



22 September 2020

Mr Stephen Palethorpe
Committee Secretary
Environment and Communications Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Mr Palethorpe,

Radiocommunications Bills 2020

Thank you for the opportunity to comment on the *Radiocommunications Legislation Amendment (Reform and Modernisation) Bill 2020* (the **Bill**).

In July 2020, the Special Broadcasting Service Corporation (**SBS**) provided a submission to the Department of Infrastructure, Transport, Regional Development and Communications 2020 *Radiocommunications Reform – Consultation Paper*. That submission is available in **Appendix A** and should be read in conjunction with this letter.

Following the consultation process, the Bill was updated, and an Outcomes Paper outlined the significant changes. There are two main issues for SBS in relation to the revised Bill:

- The **public interest test for applications and renewals**—for example, as outlined in subsection 103A(15) in relation to apparatus licences—should be further clarified. While further details of the intended scope of this test have been added to the Explanatory Memorandum, the Bill has not been updated to confirm that public broadcasting is a use that is *prima facie* in the public interest; a decision on this matter remains at the discretion of the Australian Communications and Media Authority. The Bill or Explanatory Memorandum should specify that public broadcasting falls into the 'public and community services' category, which uses spectrum to 'supply essential public services' and is therefore inherently in the public interest.

To emphasise the importance of public broadcasting, the objects of the Bill, as set out in section 3, should be amended as follows (emphasis added):

3 Object

The object of this Act is to promote the long-term public interest derived from the use of the spectrum by providing for the management of the spectrum in a manner that:

- (a) facilitates the efficient planning, allocation and use of the spectrum; and
- (b) facilitates the use of the spectrum for:
 - (i) commercial purposes; and
 - (ii) defence purposes, national security purposes and other non-commercial purposes (including public safety, **national broadcasting** and community purposes); and
- (c) supports the communications policy objectives of the Commonwealth Government.

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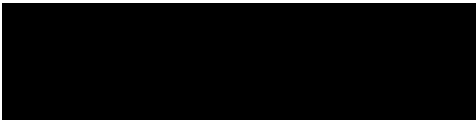
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- The scope of the **information gathering powers** as outlined in Schedule 7 of the Bill should be reduced to ensure that SBS is not required to provide sensitive or confidential information regarding potential future uses of spectrum. This information may be commercially sensitive as it relates to SBS programming decisions and suppliers, and is a matter for the SBS Board. As noted in SBS's submission at Attachment A, there are other transparency mechanisms which ensure that national broadcasters balance the need to keep Government informed about the use of spectrum while maintaining appropriate editorial independence.

As a national broadcaster providing essential multicultural, multilingual and Indigenous programming to Australian audiences, certainty should be provided that SBS will continue to have access to at least equivalent spectrum capacity in the future.

Yours sincerely,



Clare O'Neil
Director, Corporate Affairs

**SBS SUBMISSION TO THE DEPARTMENT OF INFRASTRUCTURE, TRANSPORT,
REGIONAL DEVELOPMENT AND COMMUNICATIONS
2020 RADIOCOMMUNICATIONS REFORM – CONSULTATION PAPER
JULY 2020**

Key Points

- Spectrum is an essential infrastructure asset, having a wide range of uses across the Australian economy. It is vital to SBS for both receiving and delivering content for the benefit of Australian audiences.
- Certainty should be provided to the national broadcasters that they will continue to have access to at least equivalent spectrum capacity in the future.
- In consideration of future radio delivery services, national broadcasters may require additional spectrum for the expansion of DAB services, and any potential future transition to technologies such as Digital Radio Mondiale, to ensure—in the case of SBS—provision of essential in-language audio services.
- SBS should not be subject to any additional public interest test in its application for new licences or renewals, because SBS provides an essential public service, through the provision of its broadcasting services under the *Special Broadcasting Services Act 1991* (**SBS Act**).
- SBS supports increased transparency around spectrum planning. The introduction of Australian Communications and Media Authority (**ACMA**) work plans should not increase the burden on stakeholders in relation to consultation processes.
- The proposed introduction of information-gathering powers for the ACMA should be carefully considered to avoid duplicating existing regulatory requirements or additional administrative burdens on industry participants. They should not be used to require market-sensitive information which, if disclosed, may have an adverse impact on spectrum users' commercial positions or negotiations.
- In relation to compliance and enforcement, it would not be reasonable to impose costs on a broadcaster impacted by interference for any action taken to resolve the interference.
- SBS's submission should be read in conjunction with its submission on the proposed rewriting of the *Radiocommunications Act 1992* (**Radiocommunications Act**), in July 2017 (see **Appendix A**).

Introduction

The Special Broadcasting Service Corporation (**SBS**) appreciates the opportunity to comment on the Department of Infrastructure, Transport, Regional Development and Communications' (the **Department**) *2020 Radiocommunications Reform – Consultation Paper* (the **Consultation Paper**).

SBS is unique in the Australian media environment, providing multilingual, multicultural and Indigenous radio, television and digital media services that inform, educate and entertain all Australians and, in doing so, reflect Australia's multicultural society.

