

CHAPTER 2

DATACASTING

2.1 A number of submissions were concerned about the Bill's provisions relating to datacasting. The main concerns were from parties who would like to provide datacasting services through digital terrestrial transmission but who believe that the definition of datacasting unduly restricts what they can offer while other provisions in the Bill give unfair advantage to free-to-air broadcasters who may wish to offer datacasting services on part of their free allocation of spectrum

2.2 Some submissions from potential datacasters as well as evidence provided to the Committee suggest that if amendments to the Bill are not made, the commercial viability of the datacasting industry may be called into question.

Definition of datacasting

2.3 The Bill defines a datacasting service as:

A service that delivers content:

- a) whether in the form of text; or
- b) whether in the form of data; or
- c) whether in the form of speech, music or other sounds; or
- d) whether in the form of visual images (animated or otherwise); or
- e) whether in any other form; or
- f) whether in any combination of forms;

to persons having equipment appropriate for receiving that content, where the delivery of the service uses the broadcasting services bands.¹

2.4 The definition is wide enough to also include the delivery of radio and television programs. However, the Bill places restrictions on the provision of audio content by datacasters so that they do not become de facto radio broadcasters.

2.5 The Bill also introduces a regulatory regime for datacasting, the primary objective of which is to clearly distinguish between datacasting and broadcasting services. The regime will be implemented through a new Schedule 6 to the *Broadcasting Services Act 1992*.

1 Broadcasting Services Amendment (Digital Television and Datacasting) Bill 2000, item 12

2.6 The focus of the regulatory approach is on the kinds or 'genres' of programs and services which datacasters are allowed to provide. The Bill introduces two categories of restricted programs – Category A and Category B.

2.7 Under the genre conditions, Category A television programs are regarded as free-to-air television and include drama, current affairs, sporting programs, documentary and comedy programs. Datacasters will not be permitted to offer Category A programs on their services, except for incomplete extracts of ten minutes or less.

2.8 Category B television programs can be provided by datacasters on a limited basis in recognition of the fact that these programs, such as short news, weather overview or financial or business information bulletins, are likely to enhance datacasting services and be attractive to audiences. The bulletins must be ten minutes or less but can only be updated every half hour.

2.9 Datacasters will be able to provide a range of other services including information-only programs, educational programs, and foreign language news bulletins which are specifically defined in the Bill. Other services include Parliamentary broadcasts, ordinary electronic mail, interactive computer games and Internet content.

2.10 Datacasters will need to obtain a datacasting content licence from the Australian Broadcasting Authority (ABA) and a datacasting transmitter licence from the Australian Communications Authority (ACA). The genre restrictions and audio content conditions will be datacasting content licence conditions.

Industry views on the proposed definition

2.11 The Federation of Commercial Television Stations (FACTS), in both its submission to the Inquiry and in evidence before the Committee, generally supported the thrust of the proposed changes to the Bill in relation to datacasting. FACTS stated that:

... the new datacasting rules are essential to maintain the legislatively-required separation of broadcasting and datacasting. They will allow a datacaster scope to provide a wide range of services. The review of datacasting schedules for 2003 will allow any obvious problems to be addressed at an early stage in the development of datacasting services.²

2.12 Other submissions and witnesses appearing before the Committee were, however, very critical of the proposed changes to the Bill as they consider it moves away substantially from the previous policy framework and is anti-competitive in that it gives much broader freedom to FTAs to introduce new services on their free spectrum while at the same time severely constraining what new datacasters can offer.

2 FACTS, Submission No. 21, p.1

2.13 News Limited in its submission commented:

The Bill expands what free-to-air operators can do with their spectrum, and severely limits what datacasters can do. In combination, this will have the effect of:

- (a) putting free-to-air operators beyond competition; and
- (b) retarding the social benefits to Australia of datacasting.³

2.14 News Limited argues that the Bill should be rejected in its entirety because it does not provide a coherent framework in which the Australian media industry could be fostered. It believes that the Government should be permitting competition in the media industry, by removing media-specific legislation. Competition will lead to diversity of opinion and content but what is currently proposed will bring about more of the same without innovation, diversity or fresh voices.

