Broadcasting Legislation Amendment (Digital Dividend) Bill 2013

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Contents

The Bills Digest at a glance ................................................................. 2
Purpose of the Bill ........................................................................... 3
Background ...................................................................................... 4
Definitions ...................................................................................... 4
Digital dividend ............................................................................ 5
Datacasting restrictions ................................................................. 6
Committee consideration ............................................................... 8
Policy position of non-government parties/independents .................. 8
Position of major interest groups .................................................. 8
Financial implications ................................................................. 9
Statement of Compatibility with Human Rights .......................... 9
Key issues and provisions ......................................................... 9
Appendix A ............................................................................... 11
The Bills Digest at a glance

Purpose of the Bill

This Bill proposes to amend the Broadcasting Services Act 1992 and the Radiocommunications Act 1992 to facilitate possible commencement of telecommunications services in spectrum which has been identified as the digital dividend, while that spectrum is still part of the broadcasting services bands.

The Bill does this by making changes to datacasting regulation under Schedule 6 to the Broadcasting Services Act by introducing the concept of ‘designated datacasting services’.

A designated datacasting service will be defined under the legislation as one provided by a commercial television broadcasting service, a commercial radio broadcasting service or a national broadcaster. The Bill will also allow the Minister for Broadband, Communications and the Digital Economy to declare another service of a specified kind as a designated datacasting service.

Background

Governments regulate and charge for the use of the scarce and valuable public resource of spectrum. Once the transition to digital broadcasting is completed at the end of 2013, a significant amount of spectrum will be released for new services such as mobile telephony. The Government will auction this spectrum in April 2013 and licences for its use will commence on 1 January 2015.

Stakeholder concerns

There appears to be no concerns raised about the proposed changes to the datacasting licensing regime.
Broadcasting Legislation Amendment (Digital Dividend) Bill 2013

Date introduced: 13 February 2013

House: House of Representatives

Portfolio: Broadband, Communications and the Digital Economy

Commencement: On the day after Royal Assent

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill's home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose of the Bill

The purpose of the Broadcasting Legislation Amendment (Digital Dividend) Bill 2013 (the Bill) is to amend the Broadcasting Services Act 1992 (the BSA)\(^1\) and the Radiocommunications Act 1992 (the Radcomms Act)\(^2\) to facilitate possible commencement of telecommunications services in the spectrum which has been identified as the digital dividend, while that spectrum is still part of the broadcasting services bands.

The Bill will amend the existing datacasting regime to introduce the concept of ‘designated datacasting services’. These will be defined under the legislation to be, in general, those provided by a commercial television broadcasting service, a commercial radio broadcasting service or a national broadcaster.

The Bill will allow the Minister for Broadband, Communications and the Digital Economy to declare another service of a specified kind as a designated datacasting service.

The Bill makes a number of other minor amendments to the BSA and the Radcomms Act to implement these changes to the datacasting regime.

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Background

Definitions

**Broadcasting services bands**

The broadcasting services bands are that part of the radiofrequency spectrum that is designated under subsection 31(1) of the Radcomms Act as being primarily for broadcasting purposes and that part of the radiofrequency spectrum that is designated under subsection 31(1A) of the Radcomms Act as being partly for the purpose of digital radio broadcasting services and restricted datacasting services.

**Datacasting**

A datacasting service is defined in Schedule 6 to the BSA as a service which delivers content in the form of text, data, speech, music or other sounds, visual images or in any other form, or in any combination of forms, to persons having equipment appropriate for receiving that content where the delivery of services uses the broadcasting services bands.

Datacasters can transmit information and education programs, parliamentary and court proceedings, text and still images, interactive computer games, electronic mail and Internet content.

Datacasting licensees are not able to broadcast a range of material including: programs that are considered to be equivalent to television news, drama, sports, music, weather, documentary, lifestyle or entertainment programs, or commercial radio programs. They are allowed to transmit extracts of television programs if these are no longer than ten minutes or if they are not put together to constitute a single program.

**Long Term Evolution services**

Long Term Evolution (LTE) is a 4G wireless broadband technology. LTE provides significantly increased peak data rates, with the potential for 100 megabits per second (Mbps) downstream and 30 Mbps upstream, reduced latency (that is, how much time it takes for a packet of data to get from one designated point to another), scalable bandwidth capacity and backwards compatibility with existing Global system for Global System for Mobile (GSM) and Universal Mobile Telecommunications System (UMTS) technology.

