



Communications Legislation Amendment (Information Sharing and Datacasting) Bill 2007

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Law and Bills Digest Section

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Communications Legislation Amendment (Information Sharing and Datacasting) Bill 2007

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House: House of Representatives

Portfolio: Communications, Information Technology and the Arts

Commencement: On Royal Assent, with Schedule 1, Part 1, Division 1 commencing on the day after Royal Assent and Schedule 1, Part 1, Division 2 on Proclamation or within six months of Royal Assent. Schedule 1 Part 2 commences the day after Royal Assent.

Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

To amend the *Australian Communications and Media Authority Act 2005* (the ACMA Act) to provide for sharing of information between the Australian Communications and Media Authority (ACMA) and third parties.

To amend the *Radiocommunications Act 1992* (the Radiocommunications Act) to allow the ACMA to vary the spectrum specified in a datacasting transmitter licence, including a channel A or channel B datacasting transmitter licence, after such a licence has been issued.

To amend the *Datacasting Charge (Imposition) Act 1998* (the Datacasting Charge Act) so that a fee is not payable where a licensee provides datacasting services on a channel B datacasting transmitter licence.

Background

The *Communications Legislation Amendment (Information Sharing and Datacasting) Bill 2007* (the Bill) is in two parts. Part 1 relates to disclosure of information by ACMA officials. Part 2 relates to datacasting issues.

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Information Sharing

The ACMA is responsible for the regulation of broadcasting, the Internet, radio communications and telecommunications. It undertakes functions as required by the ACMA Act and in accordance with the provisions of a raft of other legislation including the:

- *Telecommunications Act 1997* (the Telecommunications Act) and *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Telecommunications Consumer Protection Act)
- the Radiocommunications Act
- *Datacasting Charge Act* and *Datacasting Transmitter Licence Fees Act 2006* (the Datacasting TL Fees Act), and
- *Broadcasting Services Act 1992* (the Broadcasting Services Act).

As part of its regulatory function, the ACMA has wide ranging powers, including information gathering, for example:

- Under the Telecommunications Act, the ACMA may obtain information from carriers, service providers and other persons if the information is relevant to the performance of its functions or the exercise of its telecommunications powers.¹
- Under the Radiocommunications Act, the ACMA may hold a public inquiry about any matter relating to the management of the radiofrequency spectrum or any other aspect of radio emissions.²
- Under the Datacasting Charge Act, the ACMA may calculate the amount of,³ and impose an annual charge on, the holder of a transmitter licence.⁴ The amount is calculated having regard to the licensee's gross earnings using the formula set out in section 4 of the *Datacasting Charge (Amount) Determination 2001*.
- Under the Broadcasting Services Act, the ACMA established and maintains a Register of Controlled Media Groups,⁵ which contains information about:
 - the persons who exercise control of commercial television broadcasting licenses and commercial radio broadcasting licenses and the names of the directors of any company which holds a license, and

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1. Section 520 *Telecommunications Act 1997*.
 2. Section 255 *Radiocommunications Act 1992*.
 3. Section 7 *Datacasting Charge (Imposition) Act 1998*.
 4. Section 6 *Datacasting Charge (Imposition) Act 1998*.
 5. Section 65 *Broadcasting Services Act 1992*.

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- the persons who exercise control of a newspaper which is associated with the licence area of a commercial television broadcasting licence or commercial radio broadcasting licence and the names of directors of any company which publishes such a newspaper.
- In addition, the Broadcasting Services Act allows the ACMA to impose licence conditions:
 - on television and radio broadcasters, that cross-media ownership will need to be disclosed under specified circumstances,⁶ and
 - on non metropolitan commercial radio broadcasting licences if a ‘trigger event’⁷ occurs in a licence area for the purpose of maintaining existing levels of ‘local presence’.⁸

The Bill proposes to authorise the ACMA to disclose certain information gathered in the performance of its regulatory functions (referred to as ‘authorised disclosure information’) to various government agencies such as the Australian Competition and Consumer Commission (ACCC), the Telecommunications Industry Ombudsman and to overseas media and communication regulators. The information which it proposes to disclose includes information which has been given ‘in confidence’ to the ACMA.