2.15 Submissions and evidence to the Committee from Fairfax, Telstra and Optus provide more specific comment on problems with the proposed datacasting definition. They believe the definition is too narrow, unduly prescriptive and inflexible. As well it is confusing and is likely to promote uncertainty for datacasting operators. The submission from the Australian Information Industry Association (AIIA) also supports this contention. These groups advocate that datacasting be as broadly defined as possible so that it promotes innovation and diversity.

2.16 When asked by the Committee to define datacasting in terms of its important elements, Ms van Beelen, from Telstra, commented:

We have always maintained that datacasting should be defined as broadly as possible because it is a new industry that we are trying to create here. The objects of the Act are to actually be amended to say that part of the purpose of the Act is to facilitate datacasting, so we need a definition that helps the industry to emerge. There are problems with a lot of the suggested ways of doing it. It did seem to us that you need some certainty about what datacasting is, so there are a lot of options that can be ruled out because they would involve a case by case analysis. The definition in the current legislation is not all that bad; it is basically anything that is not broadcasting. If a datacaster was under threat of falling foul of the law and the consequences that that entailed if they did do broadcasting, it may be that datacasting could be that broadly defined. I just see no reason for it to be as constrained as it is.⁴

2.17 Ms van Beelen advised the Committee that Telstra's business case, based on the legislation as currently proposed, suggests that datacasting is extremely marginal, if viable at all.

3 News Limited, Submission No. 23, p.1

4 Telstra, *Proof Committee Hansard*, 31 May 2000, p.50

2.18 On being questioned by the Committee in terms of what Telstra would want to do but can't under the proposed legislation, Mr Willis advised that:

If we datacast Internet product, I think it would be very difficult to keep it within the genres that are described in the datacasting bill, so I think it is unworkable.⁵

2.19 Optus also gave evidence to the Committee that it would be able to transmit very little programming as a potential datacaster if the legislation stayed in its current form.⁶

2.20 Fairfax, in its submission, suggests that the distinction between broadcasting and datacasting should not be based on the type of content, but that what distinguishes the two is that datacasting is interactive. Fairfax maintains that there is a lack of clarity with the genre definitions in areas such as the distinction between genres (eg news and current affairs), foreign language news services which appear to prevent English subtitles and the requirement for datacasting to avoid being entertaining but still attract audiences. Fairfax also argues for a more flexible definition of information-only programs that allows for a combination of fact, opinion and advice.⁷

2.21 In evidence before the Committee, Fairfax made reference to the Optus submission which suggested that a further way to distinguish between broadcasting and datacasting is that broadcasting is live and everyone gets it at the same time. Stored information could, therefore, also be a distinguishing factor.⁸

2.22 The submission from the Australian Consumers Association suggests defining broadcasting rather than datacasting or, alternatively, defining a television program. Datacasting would then be defined as whatever broadcasting is not. A suggested definition of broadcasting is:

A non-interactive continuous stream of primarily audio-visual material transmitted on a sustained and scheduled basis occupying significant blocks of time each day, to many consumers simultaneously.⁹

2.23 This could also constitute a definition of a television program. The Bill could then specify that datacasting may not place such programs in an uninterrupted and linear stream without interactivity.

2.24 The interactivity requirement for datacasting would only be for television programming, which would not stop datacasters offering a wide range of other services, but it would stop them evolving into commercial television broadcasting.

