard definition and high definition multi-channels provided by remote commercial broadcasters in the related terrestrial licence area (a total of nine commercial multi-channels, including core/primary services). These must be distinct from each other to avoid the prospect of duplicate services;
- at commencement of the satellite broadcasting service, should remote commercial broadcasters in the related terrestrial licence area be unable to provide their core/primary or digital standard definition and high definition multi-channels to the satellite licensee, the satellite broadcasting service licensee must replace the missing digital service/s with the core/primary and/or standard definition and high definition multi-channel service/s provided by a commercial broadcaster in a metropolitan licence area;
- broadcast any local news program which is supplied by regional commercial broadcasters in accordance with licence conditions that apply to regional commercial broadcasters as soon as practicable after the regional commercial

broadcaster begins to broadcast the local news program or material in its terrestrial licence area;

- comply with any conditional access scheme registered by the ACMA under Part 9C of the draft provisions;
- comply with technical standards as may be determined by the ACMA for digital transmission and for domestic digital reception equipment using a satellite.

Like other commercial television broadcasters, satellite broadcasting service licensees would also be subject to the standard licence conditions set out in Schedule 2 to the BSA. The exceptions are that they would not be expected to comply with conditions that are specific to commercial digital television broadcasting in terrestrial licence areas and the media control rules (from which the satellite broadcasters would be exempt).

Technical standards for digital transmission and domestic reception of satellite services

The ACMA would be responsible for determining technical standards for the transmission of free-to-air digital television services on the satellite broadcasting service. Commercial satellite broadcasting service licensees and national television broadcasters providing their services by satellite would be required to comply with the technical standards as determined by the ACMA.

The ACMA would also be responsible for determining the technical standards for domestic reception equipment which is capable of receiving the commercial services provided by commercial satellite licensees on the satellite service and/or national digital television services provided by satellite. There would be corresponding provision for penalties for the supply of domestic reception equipment which does not comply with the ACMA technical standard. The ACMA would provide exemptions for specified domestic reception from the penalty provisions.

Content obligations on commercial television broadcasting licensees

Local news and information on the satellite service

As a condition of the satellite broadcasting service licence, a satellite broadcasting service licensee would be required to provide local news and information on the satellite which is broadcast by regional broadcasting licensees to viewers in each of the terrestrial licence areas corresponding with the relevant satellite licence area.

Satellite broadcasting service licensees will not be required to provide local news and information programming which is wholly a repeat of a program previously shown by a regional commercial broadcasting licensee. However, local news and information programs which are not repeats of programs previously shown by a regional commercial broadcasting licensee will be provided on the satellite service as soon as practicable after they begin to be broadcast by the regional commercial broadcasting licensee. These programs will then be repeated as part of a cycle on the new satellite service's channel.

The relevant satellite broadcasting service licensee would be responsible for the aggregation of this local news and information provided by regional broadcasters for transmission by satellite. This responsibility would include the determination of arrangements for content acquisition, negotiation of appropriate transmission rights from the relevant terrestrial regional broadcaster where necessary, and collation and distribution of local news and information from regional broadcasting licensees.

Viewers may access the local news and information which is relevant to their terrestrial regional licence area on an additional satellite service channel reserved for the purpose. However, it is likely that the satellite broadcasting service licensees for the Western Australia TV3 licence area will provide local news and information on their core/primary channels.

To ensure the supply of local news and information to satellite viewers, regional broadcasting licensees would be required to provide unique local news and information which they deliver terrestrially to viewers in each of their licence areas either simultaneously or as soon as practicable to the relevant satellite licensees for transmission by satellite in the relevant satellite licence area.

A separate condition on remote area broadcasting licensees is not required since remote area broadcasters would already provide local news and information relevant to remote area viewers through the core/primary and multi-channelled services they are required to provide to satellite broadcasting service licensees for delivery in the relevant satellite licence area.

There are two categories of local news and information which regional broadcasters would be required to supply to the relevant satellite broadcasting service licensee for transmission to satellite viewers. The first category would be the local news and information that some terrestrial regional broadcasters are required to provide as a condition of their licence. The second category would be the local news and information that is provided voluntarily by regional broadcasters as part of their terrestrial service.

In relation to the first category, section 43A of the BSA requires that the ACMA impose additional licence conditions on particular commercial television broadcasting licensees in aggregated television markets. The additional licence condition requires these broadcasters to broadcast a minimum level of material of local significance in defined local areas within the aggregated licence area. Regional broadcasting licensees operating in non-aggregated regional licence areas have no specific local area content requirements.

As part of the additional licence condition imposed by the ACMA in relation to material of local significance, section 43A of the BSA would include a requirement that a commercial television broadcasting licensee subject to the licence condition imposed under section 43A must provide material of local significance broadcast in their terrestrial licence area to the relevant satellite broadcasting service licensee for delivery to the relevant satellite licence area.

In relation to the second category, regional broadcasting licensees would provide local news, local weather, community service announcements and other local information which they broadcast as relevant to all or part of the terrestrial licence area to the

satellite licensee. The ACMA would impose an additional statutory licence condition which would require regional broadcasting licensees (whether or not they are also subject to the condition in section 43A of the BSA) to provide this local news and information to the satellite licensee. If the broadcaster concerned is already subject to section 43A, then that broadcaster would be required under the additional statutory licence condition to provide local news and information that is over and above material of local significance to the satellite licensee.

For the purpose of identifying ‘local news and information’ for the second category, the ACMA would be given the authority to make legislative instruments that define ‘local news program’ and ‘local news and information’.

Penalties would apply to regional broadcasting licensees for non-compliance with the additional licence conditions. A breach of the new licence condition would be subject to the same penalties and enforcement processes that apply to section 43A of the BSA.

Requirement to provide program content to a satellite broadcasting service licensee

It is crucial that the satellite broadcasting service licensees are able to obtain the programs that they are required to provide by their licence conditions. Accordingly, existing remote area commercial broadcasting licensees which are licensed for terrestrial licence areas related to a particular satellite licence area would be required to provide their network-affiliated core/primary and standard definition and high definition multi-channelled services to the relevant satellite broadcasting service licensee for transmission on the relevant satellite service.

Relevant remote commercial broadcasting licensees would be required to provide their program content to the satellite broadcasting service licensee either simultaneously with the broadcast of the program on the remote area terrestrial service or as soon as practicable after the broadcast of the program on the remote area terrestrial service. As outlined above, additional licence conditions would also be imposed on all regional commercial terrestrial television broadcasters which would require them to provide to the satellite broadcasting service licensee serving their terrestrial licence area the local news programs and other local information programs that they broadcast in their terrestrial licence areas.

A corresponding licence condition would be placed on commercial broadcasting licensees in metropolitan licence areas to ensure that they comply with a satellite broadcasting service licensee’s request for particular standard definition and high definition programs which would then be broadcast on the satellite broadcasting service. The metropolitan broadcaster would be required to provide the program requested by the satellite broadcasting service licensee either simultaneously, or as soon as practicable, after the program is broadcast on the metropolitan service.

Copyright and acquisition of property

To support the requirement on regional and metropolitan broadcasters to supply their content to satellite broadcasting service licensees for broadcast in the relevant satellite licence area, a satellite broadcasting service licensee would be expected to reach a commercial agreement with metropolitan and regional broadcasters for the provision

of programming and content, including local news and information, for broadcast on the satellite service.

Where such an agreement cannot be reached, a statutory licensing scheme would be established in order to provide equitable remuneration to copyright holders. Such a scheme would also account for the copyright embedded in the broadcast (that is, the copyright in works, cinematograph films and sound recordings transmitted by the satellite licensees).

The *Copyright Act 1968* would be amended to establish such a statutory licensing scheme to determine equitable remuneration where commercial negotiations fail. The scheme would provide that the copying, broadcasting and re-broadcasting by a satellite broadcasting service licensee of a particular broadcast by a metropolitan or regional broadcaster does not infringe the copyright in the broadcast, or in any work, sound recording or cinematographic film included in the broadcast, if a remuneration notice given to the relevant collecting society is in force.

The proposed statutory licence would be limited to copying, broadcasting or re-broadcasting the following program material by the satellite service provider:

- program content that a remote or metropolitan commercial television broadcasting licensee is required to supply to a satellite broadcasting service licensee for broadcast in a satellite licence area; or
- local news and information that regional commercial television broadcasting licensees are required to supply to a relevant satellite broadcasting service licensee for the applicable satellite licence area;

where that copying, broadcasting or re-broadcasting is necessary for the satellite provider to comply with licence conditions for the new satellite service.

Constitutional safety net clause

To ensure the constitutional validity of the measures in this bill, the Australian Government Solicitor (AGS) has recommended the inclusion of a constitutional ‘safety net’ to safeguard against rulings that the legislation is invalid on constitutional grounds.

Under this clause the satellite broadcasting service licensee would be liable to pay a reasonable amount of compensation if such an acquisition is deemed to be on other than ‘just terms’.

Regulation of content broadcast on the satellite services

Regulation under the BSA of the televising of sporting events on the anti-siphoning list, captioning requirements and program standards for Australian content and children’s programs on the satellite broadcasting service should be consistent with regulation on remote, regional and metropolitan broadcasters’ terrestrial digital television services. This means that a satellite broadcasting service licensee’s non-core/primary multi-channelled standard definition and high definition services would be exempt from program standards and captioning requirements until the end of the simulcast period in the last applicable terrestrial digital television switch-over date in that satellite licence area. This is consistent with the exemption provided to

commercial television broadcasters' non-core/primary standard definition and high definition multi-channels in terrestrial licence areas.

Maintaining consistency in the regulations across the satellite and terrestrial transmission platforms would avoid a situation in which programming provided for transmission on the satellite service by regional, remote and metropolitan broadcasters as part of their licence conditions would be required to meet separate regulatory requirements. Such a situation would impose an increased regulatory burden on terrestrial broadcasters which is not the intention of the new satellite broadcasting service.

Primary multi-channelled commercial and national television services delivered on the satellite

Primary services would be distinguished from other standard definition and high definition multi-channel services provided by commercial satellite broadcasting service licensees in order to enable the regulation of the new satellite services to be consistent with terrestrial services in relation to the televising of sporting events on the anti-siphoning list, captioning requirements and standards governing Australian content and children's programs.

The ACMA would be given the authority to identify up to three standard definition multi-channels as primary commercial services provided by the satellite broadcasting service licensee in the satellite licence area. It is not the intention that satellite broadcasting service licensees would broadcast two identical channels. Rather, the ACMA must identify one primary service that corresponds with each of the major terrestrial commercial networks, the Nine Network, Network Ten, and Network Seven, for broadcast by satellite in each satellite licence area. These could either be a service that is the same as the core/primary service provided by the remote area broadcasters under their terrestrial broadcasting licence, or the same, or substantially the same, as the core/primary services broadcast by commercial broadcasters in metropolitan licence areas.

Similarly, each national broadcaster would nominate to the Minister a specified standard definition service in a specific satellite delivery area as the primary satellite national television broadcasting service. The digital television services of the national broadcasters would be provided for satellite delivery in standard definition and, where currently offered in that format, high definition for delivery by satellite.

The nomination of a primary satellite national television broadcasting service would allow captioning requirements on the satellite broadcasting service to be regulated in the same way as on the national broadcasters' terrestrial services. The national broadcasters' primary services on the satellite broadcasting service would be distinguished from the other standard definition and high definition multi-channels provided by the national broadcasters on the satellite broadcasting service.

Anti-siphoning restrictions on commercial satellite broadcasting service licensees and on national broadcasters' satellite services

The digital television services provided by the satellite broadcasting service would also be subject to restrictions on television anti-siphoning events.

The restrictions would apply to the satellite broadcasting service licensee's primary standard definition commercial television broadcasting service identified by the ACMA, and to the national broadcasters' standard definition primary satellite national television broadcasting service, nominated to the Minister, as well as any other secondary standard definition multi-channelled services provided by the satellite broadcasting service licensee and national broadcasters for satellite delivery.

Similar restrictions on anti-siphoning events would also apply to high definition multi-channelled services provided by a satellite broadcasting service licensee or national broadcaster in a satellite licence area or satellite delivery area. The satellite broadcasting service licensee and the national broadcaster would not be allowed to televise the whole or part of an anti-siphoning event on its high definition multi-channel unless it met the above criteria.

The secondary standard definition or high definition multi-channel services would not broadcast the whole or a part of an event on the anti-siphoning list in the satellite licence area or, for the national broadcasters, the satellite delivery area unless:

- it was previously televised on the primary commercial television broadcasting service or the primary satellite national service;
- it will be televised simultaneously on both the primary and secondary services; or,
- in the case of a part of an anti-siphoning event, if the part of the event is televised in a news or current affairs program on the secondary service.

Content classification across time zones for commercial services on the satellite service

The BSA requires that the *Commercial Television Broadcasting Code of Practice* ensures that there are specific times during which different classifications of content can be shown, including children's content. For example, programs rated MA15+ cannot be broadcast before 9.30pm. Similarly, the *Children's Television Standards* include requirements about the times of day during which C and P programs are to be shown (including school holiday periods).

Two of the satellite service licence areas are not State or Territory specific. This means that programming would be transmitted across multiple time zones within a satellite licence area. The South Eastern Australia TV3 licence area would serve New South Wales, Victoria, South Australia, Tasmania, the Australian Capital Territory and the Jervis Bay Territory. The Northern Australia TV3 licence area would serve Queensland and the Northern Territory. The Western Australia TV3 licence area is the only area that is state specific and hence involves a single time zone.

For this reason, it is likely that satellite broadcasting service licensees for the South Eastern Australia TV3 licence area and the Northern Australia TV3 licence area would unintentionally contravene classification requirements as set out in the *Children's Television Standards* or the *Commercial Television Broadcasting Code of Practice*. A single programming stream delivered to either of these licence areas would comply in one area and not in another area due to the difference in time zones.

Mandating that the satellite broadcasting service licensees must broadcast at the correct time zone would have significant financial implications for the satellite broadcasting service licensee and the Government which is funding the new service over the first ten years. To address this, the satellite broadcasting service licensee in each of those satellite licence areas would nominate to the ACMA a time (or time zone) in a particular place that would be the basis for determining a satellite broadcasting service licensee's compliance with classification standards and codes of practice to the extent that the time of day is relevant.

For standard definition services provided by licensees in the South Eastern Australia TV3 and the Northern Australia TV3 licence areas, broadcasters would nominate a specified place in each of the licence areas. For high definition services provided by licensees in the South Eastern Australia TV3 licence area and Northern Australia TV3 licence area, broadcasters would nominate a specified place in either the South Eastern Australia TV3 or Northern Australia TV3 licence areas.

Programming broadcast by the satellite broadcasting service licensee would then be subject to the classification standards and codes of practice as they pertain to the time (or time zone) in the nominated place. Under this arrangement, the satellite broadcasting service licensee would be exempt from meeting classification standards and codes of practice on the satellite services provided in time zones other than the one in the place nominated.

Satellite broadcasting service licensees in the South Eastern Australia TV3 licence area and the Northern Australia TV3 licence area may withdraw a nomination of a place for the purpose of content classification and make a fresh nomination to the ACMA.

Emergency information

Satellite services, like all other commercial television broadcasting services, will be subject to the *Commercial Television Industry Code of Practice*, which includes provision for the broadcast of emergency information related to the satellite licence area.

Conditional access arrangements for satellite services

It is intended that viewers who are unable to adequately receive one or more of the terrestrial digital television commercial broadcasting services available in their terrestrial licence area will be able to access the relevant satellite digital television services. In this regard, the inability to receive one or more of the standard definition or high definition multi-channels that form part of the terrestrial digital television commercial broadcasting service is an inability to receive the entire service.

To preserve the integrity of the new commercial satellite licence areas and existing commercial regional and metropolitan television licence areas, access to the satellite service would be subject to conditional access arrangements. Commercial broadcasters have agreed to establish a body or association (the association) which will include a scheme administrator to administer the conditional access arrangements (the scheme administrator).

While the satellite services provided by the national broadcasters will not be subject to the conditional access system developed by the scheme administrator or the ACMA in lieu of the association, viewers of these services will receive those applicable to the State or Territory in which they reside.

Conditional access schemes

Conditional access would be based on the following principles:

- viewers residing in remote licence areas or in metropolitan and regional areas currently authorised to receive satellite-delivered remote area commercial television services (RABS) because they reside in areas of signal deficiency (Category A reception areas) would receive automatic access to the commercial satellite digital television service in the relevant satellite licence area on commencement of the satellite service in the relevant satellite licence area; and
- viewers residing in regional licence or metropolitan areas in known areas of signal deficiency (Category B reception areas), would receive access to the commercial satellite digital television service in the relevant satellite licence area as soon as they are eligible to do so;
- viewers who do not reside in Category A or Category B areas but who are unable to receive the commercial terrestrial digital television signals licensed for their area (Category C reception areas) would apply on a case by case basis for access to the relevant satellite broadcasting service and would need to demonstrate their inability to access adequate commercial terrestrial digital television signals.

The process for applying for, and approving access to, the satellite service would be managed by a body or association representing commercial television broadcasting licensees (the association). The ACMA would be responsible for determining any technical standards for assessing adequate reception of terrestrial services.

Viewers residing in Category A reception areas will be able to access the relevant satellite service from the date the service commences in the relevant satellite licence area. Viewers residing in Category B and Category C reception areas cannot be granted access to the relevant satellite service more than six months before the digital switch-over date in their licence area.

To be registered by the ACMA, any conditional access scheme would also be required to achieve the following objectives:

- identify a scheme administrator for the conditional access scheme who is authorised to issue a reception certificate to access the relevant satellite broadcasting service to a person in a Category C reception area;
- enable a person who resides in a Category C reception area and holds a reception certificate to receive the relevant satellite broadcasting service;
- provide that an application for a reception certificate must be accepted and dealt with by the scheme administrator within 14 days of receiving the application and without requiring a fee by the applicant or incurring any other expenses;

- authorise the scheme administrator to revoke a reception certificate if a person ceases to be eligible to access the satellite broadcasting services;
- ensure that viewers in a local market area and not in a Category A reception area cannot be authorised to receive the satellite service earlier than six months before the date that the local market area becomes a digital-only market area; and
- ensure that viewers who are in a simulcast area but are not in a local market area and not in a Category A reception area cannot be authorised to receive the satellite service earlier than six months before the end of the simulcast period in the simulcast area.