SBS reaches almost 100 per cent of the population through its six free-to-air TV channels (SBS SD, SBS HD, SBS VICELAND HD, SBS World Movies, SBS Food and National Indigenous Television (**NITV**)) and seven radio stations (SBS Radio 1, 2 and 3, SBS Arabic24, SBS PopDesi, SBS Chill and SBS PopAsia). Servicing 63 languages, including via SBS Arabic24, SBS Radio is dedicated to the approximately five million Australians who speak a language other than English at home, while the three music channels (SBS PopAsia, SBS PopDesi and SBS Chill) engage all Australians through music and pop culture from around the world.

SBS's reach is being significantly extended through SBS's digital services, including SBS On Demand, the SBS Radio App and portals which make online audio programming and information available to audiences at a time and place of their choosing. However, terrestrial linear broadcasting is still an essential part of SBS's language offering, particularly for those who do not have access to online services, or those older Australians who often revert to the language of their home country as they age.

Certainty for the national broadcasters

Spectrum is an essential infrastructure asset, having a wide range of uses across the Australian economy, and is vital to SBS for both receiving and delivering content.

The current position of SBS as a national broadcaster should be preserved, with no adverse changes which would impact on the quality or quantity of SBS's services, or on the ability of SBS to independently assess and determine how the spectrum allocated to it is used (within the guidelines and licence conditions by which it is bound and the remit of SBS as prescribed by the SBS Act).

Certainty should be provided to the national broadcasters that, unless otherwise agreed, they will continue to have access to, at least equivalent spectrum capacity.

The first phase of DAB digital radio expansion has now been completed in regional markets—Canberra, Hobart and Darwin—in addition to existing coverage in Sydney, Melbourne, Brisbane, Adelaide and Perth. Spectrum capacity for national broadcasters may need to be increased for further DAB network expansion.

It should also be noted that in consideration of the delivery of radio services in the medium term, SBS, along with other industry stakeholders, recommended that further consideration be given to Digital Radio Mondiale (**DRM**), as well as emerging satellite technologies.¹ Should trials of this technology prove successful, any transition to DRM will require periods of simulcast, which may require additional spectrum as the transition takes place.

The Exposure Draft of the *Radiocommunications Legislation Amendment (Reform and Modernisation) Bill 2020* (the **Proposed Bill**) puts forward a number of amendments to

¹ SBS Submission to the Australian Communications and Media Authority on The Future Delivery of Radio Services in Australia (July 2019), page 1
https://www.sbs.com.au/aboutus/sites/sbs.com.au/aboutus/files/40_sbs_submission_-_acma_future_of_radio_services_consultation_-_july_2019.pdf

the *Broadcasting Services Act 1992*. To the extent that these relate to the repeal of the datacasting licensing scheme, and related datacasting provisions and powers, these do not impact the operations of SBS.

SBS appreciates the assurance provided in the Consultation Paper that protections will remain in place to protect incumbent licensees, including the protections currently provided by subsection 36(5) of the Radiocommunications Act for broadcasting services and digital radio broadcasting services (and which would be replicated in subsection 39(7) of the amended Radiocommunications Act).²

Proposed changes to licencing processes

The Consultation Paper notes that '[a] public interest test will now apply to the issuing of both further apparatus licences and further spectrum licences, where the further licence is for a period of 10 years or more.'³ The Consultation Paper goes on to say that '[t]he public interest test is designed to ensure that spectrum is being used efficiently, by preventing it being locked up in uses that are no longer the highest-value use.'⁴

SBS also notes the Department's intent for the amendments regarding spectrum and apparatus licences is 'not to alter the arrangements applying to licence holders with broadcasting licences. As such, certain licence types (including apparatus licences issued under section 101A or section 102 and digital radio multiplex transmitter licences) will be excluded from a number of changes, including those regarding renewal statements'⁵.

The national broadcasters should be exempt from the public interest test in its application for new licences or renewals. SBS provides an essential public service, through the provision of broadcasting under the the SBS Act, which demonstrates the services it provides are clearly in the public interest.

Ministerial Policy Statements

The Consultation Paper notes the intention to provide Ministerial policy statements, in place of the previously suggested Ministerial policy directions, in order to maintain the independence of ACMA in the exercise of its spectrum management powers and functions.

The *Explanatory notes to the Radiocommunications Legislation Amendment (Reform and Modernisation) Bill* (the **Explanatory Memorandum**) provide that this is '...a new mechanism that is intended to enable the Minister to provide high-level policy guidance to ACMA about the Government's policies for spectrum management'⁶. The Explanatory Memorandum also notes that 'MPSs are complementary to the Minister's ability to make stronger regulatory intervention by giving ACMA a direction under section 14 of the ACMA Act'⁷.

As noted in SBS's submission in 2017, as these Ministerial policy statements are not binding on the ACMA, and as the functions of SBS are set out in the SBS Act, with a similar arrangement applying for the ABC, it would be preferable for current processes to remain in place for the planning of broadcast spectrum.