5 Telstra, *Proof Committee Hansard*, 31 May 2000, p.49

6 Cable & Wireless Optus, *Proof Committee Hansard*, 1 June 2000, p.112

7 John Fairfax Holdings Limited, Submission No. 25, pp 4-5

8 John Fairfax Holdings Limited, *Proof Committee Hansard*, 1 June 2000, p.96

9 Australian Consumers Association, Submission No. 10, p.7

2.25 The Committee concluded that the genre classification of datacasting provides an easily understood basis for defining these services.

Datacasting educational programs

2.26 In relation to the restrictions on the types of programs permitted under the datacasting rules, a number of submissions argued strongly for amendments to Clause 3 (educational programs) of Schedule 6 to the Bill to broaden the definition of “educational programs”. Referring to its “learning for life” proposals to be allowed under the datacasting rules, the ABC explained:

Rather than being conventional vocational or academic learning, the ABC’s educational plans are for interactive, practical, accessible programs for busy people dealing with rapid change, complexity and stress in their lives.¹⁰

2.27 Fairfax also pointed out that the restrictions were such that no educational programs of any interest could be offered by datacasters:

I think another issue we are particularly concerned about ... is the way the definition of education has been done. In our view, if the programming requires that essentially it be a course of study, then children under 12 do not do courses of study. You do not link things to courses of study. It seems to us that that means there is going to be very few children’s educational programs on datacasting. Also there is probably going to be very few open university type programs on datacasting, unless you can link them to an institution or something like that providing a course of study. We think there is a real risk in the way it is presently drafted. For example, a program which may be educational in relation to interests of rural communities or interests of particular sections of city communities will not be available on datacasting, for no particular reason.

2.28 Datacasting services could be of great potential benefit to people who do not have physical access to educational courses and large libraries or university campuses. To people who live in rural areas, they could offer access to what was previously the preserve of town and city dwellers. In the Committee’s view it would be regrettable if the current restrictions resulted in discouraging potential datacasters from offering educational programs. Accordingly,

Recommendation

The Committee recommends that the Bill be amended to delete the requirement that only those educational programs that are linked to a course of study or instruction be acceptable for datacasting purposes.

10 Australian Broadcasting Corporation, Submission No. 20, p.5

National broadcasters radio simulcast

2.29 In their respective submissions, both the ABC and SBS argue that the datacasting definition should be amended to allow them to broadcast their radio network on the audio stream. This will allow them to reach audiences in regional and remote areas that currently do not get a full suite of radio services.¹¹ In seeking the necessary amendments to the Bill in order to be able to simulcast their radio services, SBS told the Committee:

It seems to us a really good opportunity to solve the problem that exists and that has existed for some time, which is that SBS Radio is currently available only in the state and territory capitals, plus Wollongong and Newcastle. We have tried, over many years, to get frequency allocations in regional and rural areas. That is getting harder and harder to achieve in the very competitive market for spare frequency. It seems to us that it would be really simple to use a tiny—and it would be only very small—amount of our digital television spectrum to take our radio services into the homes of everyone around Australia.¹²

2.30 Technical limitations mean that currently Australians whose first language is a language other than English and who live in rural and remote areas are not able to access SBS programs in spite of the requirement in SBS's Charter that it should make its services available to those Australians as well as to those who live in the cities.

2.31 The representatives of the ABC also argued for amendments to the Bill stating that ABC radio services such as Parliamentary Radio and News Radio, Classic FM and Triple J could all become available to all parts of Australia if the ABC were to be allowed to simulcast those services using digital spectrum available to it. At present, many rural communities do not receive those services. Others have had to raise their own funds to facilitate access. The ABC's Managing Director told the Committee:

... if you take News Radio, for example, I think the coverage—I would have to check—is around 58 per cent of the country. To enable all the people of Australia to get News Radio I think would be an added benefit. If we were to distribute it through a decoder in digital, they could receive that ...

