

# **AUSTAR United Communications Limited**

**Submission to the Department of Broadband,  
Communications and the Digital Economy**

**Issues associated with the  
Exposure Draft of the Broadcasting Legislation Amendment  
(Digital Dividend and Other Measures) Bill 2011**



## 1. Introduction

AUSTAR welcomes the opportunity to comment on the Exposure Draft of the *Broadcasting Legislation Amendment Digital Dividend and Other Measures) Bill 2011* (the **Exposure Draft**).

We are concerned that the way in which the Exposure Draft has been released for comment does not allow for adequate public scrutiny of the important issues raised by the proposed amendments to the *Broadcasting Services Act 1992* (the **BSA**) and *Radiocommunications Act 1992* (**Radiocommunications Act**).

## 2. AUSTAR concerns about process

### 2.1 Timing of the release of the Exposure Draft

We are unsure when the Department first sought comment on the Exposure Draft. The date is not apparent from the webpage containing the invitation to comment and we are unable to locate any associated media release. An author notation at the foot of the Exposure Draft webpage indicates that page was Last Modified on 20 December 2010. The Exposure Draft itself is dated 8 December 2010. AUSTAR first became aware of the invitation to comment in the week of 4 January 2011. Responses were invited with a due date of 14 January.

We do not believe that a public response time of approximately 3 weeks over the Christmas / New Year period is enough for any legislation.

### 2.2 Absence of context for the Exposure Draft

The Department's invitation for public comment on the Exposure Draft contained only three paragraphs of general information about the proposed amendments to the BSA and Radiocommunications Act. Notably, it did not contain the following information.

- (a) Any reference to the *Australian Communications and Media Authority (Realising the Digital Dividend) Direction 2010* (**Ministerial Direction**) that determines how the

ACMA must allocate radiofrequency spectrum to free to air broadcasters for use after switchover (a link to the Ministerial Direction would have been useful) ;

- (b) Any explanation of the relationship between the *digital dividend policy objectives* set out in the Ministerial Direction and the improved planning and enforcement powers to be given to the ACMA in the Exposure Draft;
- (c) Any reference to the previous introduction of similar digital dividend amendments as part of the *Broadcasting Legislation Amendment (Digital Television) Bill 2010* (the **Prior Bill**), or the Government's withdrawal of those amendments from Parliament on 24 June 2010;
- (d) Any Explanatory Memorandum for the Exposure Draft. We note in particular:
  - (i) A Supplementary Explanatory Memorandum to the digital dividend amendments included in the Prior Bill was published in or around May 2010. We query why the existing Supplementary Explanatory Memorandum wasn't repurposed for the Exposure Draft;
  - (j) Without further information, we do not believe it is possible for anyone other than commercial television broadcasters directly involved in negotiating the provision of the VAST service with the Government to understand the meaning of or intention behind the changes to the VAST regime contained in the Exposure Draft. We are particularly concerned that Schedule 3 Part 2 item 8 of the Exposure Draft may indicate that the conditional access schemes for the South East Australia TV3 and Northern Australia TV3 licence areas registered by the ACMA on 15 December 2010 did not, in fact, meet the criteria set out in the VAST legislation then in place<sup>1</sup>. If this is the case, on our reading of the legislation, this would make the existing registrations of those schemes invalid.

We request an explanation from the Department or, if appropriate, the ACMA as to what this item in the Exposure Draft is addressing.

In our opinion all of the background information referred to above is needed in order to give the public and stakeholders a fair opportunity to understand the Exposure Draft and comment on what it means about (1) how the Government intends to allocate

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<sup>1</sup> Section 130ZC(1)(da) of the BSA expressly provides that a CAS is only registrable if the ACMA is satisfied that it complies with section 130ZB

radiofrequency spectrum for use in a post-analog environment, and (2) the way the VAST commercial broadcasting services will operate.

### **2.3 Significance of the Digital Dividend Policy Objectives**

The Exposure Draft contains the mechanics by which the Government proposes to move existing free to air broadcasting services to new places on the radiofrequency spectrum so that they can vacate the spectrum the Government proposes to auction as the digital dividend before the end of 2014.

The ACMA will be the planner in this process and the restacking it performs will impact both the television industry and Australian television viewers. The extent of this impact will depend on what technical decisions the ACMA makes in managing the restacking and it is possible that the interests of the ACMA, Australian television viewers and the free to air broadcasters will not be aligned in how the restacking is done.

As we understand it, the Ministerial Direction determines in large part how the ACMA must organise the restacking. However, the Ministerial Direction is not referenced in either the Exposure Draft or any of the information the Department has issued with it.

The practical effect of failing to mention the Ministerial Direction in the context of the Exposure Draft may mean that there is no Parliamentary or public scrutiny of the digital dividend policy objectives set out in the Direction, their origins, or their intended outcome (other than the obvious benefit of freeing up the digital dividend within the Government's desired timeframe).

For example, it is not clear from the Ministerial Direction or the Explanatory Statement that accompanied it why, for a metropolitan licence area but not a regional or remote licence area, there is a policy objective that all digital television broadcasting services are located in the same frequency band. Similarly, there is no explanation of why it is a policy objective for regional and remote licence areas - but not for metropolitan licence areas - that planning should, wherever possible, minimise disruption for the affected television audience (including disruption caused by

the need to reorientate, upgrade or replace antennas) and minimise the financial impact on affected television broadcasting services.