Registration of a conditional access scheme

Within 45 days after the allocation of a satellite broadcasting service licence, the association would provide the ACMA with a conditional access scheme. If the ACMA is satisfied that the conditional access scheme provided by the association is consistent with the principles that a person in a licence area should have adequate reception of either the terrestrial commercial digital services licensed for that area or the relevant satellite service, then the ACMA must register the conditional access scheme within 28 days of receiving a copy of the scheme.

If, after 90 days, the association has been unable to provide the ACMA with a suitable conditional access scheme, then the ACMA would formulate and register a conditional access scheme consistent with the principle that a person in a licence area should have adequate reception of either the terrestrial commercial digital services licensed for that area or the relevant satellite broadcasting service. Before registering the ACMA formulated conditional access scheme, the ACMA must publish a draft of the scheme on its website and invite submissions from interested persons to make written submissions within a 14 day period.

The ACMA would maintain an electronic register of conditional access schemes which would be publicly available on the ACMA website. If changes are made to a conditional access scheme, the altered conditional access scheme would be subject to the same registration process. If a conditional access scheme is altered, the conditional access scheme would be replaced on the Register, rather than the registered scheme being varied. Satellite broadcasting service licensees would be required to comply with any conditional access scheme registered by the ACMA.

The ACMA would also have an oversight role, including investigating complaints of decisions taken by the association's scheme administrator with an appropriate power to require that access to the satellite broadcasting service be provided and to direct the scheme administrator to issue a reception certificate as needed. Further, if the scheme administrator did not act on a correctly completed application within 14 days after receipt of the application, then the ACMA can also investigate the complaint. The ACMA would not need to investigate any complaints that are frivolous, vexatious or not made in good faith.

If the ACMA investigates the complaint and finds that the person does not have adequate terrestrial reception of digital television services, then the ACMA may, by written notice, direct the scheme administrator to issue a reception certificate to the

person within a period which is not longer than 28 days. Prior to issuing such a direction, the ACMA would be required to invite the scheme administrator to make a submission in relation to the complaint within a specified time period which is not longer than 28 days.

If the scheme administrator does not comply with a direction issued by the ACMA, then the ACMA may determine that the conditional access scheme and the BSA have the same effect as if the scheme administrator had issued a reception certificate to the applicant.

A reception certificate may be revoked by the scheme administrator in certain circumstances where the viewer is no longer eligible. This includes, for example, if a terrestrial transmission facility has been established which would now serve the viewer.

An applicant or the holder of a reception certificate would be able to make an application to the Administrative Appeals Tribunal for a review of a decision to refuse to issue a reception certificate or to revoke a reception certificate under any conditional access scheme formulated by the ACMA.

Improving viewer access: terrestrially-delivered commercial digital television services

The new satellite broadcasting service will be provided to viewers who are unable to receive the terrestrially-delivered commercial digital television services provided by commercial broadcasters licensed for their area. To provide increased diversity in the free-to-air commercial television services available in terrestrial licence areas, provision would be made to increase the number of commercial services available in smaller licence areas.

Equivalency of terrestrial commercial services

Commercial broadcasters in several regional terrestrial licence areas are currently only licensed to provide two commercial services. This enables them to deliver one core standard definition service, one standard definition multi-channel, and one high definition multi-channel for each service. This limits their ability to provide all of the commercial 'Freeview' digital television services to their terrestrial viewers.

Viewers in the Griffith and MIA, Broken Hill, Spencer Gulf, Mount Gambier/South East and Riverland terrestrial licence areas receive only two commercial services and commercial digital multi-channels are currently unavailable. All of the licensees in these licence areas hold a licence under section 38A of the BSA.

The establishment of a satellite broadcasting service to address black spots would create an anomalous situation in which viewers who live in a digital television black spot in those terrestrial licence areas would receive 'Freeview' services on the satellite while terrestrial viewers with adequate terrestrial digital television reception in the same licence area would not.

The inability of licensees to offer all of the commercial 'Freeview' digital television services in these licence areas would be addressed by establishing a mechanism under section 38B of the BSA for the provision of a third terrestrial commercial digital television service in those regional licence areas currently served by only two

commercial services. Making provision for a third terrestrial commercial digital television service in these licence areas would remove a barrier to the provision of an equivalent number of digital commercial television services available across every terrestrial licence area in Australia.

If the licence for the third digital-only commercial television service is issued to the incumbent licensee then they would either hold or be in a position to control three licences within a market.

Should this be the case, the incumbent licensee would be eligible for exemption from the legislated ownership and control rules through the existing exemption provisions for small markets which currently apply to additional licences allocated under section 38A and section 38B, both of which would apply to the incumbent licensee. No legislative amendment is required to provide this exemption from the legislated ownership and control rules.

Further amendments to section 38B of the BSA are also proposed to allow that, if a joint venture company fails to commence a service under section 38B, the ACMA would have the capacity to re-start the licence allocation process to a single commercial broadcaster in the licence area.

Multi-channel provisions on regional broadcasters in underserved areas during the simulcast period

In recognition of the special circumstances of terrestrial broadcasters operating in these smaller markets, terrestrial commercial broadcasters in the underserved terrestrial licence areas of Griffith and MIA, Broken Hill, Spencer Gulf, Mount Gambier/South East and Riverland would be able to provide all of the commercial 'Freeview' digital television services in standard definition only.

A commercial broadcaster licensed under sections 38A and 38B of the BSA could provide a full range of commercial digital television multi-channelled services either in standard definition format only in, or in a combination of, standard definition and high definition formats. No high definition quotas would apply to these services (although they could choose to provide high definition programming if they chose to do so).

Revocation of multi-channelling elections

A commercial broadcaster with a licence allocated under section 38B of the BSA may make a multi-channelling election under subclause 6(5A) or 6(5AA) of Schedule 4. Such an election allows a commercial broadcaster to deliver digital television services by using a minimum number of transmitters which provides cost benefits to the broadcaster by minimising transmission costs. Under a multi-channelling election it would be possible to provide additional commercial digital multi-channels within the transmission capacity of two channels of spectrum, as long as the television services are all broadcast in standard definition.

In addition, if an incumbent licensee applies for a third commercial television licence under the amended section 38B of the BSA, the allocation of the third broadcasting licence would be coupled with an entitlement to an additional transmitter licence authorising the use of an additional 7MHz channel. This would allow spare

transmission capacity under the additional transmitter licence to be used for the purpose of providing additional multichannels for one or both of the other commercial television services that the licensee currently provides.

In relation to existing section 38A and section 38B licences, all multi-channelling elections will be automatically cancelled at the end of the simulcast period and no new multi-channelling elections would be permitted. Consequently, the ACMA would allocate to the licensees in these licence areas a third transmitter licence. The intention is to equalise spectrum licences so that a transmitter licence authorises the use of one 7MHz channel of spectrum for each commercial television broadcasting licence in every licence area.

This proposed amendment to multi-channelling elections made under section 38B of the BSA, along with the proposed amendments to the allocation of commercial broadcasting licences under section 38B, would assist in facilitating commercial broadcasters to provide an equivalent range of digital television services in underserved areas as are available in metropolitan licence areas.

Designation of primary commercial television broadcasting services in terrestrial licence areas

The ACMA must declare, by legislative instrument, a standard definition multi-channelled commercial television broadcasting service in a terrestrial licence area to be the primary service and must do so as soon as practicable after the commencement of the Broadcasting Legislation Amendment (Digital Television) Act. This declaration must be in force both during and after the simulcast period.

Satellite services not to be used to meet terrestrial coverage requirement

The *Commercial Television Conversion Scheme* has, as one of its policy objectives, the requirement that commercial television broadcasting licensees in a particular terrestrial licence area should achieve the same level of coverage and potential reception quality with their standard definition digital television services, during and after the simulcast period, as that achieved by their analog terrestrial television services.

It is not the intention that the new satellite broadcasting services would be used to meet the coverage requirement expressed in the *Commercial Television Conversion Scheme*.

In order to avoid any ambiguity, commercial television services provided by a satellite broadcasting service licensee would be specifically excluded from the policy objectives dealing with same level of coverage of digital terrestrial services. Remote area broadcasters, however, may use the relevant satellite broadcasting service to provide digital program feeds to their transmitters for terrestrial transmission in their terrestrial licence areas.

FINANCIAL IMPACT STATEMENT

The Bill creates a framework for a new satellite service to allow the provision of digital television to all Australians. The amendments in this Bill will not of themselves result in any direct financial impact on the Government.

The Government is currently in negotiations with commercial and national broadcasters to fund this service.

ABBREVIATIONS

The following abbreviations are used in this explanatory memorandum:

ACMA:	Australian Communications and Media Authority
AGS:	Australian Government Solicitor
Association:	the body or association representing commercial television broadcasting licensees for the purposes of conditional access arrangements
Bill:	Broadcasting Legislation Amendment (Digital Television) Bill 2010
BSA:	<i>Broadcasting Services Act 1992</i>
Copyright Act :	<i>Copyright Act 1968</i>
HD:	broadcast of a digital television multi-channel in high definition format
LIA:	<i>Legislative Instruments Act 2003</i>
Minister:	Minister for Broadband, Communications and the Digital Economy
OBPR:	Office of Best Practice Regulation, Department of Finance and Deregulation
Related terrestrial licensee:	remote commercial broadcasting licensees whose terrestrial licence area is within the satellite licence area
Scheme administrator:	the administrator responsible for issuing reception certificates for the association representing commercial television broadcasting licensees for the purposes of conditional access arrangements
SD:	broadcast of a digital television multi-channel in standard definition format

NOTES ON CLAUSES

Clause 1 – Short title

Clause 1 provides for the Bill, when enacted, to be cited as the *Broadcasting Legislation Amendment (Digital Television) Act 2010*.

Clause 2 – Commencement

Clause 2 provides that each provision of the Bill specified in column 1 of the table in clause 2 will commence, or will be taken to have commenced, on the day or at the time specified in column 2 of that table.

Clause 3 – Schedule(s)

Clause 3 provides that each Act specified in a Schedule to the Bill is amended or repealed as set out in the Schedule concerned. There is one Schedule to the Bill, which provides for amendments to the *Broadcasting Services Act 1992* and the *Copyright Act 1968*.

Schedule 1 – Amendments

Item 1 – Subsection 6(1) (before paragraph (a) of the definition of *commercial television broadcasting licence*)

This item amends the definition of *commercial television broadcasting licence* to include a licence allocated under section 38C for the provision of commercial television broadcasting services with the use of a satellite.

Item 2 – Subsection 6(1)

This item amends subsection 6(1) to include a definition of a *conditional access scheme* as a scheme that complies with new section 130ZB.

Item 3 – Subsection 6(1) (at the end of the definition of *core commercial television broadcasting service*)

This item inserts a note after the definition of *core commercial television broadcasting service* to explain that there are no “core” services in relation to licences allocated after 1 January 2009. *Core commercial television broadcasting services* are certain services only authorised by licences that were allocated before 1 January 2009 (as provided for in sections 41A and 41B of the BSA).

Item 4 – Subsection 6(1)

This item amends subsection 6(1) to include a definition of *core/primary commercial television broadcasting service*. This definition treats, as the same, core commercial television broadcasting services authorised by licences allocated before 1 January 2009 and primary commercial television broadcasting services as declared by the ACMA under clause 41G of Schedule 4 to the BSA.

Item 5 – Subsection 6(1) (definition of *licence area*)

This item amends the definition of *licence area* in subsection 6(1) to include an area specified for the purposes of a licence allocated under section 38C for the provision of commercial television broadcasting services with the use of a satellite, as specified in column 1 of the table in subsection 38C(1).

This item also inserts two notes to the definition of *licence area*:

- a reference to section 4AD, which deals with deemed radio broadcasting licence areas; and
- a reference to section 8 of the Broadcasting Services (*Transitional Provisions and Consequential Amendments*) Act 1992, which deals with deemed licence areas.

Items 6 & 7 – Subsection 6(1)

These items amend subsection 6(1) to include definitions of *reception certificate* and *scheme administrator* for the purpose of a conditional access scheme registered under new Part 9C of the BSA (see Item 64).

Items 8 & 9 – Section 14

Under paragraph 14(b) of the BSA, commercial broadcasting services are categorised as services that provide programs that are able to be received by commonly available equipment and are made available free to the general public.

Items 8 and 9 amend the categorisation of commercial broadcasting services such that for the purposes of the application of Section 14 to a broadcasting service provided under a licence allocated under section 38C (commercial television broadcasting services provided with the use of a satellite), it is assumed that there is no conditional access system that relates to the broadcasting service.

Note: a commercial television broadcasting service provided under a licence allocated under section 38C may be subject to a conditional access system (see items 64 and 72).

Item 10 – At the end of section 29

This item amends section 29 so that this section does not apply to a licence allocated under section 38C. The licence areas for commercial television broadcasting licences allocated under section 38C are defined in subsection 38C(1).

Item 11 – Before section 35A

Items 11, 27, 33 and 42 have the effect of dividing Part 4 of the BSA into four divisions: “Division 1 – Allocation of licences”; “Division 2 – Services authorised by licences”; “Division 3 – Licence conditions”; and “Division 4 – General conditions”. The proposed sub-division of Part 4 aids reader navigation.

This item inserts the heading for Division 1.

Item 12 – Paragraph 37(1)(a)

Section 37 deals with the types of applicants who are able to be allocated a commercial broadcasting licence. Currently, in order to be allocated a broadcasting licence the applicant needs to be, among other things, a company formed in Australia or an external Territory.

This item replaces a reference to a company “formed in Australia or in an external Territory” with a reference to a company registered under Part 2A.2 of the *Corporations Act 2001*.

Item 13 – After paragraph 38A(1)(a)

This item inserts new paragraph 38A(1)(aa) to preclude a satellite service licensee from applying for an additional commercial television broadcasting licence under section 38A.

Item 14 – Paragraph 38B(1)(b)

This item repeals the prohibition on a licensee allocated a commercial television broadcasting licence under section 38A from applying for a commercial television broadcasting licence under section 38B.

Where only one commercial television broadcasting licensee exists in a licence area, section 38A provides for that licensee to be able to apply for an additional commercial television broadcasting licence in the same licence area (an additional commercial television service authorised by a licence allocated under section 38A is currently provided in each of the non-aggregated regional licence areas of Riverland and Spencer Gulf in South Australia, Mt Gambier/South East in South Australia and Victoria, and Griffith and MIA and Broken Hill in New South Wales). Under section 38B, where there are two licensees in a licence area, those licensees may apply (either as a joint venture or individually) for an additional, digital-only, commercial television broadcasting licence. A licensee who holds a licence allocated under section 38A currently cannot apply for a licence under section 38B.

This amendment will enable a broadcaster providing an additional licensed service under section 38A in those smaller regional markets to apply for an additional licence to provide a third, digital-only, commercial television broadcasting service in the same licence area.

Item 15 – At the end of paragraph 38B(1)(c)

Item 16 – After paragraph 38B(1)(c)

Item 17 – Subsection 38B(1)

Item 19 – After subsection 38B(1)

Item 20 – Subsections 38B(2) and (3)

Item 21 – Paragraphs 38B(7)(b) and 8(b)

Item 22 – Paragraphs 38B(18)(b) and (c)

Item 23 – At the end of subsection 38B(19)

Item 24 – After subsection 38B(19)

Item 25 – Subsections 38B(26), (27) and (28)

Section 38B provides for the allocation of an additional, digital-only, commercial television broadcasting licence in licence areas where there are only two existing licensees, through the allocation of the additional licence to a joint-venture company formed by the two existing licensees, or where one or both of the existing licensees applies separately for the additional licence.

The amendments made by these items have the overall effect of enabling the ACMA to initiate a licence allocation process by inviting the parent licensees to submit within the specified period a notice of intention (jointly or separately) regarding an application for a section 38B licence. This will ensure that intentions are notified within a common timeframe and that licence application(s) may be considered at the same time. A common deadline is important in the event that multiple applications are submitted (prompting a price-based allocation process).

Item 17 amends subsection 38B(1) to remove the requirement that the existing licensees have 90 days from the “designated time” to jointly give notice that a joint-venture company will apply for the licence, or else for each licensee to give notice that the licensee will apply separately for the additional licence.

Item 20 amends subsection 38B(2) to replace the requirement that an application by the joint-venture company for an additional licence must be made within 12 months of the “designated time”, to be within 12 months from when notice is given by existing licensees under proposed paragraph 38(1)(d). Item 21 similarly amends subsection 38B(3) to remove the same requirement in relation to a separate application by an existing licensee, so that the application must be made within 12 months of notice being given under paragraph 38(1)(e). Item 25 repeals provisions that define the “designated time”, because the ‘designated time’ concept is redundant.

Items 15 and 16 amend subsection 38B(1) to enable the ACMA, by notice in the *Gazette*, to invite the existing licensees to give the ACMA joint notice under paragraph 38B(1)(d), or each licensee to give notice separately under paragraph 38B(1)(e), during a period to be specified by the ACMA. A notice under new paragraph 38B(1)(ca) is not a legislative instrument (new subsection 38B(1A) in item 19).

Item 22 amends subsection 38B(18) so that only additional commercial television licences issued under section 38B before the commencement of new section 38C are subject to the licence conditions in paragraphs 38B(18)(b) and 38B(18)(c).

Item 23 amends subsection 38B(19) so that licences allocated under section 38B before the commencement of section 38C are not subject to licence conditions for commercial television broadcasting services in paragraphs 7(1)(i), 7(1)(l) and 7(1)(m) of Schedule 2 of the BSA. Item 24 inserts new subsection 38B(19A) which provides that a licence allocated under section 38B after the commencement of section 38C is not subject to licence conditions in paragraphs 7(1)(l) and 7(1)(m) of Schedule 2 to the BSA.

(Paragraph 7(1)(i) of Schedule 2 provides that a commercial television broadcasting licensee must commence a service within 12 months of allocation of a licence or such longer period as notified by the ACMA. Commencement for section 38B licensees is provided for in subsection 38B(18). Paragraphs 7(1)(l) and 7(1)(m) relate to compliance with an implementation plan and analog-digital simulcast requirements under the commercial television conversion scheme, which are not relevant to licences issued under section 38B).