...Triple J has an audience of a lot of young people who feel they are disconnected. I feel that all those services ought to be made available to all Australians where the parliament has the chance to do it.¹³

2.32 The evidence given at the inquiry persuaded the Committee that digital television transmission should be used to enable the ABC and SBS to make more

11 Australian Broadcasting Corporation, Submission No. 20, p.6; Special Broadcasting Service, Submission No. 11, p.3

12 Special Broadcasting Service, *Proof Committee Hansard*, 1 June 2000, p. 91

13 Australian Broadcasting Corporation, *Proof Committee Hansard*, 1 June 2000, p 81

radio services available to people in the regions who do not currently receive them. Accordingly,

Recommendation

The Committee recommends that the Bill be amended to enable the Australian Broadcasting Corporation (ABC) and the Special Broadcasting Service (SBS) to broadcast their radio services through their digital television channels.

2.33 The ABC also argues that, if it is not to be allowed to multichannel, the Bill should be amended to allow it to datacast its children's programming, information-only programming and educational programming. All of that mostly educational content would be severely restricted if the Bill is passed in its present form.¹⁴

2.34 In its submission, SBS joins other witnesses in recommending that the prohibition on program extracts being self-contained be deleted from the legislation. SBS argues that:

Where program extracts can be no longer than ten minutes, and cannot be combined to constitute a television program, it seems unnecessarily prescriptive to also prevent them being self-contained. This prohibition particularly affects new and young film makers, who typically start their film making development with short films and animation programs. SBS is currently the only broadcaster to accommodate short film and video, principally its weekly compilation program, *Eat Carpet*.¹⁵

2.35 A number of submitters also recommended that the reference to "little or no emphasis on dramatic or entertainment value" be deleted from the list of restrictions on Information-only Programs (new Schedule 6, Clause 4 of the Bill) as many programs which are not primarily designed to be entertaining still need some entertainment value in order to attract audiences. As well, there will be difficulties in defining whether a program has entertainment value or not, since this may be a subjective viewpoint.

2.36 The point made in the original legislation was that broadcasting programs would be primarily offering dramatic and entertainment value. The proposed Bill switches this around to deny non-broadcasting services (ie datacasting) any entertainment value at all.

2.37 Some concern was expressed about provisions relating to the restrictions on using datacasting to provide Internet services. Fairfax believes the restrictions will

14 Australian Broadcasting Corporation, Submission No. 20, p.5

15 Special Broadcasting Service, Submission No. 11, p.4

mean that very few, if any, viable services will be developed. In evidence before the Committee, Fairfax stated:

The Internet provisions just do not work. They can and should be amended. In relation to that, it is important to remember that spectrum broadcasting is not like cable. In cable you communicate ultimately one to one and you can send information packages to individuals. Therefore, you can tailor the information you send out and you can use the medium efficiently in that way. Broadcasting spectrum has huge advantages in terms of its communication with the public because of the ubiquity of the television set. Notwithstanding that, it is difficult to speak one to one to users when you are broadcasting. To try to do it uses up an enormous amount of spectrum. The way the present Internet conditions are drafted—that is, not allowing a walled garden—will make it extremely difficult, at least under present technology, to present any kind of viable Internet service at all.¹⁶

2.38 Telstra indicated in its evidence that it understood that much of the material it uses on its Internet site would not be able to be part of a datacasting service received through a television set unless it was in a site which Telstra controlled. This could be a costly exercise for Telstra and in some instances, an impossibility, if it is provided to Telstra on an ‘as is’ basis. Telstra believes this aspect of the legislation is unworkable.

So it would have to be, in a sense, taken from the Internet and put in a walled garden. We understand that it would then be subject to the genre restrictions, which makes it problematic if we have that content in an unalterable state.

