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No. 3 2003–04

Communications Legislation Amendment Bill (No. 3) 2003

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No. 3 2003–04

Communications Legislation Amendment Bill (No. 3) 2003

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Communications Legislation Amendment Bill (No. 3) 2003

Date Introduced: 19 June 2003

House: House of Representatives

Portfolio: Communications, Information Technology and the Arts

Commencement: The provisions of this amending Act commence on various dates which, in some cases, reflect the need to await amendments to subordinate instruments. The commencement date for each relevant amendment is identified in the discussion in the Main Provisions, below.

Purpose

The Bill amends broadcasting, telecommunications and radiocommunications legislation to correct minor legislative anomalies associated with the introduction of digital television and datacasting services in Australia, particularly in relation to services available to regional areas. The Bill also amends the penalty provisions of the *Telecommunications Act 1997* to provide the option of a penalty payment as an alternative to formal prosecution in the courts.

Background

Digital Conversion

In 1998, Australia established a legislative framework for conversion from analog to digital TV. The analog TV transmission system has been in place since TV was first introduced into Australia. Elements of the digital conversion schemes included the 'loan' for all free-to-air broadcasters (including the ABC and SBS) of 7Mhz of spectrum for broadcasting. A prohibition was placed on new free-to-air television entrants until the end of 2006. There was also a requirement to simulcast in analog and digital for at least eight years. A prohibition was also placed on multichanneling by the free-to-air broadcasters until 2005. These measures recognised the large capital costs in making the transition to digital television and that there was no clear evidence at that time that digital TV would bring any new major revenue schemes.¹

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'Digital transmission' is defined as the broadcasting of a program or service using a digital modulation technique. Digital TV offers sharper pictures (including some programs in high definition—HDTV) clearer sound, widescreen programs and extra channels. The common digital transmission uses a standard definition digital broadcast (SDTV). Digital TV can be received by an integrated digital television or by an analog TV that is connected to a digital television receiver set-top box.

A 'datacasting service' is defined as a service (other than a broadcasting service) that delivers information (whether in the form of data, text, speech, images or in any other form) to persons having equipment appropriate for receiving that information, where the delivery of the service uses the broadcasting services bands.² Current restrictions on datacasting imposed by the Federal government mean that it is unable to resemble a conventional TV service. Australia's first commercial datacasting channel is expected to be launched by the end of this year.³

Digital conversion for free-to-air TV is a separate issue to digitisation by pay-TV providers.

The Minister's Second Reading speech explains that the main metropolitan areas of Australia have three commercial television services, as well as the ABC and SBS. Many regional areas have two or, in some cases, only one ('solus') commercial service. The introduction of digital television broadcasting has seen government support for the provision of additional services in regional areas. In a solus market, a commercial television broadcasting licensee can obtain a second analog licence in the same area provided both are ultimately converted to digital transmission. In a two-service regional market a commercial broadcaster can provide a third service in digital mode.⁴

The Government also provided financial assistance for digital roll-out to regional broadcasters by way of rebates against their annual licence fee and supplementary grants in some smaller licensee (solus) markets. This financial assistance recognised that the cost per viewer for the roll-out in regional areas was higher and the revenue base lower than for metropolitan areas.

The Parliamentary Library has issued an E-Brief on *Digital Television and Datacasting* prepared by Dr Kim Jackson which provides a summary of the policy and legislative measures associated with the introduction of digital television and datacasting in Australia. The E-Brief notes that the ABC announced on 26 May 2003 that it would close its digital multi-channel services, 'Fly TV' and 'ABC Kids' due to lack of funding. The E-Brief is available on http://www.aph.gov.au/library/intguide/sp/digital_television.htm and it was issued on 16 June 2003.

Media Comments

The web site for the industry-based Digital Broadcasting Australia (DBA) at (www.dba.org.au) includes information on:

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- the digital take-up rate in Australia
- digital products, and
- digital reception and programming.

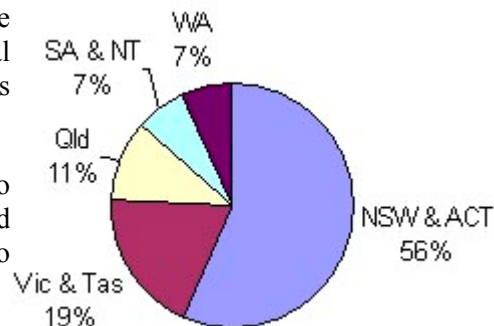
The web site contains the following pie chart estimation of the national take-up of digital TV in Australia:

NSW leads Digital TV uptake

(26 June 2003)

As at the end of May 2003, there are estimated to be more than 82,000 digital television homes, with 56% of those homes being in New South Wales and ACT.

The break down by state is based on sales to retailers of digital television receivers and integrated digital TVs in the five months to 31 May 2003.