As such, the ACMA should ensure each national broadcaster will be entitled to use the spectrum capacity necessary to enable it to fulfil the objectives in its Act and that, in

² Consultation Paper, page 9

³ Consultation Paper, page 12

⁴ Consultation Paper, page 13

⁵ Consultation Paper, page 13

⁶ Explanatory Memorandum, page 12

⁷ Explanatory Memorandum, page 12

particular, unless otherwise agreed by that national broadcaster, it will continue to have access to the equivalent capacity to that which it currently holds.

Work Program Statements

The Explanatory Memorandum notes that the ACMA will be required to determine '...a work program in relation to its spectrum management functions and spectrum management powers...[it] is intended to provide the Minister and the radiocommunications community with an early indication of new and changing priorities, spectrum planning issues and anticipated significant decisions'⁸.

SBS supports increased transparency around proposed changes and decisions relating to spectrum planning. Noting that the ACMA is required to '...undertake appropriate consultation prior to finalising a work program'⁹, this should not increase the burden on stakeholders in relation to consultation processes.

Information Gathering Powers

The Consultation Paper notes that, appropriately, proposed information gathering powers relate to seeking '...information only where it is reasonably likely that the information would assist ACMA in performing its spectrum management function...'¹⁰

The Explanatory Memorandum further specifies the grounds on which the information or documents may be required, noting that the ACMA may use the powers to '...require licensees to provide information about how licences are used. For example, the ACMA would be able to seek information about how intensively the spectrum is used, what it is used for, and whether it is 'in use''¹¹.

However, the Consultation Paper also suggests that the 'ACMA would be empowered to seek information from licensees about future or potential uses of spectrum...'¹². In particular, under proposed section 284S of the Radiocommunications Act, the ACMA would be empowered to require information in relation to the *proposed operation* of:

- devices under an apparatus licence; and
- devices under an apparatus licence that might be issued in the future.

SBS would be concerned if these information gathering powers, including those relating to future spectrum uses, were used in a way that compromises the independent decision making of the national broadcasters in discharging their obligations under their respective enabling Acts. Decisions regarding the appropriate use of spectrum, including future uses of spectrum, may be made across a range of time frames, and for different reasons. Disclosure of information about these uses may also have an adverse impact on commercial negotiations.

Under section 19(1)(a) of the *Public Governance, Performance and Accountability Act 2013*, SBS (the 'accountable authority of a Commonwealth entity') must '...keep the responsible Minister informed of the activities of the entity...' and under section 19(1)(b) must 'notify the responsible Minister as soon as practicable after the accountable authority makes a significant decision in relation to the entity...'.

Use of the ACMA's information-gathering powers relating to future or potential uses of spectrum may duplicate this requirement to the extent that it requires advance notice of an intention to make a significant decision in relation to SBS's use of spectrum.

⁸ Explanatory Memorandum, page 12

⁹ Explanatory Memorandum, page 14

¹⁰ Consultation Paper, page 15

¹¹ Explanatory Memorandum, page 80

¹² Consultation Paper, page 16

The current arrangements for the national broadcasters balance the need to keep Government informed about the use of spectrum with the appropriate legislative independence. This requirement should be amended to preserve the current arrangements which enable SBS to use its allocated spectrum at its discretion, in discharging its obligations under the SBS Act.

Compliance and Enforcement

The Consultation Paper suggests that in order to investigate and act on issues including interference, the ACMA will have access to a range of tools and powers, in order to provide '...greater flexibility to address instances of non-compliance and reduce the prevalence of equipment that can be used to cause interference, while also removing the administrative and financial burden of having to conduct lengthy criminal investigations for potentially minor breaches'.¹³ This has been facilitated by the repeal of the offence of causing interference with radiocommunications which has been substituted 'with a civil contravention in similar terms with a civil penalty equal to the criminal penalty that had been imposed'¹⁴.

As noted in SBS's July 2017 submission, it would not be reasonable to impose costs on a broadcaster impacted by interference for any action the ACMA takes to resolve the dispute. The costs of interference management should fall to the at-fault spectrum users, whether the costs are part of a civil or criminal contravention. Interference resolution must also be enforced by an appropriate authority.

¹³ Consultation Paper, page 15

¹⁴ Explanatory Memorandum, page 64

Appendix A

SBS submission on new Spectrum legislation – July 2017



Submission on new Spectrum legislation July 2017

Key points

- Spectrum is an essential infrastructure asset, having a wide range of uses across the Australian economy and is vital to the Special Broadcasting Service (**SBS**) for both receiving and delivering content.
- SBS supports the three key recommendations of the Spectrum Review undertaken by the then Department of Communications in 2015, including proposals for the simplification of broadcast licence planning.
- However, in the integration of broadcasting spectrum management into the general spectrum regulatory framework, great care should be taken to ensure the rights of SBS as a national broadcaster are preserved, with no adverse changes which would impact on the quality or quantity of SBS's services or on the ability of SBS to determine how the spectrum allocated to it is used.
- As many key issues will not be resolved until the second, complete version of the draft legislative package is available and the Australian Communications and Media Authority (**ACMA**) provides more detailed documentation as to its proposed approach in exercising its powers and performing its functions under the new regime, SBS looks forward to ongoing engagement with the Department of Communications and the Arts (**DoCA**) and the ACMA as the new regulatory framework is developed.