We also think that we are not going to be in a position to re-edit content, particularly where we have acquired that content from third parties. It makes it a significantly more costly proposition if you have to re-edit for your datacasting service content that you already have for your broadband service. We may not have that right, in any event. If we have acquired content from a third party, it would quite often be provided to us on an ‘as is’ basis. What we see as an opportunity to provide Internet type services to people who may not otherwise access them is going to be thwarted because we are not going to be able to use the content that we have.¹⁷

Unfair competition from FTAs

2.39 In its submission, Optus raised the issue of the potential for FTA broadcasters to use the digital spectrum which they have received free of charge to produce datacasting services which will unfairly compete with potential new entrants. While FTAs will have to pay a datacasting charge, they will still be competing from a position of strength in terms of existing infrastructure and commercial content arrangements. This is especially concerning given the downgrading of HDTV

16 John Fairfax Holdings Limited, *Proof Committee Hansard*, 1 June 2000, p.94

17 Telstra, *Proof Committee Hansard*, 31 May 2000, p.52

requirements on the FTAs which mean that when they broadcast in SDTV using 2 MHz, they have 5 MHz spare capacity to use for datacasting purposes (after 2003 or once a datacaster has begun services in their broadcast area).

2.40 Optus made the point that:

New datacasting providers are likely to need several years and large advertising budgets to be able to compete with the profile and exposure of datacasting services offered by an FTA. Also new datacasters will have obtained spectrum through a price based allocation process, and will not be able to rely on an incumbent position in the FTA industry in order to provide datacasting services. New entrants will therefore be undertaking greater risks in bringing new services to audiences.¹⁸

2.41 Optus suggest consideration be given to expanding the definition of datacasting for new entrants, while maintaining some restrictions for FTAs until after the end of the simulcast period. Optus recommends that at that time, FTAs be required to pay the same amount as new entrants pay at auction for the right to offer datacasting services. This will ensure they do not have an unfair competitive advantage over new datacasters who have to purchase spectrum on the open market.¹⁹

2.42 Fairfax also raises concerns about unfair competition from the FTAs in the area of datacasting. In evidence to the Committee, Ms Hambly stated:

If the entities that can datacast and broadcast do not pay for the extra services that they are able to provide – for example, the electronic program guide, multi channelling, enhanced programming, which I think are at least pseudo datacasting – then I think we are at a competitive disadvantage just in relation to datacasting.²⁰

2.43 The Australian Information Industry Association (AIIA) submission suggests that options for ensuring a more competitive environment include limiting the type of programs that FTAs are permitted to datacast or not permitting them to datacast at all before the end of the simulcast period.. AIIA also believes careful consideration will need to be given to the charges FTAs pay for use of the datacasting spectrum and their relationship to auction prices paid by new entrants.

2.44 Telstra took a strong view on this in evidence before the Committee:

On the one hand, you have free spectrum, new revenue streams particularly with what we see as an extension of multichanneling in the form of digital program enhancements, firm business models and certainty about the availability of spectrum, protection from competition, broad regulation, flexibility and a perpetual licence. On the other hand, you compare that with

18 Cable & Wireless, Optus, Submission No. 13, p.13

19 Cable & Wireless, Optus, Submission No. 13, p.13

20 John Fairfax Holdings Limited, *Proof Committee Hansard*, 1 June 2000, p.95

a high up-front charge for spectrum to new entrants in an emerging industry who need to make a business case for acquisition of that spectrum in a highly risk[y] environment with untested business models. It is most unusual to so prescriptively regulate an emerging industry. We see that as possibly being prone to litigation and uncertainty and as just not enhancing the business for datacasters at all.²¹

Electronic Program Guides (EPGs)

2.45 A number of submissions and witnesses to the Inquiry indicated some concerns in relation to the FTAs use of EPGs. Firstly, concern was expressed about the competitive advantage FTAs receive through being able to offer EPGs without paying for them. The second issue raised was whether there is a need to legislate for control of EPGs and conditions of use.

2.46 However, SBS's submission argued for an expanded definition of the EPG to allow for its full potential as an audio visual medium to be realised.