**Spectrum**

Radiofrequency spectrum refers to the electromagnetic frequencies used for communications. It includes the frequencies used for radio and television. In Australia the radio frequency spectrum known as the broadcasting services bands is that designated to the Australian Communications and Media Authority (ACMA) for planning and licence allocation.
Digital dividend

Spectrum is considered an important public resource ‘because it is the major way modern long distance communications function’. Consequently, governments across the world regulate what is a scarce resource and charge for its use. In Australia, for example, broadcasters pay licence fees to ACMA for the use of spectrum allocated to them in the broadcasting services bands.

Since the invention of television there has been an ongoing quest to develop and deliver improved technologies. Particularly from the 1980s, however, companies sought to experiment with new technologies which could transmit better, wider pictures and improved sound quality. At first these experiments concentrated on improving analogue transmissions, but it was quickly realised that despite improvements, analogue television failed to use frequency bandwidths efficiently enough to cope with developing technologies. Developers then turned to computer and communications advances and produced digital television—‘sampling and encoding video signals as a stream of zeros and ones and transmitting this data stream through a transport platform to a receiving device’.

As digital television amounted to a more effective management of the precious and finite resource of radio spectrum, countries around the world have gradually been switching television broadcasting from the analogue television broadcasting mode to digital television broadcasting. This process is currently underway in Australia. When it is complete it will free up a significant amount of broadcasting spectrum. It will deliver what has been labelled a ‘digital dividend’ of broadcasting spectrum.

There has been considerable speculation and a number of proposals since the mid-1990s about how the increased spectrum could be used. None of these came to fruition until a consultation process undertaken by the current Government led it to declare that this ‘digital dividend’ would be used for a variety of new services, such as mobile telephony and broadband services.

In June 2010, the Government announced that following the completion of analogue switch off, it would release a contiguous block of 126 Megahertz (MHz) of spectrum in the upper ultra-high frequency band.

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4. Fees for the use of spectrum are imposed under the Television Licence Fees Act 1964. In general, spectrum licences authorise the operation of radio communications devices for a period of up to 15 years within a specified frequency band and within a particular geographic area. Licensees choose how they deploy devices within their spectrum space, the nature of the services they wish to deliver and the technology they use—as long as the operation of devices is within the parameters of the conditions of the spectrum licence. The text of the Television Licence Fees Act 1964 can be viewed at: http://www.comlaw.gov.au/Details/C2007C00013/Download
frequency (UHF) band, comprising the frequency range 694 to 820 MHz inclusive (known as the 700 MHz band for the purposes of the digital dividend action), following the completion of digital switchover.\(^8\)

As ACMA has noted, three key processes are required to realise the digital dividend. These are:

- conversion of analogue television broadcasting to digital transmission (known as switchover)
- clearance of a contiguous block of spectrum and
- allocation of the cleared spectrum.

Digital switchover has been in process under the Commercial Television Conversion Scheme and the National Television Conversion Scheme, since June 1999 and February 2000 respectively, and will be completed by 31 December 2013.\(^9\) It is expected that the digital dividend spectrum will be cleared of all existing services by the end of 2014.\(^10\) In anticipation of this clearance occurring smoothly, in December 2012 the Minister directed ACMA to undertake an auction for the digital dividend spectrum by 30 April 2013.\(^11\)

**Datacasting restrictions**

ACMA responded to this directive by arranging a combinatorial clock auction process which will be used to allocate the spectrum. In accordance with section 4.5 of the Radiocommunications (Spectrum Licence Allocation—Combinatorial Clock Auction) Determination 2012, ACMA published an information package, providing details of the auction processes.\(^12\) The auction will commence on 16 April 2013 (see **Appendix A** for the auction timeline).\(^13\)

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8. S Conroy (Minister for Broadband, Communications and the Digital Economy), *Size and location of the digital dividend*, media release, 24 June 2010, viewed 21 February 2013, [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FC15X6%22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FC15X6%22)
10. Note: In the case of the 700 MHz band, the vacation of television broadcasting services from the spectrum to be auctioned depends on ‘restack’ being completed by 31 December 2014. Restack means the process of clearing digital TV services from the digital dividend spectrum. To protect against the possibility of restack being delayed beyond that date, spectrum licences for the 700 MHz band will include a condition to manage potential interference to the reception of any broadcasting or retransmission services operating lawfully in the band after the licence commences.