Summary of Recommendations

SBS recommends that certainty is provided to the national broadcasters by incorporating in the new legislation requirements that, in the planning of broadcasting spectrum and in determining licence terms, the ACMA must ensure that each national broadcaster will, unless otherwise agreed by that national broadcaster, continue to have access to the same spectrum capacity currently held.

SBS recommends that no changes are made to the manner in which spectrum licence fees/taxes and costs are determined for the national broadcasters.

SBS recommends that further consultation is undertaken regarding the proposed digital radio provisions of the new legislative package before an exposure draft of this legislation is issued. In addition, section 44A(11) of the *Radiocommunications Act 1992* (**Radcomms Act**) should be removed as soon as practicable.

SBS recommends that a provision is included in the new legislation stating that broadcasters (including national broadcasters) could not be forced to share, trade or assign licences.

SBS recommends that technical specifications should be retained in LAPs or that the ACMA is required to prepare and make publicly available, for each LAP, a document setting out the consolidated list of technical specifications applicable to that LAP.

SBS recommends that the proposed new legislation reflects the existing licence suspension and cancellation regime for broadcasting spectrum.

SBS recommends that Part 6 of the next version of the exposure draft of the Radiocommunications Bill 2017 (**draft Bill**) is appropriately modified to reflect that many of the provisions that apply to other licences will not apply to broadcasting spectrum licences (including certain provisions relating to general licence issue, variation, renewal and resumption).

SBS recommends that further consultation is undertaken by DoCA and the ACMA with broadcasters regarding the transition arrangements for existing broadcasting spectrum licences.

SBS recommends that amendments are made to Part 9 of the next version of the draft Bill to ensure interference disputes that impact on broadcasting spectrum are appropriately resolved as quickly as possible at no cost to the broadcaster suffering from the interference.

Careful consideration is required in incorporating the broadcasting spectrum provisions in the next version of the draft Bill to ensure that all relevant powers, including the ability to make Ministerial Policy Statements, apply appropriately to broadcasting spectrum.

There is a need for ongoing consultation on the draft legislation to implement the new regulatory framework and SBS supports the Government's intentions to undertake this consultation, including in relation to code making powers, the objects under which broadcasting spectrum will be planned, reviewability of certain decisions and contestable spectrum management.

Introduction

SBS welcomes the opportunity to comment on the consultation package for Spectrum Reform released by DoCA in May 2017, including the *Broadcasting Spectrum Consultation paper* (**Broadcasting Paper**) included in that package. Given the scope of the proposed reforms, and the complexity of the issues raised, the ongoing involvement of key spectrum users in the development of the new regulatory framework is of utmost importance.

SBS is unique in the Australian media environment. Its function is to provide multilingual, multicultural and Indigenous radio, television and digital media services

that inform, educate and entertain all Australians and, in doing so, reflect Australia's multicultural society.

As a national free-to-air broadcaster, SBS reaches almost 100 per cent of the population through its six free-to-air TV channels (SBS, SBS HD, SBS VICELAND, SBS VICELAND HD, Food Network and NITV), eight radio stations (SBS Radio 1, 2 and 3, SBS Radio 4, SBS Arabic24 (including PopAraby), SBS PopDesi, SBS Chill and SBS PopAsia) and World Movies, a subscription TV channel. SBS Online provides audio streaming of all of our language programs and is home to the SBS On Demand video streaming service.

Certainty in relation to access to current spectrum capacity

As is acknowledged in the Broadcasting Paper, the provision of broadcasting services by SBS (and the ABC) is not authorised by the *Broadcasting Services Act 1992 (BSA)* but is instead authorised by other legislation (in the case of SBS, the *Special Broadcasting Service Act 1991 (SBS Act)*). However, like commercial and community broadcasting services, SBS uses the 'broadcasting services bands' under the BSA and its broadcasting services are planned in licence area plans (**LAPs**) and television licence area plans (**TLAPs**) under Part 3 of the BSA. SBS holds national broadcasting service (**NBS**) transmitter licences, that is, apparatus licences, under the Radcomms Act and has access to digital radio multiplex capacity under the regime established under the BSA and the Radcomms Act.

SBS is encouraged by the statements in the Broadcasting Paper that a goal of the reform process is to embed planning, allocation and licensing arrangements for broadcast spectrum within the new framework while maintaining the same arrangements that broadcasters currently have and, specifically, that the national broadcasters will continue to have access to spectrum to fulfil the commitments specified in their enabling Acts. The multiple language programs available through SBS TV and radio (as well as online) ensure that all Australians are able to share in the experiences of others and participate in public life. SBS's purpose in providing this programming is to inspire Australians to explore, appreciate and celebrate our diverse world and, in doing so, contribute to building a cohesive society. SBS requires ongoing access to the spectrum capacity it currently holds to continue to provide this broad range of TV and radio programming in fulfilment of its Charter.