Item 18 – Subparagraph 38B(1)(d)(iii)

Currently, in order to be allocated a broadcasting licence under section 38B the applicant needs to be, among other things, a company formed in Australia or an external Territory.

This item replaces a reference to a company “formed in Australia or in an external Territory” with a reference to a company registered under Part 2A.2 of the *Corporations Act 2001*.

Item 26 – After section 38B

This item inserts new section 38C, which provides for the allocation process for commercial television broadcasting services provided with the use of a satellite. Remote commercial television broadcasting licensees will have the opportunity to apply for a licence under section 38C, as either a joint-venture with another remote commercial television broadcasting licensee, or individually. If no remote commercial television broadcasting licensee applies, or

a licence allocated under section 38C is subsequently cancelled, the ACMA must commence a reallocation process for the licence.

Column 1 in the table in subsection 38C(1) lists the three new licence areas for provision of commercial television broadcasting services by satellite, with column 2 listing the corresponding areas:

- South Eastern Australia TV3 (the area consisting of New South Wales, Victoria, South Australia, Tasmania, the Australian Capital Territory and the Jervis Bay Territory);
- Northern Australia TV3 (the area consisting of Queensland and the Northern Territory); and
- Western Australia TV3 (the area consisting of Western Australia).

Column 3 in the table in subsection 38C(1) lists the licence areas of the commercial television broadcasting licensees that are eligible joint venturers for the purposes of subsection 38C(2):

- for South Eastern Australia TV3 – Remote Central and Eastern Australia TV1, Remote Central and Eastern Australia TV2, and Mt Isa TV1;
- for Northern Australia TV3 – Remote Central and Eastern Australia TV1, Remote Central and Eastern Australia TV2, and Mt Isa TV1; and
- for Western Australia TV3 – Remote and Regional WA TV1, Western Zone TV1, Kalgoorlie TV1, Geraldton TV1, and South West and Great Southern TV1.

Allocation of a licence to a joint-venture company

Subsection 38C(2) provides that two or more eligible joint venturers may give the ACMA a joint written notice that a company specified in the notice will apply under subsection 38C(3) for a commercial television broadcasting licence for the licence area, and that the joint-venture company is registered as a company under Part 2A.2 of the *Corporations Act 2001* and has a share capital.

Eligible joint venturers for the South Eastern Australia TV3 licence area must give notice within 28 days from the commencement of section 38C. Eligible joint venturers for the Northern Australia TV3 and Western Australia TV3 licence areas must give notice during the period from the commencement of section 38C until 6 months before the earliest *applicable terrestrial digital television switch-over date* (the earliest date at which a simulcast period ends in a terrestrial licence area within the satellite licence area). *Applicable terrestrial digital television switch-over date* has the same meaning as clause 7H of Schedule 2 (subsection 38C(26)). (See notes on item 72 for clause 7H of Schedule 2).

Subsection 38C(3) provides that if a notice is given under subsection 38C(2), the joint-venture company must apply in writing to the ACMA for a commercial television broadcasting licence for the licence area within 28 days after the notice is given.

Subsection 38C(4) provides that if the ACMA receives an application under section 38C(3) in relation to a licence area, the ACMA must allocate a commercial television broadcasting

licence to the joint-venture company for the licence area within 28 days of receiving the application.

Subsection 38C(5) provides that subsection 38C(4) has effect subject to section 37 of the BSA. Section 37 is a general provision dealing with when an applicant for commercial broadcasting licence is ineligible to be allocated such a licence. The ACMA may only allocate a commercial broadcasting licence if satisfied that the applicant is a particular type of company, and that the applicant is suitable having regard to section 41 of the BSA.

Allocation of a licence to a special purpose company

Subsection 38C(6) provides that, if no notice is given under subsection 38C(2) in relation to a licence area specified in column 1 of subsection 38C(1), an eligible joint venturer for that licence area may give written notice to the ACMA stating that the wholly-owned subsidiary company (being a company registered under Part 2A.2 of the *Corporations Act 2001*) specified in the notice (the *special purpose company*) will apply under subsection 38C(7) for a commercial television broadcasting licence for the licence area. *Wholly-owned subsidiary* has the same meaning as in the *Corporations Act 2001* (subsection 38C(26)).

Subsection 38C(7) provides that if a notice is given under subsection 38C(6), the special purpose company must apply in writing to the ACMA for a commercial television broadcasting licence for the licence area within 28 days after the notice is given.

Subsection 38C(8) provides that if only one special purpose company makes an application under subsection 38C(7) in relation to a licence area, the ACMA must allocate a commercial television broadcasting licence to that company within 28 days of receiving the application.

Subsection 38C(9) provides that if the ACMA receives applications from 2 or more special purpose companies under subsection 38C(7) in relation to a licence area, the ACMA must allocate a commercial television broadcasting licence to one of those companies in accordance with a price-based system determined under subsection 38C(11).

Subsection 38C(10) provides that subsections 38C(8) and (9) have effect subject to section 37 of the BSA. Section 37 is a general provision dealing with when an applicant for a commercial broadcasting licence is ineligible to be allocated such a licence. The ACMA may only allocate a commercial broadcasting licence if satisfied that the applicant is a particular type of company, and that the applicant is suitable having regard to section 41 of the BSA.

Subsection 38C(13) provides that the Minister may, by legislative instrument, give specific directions to the ACMA in relation to the ACMA's exercise of its power to determine a price-based allocation system. Directions could address matters such as specified reserve prices for licences, and those reserve prices may be different for licences in different licence areas.

Subsection 38C(14) provides that if a commercial television broadcasting licence is allocated under subsection 38C(9) the ACMA must, unless the price-based allocation process was public, publish in the *Gazette* the name of the successful applicant and the amount the applicant agreed to pay to the Commonwealth for the allocation of the licence. This is consistent with price-based allocation processes used for other commercial broadcasting licences (see, for example, section 36 of the BSA).

Cancellation of licence – services not provided

Subsections 38C(15) and 38C(16) provide for the cancellation of a licence allocated under section 38C where the licensee does not provide the services required under the licence.

Paragraphs 38C(15)(a), (b) and (c) provide that if a licensee of a licence allocated under section 38C is contravening a licence condition about the provision of core/primary commercial television broadcasting services in clause 7B of Schedule 2, or a licence condition about the provision of non-core/primary commercial television broadcasting services in clause 7C of Schedule 2, and the ACMA is satisfied that the contravention is not due to prescribed circumstances, or technical or unforeseen circumstances beyond the licensee's control, the ACMA may give a written notice warning the licensee that if the contravention continues for more than 30 days, the licence may be cancelled. (See item 72 for notes on clauses 7B and 7C of Schedule 2).

Paragraph 38C(15)(d) provides that if 30 days pass after the notice is given, and the contravention continues, the ACMA must cancel the licence by written notice to the licensee. Subsection 38C(16) provides that the cancellation takes effect when the notice of cancellation is given to the licensee, or at a later time if one is specified in the notice. The capacity to specify a later time is intended to give the ACMA discretion to coordinate (if appropriate) the cancellation of a licensed service with the commencement of a new licensed service after a licence allocation process. This flexibility will help provide some continuity of service.

Allocation of licence after cancellation, or where no licence is allocated for a licence area under subsections 38C(4), 38C(8) or 38C(9)

Subsection 38C(17) provides that if:

- the ACMA has given notice under subsection 38C(15) to a licensee cancelling the licence; or
- no notice is given by a joint-venture company under subsection 38C(2) or a special purpose company under subsection 38C(6) to apply for a licence in a licence area; or
- notice is given by a joint-venture company or a special purpose company but no application is made for a licence,

the ACMA must advertise for applications for a licence to be allocated for the licence area. The manner of advertising is to be determined by the ACMA. Subsection 38C(21) provides for the matters that the ACMA must include in an advertisement for a licence.

If the ACMA has given notice cancelling the licence, the ACMA must advertise within 45 days of the giving of the notice. If no notice is given by a joint-venture company or a special purpose company to apply for a licence, the ACMA must advertise within 45 days after the last day on which a notice could have been given by a special purpose company. If notice is given but no application for a licence is made by a joint-venture company or a special purpose company within 28 days, the ACMA must advertise within 45 days of the failure to apply.

Subsection 38C(18) provides that, before the ACMA commences to advertise the licence under subsection 38C(17), it must determine, by legislative instrument, the eligibility requirements that must be met by applicants responding to the advertisement. Subsection

38C(19) provides that the eligibility requirements must include that the applicant has the capacity to provide the services the licensee will be required to provide under clauses 7B, 7C and 7D of Schedule 2. This does not limit other eligibility requirements that may be determined by the ACMA.

Subsection 38C(20) provides that the Minister may, by legislative instrument, direct the ACMA about the exercise of its powers under subsection 38C(18).

Subsection 38C(22) provides that the applications closing date must be the 90th day after the day of publication of the first advertisement under subsection 38C(17).

Subsection 38C(23) provides that if, in response to an advertisement under subsection 38C(17), the ACMA receives one or more applications for a licence on or before the closing date, and the ACMA is satisfied that one or more of the applicants meets the eligibility requirements, the ACMA must allocate the licence to one of the applicants within 90 days after the application's closing date.

Subsection 38C(24) provides that subsection 38C(23) has effect subject to section 37 of the BSA. Section 37 is a general provision dealing with when an applicant for a commercial broadcasting licence is ineligible to be allocated such a licence. The ACMA may only allocate a commercial broadcasting licence if satisfied that the applicant is a particular type of company, and that the applicant is suitable having regard to section 41 of the BSA.

Restrictions on transfer of licences

Subsection 38C(25) provides that a licence allocated under section 38C cannot be transferred during the period of 2 years after the date of the allocation of the licence.

Item 27 – After section 41

This item inserts a heading for Division 2 of Part 4 of the BSA (see notes for item 11 on division headings for Part 4 of the BSA).

Item 28 – After subsection 41B(1)

Item 29 – Section 41B

Subsection 41B(1) currently provides that commercial television broadcasting licences in force immediately before 1 January 2009 are authorised during the simulcast period to provide a core commercial television broadcasting service, a HDTV multi-channelled commercial television broadcasting service, and a SDTV multi-channelled commercial television broadcasting service.

Subsection 41B(2) currently provides that licences allocated on or after 1 January 2009 are authorised to provide a HDTV multi-channelled commercial television broadcasting service and 2 SDTV multi-channelled commercial television broadcasting services.

Items 28 and 29 amend section 41B to enable broadcasters with:

- an additional licence allocated under section 38A, and
- another licence allocated (after the commencement of section 38C) under section 38B (as amended by item 14 of this Bill) in the same licence area

to provide the same number of digital commercial television services in these underserved markets as may be available in metropolitan licence areas, but allows these services to all be provided in SD mode only. The amendments authorise each licensee to provide up to three SDTV digital television services during the simulcast period. These licensees will also be authorised to provide a HDTV service instead of a SDTV service.

(These provisions operate in conjunction with amendments in items 88-96 to the multi-channelling election provisions in clause 6 of Schedule 4 to the BSA to permit broadcasters in these licence areas to use two 7MHz channels of spectrum to transmit all digital services in SDTV digital mode.)

Subsection 41B(2E) identifies the three relevant licences to which these amended authorisations will apply. An *eligible parent licence* is the licence for a commercial television broadcasting service allocated under section 38A if, after the commencement of section 38C, the original licensee is allocated an additional commercial television broadcasting licence under section 38B, and where the licences allocated under sections 38A and 38B are held by the same person. An *eligible section 38B licence* is the section 38B licence held in these circumstances.

Subsection 41B(1A) provides that subsection 41B(1) does not apply, after the commencement of section 38C, to an eligible parent licence. New subsection 41B(2A) provides that subsection 41B(2) does not apply, after the commencement of section 38C, to an eligible parent licence or an eligible section 38B licence.

Subsection 41B(2B) provides that an eligible parent licence that was:

- in force immediately before 1 January 2009 and
- authorised the provision of a core commercial television broadcasting service, a HDTV multi-channelled commercial television broadcasting service and a SDTV multi-channelled commercial television broadcasting service,

is taken to authorise the licensee to provide the core service and either:

- (1) a HDTV multi-channelled commercial television broadcasting service and a SDTV multi-channelled commercial television broadcasting service, or
- (2) 2 SDTV multi-channelled commercial television broadcasting services

during the simulcast period or the simulcast-equivalent period.

Subsection 41B(2C) provides that an eligible parent licence that is allocated on or after 1 January 2009, but before the applicable simulcast period or simulcast-equivalent period for the licence area, is taken to authorise the licensee to provide:

- (3) a HDTV multi-channelled commercial television broadcasting service and 2 SDTV multi-channelled commercial television broadcasting services, or
- (4) 3 SDTV multi-channelled commercial television broadcasting services

during the simulcast period or the simulcast-equivalent period.

Subsection 41B(2D) provides that an eligible section 38B licence that is allocated before the end of the applicable simulcast period or simulcast-equivalent period for the licence area, is taken to authorise the licensee to provide:

- (5) a HDTV multi-channelled commercial television broadcasting service and 2 SDTV multi-channelled commercial television broadcasting services, or
- (6) 3 SDTV multi-channelled commercial television broadcasting services

during the simulcast period or the simulcast-equivalent period.

Note: if the original licensee has made a multi-channel election under subclause 6(5A) or subclause 6(5AA) of Schedule 4 to the BSA, the licensee is authorised to provide one or more SDTV multi-channel commercial television broadcasting services.

Item 30 – Subsection 41B(3)

Item 31 – Subsection 41C(3)

These items amend subsections 41B(3) and subsection 41C(3) so that neither section 41B nor section 41C apply to a licence allocated under section 38C. Instead the service authorisation for the licence allocated under section 38C is contained in new section 41CA (see Item 32 below).

Item 32 – After section 41C

This item inserts new section 41CA to provide for services authorised by commercial television broadcasting licences allocated under new section 38C. The licence conditions in new clauses 7B-7G of Schedule 2 to the BSA inserted by item 72 provide for the circumstances under which a service authorised by new section 41CA must be provided under a licence allocated under new section 38C.

A licence allocated under section 38C is authorised to provide commercial television broadcasting services that broadly correspond to services provided by a commercial television broadcasting licensee in a *related terrestrial licence area*, or in a *metropolitan licence area*.

Definitions – new subsection 41CA(6)

For the purposes of new section 41CA, a *related terrestrial licence area* is a remote licence area listed in column 3 of the table in new subsection 38C(1) to be a licence area for an eligible joint venturer for a licence to be allocated under section 38C.

A *metropolitan licence area* means a terrestrial licence area in which is situated the General Post Office of the capital city of New South Wales, Victoria, Queensland, South Australia or Western Australia. (For the purposes of this section, a metropolitan licence area does not include the licence area of a commercial television broadcasting licence allocated under section 38C.)

HDTV multi-channelled commercial television broadcasting service and *SDTV multi-channelled commercial television broadcasting service* to have the same meanings as in Schedule 4 to the BSA.

Service authorisations

Subsection 41CA(1) provides that a licence allocated under section 38C is authorised to provide:

- a HDTV multi-channelled commercial television service where the program content is the same or substantially the same as a HDTV multi-channelled commercial television service provided by a commercial television broadcasting licensee in a related terrestrial licence area;
- a SDTV multi-channelled commercial television service, that is not a core/primary commercial television broadcasting service, where the program content is the same or substantially the same as a SDTV multi-channelled commercial television service provided by a commercial television broadcasting licensee in a related terrestrial licence area;
- a SDTV multi-channelled commercial television service where the program content is the same or substantially the same as a core/primary SDTV multi-channelled commercial television service provided by a commercial television broadcasting licensee in a related terrestrial licence area;
- a HDTV multi-channelled commercial television service where the program content is the same or substantially the same as a HDTV multi-channelled commercial television service provided by a commercial television broadcasting licensee in a metropolitan licence area;
- a SDTV multi-channelled commercial television service, that is not a core/primary commercial television broadcasting service, where the program content is the same or substantially the same as a SDTV multi-channelled commercial television service provided by a commercial television broadcasting licensee in a metropolitan licence area;
- a SDTV multi-channelled commercial television service where the program content is the same or substantially the same as a core/primary SDTV multi-channelled commercial television service provided by a commercial television broadcasting licensee in a metropolitan licence area;
- one or more SDTV multi-channelled commercial television broadcasting services the program content of which consists wholly or primarily of programs provided, or required to be provided, to a section 38C licensee under subsection 43A(3A) or 43AA(1).

Note: new subsections 43A(3A) and 43AA(1) relate to local news and information programs required to be provided to a section 38C licensee by regional or remote commercial television broadcasting licensees (see items 38-41).

The purpose of new subsection 41CA(2) is to allow programming variations for particular regional circumstances. The programming provided by the section 38C licensee does not need to be identical to the programming provided by a terrestrial remote licensee or a metropolitan licensee. In determining for the purposes of subsection 41CA(1) whether

program content provided by a section 38C licensee is “the same or substantially the same” as the program content of another commercial television broadcasting service, the following will be ignored:

- advertising or sponsorship material, a promotion for a television program or television broadcasting service, community information material or community promotional material, a weather bulletin, and any other similar material;
- a news program;
- any program the broadcasting of which in any jurisdiction in the licence area could result in the licensee committing an offence, becoming liable to a civil penalty; breaching a court order or direction from a court; or being in contempt of court.

The regulations may also specify circumstances in which the broadcast of a program can be ignored for purposes of subsection 41CA(2).

New subsection 41CA(3) provides that, for determining whether program content is “the same or substantially the same”, coverage of an anti-siphoning event on a related service can be replaced by the section 38C licensee by coverage of another anti-siphoning event. For example, a program broadcasting an NRL premiership match could be substituted for a program broadcasting an AFL premiership match.

New subsection 41CA(5) modifies the application of the defined term *SDTV multi-channelled commercial television broadcasting service* for the purpose of this section.

Item 33 – After section 41D

This item inserts a division heading for Division 3 of Part 4 of the BSA (see item 11).

Item 34 – Paragraph 42(1)(a)

This item makes a technical amendment to paragraph 42(1)(a) consequential to the proposed sub-division of Part 3 of Schedule 2 to the BSA.

Item 35 – After subsection 42(1)

This item inserts new subsection 42(1A) to provide that each commercial television licence allocated under section 38C is also subject to the conditions set out in Division 2 of Part 3 of Schedule 2.