Source: DBA

As a general estimation, the total number of households in Australia is in the order of 7.5 million.⁵

Craig Spann, in an article 'Hi-tech nation warms slowly but surely to digital television', notes that there are divergent views about the rollout of the 'troubled' digital television network.⁶ Spann quotes the DBA as saying that recent sales of the set-top boxes have been 'impressive'. The same article quotes media analyst Paul Budde as saying that the industry optimism was misplaced and that there was 'no way in the world' that digital TV would be widespread enough to meet the 2008 analog television deadline and that the more realistic deadline will be something like another decade.⁷ The article also notes Budde's observation that:

[T]he Federal Government had hampered the take-up of digital television by restricting the commercial stations from introducing new digital TV services like multi-channelling, whereby one network offered several channels.⁸

The article concludes with a rebuttal by a spokesman for the Minister for Communications, Senator the Hon Richard Alston, denying that the Commonwealth had bungled the introduction of digital television and gave the analogy of the initial slow take-up of DVDs.

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Katrina Nicholas in an article 'Launch of TV's first datacasting channel', includes an observation that in Europe the driver for digital TV had been the sheer number of extra channels available to consumers.⁹

Main Provisions

Schedule 1—Amendments

Part 1—Solus television markets

Broadcasting Services Act 1992

When amendments to the *Broadcasting Services Act 1992* (BSA) came into effect on 1 January 2001 they enabled a licensee in a solus market the option of multi-channelling the digital transmission of their TV service with no requirement to provide a HDTV component. A second licence was made available in a solus market to facilitate simulcast of analog and digital transmission. Multi-channelling is only possible for digital services. Solus operators who received a second licence before 1 January 2001 did not enjoy that flexibility because of the wording used in the January 2001 amendments. The amendment contained in **Item 1** corrects that anomaly by amending Clause 6 of *Schedule 4—Digital Television Broadcasting* contained in the BSA. A **new subclause 6(5AA)** is inserted in Schedule 4. The new subclause 6(5AA) enables a commercial television broadcaster who received a second licence before 1 January 2001 to elect to provide digital services by multi-channelling, without the obligation to provide a HDTV component.

The inclusion of a reference to the **new subclause 6(5AA)** in subparagraph 60(1)(g)(vi) of Schedule 4 to the BSA, made by **Item 4**, obliges the Minister to conduct a review of the operation of **new subclause 6(5AA)** before 1 January 2005.

Radiocommunications Act 1992

As a broad statement, the *Radiocommunications Act 1992* (Radcom Act) deals with the management of the radiofrequency spectrum to ensure the efficient use of the spectrum and to also ensure that public benefit is derived from the use of the spectrum. The 'spectrum' means the range of frequencies within which radiocommunications are capable of being made.

Item 6 amends paragraph 102A(2A)(c) of the Radcom Act to replace the provision with a broader version that will allow both licences issued to a solus operator to broadcast in digital mode irrespective of when the additional licence was issued after the original section 102A (Radcom Act) transmitter licence was issued for the digital conversion schemes.

These amendments commence on a day to be fixed by Proclamation.

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Part 2—Two-service television markets

Broadcasting Services Act 1992

In a broadcast area serviced by two licensees, the digital conversion arrangements allowed a third licence that could be operated jointly, or by one of the two licensees on an individual basis. Licensees in a two-service market were given 90 days from 1 January 2001 to elect to apply for the additional broadcasting licence. In those cases where a regional area overlapped with a remote area the election date was governed by arrangements that were to apply to remote areas. The remote area election date is yet to be determined. This has created an anomaly for those two-service regional area licensees that are capable of electing but who are precluded because their area overlaps with a remote area. **Items 8 to 10** rectify the anomaly and allow those two-service regional areas to elect for a third licence subject to the condition that within one year of being granted the licence the licensee will commence a service in SDTV digital mode. This start-up period may be further extended by the Australian Broadcasting Authority but no later than 1 January 2006 (see **Item 10**). Time limitations have not been established for remote areas as the determinations for digital conversion for these areas have still not been finalised.

These amendments commence on the day on which the Act receives the Royal Assent.

Part 3—Transmission of datacasting services

Radiocommunications Act 1992

The Radcom Act contains provisions that regulate radiocommunications. Two of the types of radiocommunications transmitter licences regulated by the Radcom Act are for datacasting services and for digital conversion schemes operated by the 'national broadcasting service' (ABC and SBS). These licences may include conditions. Similar provisions cover the licensing of commercial broadcasting services. At present, these transmitter licences are subject to restrictions, such as delaying datacasting until 12 months have elapsed after the commencement of the simulcast period. For metropolitan areas, the simulcast period commenced on 1 January 2001. For remote licence areas, and many regional areas, the simulcast period has not commenced yet and will vary.