To ensure that the policy intent specified in the Broadcasting Paper is given effect under the proposed new legislation, SBS recommends that consideration is given to the following:

- A Ministerial policy statement is proposed to be developed to state the Government's expectations of the ACMA in planning broadcasting spectrum and that frequencies currently used by broadcasters should be allocated on a primary basis for broadcasting. Given that Ministerial policy statements are not binding on the ACMA, and that the functions of SBS are set out in the SBS Act, with a similar arrangement applying for the ABC, it would be preferable to require, under Part 4 of the draft Bill, that in planning broadcasting spectrum the ACMA ensures each national broadcaster will be entitled to use the spectrum capacity necessary to enable it to fulfil the objectives in its Act and that, in particular, unless otherwise agreed by that national

broadcaster, it will continue to have access to the same spectrum capacity currently held.

- If the approach outlined in the previous dot point is not adopted, the draft legislation should include a provision restricting the ability of the Minister to issue any policy statement limiting the rights of either national broadcaster to have access to the spectrum capacity necessary to enable it to fulfil the objectives in its Act. In particular, unless otherwise agreed by that national broadcaster, Ministerial policy statements should not limit the rights of the national broadcasters to continue to have access to the same spectrum capacity currently held.
- Similar to the recommendation in the first dot point above, the new LAP provisions, which it appears will be retained in the BSA rather than the new radiocommunications legislation, should provide that each national broadcaster will be entitled to use the spectrum capacity necessary to enable it to fulfil the objectives in its Act and that, in particular, unless otherwise agreed by that national broadcaster, it will continue to have access to the same spectrum capacity currently held.
- Under the current regulatory regime, the ACMA may impose technical conditions on broadcasting licensees so as to (amongst other matters) optimise the coverage of all broadcasting use of spectrum and to practically manage interference. The ACMA should have the ability to impose conditions for these purposes under the new regime. In addition, given the broad range of matters that may be addressed in licence conditions (including technical specifications) and the discretion given to the ACMA to determine those licence conditions, SBS recommends that the new legislation prohibits the ACMA from including any licence conditions in a spectrum licence for a broadcaster (including a national broadcaster) that would limit the ability of that broadcaster to use the spectrum. SBS has commented on other proposed licence conditions later in this submission.

Recommendation

SBS recommends that certainty is provided to the national broadcasters by incorporating in the new legislation requirements that, in the planning of broadcasting spectrum and in determining licence terms, the ACMA must ensure that each national broadcaster will, unless otherwise agreed by that national broadcaster, continue to have access to the same spectrum capacity currently held.

Fees/taxes and costs payable by SBS

SBS currently pays taxes for its apparatus licences and also pays costs for the use of digital radio multiplex capacity. These amount to, in aggregate, less than \$20,000 per annum.

On 6 May 2017 the Government announced, as part of its media reform package, that commercial broadcasters will pay a spectrum usage fee more reflective of the value of the spectrum those broadcasters use. The sector is expected to pay approximately \$40 million per annum for spectrum use under that new arrangement.

The arrangements for the revised spectrum charges are reflected in the *Commercial Broadcasting (Tax) Bill 2017 (Tax Bill)*, which was introduced in the House of Representatives on 15 June 2017. The Tax Bill applies only to transmitter licences held by commercial broadcasters. It does not apply to licences held by digital radio multiplex transmitter licensees or by the national broadcasters. In addition, the proposed five year review of the commercial broadcaster arrangements, as provided for in Schedule 7 of the *Broadcasting Legislation Amendment (Broadcasting Reform) Bill 2017* (also introduced on 15 June 2017), will apply only to the taxes in the Tax Bill. It is assumed therefore that, under the new framework, it is intended that the principles developed by the ACMA for pricing spectrum, as referred to in the *Spectrum Pricing Consultation paper (Pricing Paper)* would apply to the new spectrum licences granted to the national broadcasters and also to digital radio multiplex transmitter licensees.

The principles specified in the Pricing Paper would not be appropriate for the national broadcasters (or for the digital radio multiplex licence held by the joint venture established by the national broadcasters). For example, the Pricing Paper includes a proposal that, to ensure efficient use of spectrum, the Government and the ACMA should endeavour to charge users of similar spectrum at the same rate. This would suggest that the national broadcasters should pay the same licence fees/taxes as the commercial broadcasters, even though the national broadcasters are not included in the Tax Bill arrangements. To take another example, the Pricing Paper also includes a proposal that the ACMA should move to competitive market-based allocations of spectrum. Given that only broadcasters will be able to use the parts of the spectrum reserved for broadcasting, and the need for the national broadcasters to provide services as required by their Acts, it is difficult to see how this proposal could be applied to the national broadcasters.

As noted in the introductory comments to this submission, SBS holds a unique position in the broadcasting sector. Under the SBS Act, its function is to provide multilingual, multicultural and Indigenous radio, television and digital media services that inform, educate and entertain all Australians and, in doing so, reflect Australia's multicultural society. It would not be appropriate, by application of the principles in the Pricing Paper, to impose an additional cost on SBS for use of a resource that is essential for it to perform its statutory function.

Two further points should be made regarding the application of the Pricing Paper principles. First, the rationale for increasing the spectrum fees/taxes that applies to the commercial broadcasters (that is, that those broadcasters will no longer pay broadcasting licence fees) does not apply to the national broadcasters. Further, there seems little utility in increasing the spectrum licence fees/taxes that are payable to the levels that are proposed for the commercial broadcasters, given that SBS would need to look to the Government for additional funding to meet any substantial increase in the fees/taxes it is required to pay.