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Licences issued for the 700 MHz band as a result of the digital dividend auction are to commence on 1 January 2015. However, ACMA has notified potential bidders that in the event a broadcaster has vacated spectrum in the 700MHz band before the successful bidder’s licence period commences, the regulator would consider applications for interim licences. ACMA would consider such applications on a case-by-case basis.

Should this occur without changes to existing legislation, holders of these interim licences would be subject to additional regulatory obligations as a result of current regulation of datacasting services under Schedule 6 of the BSA.

ACMA has noted in its advice on the auction process, that the Minister had previously advised the regulator that he intended to amend the BSA ‘to allow Long Term Evolution (LTE) services to generally operate in the BSBs (broadcasting services bands) and provide a range of audiovisual content without the encumbrance of a datacasting licence’.

ACMA has stated:

Under the current legislation additional regulatory obligations may arise where radiocommunications devices are operated in accordance with a spectrum licence while the spectrum authorised by the licence remains in the BSBs. These obligations arise under Schedule 6 of the Broadcasting Services Act, which establishes a system for regulating datacasting services. The services provided using spectrum licences, if provided in the BSBs, may be ‘datacasting services’. Under current arrangements, datacasting service providers must hold datacasting licences, which are subject to licence conditions that, among other things, restrict the provision of certain kinds of audio content and certain genres of television programs. Other licence conditions require compliance with any applicable codes or standards under the Act. There is also a condition that a datacasting licensee remains a suitable licensee. The requirement to hold a datacasting licence would cease to apply following the removal of the declared parts of the 700 MHz part band from the BSBs.

This Bill proposes to limit the circumstances under which a person needs to hold a datacasting licence under Schedule 6 of the BSA, so that generally only commercial and national broadcasters would be required to hold such a licence. It appears that the intention is to allow for Long Term Evolution (LTE) services to operate in the BSBs and provide a range of audio visual content without needing to gain a datacasting licence.

In his second reading speech on the Bill, the Leader of the Government in the House of Representatives, Anthony Albanese, was of the view that limiting the scope of datacasting regulation in this way would ensure that successful bidders at the digital dividend auction would not be unduly

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restricted in the types of services they can provide in the interim period between their gaining a licence to use the digital dividend spectrum and the completion of the restack of spectrum.\footnote{18}

**Committee consideration**

At the time of writing this Bills Digest, the Bill had not been referred to a committee for consideration.

**Policy position of non-government parties/independents**

Opposition spokesperson, Paul Fletcher, has commented on the price set for the digital dividend auction, ‘accusing the government of prioritising short-term revenues over sound long-term policy’ and criticising the Government’s setting of a reserve price which will mean that if the mobile phone companies are not willing to pay this price, the spectrum will not be allocated.\footnote{19}

However, there appears to have been no comments on the specific proposals in this Bill from the non-government parties or independents.

**Position of major interest groups**

Some observations have been made on the digital dividend auction intent and process, for example, while spectrum in the 700 MHz frequency band has been described by Minister Conroy as the ‘waterfront property’ of spectrum, Vodafone initially declared its intention not to bid in April.\footnote{20}

Additionally, Optus criticised the Government’s pricing of spectrum, calling it ‘unworkable’ and warning that the high auction price would restrict investment and drive up prices for essential telecommunications services.\footnote{21} Vodafone apparently changed its intention and has registered to bid.

\footnotesize{\begin{itemize}
\item[20.] A number of references quote the Minister’s declaration, see for example, M Bingemann, ‘Telstra joins bidding for wireless spectrum’, *The Australian*, 24 January 2013, p. 2, viewed 22 February 2013, \url{http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=id%3A%22media%2Fpressclp%2F2182727%22}
\item[21.] Speculation is that the price of $1.36 per head of population as set could realise approximately $3 billion. According to Bingemann, op. cit., this compares unfavourably with prices in the northern hemisphere of 52 cents per head of population. Prices set can be found on the ACMA website, viewed 22 February 2013, \url{http://engage.acma.gov.au/digitaldividend/wp-content/uploads/2013/01/2013-01-10-Reserve-prices-with-population-data.pdf}
\end{itemize}}
as has Telstra and Optus. It appears that these three companies will be the only bidders in the spectrum auction.

The application package which provided information on the auction, which noted the probability that this Bill would be introduced, was released 3 January 2013. At the time of writing, however, there have been no comments on the specific proposals in this legislation from major stakeholders.

Financial implications

This Bill is not expected to have any direct financial implications on Australian Government expenditure or revenue.

Statement of Compatibility with Human Rights

As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act.