Item 36 – Subsection 43A(2)

Item 37 – Subsection 43A(3)

Items 36 and 37 make technical amendments to section 43A consequential to item 38.

Item 38 – After subsection 43A(3)

This item inserts a new subsection 43A(3A) to impose an additional licence condition on commercial television broadcasting licensees in an aggregated regional television licence area that is wholly or partly included in the licence area of a licence allocated under section 38C.

These regional licensees must provide to the section 38C licensee any material of local significance broadcast by the regional aggregated commercial television broadcasting licensee in a local area in compliance with the licence condition that the ACMA imposed pursuant to section 43A of the BSA.

In order to comply with the proposed licence condition the regional commercial television broadcasting licensee must:

- provide the required material simultaneously with, or as soon as practicable after, they broadcast the material in their aggregated licence area; and provide the material by transmitting it in digital mode (within the meaning of Schedule 4).

New subsection 43A(3C) provides that *local area* and *material of local significance* have the same meaning as in the condition mentioned in subsection 43A(1).

This licence condition assists the section 38C licensee to deliver its service in accordance with its licence conditions, by guaranteeing the supply of particular news programs. In turn, a regional broadcaster who complies with the licence condition proposed by this section to equitable remuneration courtesy of the proposed copyright licensing arrangements (Item 141, and related items, refers).

Item 39 – Paragraphs 43A(4)(a), (b) and (c)

Item 40 – At the end of subsection 43A(5)

Items 39 and 40 make technical amendments to section 43A consequential to item 38.

Item 41 – After section 43A

This item inserts new sections that place licence conditions on remote, regional and metropolitan commercial television broadcasting licensees in relation to the provision of particular program content for a broadcasting service licensed under section 38C. These new licence conditions assists the section 38C licensee to deliver its service in accordance with its licence conditions, by guaranteeing the supply of particular programs. In turn, a remote, regional, or metropolitan broadcaster who complies with the licence conditions proposed by this item is entitled to equitable remuneration courtesy of the proposed copyright licensing arrangements (Item 141, and related items, refers).

Conditions on regional commercial television broadcasting licensees

New section 43AA requires a regional commercial television broadcasting licensee, whose licence area is wholly or partly included in the licence area of a section 38C licensee, to provide local news and information to that section 38C licensee for broadcast on the relevant satellite service. This requirement is separate from the requirement under section 43A as amended (explained in item 38 above). Section 43AA is intended to cover local news and local information that is provided voluntarily by a regional television broadcaster (regardless of whether the licence area is aggregated) as part of their broadcasting service.

In order to comply with the proposed licence condition the regional commercial television broadcasting licensee must:

- provide the required material simultaneously with, or as soon as practicable after, they broadcast the material in their aggregated licence area; and
- provide the material by transmitting it in digital mode (within the meaning of Schedule 4).

New subsections 43AA(3) and (4) provide that the ACMA may determine the meaning of *local news program* and *local information program* in legislative instruments.

For the purposes of new section 43AA, *regional licence area* is any licence area that is not a metropolitan licence area, excluding the licence area of a section 38C licensee, or the licence area of a remote commercial television broadcasting licensee.

Conditions on metropolitan commercial television broadcasting licensees

New section 43AB requires metropolitan commercial television broadcasting licensees to provide programs from its digital television broadcasting services to a section 38C licensee, if requested to do so by the section 38C licensee. Programs must be provided simultaneously, or as soon as practicable, with the broadcast of that program on the metropolitan service.

Conditions on remote terrestrial licensees

New section 43AC applies to remote commercial television broadcasting licensees in a *related terrestrial licence area* of a licence allocated under section 38C.

For the purposes of new section 43AC, new subsection 43AC(5) provides that a *related terrestrial licence area* is defined with reference to a remote licence area listed in column 3 of the table in new subsection 38C(1). A *section 38C licensee* means the licensee of a commercial television broadcasting licence allocated under section 38C.

New subsection 43AC(2) provides that if a remote terrestrial licensee broadcasts a program in the related terrestrial licence area on either a HDTV multi-channelled commercial television broadcasting service or a SDTV multi-channelled commercial television broadcasting service, the licensee of the remote terrestrial licence must provide the program to the section 38C licensee for broadcast by the section 38C licensee. Programs must be provided simultaneously, or as soon as practicable, with the broadcast of that program on the remote terrestrial service.

Compensation for acquisition of property

New section 43AD provides a constitutional safety net to guarantee that if the operation of new subsection 43A(3A) or new sections 43AA, 43AB or result in an acquisition of property from a person otherwise than on just terms, that acquisition of property meets constitutional compensation requirements. The proposed safety net is that the section 38C licensee is liable to pay a reasonable amount of compensation to the person whose property is acquired. If necessary, a court of competent jurisdiction may determine the amount of reasonable compensation to be paid by the licensee.

Item 42 – After section 44

This item inserts a heading for Division 4 of Part 4 of the BSA (see notes for item 11 on division headings for Part 4 of the BSA).

Item 43 – Section 45

Item 44 – Section 45

Item 45 – At the end of section 45

These items amend section 45 of the BSA (which provides for the duration of commercial broadcasting licences) such a licence allocated under section 38C remains in force for 10 years, subject to cancellation provisions in new subsection 38C(15) and general licence cancellation provisions in Part 10 of the BSA.

Item 46 – Section 50A

This item amends section 50A of the BSA so that a commercial television broadcasting licence allocated under section 38C is not subject to the control provisions in Part 5 of the BSA.

Item 47 – Section 61AA

Item 48 – Section 61AA

These items are consequential to item 4.

Item 49 – Paragraph 95(1)(a)

Item 51 – Paragraphs 121FB(1)(a) and (2)(a)

Item 52 – Paragraph 121FLC(1)(c)

Item 53 – Paragraph 121FLG(1)(c)

Item 54 – Subparagraph 121FLH(1)(c)(i)

Item 55 – Subparagraph 121FLH(1)(c)(ii)

Item 56 – Paragraph 121FLH(2)(c)

Currently, in order to be allocated a subscription television broadcasting licence or an international broadcasting licence the applicant needs to be, among other things, a company formed in Australia or an external Territory.

These items replace a reference to a company “formed in Australia or in an external Territory” with a reference to a company registered under Part 2A.2 of the *Corporations Act 2001*.

Item 50 – Subsection 98D(2)

This item is consequential to new section 43AD in item 41. It excludes new subsection 43A(3A) and sections 43AA, 43AB and 43AC from the general compensation for acquisition of property provision in section 98D. As a result, the Commonwealth would not be liable if those sections operate in a way that causes an acquisition of property on other than just terms.

- Item 57 – After paragraph 122(7)(a)**
- Item 58 – After paragraph 122(8)(a)**
- Item 59 – After subsection 122(7)**
- Item 60 – Subsection 122(10)**
- Item 61 – Subsection 122(10)**

These items have the effect that program standards made by the ACMA under section 122 of the BSA about children’s television and Australian content apply only to primary commercial television broadcasting services provided by a section 38C licensee. (The ACMA must declare such primary services – see item 125).

Items 57 and 58 make technical amendments related to Item 59, and Items 30-32 – in short, a section 38C service has no ‘core’ service.

Item 59 inserts new subsections 122(8A) and 122(8B) which provide that, for services provided under a commercial television broadcasting licence allocated under section 38C, program standards apply only to a primary commercial television broadcasting service, until the end of the last *applicable terrestrial digital television switch-over date* (defined in proposed clause 7H of Schedule 4 to the BSA).

Items 60 and 61 insert defined terms relevant to the service licensed under section 38C. (See items 72 [proposed clause 7H] and 125 for the definitions).

Item 62 – After section 130AB

This item inserts new section 130AC, which provides the ACMA with the power to determine technical standards relating to the satellite transmission in digital mode of national broadcasting television services or commercial television broadcasting services licensed under section 38C. The ACMA would make such a determination by legislative instrument.

A commercial television service licensed under section 38C would be required to comply with a standard determined under this section (see item 72, proposed clause 7A). A national television broadcaster would also be required to comply with a standard determined under this section (see subsection 130AC(3)).

Section 589 of the *Telecommunications Act 1997* would apply to standards determined under this new section. Section 589 of the Telecommunications Act permits instruments made under that Act to adopt, apply or incorporate provisions of any Act, instrument or writing in force from time to time (such as legislative instruments and other official or non-official documents). Subsection 130AC(2) permits the ACMA to incorporate etc other documents when making an instrument that determines technical standards.

In this new section:

- ‘in digital mode’ has the same meaning as in Schedule 4 of the BSA, that is that the program or service is broadcast or transmitted using a digital modulation technique;
- ‘national television broadcasting service’ has the same meaning as in Schedule 4 of the BSA, that is a national broadcasting service that provides television programs.

Item 63 – At the end of Part 9A

This item inserts new section 130BB, which provides the ACMA with the power to determine technical standards that relate to domestic reception equipment capable of receiving the digital commercial television broadcasting services by satellite. The ACMA would make such a determination by legislative instrument. The ACMA may also, by legislative instrument, exempt specified domestic reception equipment from the application of the criminal offence and civil penalty provisions.

For the purposes of this new section, it is immaterial if the domestic reception equipment is used in isolation or in combination with any other equipment.

It will be unlawful for a person to supply of domestic reception equipment which is capable of receiving by satellite the digital television services provided by the ABC, SBS, or commercial television broadcasters licensed under section 38C but which does not comply with the technical standard determined by the ACMA. A person who contravenes this law commits an offence and infringes a civil penalty provision.

Section 589 of the *Telecommunications Act 1997* would apply to standards determined under this new section. Section 589 of the Telecommunications Act permits instruments made under that Act to adopt, apply or incorporate provisions of any Act, instrument or writing in force from time to time (such as legislative instruments and other official or non-official documents). Subsection 130AC(2) permits the ACMA to incorporate etc other documents when making an instrument that determines technical standards.

In this new section:

- ‘in digital mode’ has the same meaning as in Schedule 4 of the BSA, that is that the program or service is broadcast or transmitted using a digital modulation technique;
- ‘national television broadcasting service’ has the same meaning as in Schedule 4 of the BSA, that is a national broadcasting service that provides television programs;
- ‘supply’ has the same meaning as in the *Trade Practices Act 1974*.

Item 64 – After Part 9B

This item introduces new Part 9C of the BSA, which provides for the development, registration and administration of a conditional access scheme relating to access to commercial television services delivered via satellite under section 38C. A scheme registered under Part 9C must be consistent with the principle that a person in a licence area must have adequate reception of all of the applicable terrestrial digital commercial television broadcasting services.

“Adequate reception”

For the purposes of new Part 9C, new section 130ZF A provides that the ACMA may, by legislative instrument, determine what “adequate reception” means for the purpose of the conditional access scheme.

“Applicable terrestrial digital commercial television broadcasting service”

For the purposes of new Part 9C, new section 130ZG provides that a service is an “applicable terrestrial digital commercial television broadcasting service” if it is a commercial television broadcasting service that is provided by a commercial television broadcasting licensee in the licence area and is transmitted in digital mode, but does not include a commercial television broadcasting service provided under a licence allocated under section 38C or section 40. This definition is pivotal to providing conditional access since a person will only be able to access the satellite commercial television service licensed under section 38C if they are unable to adequately receive the commercial television services in their licence area that are delivered using terrestrial transmission towers.

Objectives of a conditional access scheme

New section 130ZB provides the scope and objectives of a conditional access scheme. The scheme sets out rules about access to services licensed under proposed section 38C of the BSA.

In the first instance the commercial television broadcasting industry will be given the opportunity to develop and seek registration of a conditional access scheme that is directed towards the policy objectives set out in the BSA. If they do not develop and have registered a conditional access scheme within the timeframes set down in proposed Part 9C, then the ACMA is required to develop and register a conditional access scheme instead.

The conditional access scheme has 11 policy objectives

The first objective is to specify the category A reception areas. These are remote terrestrial licence areas in which people are unable to receive adequate reception of terrestrial digital television services.

A category A reception area also includes people who access a commercial television service licensed for a remote licence area because they are entitled to the benefit of an ‘out of area’ permit held by the remote terrestrial broadcaster. The latter subcategory is intended to include people, located in regional or metropolitan terrestrial licence areas, who currently receive remote area broadcasting services through direct to home satellite services because they are unable to receive their licence area services terrestrially.

In accordance with the tenth policy objective, viewers located in Category A reception areas would have an automatic entitlement to access satellite television from the start dates for the new satellite services.

The second policy objective of the scheme is to specify the Category B reception area. This area is intended to cater for known signal deficient reception areas (as determined by the scheme). Subject to the ACMA making a determination about ‘adequate reception’ known signal deficient reception areas are intended to be areas where adequate reception of one or more services is intermittent. It is also expected that this category would include those areas where viewers rely on self-help re-transmission facilities - since in these facilities presently transmit analog television and viewers may not be able to receive terrestrial commercial television services.

The third policy objective for the scheme is to ensure that persons in a category A or category B reception area to receive section 38C commercial television broadcasting services if they are unable to adequately receive terrestrial signals in their area (new subsection 130ZB(5)). This objective is subject to the tenth and eleventh objectives in subsections 130ZB(14) and 130ZB(15) regarding when a person is able to access the satellite service (new subsection 130ZB(6)).

The fourth policy objective is to specify the category C reception area. This category would enable viewers not located in category A or B areas to seek access to the satellite broadcasting service on a case by case basis. The eligibility criteria would be set out in the scheme. These access seekers would need to apply for a reception certificate, issued by the scheme administrator, to obtain access to the section 38C service.

The fifth, sixth, seventh, eighth and ninth policy objectives are about the administration of access to services within a category C reception area, principally the role of the scheme administrator. The scheme must nominate a company to discharge the function of the scheme administrator. The scheme must authorise the administrator to deal with applications made in accordance with the scheme. The scheme must require the scheme administrator to make a decision on (formally compliant) applications received within 14 days. The scheme administrator must also deal with the application without requiring the applicant to pay a fee or incur expenses.

The scheme must authorise the scheme administrator to issue a reception certificate to a person in a category C reception area stating that the person is unable to receive adequate reception of all of the applicable terrestrial commercial television broadcasting services. The scheme must enable a person who is in a category C reception area, and holds a reception certificate, to receive the commercial television broadcasting services provided by the section 38C licensee for that reception area. This objective is subject to the tenth and eleventh objectives in subsections 130ZB(14) and 130ZB(15) regarding when a person in a category C reception area is able to access the satellite delivered commercial television broadcasting services (new subsection 130ZB(11)). The scheme must authorise the scheme administrator to revoke a reception certificate issued to a person if the person is no longer eligible for the reception certificate (new subsection 130ZB(13)). (Note that the scheme administrator's decision is able to be reviewed by the ACMA)

The conditional access scheme must not enable persons in a category C reception area to receive services provided by the relevant section 38C licensee earlier than 6 months before the earliest switchover day in a related terrestrial licence area (new subsections 130ZB(14) and 130ZB(15)).

For the purposes of section 130ZB, subsection 130ZB(13) provides that

- “related terrestrial licence area” means a remote licence area listed in column 3 of the table in new subsection 38C(1) to be a licence area for an eligible joint venturer for a licence to be allocated under section 38C;
- “terrestrial licence” means a commercial television broadcasting licence other than a licence allocated under section 38C or subsection 40(1);
- “terrestrial licence area” means the licence area of a terrestrial licence.

Registration of a conditional access scheme developed by a representative body or association

New section 130ZC provides for the registration by the ACMA of a conditional access scheme developed by a body or association that represents commercial television broadcasting licensees (the industry).

As noted previously, the industry will have the first opportunity to develop and have registered a conditional access scheme for a particular licence area for a section 38C service. This first opportunity is time limited, In order to be eligible for registration, a conditional access scheme developed by the industry needs to be submitted to the ACMA for registration within 45 days after the first (or only) occasion on which a section 38C licence is allocated for that licence area.

If the ACMA is satisfied that the draft scheme:

- has been developed by an appropriate industry body,
- has been submitted in accordance with the statutory time frame (and attaches to the appropriate section 38C licensed service), and
- is consistent with the principle that a person in the licence area should have adequate reception of all the applicable terrestrial digital commercial television services, or all the services the section 38C licensee is required to provide,

then the ACMA must register the scheme within 28 days of receiving the draft scheme from the industry.

The requirement for the ACMA to be satisfied about the scheme's consistency with the stated principle is intended to turn the ACMA's mind towards the overarching principle that a person has adequate reception of free-to-air digital television that is available in their particular location. This principle is collectively what the statutory policy objectives for the conditional access scheme are geared towards. If a person cannot adequately receive all the applicable terrestrial digital commercial television services, then he or she should instead be able to access the services the section 38C licensee is required to provide via satellite, in a manner consistent with the scheme's stated policy objectives.

Regardless of whether the industry is able to get a scheme registered at the first opportunity, paragraph 130ZC(d)(ii) confirms that the industry may develop and seek registration for a replacement scheme at any time (see also proposed section 130ZD, discussed below).

Registration of a conditional access scheme formulated by the ACMA

New section 130ZCA provides for the registration of a conditional access scheme formulated by the ACMA. The ACMA may formulate a scheme in a legislative instrument if the industry has not registered a scheme at the first opportunity under section 130ZC. The industry will have missed the first opportunity if no industry scheme is registered before the expiry of 90 days after the allocation of the first section 38C licence for a particular area.

When formulating a scheme, the ACMA is subject to similar policy objectives as an industry developed conditional access scheme. Some of the policy objectives are modified however. For example, when formulating a scheme, the ACMA must nominate itself to be the scheme administrator (the fifth policy objective refers: see paragraph 130ZB(8)(b)).

Similarly the ACMA must not register a scheme it has developed unless it is satisfied that the scheme is consistent with the principle that a person in the licence area should have adequate reception of all of the applicable terrestrial digital commercial television broadcasting services, or all of the commercial television services that the section 38C licensee is required to provide (new subsection 130ZCA(3)).

If the ACMA develops a conditional access scheme that it is satisfied meets the statutory requirements, the ACMA must register a scheme it formulates under subsection 130ZCA(2) by including it in the register under section 130ZE (new subsection 130ZCA(4)).