2.47 The objective of the additions to Schedule 4, Clauses 6 and 19 of the Bill relates to EPGs and adds to the list of exceptions to the legislative requirement that licensees must not broadcast a television program in SDTV digital mode during the simulcast period unless it is also broadcast simultaneously in analog mode in the licence area concerned.

2.48 The proposed Schedule 4, Clauses 6(24) and 19(24) define EPGs as schedules of television programs provided by any or all of the national or any or all of the commercial television broadcasting services; or both, or such a schedule combined with either or both of the following:

- brief, textual items of factual information, and/or comment, about some or all of the programs in the schedule;
- a facility used solely to enable an end-user to select, and commence viewing, one or more of the programs in the schedule.

2.49 Fairfax believes that the ability to use EPGs as a launch pad to other services means an EPG can become a "portal" for TV channels, datacasting services, e-commerce or Internet services. This gives FTAs potentially a very significant advantage in this area. In evidence to the Committee, Fairfax commented:

We think that there should be some more levelling of the playing field than there presently is. So we do not have a problem with the free-to-air's doing electronic programming guides. However, we think that it is not what broadcast television does at the moment and, therefore, if they want to do it they should pay for it. Further, because they will be able to do it for a very

21 Telstra, *Proof Committee Hansard*, 31 May 2000, p.49

wide audience, unless the electronic program guide that a particular free-to-air wants to broadcast is simply of its own programs—if it is putting up anything other than its own programs—we believe that it should put up all datacasting and free-to-air programming. We also believe that there should be a provision in the Act making information about both free-to-air and datacasting programming available to other participants in both of those industries so that we can all produce a useful program guide should we want to.²²

2.50 The ABC, in evidence to the Committee, agreed that any rules relating to EPGs in Australia should at least be as robust as those in the UK in ensuring fairness to all players through requiring that if programming information is provided for one channel other than one's own, it must be provided for all and in a standardised way.²³

2.51 SBS, in its submission, stated that the restrictions on the EPGs appear to be stifling at the outset the potential development of a powerful new tool for both broadcasters and consumers. This is because the EPG is restricted to a text-based schedule and a program selector. SBS believes the EPG offers an interactive gateway to much more than an index style list of TV programs and should be seen as an audio visual medium. SBS recommends that the definition of an EPG be expanded to allow for audio, video and animation content as well as text.²⁴

2.52 In its evidence to the Committee, Open TV also supported the urgent need for legislation to cover ownership of EPGs and under what conditions. Open TV described the EPG, in interactive television terms, as “the pot of gold, the most widely used interactive television application”.²⁵

2.53 FACTS, in its supplementary submission, argues that more elaborate EPGs will be permitted as datacasting services once the embargo on FTAs offering datacasting services ends (no later than 1 January 2002) and that the basic EPGs defined in the legislation are just an interim measure to ensure that viewers have some means of navigating around the new digital services.²⁶

2.54 Open TV also stated that the situation in the UK where the different FTAs all came under the banner of On Digital meant that users could get all FTA programs and other services through one EPG. Given the proposed legislation in Australia, Open TV was unsure how this would work.²⁷

22 John Fairfax Holdings Limited, *Proof Committee Hansard*, 1 June 2000, pp 94-95

23 Australian Broadcasting Corporation, *Proof Committee Hansard*, 1 June 2000, pp 75-76

24 Special Broadcasting Service, Submission No. 11, p.5

25 Open TV, *Proof Committee Hansard*, 1 June 2000, p.61

26 FACTS, Supplementary Submission No. 21a, p.2

27 Open TV, *Proof Committee Hansard*, 1 June 2000, p.61

2.55 A strong case was made by witnesses and in submissions to the Committee that Electronic Program Guides should be standardised so that in cases where a channel provides programming information other than its own then it should provide programming information for all channels including those offering exclusively datacasting services. In a supplementary submission to the inquiry, FACTS stated its opposition to such a requirement.²⁸

Powers of the ABA as regulator

Stay of proceedings

2.56 The Bill proposes to insert a new Clause 57 into the BSA concerning stay of proceedings relating to ABA determinations on additional licence conditions, remedial directions and suspension/cancellation decisions for datacasting licensees. These changes will:

- prevent relevant provisions of the *Administrative Decisions (Judicial Review) Act 1977* (ADJR) from applying;
- prevent the Federal Court from making any orders staying or otherwise affecting the operation or implementation of any ABA decision pending finalisation of an application for a writ or injunction in relation to that decision; and
- prevent relevant sections of the *Administrative Appeals Tribunal Act 1975* from applying.