Datacasting

The Bill also includes provisions relating to the Government’s decisions concerning channel A and channel B datacasting transmitter licences. Channel A licences will allow new free to air, in-home digital television services, while channel B licences can be used for a wider range of services, including mobile television.⁹

The Bill proposes to authorise the ACMA to vary a condition of a datacasting transmitter licence that relates to radiofrequency spectrum after such a licence has been allocated.

6. Subdivision 5B *Broadcasting Services Act 1992*.

7. A ‘trigger event’ will occur if a commercial radio licence is transferred to a third party or a new media group is created or there is a change in the control of a media group of which the radio licence is a part.

8. Section 43B *Broadcasting Services Act 1992*.

9. Senator the Hon Helen Coonan, Minister for Communications, Information Technology and the Arts, *Address to ABN AMRO Communications Conference 2007 entitled ‘2007 – reaping the benefits of the media reforms’*, Sydney, 17 April 2007, p. 5.

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Basis of policy commitment

Information Sharing

Following the enactment of the *Broadcasting Services Amendment (Media Ownership) Act 2006*, Mr Graeme Samuel, Chairman of the ACCC, expressed his support in principle to the sharing of information about media mergers with the ACMA, stating that any proposed merger would be assessed by both regulators simultaneously. Mr Samuel suggested that such sharing could ‘pose a few hurdles’ and may require some media companies to waive their right to confidentiality.¹⁰

In an article published in the *Sydney Morning Herald* on 6 March 2007, it was reported that ACCC Chairman, Graeme Samuel, had stated that the ACCC and the ACMA had reached agreement to share information regarding their media merger investigations once the new laws about cross media ownership were operating. It was stated that the two regulators would be requesting a waiver from merger parties allowing confidential information provided to one agency to be shared with the other.¹¹

It appears that the Bill has been introduced, in part, to facilitate the exchange of information between regulators in relation to media ownership. The Explanatory Memorandum states that the ACMA frequently receives information through the performance of its functions and the exercise of its powers in relation to the regulation of broadcasting, the Internet, radiocommunications and telecommunications that would be relevant to other regulatory or administrative bodies or personnel.¹²

The second reading speech states, by way of example that:

... in dealing with industry in relation to a proposed merger, both the ACCC and ACMA are likely to receive evidence relating to the question of control of commercial broadcasting licences. As arrangements currently stand, ACMA would be unable to share such information with the ACCC, even though it is relevant to the performance of the ACCC’s statutory functions under the *Trade Practices Act 1974* in considering and approving proposed media mergers.¹³

10. M. Ricketson, ‘Samuel wants close co-operation between regulators as mergers loom’, *The Age*, 25 November 2006, p. 3.

11. L. Murray, ‘One step closer to media melee’, *Sydney Morning Herald*, 6 March 2007, p. 25.

12. *Explanatory Memorandum*, p. 2.

13. The Hon. Bruce Billson MP, Minister for Veterans’ Affairs and Minister Assisting the Minister for Defence, ‘Second reading speech: Communications Legislation Amendment (Information Sharing and Datacasting) Bill 2007’, House of Representatives, Debates, 20 June 2007, p. 13.

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Datacasting

The Explanatory Memorandum states that the Bill contains measures concerning the allocation of datacasting transmitter licences, including in relation to channel A and channel B datacasting transmitter licences.¹⁴ The second reading speech states that the proposed changes would allow the ACMA to address a range of technical issues as they arise. The types of issues include addressing potential interference with existing services and optimising spectrum for particular services such as mobile television.¹⁵

Position of significant interest groups

On 21 June 2007, the Senate referred the Bill to the Standing Committee on the Environment, Communications, Information Technology and the Arts for inquiry and report by 30 July 2007.

The Committee received [four written submissions](#) in relation to the Bill. The following is a brief summary of each.