Subsections 130ZCA(5) and 130ZCA(6) set out the consultation the ACMA must undertake before registering a scheme. The ACMA must expose a draft conditional access scheme and invite written submissions. The public consultation period must not be less than 14 days. The ACMA must have due regard to submissions received during the consultation period.

Subsection 130ZCA(7) provides that section 130ZC (which relates to registration of a conditional access scheme formulated by an industry body or association) ceases to apply to the licence area if section 130ZCA applies.

Replacement of a conditional access scheme

New section 130ZD provides that changes to a conditional access scheme may be made by replacing the scheme instead of varying the scheme.

If a replacement scheme is formulated by the ACMA, and the replacement scheme differs in only minor respects from the original scheme, then the ACMA may register the scheme under section 130ZCA without the need to undertake consultation (subsection 130ZD(3)).

Subsection 130ZD(3) provides that when a conditional access scheme is registered and is expressed to replace another conditional access scheme, the other scheme ceases to be registered.

Subsection 130ZD(4) provides that the replacement of a conditional access scheme does not affect the continuity of a reception certificate issued in the scheme that has been replaced.

Register of conditional access schemes

Section 130ZE provides that the ACMA is to maintain a Register of conditional access schemes required to be registered under section 130ZC or 130ZCA. The Register is to be maintained by electronic means and is to be made available for inspection on the ACMA's website.

Complaints and directions in relation to a conditional access scheme

Section 130ZF establishes a complaints process for a person in a category C reception area who has been refused a reception certificate by a scheme administrator, where that person considers that he or she does not have adequate reception of all of the applicable terrestrial commercial television broadcasting services.

Subsection 130ZF(2) provides that a person may make a complaint to the ACMA where:

- an application was made in accordance with the scheme's requirements and the scheme administrator refused to issue the reception certificate; or
- a person has previously held a reception certificate under the scheme and the scheme administrator revoked the certificate; or
- an application was made in accordance with the scheme's requirements and the scheme administrator did not deal with the application within 14 days after receiving the application.

The ACMA must investigate the complaint in a manner determined by the ACMA, however the ACMA need not investigate a complaint if it is satisfied that the complaint is frivolous or vexatious, or was not made in good faith (subsections 130ZF(3) and 130ZF(4)).

If, after investigating a complaint, the ACMA is satisfied that the complainant does not have adequate digital terrestrial television reception and the scheme administrator either wrongly refused to issue a reception certificate or wrongly revoked such a certificate the ACMA may, by written notice to the scheme administrator, direct the scheme administrator to issue a reception certificate to the person within a specified period (subsection 130ZF(5)). The specified period must not be longer than 28 days (subsection 130ZF(6)).

In deciding whether to give a direction under subsection 130ZF(5), it is to be presumed that the person does not have adequate reception of all of the applicable terrestrial digital commercial television broadcasting services, unless the scheme administrator satisfies the ACMA that the person has adequate reception of all of those services (subsection 130ZF(7)). This is consistent with the policy objective of the conditional access scheme that the person seeking access is not to be put to any expense, and that the burden of proving adequate digital terrestrial television reception lies with the scheme administrator (see paragraph 130ZB(12)(b)).

However, before giving a direction the ACMA must consult the scheme administrator in writing about whether the complainant has adequate reception. The ACMA must have regard to any submission received within the time limit specified by the ACMA when initiating written consultation (subsection 130ZF(8)). The time limit must be no longer than 28 days (subsection 130ZF(9)). This consultation process helps to ensure that any direction subsequently issued by the ACMA is in appropriate terms

The scheme administrator must comply with a direction by the ACMA to issue a reception certificate (subsection 130ZF(10)). If the scheme administrator does not comply, then the BSA and the conditional access scheme is taken to have effect as if, on the last day for compliance, the scheme administrator had issued a reception certificate (subsection 130ZF(11)).

Where the complaint relates to the situation where a person applied to the scheme administrator for a reception certificate, but the scheme administrator did not make a decision within 14 days after receiving the application, the ACMA may determine that the BSA and the conditional access scheme is taken to have effect as if the scheme administrator had issued a reception certificate (subsection 130ZF(12)).

Subsection 130ZF(13) provides that the BSA does not prevent the subsequent revocation of a reception certificate that is taken to have been issued under subsection 130ZF(11) or subsection 130ZF(12).

Where the ACMA investigates a complaint, the ACMA must notify the complainant of the results of the investigation (subsection 130ZF(13)).

Note: a commercial television broadcasting licensee allocated a licence under section 38C must comply with a conditional access scheme registered under Part 9C (see 37B).

Item 65 – Section 204

This item is consequential to item 67.

Item 66 – Section 204

This item adds to two decisions that may be subject to an application to the Administrative Appeals Tribunal (AAT). This item adds a decision by the ACMA to refuse to allocate a licence under section 38C, and a decision by the ACMA to cancel a licence under section 38C. The unsuccessful licence applicant has standing to seek AAT review for the first decision while the affected licensee has standing to seek AAT review for the second decision.

Item 67 – At the end of section 204

This item inserts a new subsection 204(2) to provide that certain decisions under a conditional access scheme formulated by the ACMA, and registered under new section 130ZCA, may be subject to an application to the AAT. Provision is made for AAT review because the ACMA makes decisions at first instance under such a scheme, because the ACMA is the scheme administrator (the scheme administrator (see paragraph 130ZB(8)(b))). The two decisions by the ACMA (as administrator of the conditional access scheme) that are to be subject to review are

- refusing to issue a reception certificate, or
- revoking a reception certificate with respect to a category C reception area.

The applicant for a reception certificate has standing to seek AAT review for the first decision, while the holder of the reception certificate has standing to seek AAT review of the second decision.

Item 68 – After section 211

This item inserts new section 211A to address regulatory compliance issues faced by section 38C licensees that are licensed to provide services in licence areas that cover more than one time zone. This affects all proposed satellite licence areas except Western Australia TV3.

Subsection 211A(1) provides that a licensee for a commercial television broadcasting licence allocated under section 38C for the South Eastern Australia TV3 licence area may, by written notice to the ACMA, nominate a specified place in either the South Eastern Australia TV3 licence area or the Northern Australia TV3 licence area, for the purposes of the HDTV multi-channelled services provided under the licence. The licensee may nominate a place in the

South Eastern Australia TV3 licence area for the purposes of SDTV multi-channelled commercial television broadcasting services provided under the licence.

Subsection 211A(3) provides that a licensee for a commercial television broadcasting licence allocated under section 38C for the Northern Australia TV3 licence area may, by written notice to the ACMA, nominate a specified place in either the South Eastern Australia TV3 licence area or the Northern Australia TV3 licence area, for the purposes of the HDTV multi-channelled services provided under the licence. The licensee may nominate a place in the Northern Australia TV3 licence area for the purposes of SDTV multi-channelled commercial television broadcasting services provided under the licence.

The distinction between HDTV and SDTV services for the South Eastern Australia TV3 and Northern Australia TV3 licence areas recognises that a single HDTV stream may be provided across both licence areas. Where there is a single HDTV stream is provided to these licence areas, the intention is to regulate these services in relation to the legal time at one place.

Subsection 211A(7) provides that if a nomination is in force in the South Eastern Australia TV3 licence area or the Northern Australia TV3 licence area for the purposes of the HDTV multi-channelled television broadcasting services provided under the applicable section 38C licence, then the BSA and any program standards, other legislative instruments and any codes of practice registered under section 123, have effect in relation to any programs broadcast by the licensee as if these programs had been broadcast in all parts of the licence area at the time that is legal time in the nominated place.

Subsection 211A(8) provides that a nomination in force in the South Eastern Australia TV3 licence area or the Northern Australia TV3 licence area for the purposes of the SDTV multi-channelled television broadcasting services provided under the licence, operates in a corresponding fashion to subsection 211A(7) described above.

A licensee may, by written notice to the ACMA, withdraw a nomination. The withdrawal of a nomination does not prevent the licensee from making a fresh nomination.

Item 69 – Before clause 7 of Schedule 2

Since there are extensive licence conditions for the broadcasting licence to be allocated under proposed section 38C, to aid the reader's navigation item 69 proposes to sub-divide Part 3 of Schedule 2 to the BSA. Item 69 inserts a new heading "Division 1 – General" before the commencement of clause 7 of Schedule 2. The standard licence conditions set out in proposed Division 1 would apply to all commercial television broadcasting licensee unless expressed otherwise. Meanwhile, the licence conditions proposed for Division 2 would apply exclusively to the commercial television licences allocated under proposed section 38C (see Item 72 below).

Item 70 – Paragraph 7(1)(c) of Schedule 2

This item excludes a licence allocated under section 38C from the application of the licence condition set out in paragraph 7(1)(c) of Schedule 2 to the BSA. This standard licence condition requires a licensee company's articles of association to deal with particular matters; these matters are conducive to assessing the application of the BSA control rules in Part 5 of the BSA (in conjunction with Schedule 1 to the BSA).

Since the licensee under section 38C is proposed to be exempt from the control rules (see Item 46 above), there is no need for the licensee company to have these particular articles of association.

Item 71 – Paragraphs 7(2)(a) and (c) of Schedule 2

This item excludes a licensee for a licence allocated under section 38C from the licence condition in paragraph 7(2)(a) of Schedule 2, which requires a commercial television broadcasting licensee to provide a service or services that, when considered with other broadcasting services available in the licence area, contributes to the provision of an adequate and comprehensive range of broadcasting services in that licence area. Item 71 also excludes a section 38C licensee from the licence condition in paragraph 7(2)(c) of Schedule 2, which requires that a licensee will broadcast matter of a religious nature during such periods as the ACMA determines.

Item 72 – At the end of Part 3 of Schedule 2

This item inserts a new Division 2 to Schedule 2 of the BSA, to provide licence conditions for commercial television broadcasting licences allocated under section 38C.

Clause 7A – Common conditions

New subclause 7A(1) provides for common conditions pertaining to all licences allocated under section 38C:

- a section 38C licensee must only provide commercial television broadcasting services in digital mode (within the meaning of Schedule 4);
- a section 38C licensee may only provide commercial television broadcasting services with the use of a satellite;
- if a conditional access scheme is registered under Part 9C, a section 38C licensee will ensure that any conditional access system that relates to any of the services provided under the licence complies with the scheme;
- a section 38C licensee will comply with any technical standards determined by the ACMA under section 130AC for digital transmission by satellite.

New subclause 7A(2) provides that paragraphs 7(1)(i) and (oa) of Schedule 2 do not apply to a licence allocated under section 38C. Paragraph 7(1)(i) requires a commercial television broadcasting licensee to provide at least one broadcasting service within one year of being allocated the licence. Start dates for a licence allocated under section 38C are provided in new clause 7H (see below). Paragraph 7(1)(oa) refers to technical standards for terrestrial digital television transmission in section 130A. Technical standards for digital television transmitted by satellite are provided for in new section 130AC (see item 62).

Clause 7B – Conditions about the provision of core/primary commercial television broadcasting services

The effect of new clause 7B is that, *at commencement of the service*, a commercial television broadcasting service provided under a licence allocated under section 38C must provide at least 3 core/primary commercial television broadcasting services:

- If there are three distinct core/primary television services provided by remote commercial television broadcasting services in remote licence areas related to the section 38C licence area (the *related terrestrial core/primary service*), the section 38C licensee must provide a corresponding service that has program content that is the same, or substantially the same, as each of those related terrestrial services.
- If there are less than three distinct core/primary television services provided by commercial television licensees in the related terrestrial licence areas, the section 38C licensee must provide one or more services that are the same or substantially the same as a core/primary service available in a metropolitan licence area to ensure a total of at least three core/primary services.

The intention is to give priority to the remote broadcasters in the corresponding terrestrial licence area who are intended to be stakeholders in the satellite television service that delivers services to audiences in remote areas and areas that rely solely on direct-to-home satellite reception. It will also be beneficial to remote broadcasters because the licence condition will encourage the making of affiliation or program supply agreements between the satellite broadcaster and the remote terrestrial broadcaster.

If, *after the commencement of the satellite service*, the section 38C licensee is providing a core/primary service that is the same or substantially the same a core/primary service provided by a related terrestrial licensee, and the related terrestrial licensee ceases to provide the service, the section 38C licensee is authorised, but not required, to substitute that service with a service that provides program content that is the same, or substantially the same, as a core/primary service provided by a metropolitan television licensee. If the related terrestrial licensee commences a core/primary service at a later date, the section 38C licensee must provide program content that is the same, or substantially the same, as that related terrestrial service.

For the purpose of assessing whether program content is the same, or substantially the same, particular program content will be disregarded (see clause 7J below).

Provision of core/primary services

New subclause 7B(1) provides that a licence allocated under section 38C is subject to the condition that, if there are at least 3 commercial television broadcasting services, where each service is:

- provided by a terrestrial licensee in a related terrestrial licence area;
- is a core/primary commercial television broadcasting service; and
- is distinct from each of the other services;

the section 38C licensee will provide at least 3 commercial television broadcasting services where:

- the program content of each of the services provided is the same or substantially the same as the program content of a related terrestrial core/primary service; and
- each of the services is distinct from each of the other services.

New subclause 7B(2) provides that, if there are only 2 commercial television broadcasting services, where each service is:

- provided by a terrestrial licensee in a related terrestrial licence area;
- is a core/primary commercial television broadcasting service; and

- is distinct from each of the other services;

the section 38C licensee will provide:

- 2 commercial television broadcasting services where the program content of each of the services provided is the same or substantially the same as the program content of a related terrestrial core/primary service, and each of the services is distinct from each of the other services; and
- one commercial television broadcasting service where the program content is the same or substantially the same as the program content of a core/primary commercial television broadcasting service provided by a terrestrial licensee in a metropolitan licence area, and the service is distinct from each of the 2 services that are services provided by a related terrestrial licensee.

New subclause 7B(3) provides that, where neither subclauses 7A(1) and 7A(2) apply, and there is one core/primary commercial television service in a related terrestrial licence area, the section 38C licensee must provide:

- one commercial television broadcasting service where the program content is the same or substantially the same as the program content of the related core/primary commercial television service; and
- 2 commercial television broadcasting services where for each service the program content is the same or substantially the same as the program content of a core/primary commercial television broadcasting service provided by a terrestrial licensee in a metropolitan licence area, and the 2 services are distinct from each other and from the service provided by the related terrestrial licensee.

Subclauses 7B(2) and (3) are intended to ensure that television viewers in a satellite licence area are able to access no fewer than three core/primary commercial broadcasting services which, if not sourced from the remote licensees, are sourced from metropolitan licensees. If the number of extant remote terrestrial core/primary services is fewer than three when the satellite service commences, the satellite broadcaster must make up the difference by providing a core/primary service that is distinct from the other core services, but which provided the same or substantially the same program content as a core/primary service provided by a metropolitan commercial broadcasting licensee.

Subsection 7B(4) provides that subsections 7A(1), (2) and (3) do not require a section 38C licensee to provide a service before the start date for the licence area (see new clause 7H below for provisions relating to the start date).

Exemption – cessation of related terrestrial core/primary services

New subclause 7B(5) provides that if:

- a section 38C licensee is providing a commercial television broadcasting service whose program content is the same or substantially the same as a core/primary service provided by a related terrestrial licensee, and
 - the related terrestrial broadcasting licensee ceases to provide the service,
- the section 38C licensee is not required to provide a commercial television broadcasting service that is the same or substantially the same as a core/primary service provided in a metropolitan licence area.

The effect of subclause 7A(5) is that where a remote broadcasting licensee ceases to provide a core/primary commercial television broadcasting service in a related licence area the section 38C licensee is not required to substitute that service with a core/primary service that has program content that is the same or substantially the same as a core/primary service provided by a metropolitan television licensee.

New subclause 7B(6) provides that if a section 38C licensee, in compliance with subclause 7B(2), is:

- providing a commercial television broadcasting service whose program content is the same or substantially the same as a core/primary service provided by a related terrestrial licensee, and
- the core/primary service ceases to be provided by the related terrestrial licensee;

the section 38C licensee is required to provide:

- one service that is the same or substantially the same as a core/primary service provided by a related terrestrial licensee, and
- one service that is the same or substantially the same as a core/primary service of a metropolitan licensee.

Subclause 7B(6) has the effect that, where:

- a section 38C licensee is providing two services that are the same or substantially the same as two distinct core/primary services provided by a related terrestrial licensee, and
- one service that is the same or substantially the same as a core/primary service provided by a metropolitan licensee, and
- one of the related terrestrial licensees ceases to provide the core/primary service,

the section 38C licensee is not required to provide the service that is the same or substantially the same as the service that has ceased.

For the purposes of clause 7B, a commercial television broadcasting service is “distinct” from another commercial television broadcasting service if the program content of the services is the same or substantially the same.

Clause 7C – Conditions about the provision of non-core/primary commercial television broadcasting services

HDTV multi-channelled commercial television broadcasting services

In relation to HDTV multi-channelled commercial television broadcasting services, the effect of clause 7C is that *at the commencement of a service* provided under a licence allocated under section 38C, the licensee is required to provide:

- HDTV services that are the same or substantially the same as all HDTV services provided by the related terrestrial licensees, and
- where there are HDTV services provided by a metropolitan licensee that are distinct from the HDTV service provided by the related terrestrial licensee, those services.

If, *after the commencement of the service*, a related terrestrial licensee ceases to provide a HDTV service, the section 38C licensee is not required to provide a service that is the same or substantially the same as the HDTV service. If the related terrestrial licensee recommences

the HDTV service, the section 38C licensee must provide a HDTV service that is the same or substantially the same as that service.

Subclause 7C(1) provides that, if there is a HDTV multi-channelled commercial television broadcasting service provided by a related terrestrial licensee that has the same, or substantially the same, program content as a HDTV multi-channelled commercial television broadcasting service provided by a metropolitan licensee, the section 38C licensee will provide a HDTV multi-channelled commercial television broadcasting service that is the same or substantially the same as the HDTV service provided by related terrestrial licensee.

Subclause 7C(2) provides that, if there is a HDTV multi-channelled commercial television broadcasting service provided by a metropolitan licensee, and there is no HDTV multi-channelled commercial television broadcasting service provided by a related terrestrial licensee that is the same, or substantially the same as the service provided by the metropolitan licensee, the section 38C licensee will provide a HDTV multi-channelled commercial television broadcasting service that is the same, or substantially the same, as the service provided by the metropolitan licensee.