2.57 The intent of the legislation is to prevent a person from continuing to provide an unlicensed datacasting service or a service which breaches certain licence conditions throughout the period during which the case is being considered by the courts or the Administrative Appeals Tribunal. The Explanatory Memorandum to the Bill acknowledges that this is unusual but stated that:

In the absence of such a provision, there may be considerable financial incentives for a datacasting licensee to test the boundaries of what is permitted under its licence, while using whatever scope is available for legal challenge to delay the effect of any enforcement action taken against it.²⁹

2.58 Fairfax was particularly concerned about the powers given to the ABA in relation to datacasting licensees. It described it in the following terms:

Imposition of the sentence before the trial is complete. Removal of a service from the air is effectively a death sentence on that service. Elemental principles of justice and due process require that irreparable enforcement

28 FACTS, Supplementary Submission No. 21a, p.3

29 Explanatory Memorandum, Broadcasting Services Amendment (Digital Television and Datacasting) Bill 2000, p.129

action should only be imposed after all legal remedies are exhausted. The legislation should be so amended to eliminate this potential.³⁰

2.59 In evidence to the Committee, Fairfax also pointed out that:

... [these measures] have no precedent in the Broadcasting Services Act as it presently stands. Notwithstanding the fact that very serious matters are dealt with in the Act—matters of cross-media ownership, foreign ownership; all of those things—none of those provisions give the kinds of powers that the ABA has to, in essence, take people off the air or impose extra conditions on licences. You have ultimate relief in the courts, but by that time you may have been off the air for some time.³¹

Oversight of ABC and SBS datacasting services

2.60 Both the ABC and SBS stated that, in giving the ABA jurisdiction over ABC and SBS datacasting content, the Bill potentially compromises the statutory roles of the respective Boards. The ABA would, in the view of the ABC and SBS, have control over program content and this is contrary to the spirit of their enabling legislation, the *Australian Broadcasting Corporation Act 1983* (ABC Act) and the *Special Broadcasting Service Act 1991* (SBS Act).

2.61 In its submission, the ABC argued that:

The ABA's jurisdiction over datacasting content presents a potential conflict of interest for the ABA in that it will be acting as both the creator of the rules as well as policing compliance. The ABC Board believes it is competent to ensure that datacasting or other digital services comply with the Government's rulings on content restrictions ...

In previous broadcasting legislation, the ABC has been treated differently to the commercial sector because of its distinctive role and different accountability requirements. This Bill places the basic grant of power to datacast in the Broadcasting Services Act and not the ABC Act.³²

2.62 The SBS submission points out that national broadcasters have not, hitherto, been subject to a licensing regime. SBS recommended that:

... the national broadcasters be removed from the commercial datacasting framework (Schedule 6), and that an express power for SBS and ABC datacasting be provided in the *SBS Act 1991* and the *ABC Act 1983* respectively.³³

30 John Fairfax Holdings Limited, Submission No. 25, p.10

31 John Fairfax Holdings Limited, *Proof Committee Hansard*, 1 June 2000, p.93

32 Australian Broadcasting Corporation, Submission No. 20, p.7

33 Special Broadcasting Service, Submission No. 11, p.7

2.63 However the Committee believes that it is important in the context of the datacasting regime that the ABA should have a formal role in governing adherence to the definitions by all players in the new environment.