Office of the Privacy Commissioner

The Office of the Privacy Commissioner (OPC) acknowledged that the Bill is primarily targeted at commercial transaction information. The information which is expected to be disclosed under the provisions of the Bill is commercially sensitive or confidential information. However, the OPC considered that it is probable that some personal information would be disclosed under the information sharing arrangement, such as the personal information of directors and small business operators.¹⁶

The major concerns of the OPC were:

- the Bill allows for personal information to be disclosed to agencies and bodies in jurisdictions that do not have privacy regulation¹⁷
- media regulators in overseas jurisdictions are entitled to receive 'authorised disclosure information' but may not have enacted privacy regulations similar to the Information Privacy Principles (IPPs) in the *Privacy Act 1988* (the Privacy Act), and

14. *Explanatory Memorandum*, p. 3.

15. The Hon. Bruce Billson, op.cit.

16. Office of the Privacy Commissioner, *Submission No. 2*, July 2007, p. 3.

17. For example: Queensland, South Australia and Western Australia do not have privacy legislation.

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- this means that there may not be any legislation to prevent any unintended secondary uses of an individual's personal information and there may be no way to ensure that the accuracy and currency of information is maintained.

In addition, the OPC was concerned that the ACMA may disclose 'authorised disclosure information' if it is already 'publicly available'. The OPC considered that this was at variance with the IPPs. This is because the Privacy Act provides that, even if an agency collects publicly available personal information, for example, from a public register or from a newspaper, the agency must still comply with the IPPs.¹⁸

The OPC made several recommendations for amendment to the Bill including:

- that disclosure of 'personal information' should be specifically excluded from any 'authorised disclosure information', or
- in the alternative, a definition of 'personal information' be included and a requirement that compliance with the Privacy Act was required, and
- that the regulation making powers in the Bill should expressly provide that the privacy of individuals is to be a matter for consideration by the Chair of the ACMA.¹⁹

Privacy Victoria

Privacy Commissioner Helen Versey from Privacy Victoria was concerned that the definition of 'authorised disclosure information' is extremely broad and includes information that the ACMA has collected in confidence and through its coercive powers.²⁰

Like the OPC, Privacy Victoria was concerned that 'personal information' would be disclosed to a state, territory or foreign authority that may not be subject to privacy regulation that is similar to the Privacy Act.²¹

In relation to that part of the Bill which allows for information about the affairs of a person to be disclosed, where the person has consented to the disclosure, Privacy Victoria was concerned that the term 'information that relates to the affairs of a person' is not defined. Further, whilst the Explanatory Memorandum states that the Privacy Act is intended to prevail in relation to disclosure of personal information, the wording of the Bill does not emphasise that intention.²²

18. Office of the Privacy Commissioner, op. cit., p. 4.

19. Office of the Privacy Commissioner, op. cit., p. 5.

20. H. Versey on behalf of Privacy Victoria, *Submission No. 1*, 13 July 2007, p. 1.

21. *ibid.*, p. 2.

22. *ibid.*, p. 2.

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Privacy Victoria was also concerned about the section relating to disclosure of ‘publicly available information’ as that term is not defined in the Bill.

Like the OPC, Privacy Victoria strongly recommended that, to prevent ambiguity, the Bill should be amended to provide that the Privacy Act is to apply in matters relating to personal information.²³

Free TV Australia Pty Ltd

Free TV Australia Limited (Free TV) is the peak industry body representing all of Australia’s commercial free-to-air television licensees.²⁴

Information Sharing

Free TV considers that the Bill should be amended as follows:

- to ensure that the ACMA cannot disclose confidential information to another agency unless that agency also agrees to keep the information confidential, and
- references to information which is already publicly available should be qualified to ensure that breaches of confidentiality (whether by the ACMA or other persons) are not compounded by further disclosures.²⁵

Datacasting

Free TV submitted that the proposed amendment to section 111 will empower the ACMA to vary the conditions of a licence without any industry consultation. In their view, issues relating to the availability and quality of free-to-air television services are far too important to leave to administrative discretion.²⁶

In evidence to the Committee they said they would like to see a mandatory consultative process to address potential problems before they actually occur.²⁷

23. *ibid.*, p. 3.

24. Free TV Australia Limited, ‘*Submission No. 4*, 17 July 2007, p. 1.

25. *ibid.*, Introduction, p. 1.