Proposal 3 in the Broadcasting Paper includes a recommendation that the ACMA should be able to recover costs related to the technical planning and administrative work involved in issuing or varying a broadcasting spectrum licence. Again, SBS believes there should be no change to the arrangements currently in place that would increase the

costs SBS is required to pay to the ACMA. SBS does not believe this should be controversial given, as stated in the ACMA's consultation draft of the *Five Year Spectrum Outlook 2016–20*, the ACMA is considering options to reduce the cost of broadcasting licence planning (see page 46 of that draft).

SBS therefore recommends that the new legislation provides there is no change to the manner in which the spectrum licence fees/taxes (and costs) payable by SBS (or the ABC) are determined, including the fees/licences paid indirectly for use of digital radio multiplex capacity. This would be consistent with the Government's stated position that the rights of broadcasters are not to be adversely impacted by the introduction of the new regime.

Recommendation

SBS recommends that no changes are made to the manner in which spectrum licence fees/taxes and costs are determined for the national broadcasters.

Digital radio arrangements

SBS currently provides digital radio to listeners in Sydney, Canberra (on a trial basis), Melbourne, Adelaide, Perth and Brisbane. SBS is committed to the future of digital radio and supports regulatory proposals that would enable expansion of its digital radio coverage.

The Broadcasting Paper provides minimal detail as to how digital radio regulation will fit into the new framework. For example, although the Broadcasting Paper proposes that digital radio channel plans will be removed and that function will be incorporated into the new single licensing system, it is unclear how digital radio channels will be planned under the new single licensing system. SBS is broadly supportive of the digital radio proposals in the Broadcasting Paper (which in any event will have a greater impact on commercial broadcasters than on the national broadcasters), however SBS would appreciate being given the opportunity to make a further submission on the digital radio arrangements before a consultation draft of the relevant legislative provisions is released. It would be very helpful if, as part of this further consultation, an options paper could be issued by DoCA which sets out the various ways in which digital radio regulation could be dealt with in the new framework so that stakeholders are able to comment directly on those alternatives.

Although not dealt with in the Broadcasting Paper, it is relevant to considerations of the digital radio arrangements that the existing non-discrimination provisions in the Radcomms Act are impeding the coverage that is able to be achieved by national broadcasters.

As previously noted in Government and industry discussions and by SBS in its submissions in response to the ACMA's consultation paper *Proposed digital radio plan for Northern Territory and proposal to vary the digital radio channel plans for NSW/ACT, Queensland and Tasmania*, the effect of section 44A(11) of the Radcomms Act is that national broadcasters' digital radio coverage is being unnecessarily restricted to provide

general equivalence to commercial services, a restriction which does not exist in the analog domain.

Such restrictions reduce the range and robustness of coverage in the prescribed directions, and in many cases will require the addition of localised infill transmitters to compensate. Such infills incur significant additional costs on a per-capita basis.

SBS recommends that the existing section 44A(11) should simply be removed or, alternatively, it should be amended to allow national broadcasters to transmit more widely for the benefit of a greater number of listeners where practical to do so and after being assessed on a case-by-case basis. This reform does not need to wait for the implementation of the proposed new regime but could be incorporated in the Radcomms Act in the short term.

Recommendation

SBS recommends that further consultation is undertaken regarding the proposed digital radio provisions of the new legislative package before an exposure draft of this legislation is issued. In addition, section 44A(11) of the Radcomms Act should be removed as soon as practicable.

Forced sharing or trading arrangements

Proposal 9 of the Broadcasting Paper recommends greater flexibility for trading and sharing of spectrum. The discussion of that proposal then states that the Government will not impose forced sharing or trading arrangements. SBS strongly supports the proposition that no broadcaster, including the national broadcasters, should be forced to share or trade spectrum licences.

In this context, the provisions permitting the inclusion of regulatory undertakings in licences would not seem to have application for spectrum licences for broadcasters. It is understood that these provisions would apply to regulate the terms on which the ACMA could grant two or more licences over the same spectrum frequency or in the same geographic area. If the second consultation draft of the Radiocommunications Bill reflects that no broadcasters may be forced to share or trade spectrum licences, it would not be necessary for broadcasters to rely on regulatory undertakings relating to spectrum sharing arrangements, noting that such undertakings could be varied or revoked by the ACMA (see Division 6 of Part 6 of the draft Bill) and it is unclear what recourse a spectrum licence holder would have in the event that the ACMA breached a regulatory undertaking.

Recommendation

SBS recommends that a provision is included in the new legislation stating that broadcasters (including national broadcasters) could not be forced to share, trade or assign licences.

Technical specifications

Under the existing regime, each LAP and TLAP includes technical specifications that apply to broadcasters with licences that are subject to the relevant LAP or TLAP and may also include technical specifications that impact on other LAPs (usually in adjacent areas). As noted in the Broadcasting Paper, the technical specifications in LAPs and TLAPs may include frequency, maximum effective radiated power, the site of transmitters and any special conditions relating to radiation patterns and other technical conditions.