Subclause 7C(4) provides that section 38C licensee is not required to provide a HDTV multi-channelled commercial television broadcasting service from a metropolitan licensee under subclause 7C(2) if the metropolitan licensee commences to provide the service after the end of the simulcast period for the metropolitan licence area.

After the end of the simulcast period for a terrestrial licence area, the BSA's restrictions on the number of multi-channelled services provided by terrestrial commercial television broadcasting licensees in their terrestrial licence areas will end (see section 41C of the BSA).

Broadcasters will be able to provide additional multi-channelled digital television services in their terrestrial licence areas subject to the limits of their radiofrequency spectrum allocation.

If a terrestrial metropolitan broadcaster launches additional HD digital multi-channels in metropolitan licence areas after the end of the simulcast period, subclause 7C(4) would not require the section 38C licensee, as a condition of their licence, to launch additional HD multi-channels that provide program content that is the same or substantially the same as the program content on the corresponding metropolitan service. This exemption recognises that the ability of the 38C licensee to deliver future additional digital multi-channels may be constrained by the capacity of transponder space available on the satellite platform. However, this exemption would not prevent those additional multichannels being provided via satellite if the section 38C licensee has the capacity to do so, and chooses to do so.

Subclause 7C(5) provides that if:

- a section 38C licensee provides a HDTV multi-channelled commercial television broadcasting service that is the same, or substantially the same, as a HDTV multi-channelled commercial television broadcasting service provided by a related terrestrial licensee, and
- the related terrestrial licensee ceases to provide the service,

the section 38C licensee does not, while the cessation continues, have to provide a HDTV multi-channelled commercial television broadcasting service that is the same, or substantially the same, as a service provided by a metropolitan licensee.

This exemption would be lifted once a terrestrial remote licensee resumes providing the core/primary service and/or multi-channelled service (as the circumstances determine). The exemption caters for a situation where a terrestrial remote broadcaster either:

- surrenders their licence or has their licence cancelled by the ACMA; or
- for financial or other reasons, decides to reduce the services they offer within their remote licence area (e.g. they stop providing one or more non-core or secondary multichannel service(s)).

SDTV multi-channelled commercial television broadcasting services

In relation to SDTV multi-channelled commercial television broadcasting services, the effect of clause 7C is that *at the commencement of a service* provided under a licence allocated under section 38C, the licensee is required to provide:

- SDTV services that are the same or substantially the same as all SDTV services provided by the related terrestrial licensees, and
- where there are SDTV services provided by a metropolitan licensee that are distinct from the SDTV service provided by the related terrestrial licensee, those services.

If, *after the commencement of the service*, a related terrestrial licensee ceases to provide a SDTV service, the section 38C licensee is not required to provide a service that is the same or substantially the same as the SDTV service. If the related terrestrial licensee recommences the SDTV service, the section 38C licensee must provide a SDTV service that is the same or substantially the same as that service.

This exemption would be lifted once a terrestrial remote licensee resumes providing the core/primary service and/or multi-channelled service (as the circumstances determine). The exemption caters for a situation where a terrestrial remote broadcaster either:

- surrenders their licence or has their licence cancelled by the ACMA; or
- for financial or other reasons, decides to reduce the services they offer within their remote licence area (e.g. they stop providing one or more non-core or secondary multichannel service(s)).

Subclause 7C(6) provides that, if there is a SDTV multi-channelled commercial television broadcasting service provided by a related terrestrial licensee that has the same, or substantially the same, program content as a SDTV multi-channelled commercial television broadcasting service provided by a metropolitan licensee, and the section 38C licensee will provide a SDTV multi-channelled commercial television broadcasting service that is the same or substantially the same as the SDTV service provided by related terrestrial licensee.

Subclause 7C(7) provides that, if there is a SDTV multi-channelled commercial television broadcasting service provided by a metropolitan licensee, and there is no SDTV multi-channelled commercial television broadcasting service provided by a related terrestrial licensee that is the same, or substantially the same as the service provided by the metropolitan licensee, the section 38C licensee will provide a SDTV multi-channelled commercial television broadcasting service that is the same, or substantially the same, as the service provided by the metropolitan licensee.

Subclause 7C(9) provides that section 38C licensee is not required to provide a SDTV multi-channelled commercial television broadcasting service from a metropolitan licensee under subclause 7C(7) if the metropolitan licensee commences to provide the service after the end of the simulcast period for the metropolitan licence area.

Subclause 7C(9) complements subclause 7C(4). This exemption in relation to additional SDTV multichannel services provided under the section 38C licence has the same policy rationale as described for subclause 7C(4) above.

Subclause 7C(10) provides an exemption that is similar to the exemption contained in subclause 7C(5) (the latter subclause is about the cessation of related terrestrial HDTV multichannels). The exemption in subclause 7C(10) relates to the cessation of a SDTV multi-channelled service provided by a related terrestrial licensee. While the cessation continues, the section 38C licensee does not have to provide a SDTV multi-channelled commercial television broadcasting service that provides program content that is the same, or substantially the same, as a service provided by a metropolitan licensee.

Clause 7D – Condition about the provision of local news services

New clause 7D provides that a section 38C licensee is required to broadcast local news and information programs or material as supplied by regional commercial television broadcasting licensees as soon as practicable after that program or material begins to be broadcast in the related terrestrial licence area.

Regional broadcasters are required to supply local news and information program or material under new subsections 43A(3A) or 43AA(1) (see items 38 and 41).

The section 38C licensee must broadcast the local news program or material on either:

- a SDTV multi-channel that is dedicated to providing local news and local information programming (see paragraph 41CA(1)(g), explained in Item 32 above, regarding the authorised services); or
- a SDTV multi-channel that is a core/primary service (within the meaning of paragraphs 41CA(1)(c) and (f), explained in Item 32 above).

Clause 7E — Exemption – provision of new commercial television broadcasting services not technically feasible)

New Clause 7E provides the ACMA with the power to determine that a particular section 38C licensee is not required to provide a new commercial television multichannel after the start date if the provision of that service is not considered by the ACMA to be technically feasible. The determination would be a legislative instrument.

Although the section 38C licensees are authorised to provide the full suite of commercial multi-channels that correspond to those available in a terrestrial licence area (which presently totals 3 core services and 6 multi-channels), the provision of additional multi-channels after the *start date* (defined in clause 7H below) as a result of new multichannels being launched terrestrially may not be immediately possible for technical reasons (such as satellite transponder capacity constraints or other technical issues relating to the satellite service's distribution).

For this reason, this clause enables the ACMA to grant exemptions to the licence condition set out in clause 7C that requires the provision of additional multi-channel services which commence after the start date for the satellite service.

Clause 7F – Exemption – commercial television broadcasting services with the same program content

New Clause 7F provides that the Minister may determine that a particular section 38C licensee is not obliged, for a specified period, to provide a commercial television broadcasting service which has the same program content as another service already provided by the section 38C licensee. The Minister's determination would be a legislative instrument.

Ordinarily, under clause 7C, a section 38C licensee would be required to provide:

- a HDTV multi-channel commercial television broadcasting service or
- a SDTV multi-channel commercial television broadcasting service that is not the core/primary commercial television broadcasting service

that provides program content that is the same or substantially the same as the program content of a commercial television broadcasting service provided by a terrestrial licensee.

The proposed exemption power in this clause 7E would enable the Minister to temporarily exempt a section 38C licensee from providing a particular multi-channel that is materially identical to another service that the licensee is already required to provide. This avoids unnecessary duplication on the satellite service.

For example, currently the digital service known as ONE HD is currently being simulcast in SD mode in metropolitan areas. The content of ONE HD and ONE SD in a particular metropolitan licence area is identical. The Minister may, after consultation with the ACMA, decide to exempt the section 38C licensee from having to provide a SDTV multi-channel that corresponds with ONE SD, because the same program content is already being provided via satellite through a HDTV multichannel.

An exemption may be granted for a period of no longer than two years, although the exemption may be extended by the Minister.

Clause 7G – Delay in commencement of new commercial television broadcasting services

Clause 7G provides that if, after the start date for a section 38C service:

- a terrestrial licensee commences a HDTV multi-channelled commercial television broadcasting service or a SDTV multi-channel commercial television broadcasting service that is not a core/primary service, and
- the section 38C licensee is required, under clause 7C, to provide a service that is the same or substantially the same as that service,
- and there is a delay in the provision of the required service,

the delay is to be disregarded so long as the delay is as short as is practicable.

Clause 7G recognises that there may be instances where the commencement of satellite transmissions of a multi-channel service is delayed for reasons outside the section 38C licensee's control. In such circumstances the ACMA may disregard the delay so long as the

delay is as short as practicable. (This exemption complements the narrower technical feasibility exemption in clause 7E, described above).

Clause 7H – Start dates for licence areas

New clause 7H provides that the ACMA may, by legislative instrument, declare a specified date is the start date for a service provided under a licence allocated under section 38C.

The start date for the South Eastern Australia TV3 licence area must not be later than 90 days after the first or only occasion on which a licence for the licence area is allocated under section 38C.

The start date for the Northern Australia TV3 licence area or the Western Australia TV3 licence area must not be later than 3 months before the end of the earliest applicable terrestrial digital television switch-over date for the licence area.

For the Northern Australia TV3 and Western Australia TV3 licence areas:

- if a terrestrial licence is included in the licence area, and
- there is a simulcast period for the terrestrial licence area, and
- there is no local market area included in the terrestrial licence area,

the last day of the simulcast period for the terrestrial licence area is an “applicable terrestrial digital television switch-over date”.

If the Minister makes a digital-only local market area determination under clause 5F of Schedule 4 to the BSA in relation to a terrestrial licence area, then the day on which the local market area becomes a digital-only local market area is an “applicable terrestrial digital television switch-over date”. The latter mentioned day will be before the end of the simulcast period for the terrestrial licence area concerned.

Clause 7J – Program content

Clause 7J provides a section 38C licensee with some scheduling flexibility in that there may be more regionally appropriate programming for a particular satellite licence area at a particular time.

Subclause 7J(1) provides that, in determining the whether the program content of a commercial television broadcasting service provided by a licensee in a licence area is the same, or substantially the same, as the program content of another commercial television broadcasting service, the following content will be ignored:

- advertising or sponsorship material (whether or not of a commercial kind);
- a promotion for a television program or a television broadcasting service;
- community information material or community promotional material;
- a weather bulletin;
- any other similar material, and
- a news program, and
- any program that the broadcasting of which in any jurisdiction in the licence area could result in the licensee:
 - committing an offence; or
 - becoming liable to a civil penalty; or

- breaching an order or direction of a court; or
- being in contempt of court; and
- a program broadcast in circumstances specified under regulations.

Subclause 7J(2) provides that, in relation to the program content of the core/primary services provided by the section 38C licensee (clause 7B refers) the content of a program that provides coverage of one event listed on the anti-siphoning list is assumed to be the same as the content of a program that provides coverage of *another* event listed on the anti-siphoning list.

Clause 7K – SDTV multi-channelled commercial television broadcasting service

For the purpose of Division 2 – licences allocated under section 38C, paragraph 5A(1)(d) of Schedule 4 is assumed not to have been enacted.

Clause 7L – Definitions

Clause 7L provides definitions for the purpose of Division 2 of Schedule 2.

- *digital-only local market area* has the same meaning as in Schedule 4.
- *HDTV multi-channelled commercial television broadcasting service* has the same meaning as in Schedule 4.
- *local market area* has the same meaning as in Schedule 4.
- *metropolitan licence area* means a licence area in which is situated the General Post Office of the capital city of New South Wales, Victoria, Queensland, Western Australia or South Australia, but does not include the licence area of a commercial television broadcasting licence allocated under section 38C.
- *related terrestrial licence area*
 - in relation to a section 38C licence allocated for the South Eastern Australia TV3 licence area, means a terrestrial licence area mentioned in column 3 of item 1 of the table in subsection 38C(1), or
 - in relation to a section 38C licence allocated for the Northern Australia TV3 licence area, means a terrestrial licence area mentioned in column 3 of item 2 of the table in subsection 38C(1), or
 - in relation to a section 38C licence allocated for the Western Australia TV3 licence area, means a terrestrial licence area mentioned in column 3 of item 3 of the table in subsection 38C(1).
- *SDTV multi-channelled commercial television broadcasting service* has the same meaning as in Schedule 4.
- *simulcast period* has the same meaning as in Schedule 4.
- *terrestrial licence* means a commercial television broadcasting licence other than a commercial television broadcasting licence allocated under section 38C or section 40(1).
- *terrestrial licence area* means the licence area of a terrestrial licence.

Item 73 — Subparagraph 10(1)(e)(ii) of Schedule 2
Item 74 — Subclauses 10(1A) and (1B) of Schedule 2

These items make technical amendments to the statutory licence condition about anti-siphoning that applies to subscription television broadcasting licensees. Subscription television broadcasters cannot acquire the right to broadcast events on the anti-siphoning list unless either a national broadcaster, or commercial television broadcasters with a combined audience reach of 50% of the Australian population have acquired the right to broadcast the event.

The amendments would exclude the satellite commercial broadcasting licences issued under proposed section 38C of the BSA from the ambit of the audience reach test that applies to commercial television broadcasters. Section 38C licences will be treated the same way as section 40 television licences, because these are comparatively ‘niche’ commercial broadcasting services – section 38C services are considered ‘niche’ because a conditional access scheme applies to the reception of such services.

Item 75 — Clause 2 of Schedule 4 (definition of metropolitan licence area)
Item 77 — Clause 2 of Schedule 4 (definition of regional licence area)
Item 79 — Clause 2 of Schedule 4 (paragraph (a) of the definition of simulcast period)

Items 75 and 77 insert into Schedule 4 to the BSA new defined terms for *metropolitan licence area* and *regional licence area*. The key change is to exclude the satellite licence areas for the section 38C licence from the defined term. This is because the new satellite commercial broadcasting services are to be disregarded for the purposes of the conversion scheme for terrestrial television transmitters from analog to digital.

Item 79 consequentially amends the definition of *simulcast period* by reference to the new definitions of *metropolitan licence area* and *regional licence area*. These types of commercial television licence areas are distinguished from a *remote licence area*.

Item 76 — Clause 2 of Schedule 4
Item 78 — Clause 2 of Schedule 4

These items insert into Schedule 4 to the BSA new defined terms that relate to national broadcasting services delivered by satellite.

Item 76 should be read in conjunction with item 120 (which gives meaning to the defined term inserted by item 76).

Item 78 should be read in conjunction with item 119. The satellite delivery area is a similar concept to a national broadcasting *coverage area* (within the meaning of Schedule 4 to the BSA), except that the satellite delivery area for a national broadcasting service corresponds with a satellite licence area for a commercial television broadcasting service licensed under section 38C of the BSA.

Item 80 — Clause 4C of Schedule 4

Item 81 — At the end of clause 4C of Schedule 4

These items amend clause 4C of Schedule 4 to the BSA. Clause 4C provides for the determination of a *simulcast-equivalent period for a licence area*. Item 81 provides that such a determination (if made by the ACMA) does not apply to a commercial television broadcasting licence allocated under section 38C. This is because there is no simulcasting of the service licensed under section 38C – it is a digital-only television service.

Item 82 — After subclause 5(1) of Schedule 4

This item amends clause 5 of Schedule 4 to the BSA. Clause 5 empowers the ACMA to make a remote licence area determination. Item 82 provides that such a determination such a determination does not apply to a commercial television broadcasting licence allocated under section 38C.

Item 83 — Paragraph 5A(1)(b) of Schedule 4

Item 84 — Paragraph 5B(b) of Schedule 4

Item 85 — Paragraph 5C(1)(b) of Schedule 4

Item 87 — Paragraph 5D(b) of Schedule 4

These items amend the definitions of:

- SDTV multi-channelled commercial television broadcasting service;
- HDTV multi-channelled commercial television broadcasting service;
- SDTV multi-channelled national television broadcasting service;
- HDTV multi-channelled national television broadcasting service.

These terms are used extensively throughout the BSA in relation to digital television. The amendments concern the mode of transmission for the respective digital multichannel services. The amendments enlarge the scope of such multi-channel services by recognising that they may be transmitted in digital mode (whether SD or HD) with the use of a satellite, in addition to terrestrial transmission towers.

Item 86 — At the end of clause 5C of Schedule 4

This item amends clause 5C of Schedule 4 so that the requirement that a national broadcaster give the Minister written notice nominating a particular service transmitted by as a *SDTV multi-channelled national television broadcasting service* does not apply to a national broadcasting service that is provided via satellite. This means that the definition is modified to the extent that Schedule 4 to the BSA relates to a *SDTV multi-channelled national television broadcasting service* provided with the use of a satellite.

Item 88 — Paragraph 6(3)(c) of Schedule 4

Consequential to items 75 and 77 (see above), this item amends the policy objective for the commercial television conversion scheme that relates to the duration of the simulcast period.

- Item 89— Paragraph 6(5A)(d) of Schedule 4**
- Item 90 — Paragraph 6(5A)(e) of Schedule 4**
- Item 91 — Paragraph 6(5AA)(e) of Schedule 4**
- Item 92 — Paragraph 6(5B)(a) and (c) of Schedule 4**
- Item 93 — Paragraph 6(5B)(c) of Schedule 4**
- Item 94 — After subclause 6(5BA) of Schedule 4**
- Item 95 — After subclause 6(5C) of Schedule 4**
- Item 96 — After subclause 6(7C) of Schedule 4**

These items amend the multi-channelling election provisions that apply in former solus or two-station markets for which there are commercial television broadcasting licences allocated under section 38A or section 38B of the BSA.

In some regional licence areas the establishment of the new satellite broadcasting service will mean that there will be a more attractive suite of digital television services available by satellite than terrestrially. This will particularly affect the broadcasters in the licence areas where a second commercial licence has been allocated under section 38A, and where the licensee has elected under subclause 6(5A) or 6(5AA) of Schedule 4 to the BSA to deliver digital services using one 7 MHz channel of spectrum. This generally limits digital services in these licence areas to standard definition multi-channelling (the election exempts the licensee from the HD quotas that apply to other broadcasters during the simulcast period).