26. *ibid.*, Section 2, p. 2.

27. Evidence of R. Bunch, *Public Hearing before Senate Standing Committee on Environment, Communications, Information Technology and the Arts*, 7 August 2007, p. 6. Free TV Australia Limited considers that the Radiocommunications Act should include an additional amendment in similar terms to Part 3 of the Broadcasting Services Act which would entrench a formal consultation.

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Australian Broadcasting Corporation

Information Sharing

The Australian Broadcasting Corporation (ABC) submission related to disclosure of information which had been provided in confidence to the ACMA.

They acknowledged that the Bill provided for the Chair of the ACMA to impose conditions on 'authorised disclosure information' provided to Royal Commissions, for example, that the recipient of the information does not further disclose it. Of concern to the ABC was that the Bill does not have a similar provision in relation to information disclosed to Ministers or Departmental Secretaries.²⁸ The ABC believes that these provisions do not provide adequate protection for sensitive information disclosed to the ACMA on a confidential basis.

Datacasting

The ABC also made submissions about Part 2 of Schedule 1 of the Bill which proposes to amend the Radiocommunications Act so that the ACMA is able to vary the licence conditions applying to a datacasting transmitter licence. This would, in effect, permit the ACMA to move a datacasting service from one channel to another.²⁹

Like Free TV, the ABC was concerned that there is potential for interference to free-to-air television broadcasts from mobile television services that are expected to operate under channel B datacasting transmitter licences. The ABC submitted that the proposed amendment is an adequate means of protecting terrestrial television transmissions from interference from channel B mobile television services and supports the arguments for a fully-developed planning regime which were advanced by Free TV.³⁰

Financial implications

The Explanatory Memorandum states that the Bill is expected to have minimal impact on Commonwealth expenditure or revenue.³¹

28. G. Dawson for and on behalf of Australian Broadcasting Corporation, '*Submissions to the Senate Environment, Communications, Information Technology and the Arts Committee*, 17 July 2007, p. 1.

29. Australian Broadcasting Corporation, op. cit., p. 2.

30. *ibid.*, p. 2.

31. *Explanatory Memorandum*, p. 3.

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Main provisions

Part 1 - Information Sharing

Schedule 1 proposes to amend the ACMA Act by inserting two additional definitions into the existing section 3. **Item 1** inserts ‘**ACMA official**’ which means

- a member of ACMA
- an associate member of ACMA
- a member of the ACMA staff or
- an officer or employee of a Commonwealth authority whose services have been made available to ACMA.

These are the persons whom it is proposed will have the authority to disclose information under the ACMA Act.

The second definition, inserted by **item 2**, is ‘**authorised disclosure information**’ which defines the nature of the information which will be releasable under the ACMA Act as follows:

- information that was given in confidence to the ACMA in connection with the performance of any of the ACMA’s functions or the exercise of its powers;
- information that was obtained by the ACMA as a result of the exercise of the following of its powers under:
 - the Broadcasting Services Act - Parts 2 (categories of broadcasting services), 5 (control of commercial broadcasting licences and datacasting transmitter licences), 7 (subscription television broadcasting services) or 13 (information gathering by the ACMA by way of investigations³² and hearings³³)
 - the Radiocommunications Act - Chapters 3 (licensing of radiocommunications), 5 (administration and enforcement) or 6 (miscellaneous³⁴)
 - the Telecommunications Act - Parts 3, (carriers) 6, (industry codes and industry standards) 21, (technical regulation) 26 (investigations) or 27 (ACMA’s information gathering powers)
 - the Telecommunications Act - Schedule 3A (about a carrier’s powers and immunities)

32. Part 13, Division 2 of the Broadcasting Services Act.

33. Part 13 Division 3 of the Broadcasting Services Act.

34. Including international agreements at section 299 of the *Telecommunications Act 1997*

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- the Telecommunications Consumer Protection Act - Part 2 (which relates to the universal service regime)³⁵
- information that was obtained by the ACMA as a result of the exercise of its powers under a provision that allows the ACMA or an ACMA official to require a person to give information or to produce a document³⁶, and
- information that was given in confidence to the ACMA by a government authority of a foreign country.