The Government considers that the Bill is compatible ‘as it promotes freedom of expression in accordance with Article 19(2) of the International Covenant on Civil and Political Rights (ICCPR).’ Article 19(2) of the ICCPR states that everyone should have the right ‘to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.’

Key issues and provisions

The key issue addressed by the provisions in this Bill is that of providing added flexibility for ACMA to make decisions benefitting operators, and consequently, the public, in the new digital-only broadcasting environment. The Bill provides the legislative environment for ACMA to use its discretion to allow successful bidders at the Government’s digital dividend auction to use spectrum

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24. The Statement of Compatibility with Human Rights can be found at page 3 of the Explanatory Memorandum to the Bill.
25. Ibid.

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in the BSBs prior to the commencement of the stated licence period, should television services have vacated blocks of spectrum prior to the licence commencement period.

While the auction process commences 16 April 2013, the licence period for the successful bidders does not commence until 1 January 2015. The delay between the auction process and the commencement of licences for successful auction bidders is necessary to ensure that there is sufficient time for the comprehensive clearing of digital television services from the digital dividend spectrum to be completed. However, as noted, it may be possible in some geographical areas for new services to commence while spectrum is still considered to be part of the BSBs.

**Broadcasting Services Act 1992**

**Item 5** of the Bill inserts a new definition of *designated datacasting service* into Schedule 6 of the BSA. A designated datacasting service will be one provided by a commercial television broadcasting licensee, a commercial radio broadcasting licensee, a national broadcaster or a service of a kind specified in a legislative instrument. Proposed subclause 2A(2) of the BSA confers power on the Minister to specify the ‘kinds’ of designated datacasting services for the purposes of the new definition. As the Explanatory Memorandum to this Bill notes, this power gives the Minister flexibility ‘to expand the scope of the datacasting regime if the circumstances warrant’, for example, by including unlicensed datacasting services within the scope of the Schedule 6 requirements if at some time this may be considered necessary.27

**Item 3** of the Bill amends Schedule 6 of the BSA so that only those persons who provide designated datacasting services are required to hold datacasting licences.

**Radiocommunications Act 1992**

**Item 11** of the Bill inserts the definition of *designated datacasting service* into the Radcomms Act so that the term has the same meaning as in Schedule 6 to the BSA. Items 12 to 19 make consequential amendments to subsections 100A(1), 100A(1B), 100B(2), 100B(2B), 102(3), 102(5), 102A(5) and 102A(5) of the Radcoms Act to reflect that definition. These sections:

> ... provide that certain types of licences are taken to authorise the operation of the relevant transmitter (or transmitters) for transmitting datacasting services in digital mode on specified channels. However, subsections 100A(1B), 100B(2B), 102(5) and 102A(5) provide that such authorisation has no effect unless the licensee also holds a BSA datacasting licence authorising the datacasting service.28

The amendments operate so that these subsections apply only to designated datacasting services, provided that the licensees of those services hold broadcasting services bands datacasting licences.

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28. Ibid., p. 8.
Appendix A

Auction application and registration process

**Regulations stage:**
By the eligibility deadline, applicants will need to:
- submit completed eligibility nomination form
- make an eligibility payment (linked to their nominated initial eligibility points), or provide a completed Deed of Financial Security

**Registrations confirmed**
ACMA confirms registrations
Thurs 28 Mar

**Eligibility deadline**
Thurs 21 Mar

**Mock auctions conducted:**
The ACMA will conduct mock auctions prior to the auction.
Details can be found in the bidder engagement plan.

**Affiliates identified**
ACMA circulates list of applicants to other applicants
Fri 25 Jan – Fri 8 Mar

**Applications close**
Thurs 24 Jan

**Auction advertised**
Applications open
 Applicant information package published
Thurs 3 Jan

**Auction instruments registered**
Including allocation & technical instruments
Thurs 20 Dec

**Reserve prices announced**
Including lot ratings and dollar value of eligibility points
Thurs 3 Jan

**Early release of auction forms and rules**
Including allocation & technical instruments, application form, deeds & statutory declarations
Fri 21 Dec

*If affiliations are identified at this stage, the ACMA will notify applicants in writing that to participate in the auction they must either withdraw the applications of all the affiliated applicants and submit a new application (within 10 working days) OR withdraw the applications of all but one of the affiliated applicants.

*Updated: 31 Jan 2013
Members, Senators and Parliamentary staff can obtain further information from the Parliamentary Library on (02) 6277 2500.