THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

BROADCASTING LEGISLATION AMENDMENT (DIGITAL DIVIDEND)
BILL 2013

EXPLANATORY MEMORANDUM

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

The Broadcasting Legislation Amendment (Digital Dividend) Bill 2013 (the Bill) would amend the Broadcasting Services Act 1992 (the BSA) and the Radiocommunications Act 1992 (the Radcoms Act) with respect to the datacasting licensing regime.

On 24 June 2010, the Minister for Broadband, Communications and the Digital Economy (the Minister) announced that the Australian Government had decided to release 126 Megahertz of broadcasting spectrum as a digital dividend. This spectrum is expected to be cleared of all existing services by 31 December 2014. The auction of the digital dividend spectrum is scheduled to take place in April 2013.

The Australian Communications and Media Authority (ACMA) may agree that the successful bidders at the digital dividend auction can commence services in particular geographic areas prior to the digital dividend spectrum being redesignated out of the broadcasting services bands (BSBs). The ACMA will assess on a case-by-case basis any applications from incoming spectrum licensees seeking early access to the digital dividend spectrum.

To facilitate the potential early commencement of new services in the digital dividend spectrum, while that spectrum remains in the BSBs, the Bill would limit the application of datacasting regulation in Schedule 6 to the BSA so that only commercial television broadcasting licensees, commercial radio broadcasting licensees and national broadcasters providing datacasting services would generally be required to hold a datacasting licence under the BSA.

The Bill would achieve this by introducing the concept of ‘designated datacasting services’. A designated datacasting service will be defined as a datacasting service that is provided by a commercial television broadcasting licensee, a commercial radio broadcasting licensee or a national broadcaster, or is of a kind specified by the Minister.

The Bill would empower the Minister to specify, by legislative instrument, kinds of datacasting services that should be considered designated datacasting services, and providers of those services will therefore be required to hold a datacasting licence under Schedule 6 to the BSA. This would empower the Minister to require a service provided in the BSB spectrum (such as one provided by a successful bidder of the digital dividend auction) to comply with datacasting regulation under Schedule 6 to the BSA.

The Bill would also make a number of minor consequential amendments to the BSA and the Radcoms Act in order to implement changes to the datacasting regime.

The Bill would also repeal a spent provision in the BSA that refers to a statutory review that has already been conducted and tabled in Parliament.
FINANCIAL IMPACT STATEMENT

The amendments in the Bill are not expected to have any direct financial impact on Commonwealth revenue or expenditure.
STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Broadcasting Legislation Amendment (Digital Dividend) Bill 2013

The Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011. The Bill promotes freedom of expression by allowing certain datacasting services to be provided without a datacasting licence.

Overview of Bill

The general purpose of the Bill is to amend the Broadcasting Services Act 1992 (BSA) and the Radiocommunications Act 1992 with respect to the licensing of datacasting services. In particular, the Bill limits the scope of datacasting regulation so that only certain datacasting services are required to be provided in accordance with a datacasting licence under the BSA.

Human rights implications

Australia is a signatory to the International Covenant on Civil and Political Rights (the ICCPR), one of the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011. Article 19(2) of the ICCPR protects freedom of expression, including the right to seek, receive and impart information and ideas of all kinds, and the means of their dissemination.

The measures in the Bill have no impact on any natural persons in the capacity of licensee; only qualified companies are eligible to hold datacasting licences. Nevertheless, by reducing the barriers to entry and administrative burden associated with the provision of datacasting services, the measures in the Bill may encourage additional services to emerge, or to emerge more quickly. The Bill therefore promotes freedom of expression by increasing the potential range of datacasting services available to the public.

Conclusion

This Bill is compatible with human rights as it promotes freedom of expression in accordance with Article 19(2) of the ICCPR.
ABBREVIATIONS

The following abbreviations are used in this explanatory memorandum:

ACMA: Australian Communications and Media Authority

Bill: Broadcasting Legislation Amendment (Digital Dividend) Bill 2013

BSA: Broadcasting Services Act 1992 (Cth)

Radcoms Act: Radiocommunications Act 1992 (Cth)

Minister: Minister for Broadband, Communications and the Digital Economy
NOTES ON CLAUSES

BROADCASTING LEGISLATION AMENDMENT (DIGITAL DIVIDEND) BILL 2013

Clause 1 – Short title


Clause 2 – Commencement

2. Clause 2 of the Bill provides for the Act to commence on the day after the Act receives the Royal Assent.

Clause 3 – Schedule (s)

3. Clause 3 of the Bill provides that each Act that is specified in a Schedule to the Bill is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the Bill has effect according to its terms.
Schedule 1 — Amendments

Broadcasting Services Act 1992

Item 1 – Subsections 34(5) and (6)

4. Item 1 of Schedule 1 to the Bill would repeal subsections 34(5) and 34(6) of the BSA.

5. Section 34 of the BSA allows the ACMA to make unused or unplanned broadcasting services bands spectrum available for other purposes (including for the transmission of datacasting services) for a specified period of time. The ACMA makes spectrum available under section 34 by making what is known colloquially as a ‘drop through’ determination.