The second reading speech explains the reason that it is intended to provide disclosure to a government authority of a foreign country. It states that the ACMA has established close relationships with overseas regulatory agencies in developing co-operative arrangements for the regulation of the Internet industry. The global nature of the Internet means that liaison with regulatory and other relevant bodies overseas is a vital part of addressing offensive Internet material and working towards securing child-safety online.³⁷

The submissions to the Standing Committee on the Environment, Communications, Information Technology and the Arts in relation to the Bill each expressed concerns that the definition of ‘authorised disclosure information’ was extremely broad and would capture ‘personal information’, in addition to commercially sensitive information.

According to section 6 of the Privacy Act, ‘personal information’ means information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion. Given the range and extent of the information which the ACMA is empowered to gather in carrying out its functions, those concerns are well founded.

None of the sections of the proposed Bill make express reference to the intention expressed in the Explanatory Memorandum that the Privacy Act will apply to ‘personal information’.³⁸

35. According to section 8 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999*, the main object of the universal service regime is to ensure that all people in Australia should have reasonable access to standard telephone services, payphones, prescribed carriage services and digital data services.

36. For example section 45 of the *Broadcasting Services Act* which requires licensees to provide information for the Register of Controlled Media Groups.

37. *Second reading speech*.

38. *Explanatory Memorandum*, p. 7.

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Item 3 of Schedule 1 of the Bill proposes to insert a new **Part 7A** into the existing Act. **Proposed sections 59A to 59H in Part 7A** set out various circumstances in which an ACMA official may disclose ‘authorised disclosure information’ to a third party.

Proposed subsection 59A(1) allows an ACMA official to disclose any of the information which is defined as ‘authorised disclosure information’ to the Minister for Communications, Information Technology and the Arts. In addition, an ACMA official may disclose ‘authorised disclosure information’ to the Secretary of the Department, or an APS employee in the Department who has written authorisation from the Secretary under **proposed subsection 59B(1)** as long as the purpose of disclosing the information is to advise the Minister.

Proposed subsection 59A(2) allows an ACMA official to disclose to any other Minister ‘authorised disclosure information’ that relates to a matter arising under a provision of an Act that is administered by that Minister. In addition, an ACMA official may disclose ‘authorised disclosure information’ to the Secretary of a Department, or an APS employee of that Department who has written authorisation from the relevant Secretary under **proposed subsection 59B(2)**, as long as the purpose for disclosing the information is to advise the relevant Minister in accordance with **proposed subsection 59A(2)**.

Proposed section 59C relates to disclosure to Royal Commissions. Under **proposed subsection 59C(1)** an ACMA official may disclose ‘authorised disclosure information’ to a Royal Commission. The Chair of the ACMA may impose written conditions to be complied with in relation to the information which is disclosed: **proposed subsection 59C(2)**.

The ABC was critical that the **proposed section 59C** allowed for the Chair of the ACMA to impose conditions upon the information which could be disclosed to a Royal Commission but that **proposed sections 59A and 59B** did not allow for any limitations on the disclosure of information to a Minister or the Secretary of a Department.

The Explanatory Memorandum states that it is intended that information would be disclosed by the ACMA to a Royal Commission when the information is relevant to the Commission’s terms of reference.³⁹ A similar limitation is imposed on the relevant Minister under the **proposed subsections 59A(2) and 59B(2)**. Under those subsections ‘authorised disclosure information’ may be disclosed if it relates to a matter arising under a provision of an Act that is administered by the Minister.