Datacasting charges for national broadcasters

2.64 A further but related issue to the one above for the ABC and SBS is the imposition of datacasting charges on all FTAs. Both the ABC and SBS argue that they should be exempt from the requirement to pay a datacasting charge as they should be treated differently to commercial FTAs and their public benefit, not-for-profit objectives should be recognised. The ABC submission states that:

The ABC is funded through Parliamentary appropriation and operates as a non-commercial service for the benefit of all Australians. As datacasting is an additional means of extending its services to the public, it considers that it should not be charged for doing so. If such a charge were imposed, the ABC would submit that its Parliamentary appropriation should be increased accordingly.³⁴

2.65 SBS, in evidence to the Committee, argued that it would need further Government funding to cover the costs of the charge and that this would be nonsensical.

We have no idea how that charge is going to be configured or what it will be, but we would certainly have to go to government to cover the cost of any charges. You then have the ridiculous situation of applying to government to cover a national broadcaster paying a fee back to government. It does not make sense to us.³⁵

Length of datacasting transmitter licences

2.66 The Bill provides that the transmitter licences will be a category of apparatus licence under the Radiocommunications Act and allocated under a price-based system for a 10 year period with the expectation of a single renewal of 5 years only. The Bill also imposes restrictions on what the licence can be used for up until 31 December 2006. From 1 January 2007, the licensee will be able to provide licensed broadcasting services as well as licensed datacasting services.

2.67 The regulatory and revenue arrangements which should apply to enable a datacasting transmitter to be used on or after 1 January 2007 to provide other services licensed under the BSA is subject to review before 31 December 2005.

2.68 Submissions and evidence before the Committee indicate that the finite nature of the licences and the uncertainty surrounding regulations after 31 December 2006

34 Australian Broadcasting Corporation, Submission No. 20, p.6

35 Special Broadcasting Service, *Proof Committee Hansard*, 1 June 2000, p.90

may have an impact on the viability of new entrants to the market and on the prices which they may be willing to pay for the licences.

2.69 In evidence before the Committee, Telstra argued that:

... without rapid take-up of digital TV and datacasting services, consumers will not be able to benefit from the competitive provision of services using the spectrum that will be freed up once the analog simulcast is turned off ... There are layers of prescription and limitation on datacasting services that really give us a lack of commercial certainty. The bill under discussion today effectively loses its unique opportunity. This is because datacasters are not interested in investing in spectrum, with the business cases really having only a 15-year anchor point, whereas with the free-to-air there is an expectation of renewal. There are also many regulatory reviews which will impact on their business, anyway. These factors probably also mean that the cost of the datacasting spectrum will be low rather than high because of the inherent risk in entering into this business, especially in entering against businesses that will already have had secure bands and will be secure in that business.³⁶

2.70 Optus expressed similar concerns:

From Optus's point of view, we have a concern at the degree of uncertainty that that brings to the environment and also the lack of parity between the way the datacasters are treated and the way the free-to-air broadcasters, who have expectations of renewal, are treated.³⁷

2.71 In response to questioning from the Committee, Fairfax indicated that the reviews of datacasting (Schedule 6, review due in 2003 and Post-2006 Regulatory Arrangements review, due in 2005) should look at the issue of the length of the licences and be conducted as quickly as possible. Fairfax commented:

Most importantly there is a need for certainty. I can understand that none of us are quite sure how this service will develop and how indeed other services which may be provided through spectrum will develop as well. So I can understand the notion of a review period. But I think it is very important that the people who are thinking of bidding for these licences have a clear understanding of what are the terms under which those reviews will be carried out.³⁸

36 Telstra, *Proof Committee Hansard*, 31 May 2000, p.48

37 Cable and Wireless Optus, *Proof Committee Hansard*, 1 June 2000, p.111

38 John Fairfax Holdings Limited, *Proof Committee Hansard*, 1 June 2000, p.95