6. Subsection 34(5) of the BSA deals with the availability of spectrum before 1 January 2007, and is a spent provision.

7. Subsection 34(6) of the BSA sets out the meaning of ‘datacasting service’ for the purposes of the application of section 34 to the availability of the spectrum on or after 1 January 2007.

8. The Bill proposes to amend Schedule 6 to the BSA so that only those persons who provide a designated datacasting service will be required to hold a BSA datacasting licence (see item 5 below). As a result, Item 1 of this Bill repeals subsection 36(6) to ensure that the ACMA is able to make part (or parts) of the broadcasting services bands spectrum available for allocation for the purposes of datacasting services, whether or not such services were provided under a datacasting licence.

Item 2 – Section 215A

9. Item 2 of Schedule 1 to the Bill would repeal section 215A of the BSA. Section 215A provides for a statutory review of certain transmission technologies to be conducted by 1 January 2011. This section is now spent.

10. On 17 November 2010, the Minister caused to be conducted the review required by section 215A of the BSA.

11. The Minister completed his report of the review on 7 October 2011.

12. The report was tabled in both houses of Parliament on 12 October 2011.

Item 3 – Clause 1 of Schedule 6

13. Item 3 amends the simplified outline in Clause 1 of Schedule 6 to the BSA. The amendment to the outline reflects the fact that only a person who provides a designated datacasting service will be required to hold a datacasting licence.
Item 4 – Subclause 2(1) of Schedule 6

14. Item 4 would insert a new definition of *designated datacasting service* for the purpose of Schedule 6 to the BSA (see discussion at item 5 below).

Item 5 – After clause 2 of Schedule 6

15. Item 5 of Schedule 1 to the Bill would insert a new clause 2A into Schedule 6 to the BSA. The new clause would insert the definition: *designated datacasting service*.

16. A *designated datacasting service* would mean a datacasting service (as defined in section 6 of the BSA) provided by a commercial television broadcasting licensee; a commercial radio broadcasting licensee; or a national broadcaster; or of a kind specified in a legislative instrument made by the Minister under new subclause 2A(2). As a result of this amendment, a datacasting service that is outside the scope of the *designated datacasting service* definition would not be required to hold a datacasting licence under the BSA.

17. Proposed subclause 2A(2) would confer on the Minister a power to specify kinds of designated datacasting services. A category of datacasting service so specified by the Minister would be required to hold a BSA datacasting licence. This will allow the Minister the flexibility to expand the scope of the datacasting regime if the circumstances warrant. In particular the government will monitor unlicensed datacasting services and reserves the right to bring these datacasters within the scope of Schedule 6 to the BSA, including the conditions of service and codes of practice that only apply to licensed datacasting services.

Item 6 – Subclause 36(2) of Schedule 6

18. Subclause 36(2) of Schedule 6 to the BSA provides for a person who believes that another person is providing a datacasting service without a datacasting licence which authorises the service, to make a complaint to the ACMA.

19. Item 6 would amend subclause 36(2) so that a complaint could only be made to the ACMA by a person who believed that a *designated datacasting service* was being provided without a datacasting licence. This reflects the fact that only designated datacasting service will be required to be licenced.

Item 7 – Division 1 of Part 8 of Schedule 6 (heading)

20. This item would insert the word ‘designated’ into the heading for Division 1 of Part 8 of Schedule 6. This is a technical amendment to make the heading better reflect the datacasting licensing regime as proposed to be amended.

Item 8 – Clause 49 of Schedule 6 (heading)

21. This item would insert the word ‘designated’ into the heading for clause 49 of Schedule 6. This is also a technical amendment designed to make the heading better reflect the datacasting licensing regime as proposed to be amended.
**Item 9 - Paragraph 49(1)(a) of Schedule 6**
**Item 10 – Subclause 49(3) of Schedule 6**

22. Clause 49 of Schedule 6 to the BSA prohibits the provision of a datacasting service without a licence. Subclause 49(1) is an offence provision, making it an offence to intentionally provide a datacasting service without a licence. A separate offence is committed for each day of contravention (subclause 49(2)). Subclause 49(3) is a civil penalty provision that applies to the provision of a datacasting service without a licence.