Proposal 3 of the Broadcasting Paper states that simplified licence area plans (combining existing LAPs and TLAPs) will define the geographic scope of licence areas and set out the number and category of services that will be available in those areas but will no longer include technical specifications.

Each broadcaster will be concerned to know the technical specifications that apply to its licences but will also need to know the technical specifications that apply to other licensees—both for the relevant LAP and for other LAPs in adjacent areas. If technical specifications are only included in the licences of individual broadcasters under the new regime, each broadcaster will therefore need to review multiple documents to have a full understanding of the technical specifications that apply for a LAP. This does not seem to be an optimal outcome. In addition, technical specifications in a LAP include those which apply to all broadcasters subject to the LAP. It would seem inefficient to repeat identical specifications in each individual licence rather than providing for these in a LAP. Therefore it is recommended either that technical specifications are included in the new LAPs or that the ACMA is required to prepare and make publicly available, for each LAP, a document setting out the consolidated list of technical specifications applicable to that LAP.

Assuming that the new LAP arrangements replace digital radio channel plans, the same recommendation applies for digital radio.

Recommendation

SBS recommends that technical specifications should be retained in LAPs or that the ACMA is required to prepare and make publicly available, for each LAP, a document setting out the consolidated list of technical specifications applicable to that LAP.

Cancellation or suspension of licences

Divisions 8 and 9 of Part 6 of the draft Bill regulate the suspension and cancellation of licences. It is assumed that these provisions will not apply to licences of broadcasting spectrum, noting that the Broadcasting Paper makes no reference to any changes to the cancellation or suspension arrangements that apply under the existing regulatory framework. SBS therefore recommends that, when the broadcasting provisions are included in the second consultation draft of the Radiocommunications Bill, Divisions 8 and 9 are modified to reflect the existing regime applicable to licences of broadcasting spectrum.

Recommendation

SBS recommends that the proposed new legislation reflects the existing licence suspension and cancellation regime for broadcasting spectrum.

Other provisions of Part 6 of the draft Bill

There are a number of other provisions in Part 6 of the draft Bill which would not have application to licences of broadcasting spectrum. These are:

- Division 2, Issue of licences: To the extent this Division deals with licence issue schemes, it would not apply to broadcasting licences as those licences would not be issued under such a regime.
- Division 3, Third party use; Division 11, Subdivision of licences; Division 12, Assignment of licences; Division 13, Dealing with licences etc.: These Divisions would not apply given the different regime to apply to broadcasters dealing with spectrum licences.
- Division 6, Varying licences: Broadcasting spectrum licences should not be able to be varied at the discretion of the ACMA. Variations should only be permitted if consistent with the relevant LAP and consented to by the broadcaster. This should be specified in the legislation, not in the conditions of a licence.
- Division 7, Renewing licences: In the case of the national broadcasters, each should be entitled to renewal of its licences to enable it to perform its functions under its Act. This should be specified in the legislation, not the conditions of the licences.
- Division 14, Resumption of licences: This Division would not apply to broadcasting spectrum.

Recommendation

SBS recommends that Part 6 of the next version of the draft Bill is appropriately modified to reflect that many of the provisions that apply to other licences will not apply to broadcasting spectrum licences (including certain provisions relating to general licence issue, variation, renewal and resumption).

Transitional arrangements

The Broadcasting Paper states that the transitional arrangements outlined in the *A proposed approach to transition from the 1992 Act to the Radiocommunications Bill Consultation paper* (**Transitional Paper**) will generally apply to spectrum licences issued to broadcasters.

The Transitional Paper contemplates a 'hybrid' approach to transition. Under such an approach it is proposed that apparatus licences, and therefore presumably transmitter licences issued to broadcasters, will be transitioned in groups. SBS agrees it would be sensible to ensure that such broadcasting spectrum licences are all transitioned to the new regime at one time.

Broadcasting spectrum licences present particular challenges that will not apply to other licence types. This includes but is not limited to ensuring that changes to the BSA (and potentially other legislation) that are linked to the transition by the broadcasters to the new regime take effect simultaneously with the transition. Given the likely complexities in transitioning the broadcasting spectrum licences, and also given that the rights of broadcasters will not change as a consequence of the transition, it may be preferable to defer transition of these licences to the latter part of the five year transition period. This would mean that the existing regime under the Radcomms Act for issuing/renewing transmitter licences for broadcasters would need to continue to operate for a period of time.

It may also be appropriate to deal with spectrum licences related to digital radio multiplex capacity separately to other broadcasting spectrum licences. In any event, as noted in the Transitional Paper, further consultation will be required with broadcasters regarding the transition.

Recommendation

SBS recommends that further consultation is undertaken by DoCA and the ACMA with broadcasters regarding the transition arrangements for existing broadcasting spectrum licences.

Interference management arrangements

The proposed new interference management arrangements reflected in the draft Bill are supported and SBS agrees that these should increase flexibility in dealing with interference disputes and allow for quicker resolution of some disputes.