Item 14 (above) proposes to amend section 38B of the BSA to enable the holder of a section 38A licence to apply for a third commercial television licence. The allocation of the 38B licence will be coupled with an entitlement to an additional transmitter licence authorising the use of an additional 7 MHz channel for the provision of the digital-only additional service (see subsection 102(1) of the Radiocommunications Act). Thus, the licensee will have 14 MHz of spectrum to use for the delivery of three digital commercial television broadcasting services (each comprising the core/primary channel and up to two multi-channels for the remainder of the simulcast period).

During the remainder of the simulcast period, the third commercial service licensed under the amended section 38B will not be subject to any HD quota obligations provided the licensee under amended section 38B makes an (additional) election to multichannel under subclause 6(5A) of Schedule 4 to the BSA. Item 88 provides the making of an additional multi-channelling election at around the same time the section 38B licence is allocated to the holder of the section 38A licence.

The effect of the election is to permit the broadcaster to use their existing transmission capacity to provide all three commercial broadcasting services – therefore spare transmission capacity under the additional transmitter licence for the 38B service (see subsection 102(1) of the Radiocommunications Act) may be used for the purpose of providing additional multi-channels for one or both of the other commercial television services that the licensee provides in that licence area.

Items 90, 91, 92 make technical amendments to subclauses 6(5A), 6(5AA), and 6(5B) of Schedule 4 so that the modified policy objectives of the commercial television conversion scheme apply to any of the commercial television broadcasting services covered by an election made by the licensee.

During the remainder of the simulcast period for the relevant licence area, the holder of the 38A and 38B licences will be entitled to the benefit of any multi-channelling elections they have made. If the licensee chooses to revoke any election before the end of the simulcast period, the licensee will be granted additional BSB transmission capacity but in return for meeting HD service obligations. The ACMA's approval of the revocation of one election is taken to revoke all of the licensee's elections made under subclauses 6(5A) or 6(5AA) of Schedule 4.

Items 93 and 94 would amend the multi-channelling transmission capacity arrangements for the holder of 38A and/or 38B licences.

Item 93 repeals paragraph 6(5B)(c) of Schedule 4 to the BSA. (Item 97 makes a consequential amendment).

Paragraph 6(5B)(c) provides for the continuation of the multi-channelling election after the end of the simulcast period and (in conjunction with clause 7B of Schedule 4 to the BSA) makes the future transmission arrangements for a licensee who has made an election contingent on the availability of spectrum. If the election is revoked there is no guarantee that the licensee will get additional transmission capacity (an extra 7 MHz spectrum channel).

Items 94 and 96 provide that a multi-channelling election is automatically revoked when the simulcast period ends for the relevant licence area. Consequentially, the ACMA must grant the licensee additional transmission capacity (through an additional transmitter licence) to the holders of the parent, 38A or 38B licences that were subject to a multi-channelling election in force when the simulcast period ends, a third transmitter licence under section 102 of the Radiocommunications Act. The intention is to equalise licensee spectrum holdings in licence areas (including remote licence areas) that have three commercial television broadcasting licences so that the transmitter licence authorises the use of one 7 MHz channel of spectrum per commercial television broadcasting licence.

Item 95 add a new subclause 6(5CA) to Schedule 4 to the BSA. The amendment provides that a satellite commercial broadcasting service licensed under section 38C is to be disregarded when assessing whether the policy objectives about digital television achieving the same level of coverage and reception quality as analog television. This ensures that the focus of the commercial television conversion scheme is on the equivalence of digital terrestrial television and analog television.

Item 98 — After subclause 6(7K) of Schedule 4

This item provides that clause 6 of Schedule 4 does not apply to a satellite commercial broadcasting licence allocated under section 38C of the BSA. This is because a section 38C service is a digital-only service, for which no conversion scheme is required.

Item 99 — At the end of clause 7A of Schedule 4

Item 100 — After subclause 9(1B) of Schedule 4

Item 101 — After subclause 19(7C) of Schedule 4

These items amend the particular clauses of Schedule 4 so that satellite-delivered commercial television broadcasting services (licensed under section 38C of the BSA) or satellite-delivered national broadcasting services are disregarded for the purposes of the digital

channel planning and implementation planning aspects of the commercial television conversion scheme and national television conversion scheme respectively.

Item 102 — Before clause 37DA of Schedule 4

This item provides that satellite commercial television broadcasting services licensed under section 38C of the BSA are not subject to HDTV quota obligations during the remainder of the simulcast period.

Item 103 — After paragraph 38(4)(a) of Schedule 4

Item 104 — After paragraph 38(4A)(a)

Item 105 — After paragraph 38(4A) of Schedule 4

Item 106 — After paragraph 38(5)(a) of Schedule 4

Item 107 — After paragraph 38(5)(c) of Schedule 4

Item 108 — After paragraph 38(5)(d) of Schedule 4

Item 109 — After subclause 38(5) of Schedule 4

Item 110 — After paragraph 38(9)(a) of Schedule 4

Item 111 — After subclause 38(9) of Schedule 4

Item 112 — After subclause 38(10) of Schedule 4

Item 113 — Subclause 38(12) of Schedule 4

These items amend the captioning rules in Division 3 of Schedule 4 to the BSA. The basic rule is that a commercial television broadcaster and a national television broadcaster must provide a captioning service for any news or current affairs program, and television programs broadcast during prime time viewing hours (6pm-10.30pm). When clause 38 of Schedule 4 to the BSA applies, it is a condition of a commercial television broadcasting licence to comply with this requirement (subclause 7(1)(o) of Schedule 2 to the BSA).

This basic captioning rule is subject to a number of exceptions. A captioning service is not required in relation to:

- a television program that is not in English or mainly not in English;
- non-vocal music-only programs;
- incidental or background music;
- live sport coverage with unscheduled extended coverage that displaces a news program;
- programs broadcast outside the broadcasting services bands under a television broadcasting licence allocated under subsection 40(1) of the BSA (for the first 12 months of service); and
- programs broadcast on a standard definition television (SDTV) or high definition television (HDTV) multi-channel during the simulcast period (unless previously broadcast with captions on the broadcaster's core/simulcast channel).

These items would amend the exceptions to the basic captioning rule to add services licensed under section 38C that are not primary satellite commercial broadcasting services, and national broadcasting television services that are not nominated as primary satellite broadcasting services.

The exemptions for non-primary SDTV and HDTV commercial multi-channelled broadcasting services would continue until the end of the last applicable terrestrial digital television switch-over date for the licence area. For national broadcasters, the exemption

would continue until the last applicable terrestrial digital television switchover date in a licence area that is a related coverage area.

(See item 72 for new clause 7H in Schedule 2 for the meaning of *applicable terrestrial digital television switch-over day*).

Item 114 — At the end of clause 41A of Schedule 4

Item 115 – Paragraph 41B(1)(a) of Schedule 4

Item 116 — At the end of clause 41B of Schedule 4

Item 117 — At the end of clause 41C of Schedule 4

Item 118 – Paragraph 41D(1)(a) of Schedule 4

Item 119 — At the end of clause 41D of Schedule 4

Item 120 — At the end of clause 41E of Schedule 4

Item 121 — At the end of clause 41F of Schedule 4

These items amend the particular clauses of Schedule 4 so that satellite commercial television broadcasting services licensed under section 38C of the BSA are not covered by the same restrictions that apply to commercial broadcasters licensed under section 36, section 38A or section 38B in relation to the use of SD or HD digital multi-channels - during or after the simulcast period - to premiere all or part of an event that is included on the anti-siphoning list.

The exclusion from these clauses is needed because there is no simulcast period applicable to satellite commercial broadcasting services licensed under section 38C of the BSA. Note, however, that satellite commercial broadcasting services licensed under section 38C will be regulated in relation to the broadcast of events included on the anti-siphoning list through the amendments contained in Item 122 below.

Item 122 — After clause 41F of Schedule 4

This item inserts new clauses into Schedule 4 to the BSA that regulate the way a satellite commercial broadcasting service licensed under section 38C broadcasts events that are included on the anti-siphoning list. The new clauses contain restrictions that are substantially similar to the current restrictions that apply to commercial television broadcasters licensed under other sections of the BSA.

New clause 41FA regulates the SDTV multi-channels provided by a section 38C licensee. The 38C licensee must not televise a part of an anti-siphoning event on a SDTV multi-channel unless:

- the licensee has previously televised that part of the anti-siphoning event on one of the licensee's primary services; or
- the licensee televises that part of the anti-siphoning event simultaneously on both a primary service and a SDTV multi-channel; or
- the licensee televises that part of the anti-siphoning event as part of a news or current affairs program broadcast on a SDTV multi-channel.

The exception in relation to televising parts of anti-siphoning events in news or current affairs programs will permit the 38C licensee to transmit a news and current affairs program with a

sports segment on one of their SDTV multi-channels (for example, the dedicated satellite SDTV news service), and that the sports segment may include televised excerpts from anti-siphoning events.

New clause 41FB regulates the HDTV multi-channels provided by a section 38C licensee. The 38C licensee must not televise the whole of an anti-siphoning event on a HDTV multi-channel unless:

- the licensee has previously televised the whole anti-siphoning event on one of the licensee's primary services (in relation to primary services, see Item 123 below); or
- the licensee televises the whole anti-siphoning event simultaneously on both a primary service and the HDTV multi-channel.

Item 123 – Subclause 41G(1) of Schedule 4

Item 124 – After subclause 41G(1) of Schedule 4

Item 125 – At the end of clause 41G of Schedule 4

This item inserts additional subclauses to clause 41G of Schedule 4 to the BSA, which deals the ACMA's powers to declare *primary commercial television broadcasting services*. Currently, the ACMA has discretion to make such a declaration. The additional amendments will require the ACMA to make declarations for both terrestrial and satellite commercial television broadcasting services.

New subclause 41G(1A) requires to declare under subclause 41G(1), as soon as practicable after the commencement of the subclause, a SDTV commercial multi-channelled service to be a primary commercial television broadcasting service, and must ensure that a declaration remains in force until the end of the simulcast period or simulcast-equivalent period (noting that the declaration may be varied).

New subclause 41G(3) requires a declaration of a primary commercial television broadcasting service to be in force at all times after the simulcast period or simulcast-equivalent period.

New subclause 41G(4) empowers the ACMA to make a legislative instrument declaring at least one, but no more than three, specified SDTV multichannels provided on a satellite television broadcasting service (licensed under section 38C) to be the licensee's primary commercial television broadcasting service(s).

This item also amends clause 41G generally so as to ensure that such a declaration instrument is in force at all times, and will need to be made by the ACMA as soon as practicable after the earlier of the commencement of this item or the date a particular commercial television broadcasting licence is allocated.

Item 126— At the end of clause 41H of Schedule 4

Item 127 — At the end of clause 41J of Schedule 4

Item 128 — At the end of clause 41K of Schedule 4

Item 129 — At the end of clause 41L of Schedule 4

These items are similar in substance to Items 114-121 above. The only material difference is that these items are about national television broadcasting services instead of commercial

television broadcasting services. The reason for these amendments is the same as for Items 114-121.

Item 130 — After clause 41L of Schedule 4

This item would insert new clauses into Schedule 4 to the BSA that regulate the way a national television broadcasting service delivered by use of a satellite broadcasts events that are included on the anti-siphoning list.

New clause 41LA regulates the SDTV multi-channels delivered by a national broadcaster by use of a satellite. The national broadcaster must not televise via satellite a part of an anti-siphoning event on a SDTV multi-channel unless:

- the broadcaster has previously televised that part of the anti-siphoning event on the broadcaster's *primary satellite television broadcasting service* (see Item 131 below) in a *satellite delivery area* (a defined term inserted by Item 78 above); or
- the broadcaster televises that part of the anti-siphoning event simultaneously on both its primary satellite television broadcasting service and a SDTV multi-channel in a satellite delivery area; or
- the broadcaster televises that part of the anti-siphoning event as part of a news or current affairs program broadcast on a SDTV multi-channel.

The exception in relation to televising parts of anti-siphoning events in news or current affairs programs will permit the ABC or the SBS to transmit via satellite on one of their SDTV multi-channels a news and current affairs program with a sports segment, and that the sports segment may include televised excerpts from anti-siphoning events.

New clause 41LB regulates the HDTV multi-channels delivered by a national broadcasting service by use of a satellite. The national broadcaster must not televise the whole of an anti-siphoning event on a HDTV multi-channel unless:

- the broadcaster has previously televised the whole anti-siphoning event on one of the licensee's primary services (in relation to primary services, see Item 123); or
- the licensee televises the whole anti-siphoning event simultaneously on both a primary service and the HDTV multi-channel.

Item 131 — At the end of Part 4A of Schedule 4

This item inserts a new clause which deals with *primary satellite national television broadcasting services*.

The new clause requires a national broadcaster to nominate to the Minister a specified SDTV multi-channel provided by the national broadcaster, with the use of a satellite, to be the broadcaster's primary satellite national television broadcasting service in a specified satellite delivery area. As noted above, the satellite delivery area corresponds to the satellite licence area of a commercial broadcasting service licensed under section 38C of the BSA.

Item 132 — Clause 43 of Schedule 4

This item inserts a defined term for *commercial television broadcasting licence* into Part 4A of Schedule 4 to the BSA. This Part sets up a transmitter access regime for terrestrial television transmission towers. The new defined term excludes a licence allocated under section 38C of the BSA, because such a licensee does not use terrestrial transmitters to deliver their service. Accordingly the transmitter access regime does not need to apply to services licensed under section 38C of the BSA.

Item 133 — Subclause 2(1) of Schedule 6

This item makes minor amendments to the provisions in the BSA that describe the companies that are eligible to apply for datacasting licences. Currently the BSA requires a licensee company for datacasting services to be formed in Australia or an external Territory. The amendment would require a licensee company to be registered under Part 2A.2 of the *Corporations Act 2001*.

Item 134 — Transitional — licences allocated under section 38B of the BSA

This item is a transitional provision that preserves the continuity of a licence previously allocated under 38B of the BSA notwithstanding the amendments made to section 38B by items 14-25 of Schedule 1 to this bill.

Copyright Act 1968

Item 135 — Subsection 10(1) (definition of *broadcast*)

Item 136 — Subsection 10(1) (definition of *satellite BSA licence*)

Item 137 — Subsection 10(1) (definition of *satellite BSA licensee*)

These items amend or insert new definitions in section 10 of the *Copyright Act 1968* (the Copyright Act). These items are consequential to item 141, which provides for a new type of statutory licence relating to the re-broadcast of copyright material by the *satellite BSA licensee*. A satellite BSA licence and the licensee of such a licence is defined by reference to a licence allocated under section 38C of the *Broadcasting Services Act 1992* (the BSA).

For the purposes of the Copyright Act, the fact that a broadcast by a satellite BSA licensee is subject to a conditional access system is disregarded.

Item 138 — Section 100AH (note)

This item amends the note under section 100AH of the Copyright Act to insert a new cross-reference. This item is consequential to the amendments proposed by item 141.

Item 139 — Section 135ZZJA

Item 140 — At the end of section 135ZZJA

These items amend section 135ZZJA of the Copyright Act. Section 135ZZJA is the application provision for Part VC of the Copyright Act (Retransmission of Free-to-Air Broadcasts). The amendments add a new subsection 135ZZJA(2) which provides that Part VC does not apply to retransmissions by a satellite BSA licensee. This is because such broadcasts are to be regulated instead by proposed Part VD of the Copyright Act (the legislative note under subsection 135ZZJA(2) refers). The scope of proposed Part VD is broader than Part VC in that the former sets up a statutory licence regarding the particular use of copyright in a broadcast (that is, broadcast signal copyright), whereas Part VC only confers a statutory licence regarding the use of copyright in the underlying program material.

Item 141 — After Part VC

Item 141 inserts a new part after Part VC of the Copyright Act. Proposed Part VD (Re-broadcasts by satellite BSA licensees) would deal with the copyright aspects of the new licence conditions to be imposed on commercial television broadcasters by items 41 and 72 of Schedule 1 to this bill. These new licence conditions require particular metropolitan, regional and remote commercial television broadcasters to supply particular television programs to particular satellite BSA licensees in particular circumstances. Correspondingly, the satellite BSA licensees will be made subject to licence conditions regarding the broadcast of television programming supplied by the previously mentioned commercial television broadcasters.

Proposed Part VD of the Copyright Act would set up a statutory licence scheme regulating two distinct copyright issues that arise in the context of television broadcasts:

- the use of broadcast signal copyright (that is, copyright in a broadcast); and
- the use of underlying copyright in the television program material (such copyrights include the script writing, music and other recorded sounds, artworks and cinematographic films that together make up a television program).

Division 1 - Preliminary

Division 1 of Part VD sets out the defined terms used throughout the Part (section 135ZZZF).

Section 135ZZZG deals with the key concepts of an *eligible program* and an *original broadcaster*. In short, television program material will be an *eligible program* under Part VD of the Copyright Act if that material is supplied by a commercial television broadcaster to a satellite BSA licensee pursuant to a broadcasting licence condition imposed under:

- subsection 43A(3) of the BSA;
- section 43AA of the BSA;
- section 43AB of the BSA; or
- section 43AC of the BSA.

In turn, the commercial television broadcaster who is subject to the previously mentioned BSA licence conditions will be an *original broadcaster* under Part VD of the Copyright Act. The identification of both the eligible program and the original broadcaster is pivotal to the operation of the remainder of Part VD of the Copyright Act.

Section 135ZZZH provides for the concurrent operation of collecting society rules except for any rule that is inconsistent with the application of Part VD to that collecting society.

Division 2 - Re-broadcasts by satellite BSA licensees

Division 2 of Part VD sets out the statutory licence for a satellite BSA licensee.

Subsection 135ZZZI(1) sets out the preconditions for the statutory copyright licence authorising the use of the underlying copyright in the program material.

A satellite BSA licensee will not infringe the underlying copyright in a television program if the re-broadcast of the eligible program is authorised by the satellite BSA licensee's broadcasting licence (see section 38C of the BSA) and otherwise complies with the broadcasting licence condition set out in clause 7A of Schedule 2 to the BSA (except for compliance with the conditional access scheme - see item 124 above and the definition of *broadcast* used in the Copyright Act).