23. Items 9 and 10 of Schedule 1 to the Bill amend the offence and civil penalty provisions, respectively, in clause 49 so that they only apply to provision of a *designated datacasting service* without a licence.

**Radiocommunications Act 1992**

**Item 11 – Section 5**

24. Item 11 inserts a new definition of ‘datacasting service’ in section 5 of the Radcoms Act. The new definition cross-references the definition proposed to be inserted into Schedule 6 to the BSA (see discussion at item 5 above).

**Item 12 – Subsection 100A(1)**
**Item 13 – Subsection 100A(1B)**
**Item 14 – Subsection 100B(2)**
**Item 15 – Subsection 100B(2B)**
**Item 16 – Subsection 102(3)**
**Item 17 – Subsection 102(5)**
**Item 18 – Subsection 102A(3)**
**Item 19 – Subsection 102A(5)**

25. Division 2 of Part 3.3 of the Radcoms Act governs the issuing of various types of apparatus licences by the ACMA. Subsections 100A(1), 100B(2), 102(3) and 102A(3) of the Radcoms Act 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.

26. The categories of licence subject to this general regime are:

- NBS transmitter licences (ie used for transmitting a national broadcasting service to the public) issued under section 100 (see subsections 100A(1) and 100A(1B) of the Radcoms Act);

- NBS transmitter licences required to be issued under the *National Television Conversion Scheme 1999*, which is made by the ACMA in accordance with clause 19 of Schedule 4 to the BSA (see subsections 100B(2) and 100B(2B) of the Radcoms Act);
• transmitter licences issued under section 102 of the Radcoms Act, which requires the ACMA to issue a transmitter licence to a person allocated a broadcasting services band licence under Part 4 (commercial television and radio broadcasting licences) or Part 6 (community broadcasting licences) of the BSA. (See subsections 102(3) and 102(5) of the Radcoms Act);

• transmitter licences required to be issued under the Commercial Television Conversion Scheme 1999, which is made by the ACMA in accordance with clause 6 of Schedule 4 to the BSA (see subsections 102A(3) and 102A(5) of the Radcoms Act).

27. Item 12 to 19 of Schedule 1 to the Bill would make consequential amendments to subsections 100A(1), 100A(1B), 100B(2), 100B(2B), 102(3), 102(5), 102A(3) and 102A(5) of the Radcoms Act, described above, so that those subsections would only apply to designated datacasting services. That is, the various categories of transmitter licence specified above would be taken to authorise the operation of the transmitter for transmitting a designated datacasting service (see definition at item 5 above), provided the licensee held a BSA datacasting licence authorising the provision of the service.

28. Item 20 of Schedule 1 to the Bill would repeal paragraph 109A(1)(i) of the Radcoms Act.

29. Section 109A of the Radcoms Act sets out certain standard conditions that apply to datacasting transmitter licences. A datacasting transmitter licence is a licence for a transmitter used for transmitting a datacasting service, but does not include an NBS transmitter or a transmitter issued under section 101B, 101C, 102 or 102A.

30. Paragraph 109(1)(i) currently imposes the condition that a licensee must not use the transmitter for transmitting a datacasting service unless the service is authorised under a BSA datacasting licence (or other BSA licence), a class licence under the BSA, or is a BSA exempt re-transmission service (a term defined by section 5 of the Radcoms Act).

31. The repeal of this particular licence condition is a consequence of the introduction of the new concept of ‘designated datacasting services’ and the idea that not all datacasting licences will be required to be licenced under the BSA.

Item 21 – Section 118M (definition of content service)

32. Item 21 of Schedule 1 to the Bill would repeal and substitute the definition of ‘content service’ in section 118M, which applies to Division 4A of Part 3.3 of the Radcoms Act (‘Access to the Channel B Datacasting Transmitter Licences’). The new definition is a necessary consequence of the repeal of paragraph 109A(1)(i), described above, which is incorporated by reference into the existing definition of content service. Item 21 is not intended to alter the substantive meaning of ‘content service’.
33. Items 22, 23 and 24 of Schedule 1 to the Bill make consequential amendments to remove references to paragraph 109A(1)(i) from paragraph 125(1)(a), subsection 128C(1) and section 128D of the Radcoms Act. Paragraph 109A(1)(i) is proposed to be repealed (see item 20 above).