However, SBS recommends that certain amendments are considered in dealing with interference disputes that impact on broadcasting spectrum, given the importance of ensuring that interference with the delivery of broadcasting services is minimised:

- Part 9 of the draft Bill promotes alternative dispute resolution for management of interference disputes. In addition, the paper the ACMA has released regarding interference management states that the guidelines it develops would promote practices that promote alternative resolution strategies in advance of seeking recourse to the ACMA. Part 9 of the draft Bill should make clear that alternative dispute resolution is unlikely to be appropriate for resolving issues of interference with broadcasting services and direct that the ACMA investigates such disputes and takes other action available to it to ensure any interference ceases as soon as practicable.
- It would not be reasonable to impose costs on a broadcaster impacted by interference for any action the ACMA takes to resolve the dispute. Instead cost recovery should be sought from:
 - the person causing the interference (if any interference is found), as an incentive to minimise the risks of interference occurring and to promptly resolve any interference issues that do arise; or

- if a complaint is made and no interference is found to have occurred, the complainant. This will provide an incentive to ensure complaints are only made where interference is in fact occurring.

Recommendation

SBS recommends that amendments are made to Part 9 of the next version of the draft Bill to ensure interference disputes that impact on broadcasting spectrum are appropriately resolved as quickly as possible at no cost to the broadcaster suffering from the interference.

Amending the draft Bill to incorporate broadcasting issues

As is acknowledged in the consultation package, amendments will need to be made to the draft Bill to deal with issues related to broadcasting spectrum. For example, the Broadcasting Paper states that a Ministerial policy statement on broadcasting spectrum will be developed. Part 2 of the draft Bill sets out the Ministerial policy statement regime. However, Part 2 does not currently apply to all of the ACMA's broadcasting spectrum functions and powers, including the ability to plan segments of the broadcasting services bands. It is assumed therefore that Part 2 of the draft Bill will be further amended once the broadcasting specific provisions are incorporated.

Careful consideration will need to be given in preparing the amendments to the draft Bill to incorporate the broadcasting provisions to ensure that there are no inadvertent errors or inconsistencies. This again highlights how critical it is that DoCA and the ACMA continue to involve stakeholders in the process for the development of the new regulatory framework.

Recommendation

Careful consideration is required in incorporating the broadcasting spectrum provisions in the next version of the draft Bill to ensure that all relevant powers, including the ability to make Ministerial Policy Statements, apply appropriately to broadcasting spectrum.

Other comments

- **Codes**

Part 13 of the draft Bill establishes a self-regulatory code regime. The consultation paper states that Part 13 has been included as submissions to the review suggested that industry codes would be useful in spectrum management as a cost effective and flexible alternative to black letter law. Although the existing legislative regime for industry codes does not apply to SBS, SBS may in future be party to an industry code arrangement and therefore SBS has an interest in Part 13 of the draft Bill.

As Part 13 provides for a self-regulatory code regime, there should be no need for codes to be approved by the ACMA. Instead relevant industry bodies should be able to notify the ACMA that a code has been put in place that complies with the requirements of the Part.

As currently drafted, Part 13 states that in considering whether to approve a code the ACMA may have regard to whether the industry body seeking approval is able to ensure that members who represent that they will comply with the code actually do so. It will not be possible for an industry body to ensure compliance, though codes should provide for an enforcement regime. Therefore it is the existence of an enforcement regime that should be of relevance to code notification under Part 13.

Finally, as noted, Part 13 is intended to provide an alternative to black letter law. Therefore Part 13 should include a provision that requires the ACMA to take into account codes that are notified under Part 13 in determining its regulatory priorities. Where a self-regulatory code is in place, the ACMA should only intervene where there is convincing evidence of a failure of that self-regulatory code.

- **Section 23 criteria**

Section 23 of the BSA provides that the ACMA is, in planning the broadcasting services bands, to promote the objects of the BSA and to have regard to specific matters. The Broadcasting Paper states that the section 23 criteria will be retained, but will have 'minor amendments'. No detail is provided of what these amendments will be. SBS recommends that further detail should be provided on proposed changes to these criteria.

- **Review of decisions**

The Broadcasting Paper makes no reference to the rights of broadcasters to seek a review of decisions made by the ACMA under the new regime. It is assumed that Part 18 of the draft Bill will be expanded to allow for review of broadcasting-related decisions.

The draft Bill provides that, although radiofrequency plans are legislative instruments, these are not disallowable (see section 24(9)). It is recommended that radiofrequency plans for broadcasting spectrum are disallowable to provide for oversight of the process for making these plans (in the same way as it will remain the case that LAPs will be disallowable instruments).

- **Potential for contestable spectrum management**

SBS cannot foresee any circumstances in which it would be appropriate for the ACMA to delegate the power to issue broadcasting spectrum licences to a third party on the terms contemplated by Part 17 of the draft Bill and it is assumed Part 17 will not extend to those licences.

Recommendation

There is a need for ongoing consultation on the draft legislation to implement the new regulatory framework and SBS supports the Government's intentions to undertake this consultation, including in relation to code making powers, the objects under which broadcasting spectrum will be planned, reviewability of certain decisions and contestable spectrum management.