Under **proposed section 59D** the Chair of the ACMA may authorise an ACMA official in writing to disclose ‘authorised disclosure material’ to a number of authorities which are specifically listed. Under **proposed subsection 59D(1)** the Chair of the ACMA must be satisfied that the information will enable or assist the authority to perform or exercise any

39. *Explanatory Memorandum*, p. 12

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of its functions or powers. The Explanatory Memorandum states that this is an important safeguard which is intended to ensure that information will only be disclosed to authorities which have a genuine interest in receiving it.⁴⁰

The major criticism of this section is that a number of the authorities which are defined in the proposed section have not enacted legislation which is equivalent to the Privacy Act.⁴¹ In addition, there are not sufficient protections of sensitive information disclosed to the ACMA on a confidential basis.⁴²

However, according to **proposed subsection 59D(2)** the Chair of the ACMA may impose written conditions on the disclosure of ‘authorised disclosure material’ to the listed authorities. The Explanatory Memorandum states by way of example that a condition could be imposed that the information must not be further disclosed by the authority that receives it.⁴³ The ABC supports such a condition being imposed.⁴⁴ However, in the current Bill there is no compulsion for the Chair of the ACMA to impose that or any other specific condition. Privacy Victoria suggested that a provision be inserted to ensure that the Chair of ACMA gives consideration to transborder data flows in accordance with Schedule 2 of the Privacy Act.⁴⁵

Proposed section 59E authorises an ACMA official to disclose ‘authorised disclosure information’ about the affairs of a person where the person consents to the disclosure and the disclosure is in accordance with the consent that has been given.

Privacy Victoria was concerned that the term ‘information about the affairs of a person’ is not defined and that the proposed section does not contain a specific provision to give effect to the intention enunciated in the Bill, i.e., that the Privacy Act will apply to matters of personal information.⁴⁶

Neither the Bill nor the Explanatory Memorandum give an indication of how this consent might be requested or the circumstances in which it might be requested.

Proposed section 59F deals with disclosure of ‘authorised disclosure information’ which is already publicly available. The term ‘already publicly available’ is not defined.

40. *Explanatory Memorandum*, p. 13.

41. Privacy Victoria, op. cit., p. 2.

42. Australian Broadcasting Corporation, op. cit., p. 1.

43. *Explanatory Memorandum*, p. 13.

44. Australian Broadcasting Corporation, op. cit., p. 2.

45. Privacy Victoria, op. cit., p. 2.

46. *ibid.*, p. 2.

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Privacy Victoria expressed concern about the breadth of the proposed section on the grounds that ‘it potentially extends from any authorised disclosure information, including personal information, that is printed in a popular newspaper, to information that a person may be able to find from a complex ‘google’ search’.⁴⁷ Free TV was equally concerned about how the phrase might be construed.⁴⁸

Proposed section 59H refers to disclosure of ‘authorised disclosure information’ in ‘specified circumstances’. The Explanatory Memorandum states that the proposed section provides for regulations to authorise an ACMA official to disclose ‘authorised disclosure information’ in specified circumstances, and to provide that the Chair of ACMA may impose written conditions to be complied with in relation to the disclosure.⁴⁹

There is no indication in the Bill or Explanatory Memorandum as to what those ‘specified circumstances’ might be.

The OPC submits that this clause should expressly provide for the privacy of individuals to be a matter of consideration for the Chair of the ACMA and suggests that the power to make regulations under this clause could include a process of consultation with the Privacy Commissioner.⁵⁰

Despite the provisions of the **proposed sections 59A to 59H** which set out the circumstances in which ‘authorised disclosure information’ can be disclosed and the conditions which may be imposed on that disclosure, the effect of **proposed section 59J** is that disclosure may also take place in other circumstances which have not been specified. Privacy Victoria submitted that the ‘specified circumstances’ envisaged by this section should be clearly expressed in the Act, because in its current form, there is no limit on what information may be disclosed or in what circumstances. Of particular concern to Privacy Victoria was that the disclosure of ‘authorised disclosure information’ that is also ‘personal information’ should be specifically excluded from this provision.⁵¹

Item 4 of Schedule 1 of the Bill provides that disclosure of information under the proposed Part 7A relates to information which was given to, or obtained by ACMA before, on or after the commencement of that Part. Essentially, with the enactment of the Bill, the ACMA will be authorised to disclose information which is already in its possession, despite the fact that the material may have been provided to the ACMA on the

47. *ibid.*, p. 2.

48. Free TV Australia Limited, *op. cit.*, Introduction, p. 1.

49. *Explanatory Memorandum*, p. 16.