In addition, a satellite BSA licensee will not infringe the underlying copyright if the licensee complies with the requirements of the statutory licensing scheme set out in Part VD of the Copyright Act:

- the satellite BSA licensee must provide a *remuneration notice* (particulars are set out in section 135ZZZJ below) to the *relevant collecting society* (see Divisions 3 and 4 below), and that notice must be in force at the time of re-broadcasting;
- the remuneration notice must specify the *original broadcaster* of the program that the

- satellite BSA licensee has (or will) re-broadcast; and
- the satellite BSA licensee must keep appropriate records of the program material they have (or will) re-broadcast (see section 135ZZZL below).

Subsection 135ZZZI(2) sets out the preconditions for the statutory copyright licence authorising the use of the copyright in the broadcast signal (broadcast signal copyright).

There will be no infringement of the broadcast signal copyright (for the re-broadcast of an eligible program) provided the re-broadcast is made by a satellite BSA licensee (paragraph-135ZZZI(2)(a)).

In addition, paragraphs 135ZZZI(2)(b)-(c) provide that the satellite BSA licensee's re-broadcast of the eligible program must be authorised by the satellite BSA licensee's broadcasting licence (see section 38C of the BSA), and otherwise comply with the broadcasting licence condition set out in clause 7A of Schedule 2 to the BSA (except for compliance with the conditional access scheme - see item 135 above and the definition of *broadcast* used in the Copyright Act).

The final precondition for the statutory licence is that the satellite BSA licensee must be bound by either:

- an agreement with the original broadcaster that sets out the amount to be paid by the satellite BSA licensee to the original broadcaster for the re-broadcast of the eligible program during a particular period; or
- absent an agreement, a Copyright Tribunal determination that sets out the amount to be paid by the satellite BSA licensee to the original broadcaster for the re-broadcast of the eligible program during a particular period (see section 153RA of the Copyright Act); or
- if there is no agreement or Copyright Tribunal determination, a written undertaking made by the satellite BSA licensee in the original broadcaster's favour that commits the satellite BSA licensee to pay an amount as determined by the Copyright Tribunal for the re-broadcast of the eligible program during a particular period (see section 153RA of the Copyright Act).

Subsections 135ZZZI(3) and (4) deal respectively with temporary copying of underlying program material and broadcast signal copyright to enable re-broadcasting by the satellite BSA licensee. Temporary copying will not infringe any copyright provided the copy is destroyed within 7 days of being made. If the copy is not destroyed on time, subsection 135ZZZI(3) or (4) is taken never to have applied to the making of the copy (subsection 135ZZZI(5) refers) - this means that such copying is potentially a copyright infringement unless some other copyright licence covers such copying.

Section 135ZZZJ deals with remuneration notices. A satellite BSA licensee may through written notice to a collecting society undertake to pay equitable remuneration to the society for the re-broadcasts made by the satellite BSA licensee. The notice must state that the amount of equitable remuneration is to be assessed on the basis of records kept by the satellite BSA licensee under new section 135ZZZL. (The record system – as agreed between satellite BSA licensee and the relevant collecting society or as determined by the Copyright Tribunal – must provide for the keeping of records identifying each program broadcast by the original broadcaster

and re-broadcast by the satellite BSA licensee).

Section 135ZZZK deals with the amount of equitable remuneration payable by the satellite BSA licensee. The remuneration amount is to be determined by agreement between the collecting society and the satellite BSA licensee. If the parties are unable to reach agreement, the Copyright Tribunal will determine the amount of equitable remuneration on the application of either the satellite BSA licensee or the collecting society. Different remuneration amounts may be determined in relation to the different types of copyright – works, sound recordings and film recordings – included in re-broadcasts.

Section 135ZZZL establishes the requirements for a records system to be established and maintained by the satellite BSA licensee for the purpose of re-broadcasting eligible programs.

Subsection 135ZZZL(2) provides that the record system must provide for a record to be kept of the title of each eligible program broadcast by each broadcaster specified in the remuneration notice (that is, the original broadcaster and the satellite BSA licensee). The collecting society is entitled to access such records.

Subsection 135ZZZL(3) provides that the record system must be agreed between the satellite BSA licensee and the collecting society. Absent an agreement either of them can apply to the Copyright Tribunal and the Tribunal may determine the records system.

Section 135ZZZM provides that a remuneration notice may be revoked at any time by the relevant satellite BSA licensee providing written notice to the relevant collecting society. The revocation takes effect 3 months after the date of the notice or on a later specified day.

Section 135ZZZN provides that a collecting society may request a satellite BSA licensee to pay equitable remuneration (payable under new section 135ZZZK) as specified in the collecting society's notice, and within a reasonable time after the date of that notice. Subsection 135ZZZN(2) provides that the collecting society may initiate debt recovery actions regarding the amount specified in the collecting society's notice under this section if the amount is not paid by the satellite BSA licensee as requested. Action to recover the debt may be brought in the Federal Court of Australia or any other court of competent jurisdiction.

Division 3 - Collecting Societies

Division 3 sets out the arrangements for the establishment of collecting societies for Part VD purposes. A collecting society collects and distributes the fees that attach to the statutory licence to the copyright owners that the society works for.

Section 135ZZZO provides for the identification of one or more collecting societies for the purpose of administering the statutory licence created by Part VD of the Copyright Act.

Subsection 135ZZZO(1) provides that a body may apply to the Attorney-General seeking a declaration that that body is a collecting society for Part VD purposes for

all *relevant copyright owners* (as defined in section 135ZZZF above) or one or more specified classes of relevant copyright owners.

Subsection 135ZZZO(2) provides that the Attorney-General may by a notice in the gazette declare the applicant body to a collecting society, refuse to declare the applicant body to be a collecting society, or refer the application for the Copyright Tribunal instead.

Subsections 135ZZZO(3)-(4) are machinery provisions.

Subsection 135ZZZO(5) provides that a collecting society declaration must specify whether the collecting society collects to all or specified classes of relevant copyright owners. This is necessary because a collecting society will generally occupy a monopoly position for the purpose of administering for its members the statutory licence set up by Part VD of the Copyright Act. (See also the notes below on subsections 135ZZZO(6) and (8).)

Subsection 135ZZZO(7) sets out eligibility requirements that a body must meet before it can be declared a collecting society. These include that:

- it be registered as a company limited by guarantee under Part 2A.2 of the *Corporations Act 2001*;
- the relevant copyright owners (or their agents) who the society would collect for are entitled to be members of the society;
- its rules prohibit payment of dividends to members; and
- its rules contain other prescribed provisions protecting the interests of members about: the collection of equitable remuneration, the funding of the society's administrative overheads, the distribution of the collected amounts, the establishment of trust accounts for relevant copyright owners who are not society members, and members' access to society records.

Subsection 135ZZZO(6) deals with the circumstance where the Attorney-General or the Copyright Tribunal makes declarations that result in multiple collecting societies for the purpose of Part VD of the Copyright Act. Normally, a collecting society will exclusively collect for the class of copyright owners specified in the collecting society's declaration. However, subsection 135ZZZO(8) provides that the Attorney-General or the Copyright Tribunal may subsequently declare another collecting society for that class of copyright owners, because to do so is in the interests of those copyright owners. Where a subsequent declaration is made recognising another collecting society, the scope of the first collecting society's declaration is modified accordingly and remuneration notices given to the first collecting society cease to be in force to the extent that those notices now fall within the ambit of the second collecting society (see subsection 135ZZZO(6)). New remuneration notices will need to be given to the successor collecting society.

Section 135ZZZP provides for the revocation of collecting society declarations. The Attorney-General may, by notice in the gazette, revoke a collecting society declaration. To do so, the Attorney-General must be satisfied that the collecting

society: is not functioning adequately; is not acting in accordance with its rules or in the best interests of its copyright owner members; has altered its rules so that they no longer comply with the requirements in paragraphs 135ZZZO(3)(c) or (d); or has refused or failed, without reasonable excuse, to comply with its annual reporting and accounting requirements (see section 135ZZZQ below) or its duty to provide the Attorney-General with an updated copy of the society's rules, and an explanatory statement, whenever the society's rules have been amended (see section 135ZZZQ below).

Section 135ZZZQ provides a number of rules in relation to collecting societies' annual reports and accounts. Subsections 135ZZZQ(1)-(2) provide that after the end of each financial year, each collecting society must prepare a report of its operations (an annual report) and send a copy of that report to the Attorney-General. Within 15 sitting days of receiving the report, the Attorney-General must table a copy of the annual report in the House of Representatives and the Senate.

Subsections 135ZZZQ(3)-(5) deal with the collecting society's book-keeping. A collecting society must keep accounting records that correctly record and explain the society's transactions and financial position. This extends to records of transactions where the society is a trustee. The records must be kept in a manner that will enable true and fair accounts to be prepared that can be conveniently and properly audited. At the end of each financial year, a collecting society must have its accounts independently audited and send a copy of the audited accounts to the Attorney-General.

Subsection 135ZZZQ(6) requires a collecting society to give its members reasonable access to copies of all reports and audited accounts prepared under this section.

Subsection 135ZZZQ(7) makes clear that this section does not affect any obligations a collecting society has relating to the preparation and lodging of annual returns or accounts under the Corporations Act.

Section 135ZZZR provides that if a collecting society alters its rules, it must send a copy of the altered rules to the Attorney-General within 21 days. The altered rules must be accompanied by a statement that sets out the effect of the alteration and the reasons why it was made.

Section 135ZZZS provides that a collecting society (or a society member) may apply to the Copyright Tribunal for review of the collecting society's adopted or proposed distribution arrangement (the society's rules must include distribution arrangements that adequately protect the members' interests: see subparagraph 135ZZZO(7)(d)(iii) noted above).

Subsection 135ZZZS(2) provides that an order made by the Copyright Tribunal varying or replacing the collecting society's distribution arrangement cannot affect a distribution begun before the Tribunal's order is made. This ensures that, where the society's distribution arrangement applies to successive annual distributions, any variation or replacement ordered by the Tribunal cannot oblige the society to redistribute moneys already paid or committed under an annual distribution that has been completed or begun before the order was made.

Division 4 - Interim re-broadcasts

Division 4 contains interim arrangements for the administration of the statutory licence before the first declaration of a collecting society under Part VD of the Copyright Act. This Division enables interim remuneration notices to be collected by an interim collector (the notice holder).

Section 135ZZZT provides that the Attorney-General may appoint a person to be the notice holder for the purposes of the interim arrangements. This appointment is to be made by notice in the gazette.

Section 135ZZZU provides that the copyright in a work, sound recording or film included in a re-broadcast by a satellite BSA licensee is not infringed before the declaration of a collecting society, provided the re-broadcast satisfies six conditions.

The first three conditions are the same that apply when a collecting society exists. That is, the eligible program must be re-broadcast:

- by a satellite BSA licensee;
- on a service that is authorised by the satellite BSA licensee's broadcasting licence (see section 38C of the BSA); and
- otherwise in compliance with the broadcasting licence condition set out in clause 7A of Schedule 2 to the BSA (except for compliance with the conditional access scheme - see item 58AAA above and the definition of *broadcast* used in the Copyright Act).

The three additional conditions that apply to re-broadcasts made during the interim period are that:

- at the time of the re-broadcast, there must be no declared collecting society;
- the satellite BSA licensee must have given notice to the notice holder in accordance with the new section 135ZZZV; and
- the satellite BSA licensee must comply with the record keeping requirements (see section 135ZZZL above).

Section 135ZZZV sets out the requirements for giving notices during the interim period. The required notice is basically an interim remuneration notice. The notice is the satellite BSA licensee's binding undertaking to pay equitable remuneration to a collecting society once it is declared. The undertaking to make payment applies to any eligible program re-broadcast by the satellite BSA licensee for the duration of the notice.

The satellite BSA licensee may give written notice to the notice holder at any time before the declaration of the first collecting society. Subsection 135ZZZV(2) provides that such a notice must specify that the amount of equitable remuneration is to be assessed on the basis of the records kept by the BSA satellite licensee in accordance with their record keeping obligations in section 135ZZZL.

The satellite BSA licensee's interim notice comes into force on the day it is given to the notice holder, or on a later day as specified in the notice. The notice remains in force until it is revoked - a notice may be revoked at any time through the satellite

BSA licensee giving written notice to the notice holder. The revocation date is the date of the revocation notice or a later date as specified in that notice (see subsections 135ZZZV(3)-(5)).

Section 135ZZZW provides that the requirements in new section 135ZZZK (amount of equitable remuneration) and 135ZZZL (record system) apply in this Division, such that references to a 'collecting society' are references to the 'notice holder', and references to a 'remuneration notice' are references to a notice made under section 135ZZZV (that is, the interim remuneration notice).

Section 135ZZZX provides for the transition from the interim collection scheme to the scheme administered by the collecting society after the making of a collecting society declaration. Subsection 135ZZZX(1) deals with the situation where one or more collecting societies are declared, and as a result there is a collecting society for all relevant copyright owners. In this situation, a notice given by a satellite BSA licensee to the notice holder under section 135ZZZV ceases to have effect as an interim notice, but is instead taken to be a remuneration notice given to the relevant collecting society or societies. The remuneration notice is taken to have come into force on the same day as the interim notice came into force.

Subsection 135ZZZX(2) deals with the situation where one or more collecting societies are declared for one or more, but not all, classes of relevant copyright owners. In this situation, a notice given by a satellite BSA licensee to the notice holder ceases to have effect as an interim notice in relation to the classes of copyright owners whose interests are now represented by the declared collecting societies. The interim notice is instead taken to be a remuneration notice given to the relevant collecting society or societies, and the remuneration notice is taken to have come into force on the same day as the interim notice came into force. However paragraph 135ZZZX(2)(d) provides that the notice given to the notice holder continues to remain in force for those copyright owners whose interests are not being represented by the declared collecting society or societies.

Subsection 135ZZZX(3) provides that once an interim notice is taken to be a remuneration notice given to a collecting society, the satellite BSA licensee must send copies of all records made under section 135ZZZL to the relevant collecting society (this is consistent with the undertaking contained in the interim notice: see subsection 135ZZZV(2)). The delivery of the records regarding the interim re-broadcasts must occur within 21 days after the declaration of the collecting society.

Division 5 - Miscellaneous

Division 5 contains miscellaneous provisions confirming that the relevant copyright owners may licence re-broadcasts by the satellite BSA licensee outside the statutory licensing scheme contained in Part VD of the Copyright Act.

Section 135ZZZY makes clear that nothing under this new Part affects a copyright owner's right to grant a licence authorising a re-broadcast of the eligible program without infringing copyright.

Section 135ZZZZ makes clear that a re-broadcast of an eligible program in

accordance with the statutory licence in Part VD of the Copyright Act does not vest copyright in any work or other subject-matter in any person.

Section 135ZZZZA clarifies that where a copyright owner (such as the original broadcaster) licences the re-broadcast of an eligible program, the owner is not taken to have authorised any copyright infringement in underlying copyright material included in the broadcast.

Item 142 — After Subdivision G of Division 3 of Part VI

This item confers a new jurisdiction on the Copyright Tribunal. These amendments are a consequence of the creation of the new statutory licence scheme for the re-broadcast via satellite of particular television programs (see new Part VD of the Copyright Act).

New section 153RA enables applications to be made to the Copyright Tribunal seeking orders determining the amount of equitable remuneration payable by the satellite BSA licensee to the copyright owner in relation to the re-broadcast of eligible programs.

Subsection 153RA(1) provides that parties to an application to the Tribunal are the copyright owner and the satellite BSA licensee. Subsections 153RA(2)-(3) deal with the Copyright's Tribunal's decision making process for such an application.

Section 153S deals with Copyright Tribunal proceedings arising from an application made under proposed section 135ZZZK (for a determination of the amount of remuneration payable by a satellite BSA licensee to a collecting society for the re-broadcast of eligible programs). Subsection 153S(2) provides that the parties to the proceeding are the collecting society and the satellite BSA licensee. Subsections 153S(2)-(4) deal with the Copyright Tribunal's decision making process for such an application.

Section 153T deals with Copyright Tribunal proceedings arising from an application made under proposed section 135ZZZL (for a determination about the satellite BSA licensee's record system, when one is unable to be agreed between the licensee and the collecting society). Subsection 153T(2) provides that the parties to the proceeding are the collecting society and the satellite BSA licensee. Subsections 153T(2) deals with the Copyright Tribunal's decision making process for such an application.

Section 153U deals with the Copyright Tribunal's handling of a referral from the Attorney-General regarding the declaration of a collecting society (see proposed section 135ZZZO, noted above). The parties to the reference are the applicant body (who wants to be a collecting society), and any other person the Tribunal decides to make a party to the application under subsection 153U(3) - the Tribunal may add a party to the reference on application, provided the Tribunal is satisfied that the person has a sufficient interest in the matter. For example, another collecting society may request to be heard on the application. Subsections 153U(4)-(5) deal with the Copyright Tribunal's decision making process for such a reference. Notices of a declaration made by the Tribunal are to be published in the gazette (subsection

153U(5)).

Section 153V deals with the Copyright Tribunal's handling of a referral from the Attorney-General regarding the proposed revocation of a collecting society declaration. The Attorney-General and the collecting society are to be parties to the reference, along with any other person that the Tribunal makes a party to the reference. The decision making procedures are similar to that described in relation to section 153U above.

Section 153W sets out the Copyright Tribunal's procedure for hearing an application under new section 135ZZZO (review of collecting society distribution arrangement).

Subsection 153W(2) provides that the parties to the application are the society, the member who made the application (if it was not made by the society) and any (other) member or an organisation representing members, if made a party by the Tribunal.

Subsection 153W(3) allows the Tribunal to make, upon application, one or more collecting society members (or an organisation representing such members), a party to the application provided the Tribunal is satisfied that the applicant member or organisation has a substantial interest in the distribution arrangement that is under review.

Subsection 153W(4) requires the Tribunal to make an order either confirming or varying the distribution arrangement, or substituting another arrangement.

Item 143 — Paragraph 195B(1)(e)

Item 144 — Paragraph 195B(1)(f)

Section 195B of the Copyright Act confers merits review functions on the Administrative Appeals Tribunal (the AAT).

These items add new merits review functions on the AAT as a consequence of the amendments that would insert new sections 135ZZZO and 135ZZZP into the Copyright Act. As a result of these respective items, the AAT may review the Attorney-General's decision to:

- refuse to declare a particular body to be a collecting society, or
- revoke a collecting society declaration for a particular body.