Items 11 to 16 repeal various provisions in the Radcom Act to remove timing restrictions on the national broadcasting service. **Items 17 to 22** remove timing restrictions on commercial broadcasters. The timing restrictions apply to the transmission of datacasting services. Transmissions of the services by a free to air broadcaster are delayed until either 12 months after the simulcast period commences, or the commencement by another licensed transmitter of datacasting services, whichever occurs first. The removal of the 'delay period' followed a review of datacasting services which concluded that the delay provisions are no longer necessary. Originally, it had been thought that the provisions were necessary to ensure a level playing field.¹⁰

These amendments commence on the day on which the Act receives the Royal Assent.

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Part 4—Variations to approved implementation plans

Broadcasting Services Act 1992

Under Schedule 4 to the BSA, the ABC and SBS are required to formulate and present to the Minister implementation plans for the national television conversion scheme. The Minister may approve or refuse to approve an implementation plan. The rollout of digital services has seen the need to obtain approval for a series of variations to the implementation plans. **Item 23** enables the Minister to delegate his powers to the Secretary of his Department or to an SES officer within the Department to perform this function under the BSA.

These amendments commence on the day on which the Act receives the Royal Assent.

Part 5—Penalties payable instead of prosecution

Telecommunications Act 1997

Under Part 21 of the *Telecommunications Act 1997*, the Australian Communications Authority may make technical standards about customer equipment, customer cabling and compliance labelling. The purpose of these measures is to prevent, as far as possible, the use of equipment, cabling and connections that is unlawful and dangerous. A breach of matters such as the conditions of a connection permit, standards for equipment and cabling or the misapplication of compliance labelling may result in a prosecution of an offender under the *Telecommunications Act 1997*. At present, the two regulatory measures are (a)—a warning to an offender, or (b)—formal prosecution.

The Bill proposes an additional option of a penalty in lieu of formal prosecution. **Item 47** inserts a new '**Division 13—Penalties payable instead of prosecution**' in the *Telecommunications Act 1997* and specifies the range of penalties for individual or a body corporate for breaches of Part 21 of the *Telecommunications Act 1997*.

These amendments commence on the 28th day after the day on which the Act receives the Royal Assent.

Concluding Comments

The Bill provides additional flexibilities to assist in the rollout of digital TV and datacasting services. Over time, the primary legislation in this area has become layered and complicated. The Bill aims to remove anomalies and unnecessary restrictions in the BSA and Radcom Act. Additional flexibility for the *Telecommunications Act 1997* (in terms of penalties payable for breaches in lieu of formal prosecution) is also contained in the Bill. These are desirable objectives but some of the policies that have underpinned the overall legislative scheme have drawn both support and criticism from time to time.¹¹

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Endnotes

- 1 Drawn from the speech by Senator the Hon Richard Alston, Minister for Communications, to the *Digital Revolution Conference*, 14 June 2000.
- 2 See generally: Peter Leonard and Angus Henderson, 'Television Conversion Schemes', *Communications Law and Policy in Australia*, Volume 1, Butterworths, Chatswood, NSW, 2001, pp. [26,095] to [28,950]; and Digital Broadcasting Australia, 'What is Digital Television?' on www.dba.org.au.
- 3 Katrina Nicholas 'Launch of TV's first datacasting service', *Australian Financial Review*, 1 July 2003, p.16.
- 4 The Hon Peter McGauran MP, Minister for Science, 'Second Reading Speech', Communications Legislation Amendment Bill (No. 3) 2003, House of Representatives, *Debates*, 19 June 2003, p. 16009.
- 5 Dr Kim Jackson, *Digital Television and datacasting*, E-Brief, Department of the Parliamentary Library, Canberra, 16 June 2003 at: http://www.aph.gov.au/library/intguide/sp/digital_television.htm .
- 6 Craig Spann, 'Hi-tech nation warms slowly but surely to digital television', *Courier Mail*, 1 March 2003, p.16.
- 7 *ibid*
- 8 *ibid*
- 9 Katrina Nicholas 'Launch of TV's first datacasting service', *Australian Financial Review*, 1 July 2003, p.16.
- 10 The Hon Peter McGauran MP, Minister for Science, 'Second Reading Speech', Communications Legislation Amendment Bill (No. 3) 2003, House of Representatives, *Debates*, 19 June 2003, p. 16009.
- 11 While supporting the earlier amendments contained in the Broadcasting Legislation Amendment Bill (No. 1) 2002, the Labor Party criticised the initial legislative policies such as mandating HDTV (see the Second Reading speeches of Mr Lindsay Tanner MP, Broadcasting Legislation Amendment Bill (No. 1) 2002, House of Representatives, *Debates*, 5 December 2002, p. 9705 and Senator Sue Mackay, Broadcasting Legislation Amendment Bill (No. 1) 2002, Senate, *Debates*, 14 November 2002, p. 6364.)

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