We are confident that the Government has good reasons for adopting the digital dividend policy objectives that it has. However, we are very concerned that the way these objectives and decisions are being made and put into effect is not sufficiently transparent. We do not agree with the last section of the Explanatory Statement to the Ministerial Direction (titled **Consultation**), that asserts that the public consultation undertaken through the *Digital Dividend Greenpaper* adequately explains the policy decisions set out in the Ministerial Direction.

## 2.4 Suspension of public consultation under the Exposure Draft

The following provisions in the Exposure Draft add to our concerns about transparency and process:

- (a) Item 7, under which the Minister may give the ACMA (and the ACMA must comply with) further directions about the exercise of the ACMA's powers to make or vary the spectrum allocated to free to air broadcasters in a particular licence area. The amendment is silent on whether any subsequent direction will be open to Parliamentary or public scrutiny;
- (b) Item 13, which replaces for the purposes of the restacking the usual need for the ACMA to make provision for wide public consultation in connection with its broadcasting spectrum planning activities. Under the Exposure Draft, the ACMA must only make provision for consultation with national broadcasters and affected commercial and community television broadcasting licensees and such other people (if any) as the ACMA considers appropriate.

We refer to the explanation of this amendment in the Supplementary Explanatory Memorandum to the Prior Bill (in relation to Item 14), which provided;

“Making or varying a special LAP for the sole or primary purpose of achieving the digital dividend policy objectives will largely be a technical and engineering exercise concerning the transmission specifications of existing broadcasting services. Wide public consultation is not necessary.

Accordingly, consultation in these circumstances will be limited to the affected broadcasters, owners of transmission infrastructure and other people as the ACMA considers appropriate.”

We do not agree with this characterisation of the restacking exercise to be done by the ACMA. Technical decisions made by the ACMA in the context of the restacking will have broad practical ramifications for not only the free to air broadcasters affected but for other participants in the video content distribution industry and for all Australians who watch television. The same decisions will heavily influence other uses to which the public asset comprising the radiofrequency spectrum can be put. As such, it is our view that the ACMA’s decisions determining the way free to air broadcasting services are accommodated in a post-analog world should be subject to the same wide public consultation that is required for all other similar spectrum planning decisions made by the ACMA. The restacking cannot occur in isolation and should not be quarantined from the broader public discussion about spectrum usage.

Finally, we note the apparent inconsistency between the restrictions on public consultation contained in the Exposure Draft and the Government’s stated intentions surrounding the Convergence Review to be conducted in 2011.

In particular we note at paragraphs 5(f) and 5(g) of the proposed Terms of Reference that the [Independent Committee charged with conducting the Review] is to take into account the following policy parameters:

- f. Appropriate industry and regulatory settings to maximise consumer and citizen choice in, and access to, the broadest range of content, and services used to deliver content as are supported by convergent technologies and communications infrastructure; and
- e. the appropriate processes by which to manage spectrum allocation.

In our view the allocation of spectrum to free to air broadcasters for use for the foreseeable future and the way that spectrum is allocated are clearly subjects that fall within the policy parameters set out above. However, if the ACMA’s decisions relating to the restacking are removed from public scrutiny, we are concerned that spectrum issues affecting the free to air broadcasters will be quarantined from review and analysis under the Convergence Review.

**To allow for the ACMA's decisions to be taken into account in the context of the Review, we request Item 13 of Schedule 1 to the Exposure Draft be deleted.**

### **3. Conclusion**

For the reasons set out above, AUSTAR takes the view that the way the Exposure Draft has been presented by the Department does not give stakeholders or the Australian public a fair opportunity to make comments. In particular, the timing of the request for submissions and the lack of background information provided means that it is not clear what the Government intends the Exposure Draft amendments to achieve or how the Government settled on these intentions.

We believe that spectrum issues relating to free to air television should be considered holistically, in the context of how the radiofrequency spectrum is to be used generally after switchover to digital television. While some parties may be of the mistaken belief that the technical nature of the restacking process means that only the free to air broadcasters have an interest in this issue, this spectrum is an asset of the Commonwealth, not the broadcasters, and how it is treated has significant consumer, competition and revenue implications.

Any redesign of the radiofrequency spectrum in support of the allocation of spectrum to any person or industry, including the free to air broadcasters, should be the subject of wide public consultation and not hidden from comment through the use of Ministerial directions and unscrutinised determinations by the ACMA following consultation with the 'interested parties' it selects.

To address these concerns, we request that the Government reissue its request for comment on the Exposure Draft together with an appropriate explanation of what the amendments it contains are intended to achieve and why, and a reasonable time line for responses. Further proposals by the Government connected with the removal of free to air broadcasting services from the digital dividend spectrum should be subject to the same rules of transparency.

At at a minimum, Item 13 of Schedule 1 to the Exposure Draft should be deleted to allow proper public scrutiny of decisions made by the ACMA in connection with its allocation of new spectrum to the free to air broadcasters.

AUSTAR would welcome the opportunity to discuss the issues raised in this submission with the Department, and the opportunity to review and respond to any further draft legislation relating to arrangements for the freeing-up-of the digital dividend.

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