50. Office of the Privacy Commissioner, *op. cit.*, p. 4.

51. Privacy Victoria, *op. cit.*, p. 3.

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understanding that it was confidential and would not be disclosed to a third party, and without any knowledge of the proposed Bill.

Part 2 - Datacasting

Existing Part 3.3 of the Radiocommunications Act relates to apparatus licences.

Division 1 of Part 3.3 of the Radiocommunications Act relates to the types of apparatus licences. Section 97 of the Radiocommunications Act provides that the ACMA may issue either transmitter licences or receiver licences. Sections 98A and 98B provide that the ACMA may declare that a specified datacasting licence will be issued as a channel A datacasting transmitter licence or a channel B datacasting transmitter licence respectively.

Division 2 of Part 3.3 of the Radiocommunications Act relates to the manner in which the ACMA issues different types of apparatus licence.

Division 3 of Part 3.3 of the Radiocommunications Act relates to the conditions which can be placed upon apparatus licences. In particular, sections 107(1)(g), 108A(1)(f), 109(1)(f) and 109A(1)(k) provide that the ACMA can apply 'such other conditions as are specified in the licence'.

Items 6 and 7 of the Bill propose to amend subsection 111(1)(d) of the Radiocommunications Act which is located in Division 3 of Part 3.3.

The existing subsection 111 currently provides for the ACMA to make certain changes to licence conditions applicable to apparatus licences, including a datacasting transmitter licence, for example:

- impose one or more further conditions to which the licence is subject
- revoke or vary one of those further conditions
- revoke or vary one of the conditions that has been applied to the licence under sections 107(1)(g), 108A(1)(f), 109(1)(f) and 109A(1)(k), and
- if the licence is a transmitter licence, *but not* a datacasting transmitter licence, vary a condition already specified in the licence under sections 108(2)(a),⁵² (b),⁵³ or (c)⁵⁴

52. Provides that a licensee must not operate a transmitter for a purpose that is inconsistent with a purpose of the kind specified in the appropriate frequency band plan.

53. Provides that a licensee must not operate a transmitter except in accordance with the licence conditions that relate to containment of interference to radiocommunications or transmission of an identification signal.

54. Provides that a licensee must not operate the transmitter except on the frequency specified in the licence.

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Item 6 proposes to delete the phrase ‘or a datacasting transmitter licence’ from subsection 111(1)(d) so that the ACMA can vary a condition specified in the licence under subsections 108(2)(a) – (c).

Item 7 proposes to insert the phrase ‘or 109A(1)(d)’ to subsection 111(1)(d) so that, in addition to being able to rely on the terms of 108(2)(a) – (c), the ACMA will also be able to vary the terms of a licence under section 109A(1)(d).⁵⁵

These proposed amendments will achieve their stated intention, that is, to enable the ACMA to vary the spectrum specified in a datacasting transmitter licence, including a channel A or channel B datacasting transmitter licence, after such a licence has been issued.⁵⁶

Item 8 of the Bill proposes to amend the Datacasting Charge Act.

Section 6 of the current Datacasting Charge Act provides that if a transmitter licence authorises the holder to transmit datacasting services in digital mode, then a charge is imposed on the transmitter licence in respect of the financial year. The proposed amendment to subsection 6(a) will exempt channel B datacasting transmitter licences from this section.

According to the Explanatory Memorandum, the Government has decided that channel B datacasting licences should not be subject to an annual licence fee.⁵⁷

Conclusion

In respect of Part 1, the Senate inquiry process raised significant concerns about tightening the definitions of key terms in order to reflect privacy concerns. These concerns are referred to in the Main Provisions section of this Digest.

In respect of Part 2, despite the apparently minor changes that are proposed to the Radiocommunications Act, the effect is significant. The submissions by the ABC and Free TV reflect their concerns about the need for further consultation before channel A or channel B datacasting transmitter licences are issued so as to avoid any interference with existing free-to-air broadcasts.

55. Provides that a datacasting transmitter licence is subject to a condition that the licensee must not operate the transmitter except on a frequency or a frequency channel and at a constancy that is specified in the licence.

56. *Explanatory Memorandum*, p. 18.

57. *ibid.*, p. 19.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

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