

Parliament of the Commonwealth of Australia

**Broadcasting Services Amendment
(Digital Television and Datacasting)
Bill 2000**

**Report of the Senate Environment, Communications,
Information Technology and the Arts Legislation Committee**

June 2000

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Committee Secretariat

Ms Roxane Le Guen, Secretary

Ms Stephanie Holden, Senior Research Officer

Ms Rhonda Thorpe on secondment from the Dept of Communications IT & the Arts

Ms Angela Mututu, Executive Assistant

Environment, Communications, Information Technology
and the Arts Legislation Committee

S1.57, Parliament House

Canberra ACT 2600

Tel: 02 6277 3526

Fax: 02 6277 5818

Email: erca.sen@aph.gov.au

LIST OF RECOMMENDATIONS

Recommendation 1

The Committee recommends that the Senate pass the Bill with the following amendments.

Recommendation 2

The Committee recommends that the Australian Broadcasting Authority be given the power to rationalise and clear spectrum particularly for the creation of datacasting channels.

Recommendation 3

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 channels.

Recommendation 4

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.

Senator Alan Eggleston

Chair

CHAPTER 1

OVERVIEW

Introduction

1.1 The Broadcasting Services Amendment (Digital Television and Datacasting) Bill 2000 was referred to the Senate Environment, Communications, Information Technology and the Arts Legislation Committee on 10 May 2000 by the Senate (Selection of Bills Committee Report No 6 of 2000). The Committee was required to report to the Senate by 8 June 2000.

The Bill

1.2 The purpose of the Broadcasting Services Amendment (Digital Television and Datacasting) Bill 2000 amends the *Broadcasting Services Act 1992* (the BSA) and the Radiocommunications Act 1992 to make arrangements for the introduction of digital television in Australia and to implement a new regulatory regime for the provision of datacasting services. The changes follow various reviews required to be conducted by Clause 59 of Schedule 4 of the *Broadcasting Services Act 1992* (BSA). The Explanatory Memorandum to the Bill deals in detail with the proposed amendments.¹

The Committee's Inquiry

1.3 The Committee advertised its inquiry in *The Week-end Australian* and *The Australian Financial Review* and on the Internet. The Committee also wrote to a number of organisations with an interest in television and with a potential interest in datacasting, inviting them to make submissions. The Committee received 38 submissions and a number of supplementary submissions. A list of the submissions received is at Appendix 1. The Committee held two days of public hearings at Parliament House in Canberra on Wednesday 31 May 2000 and Thursday 1 June 2000 and heard from 60 witnesses. A list of the witnesses who appeared before the Committee is at Appendix 2.

Overview of major issues

1.4 The Committee received 38 submissions, 7 of which came from private individuals and 1 from the Government of Western Australia. The majority of submissions came from organisations involved in the television broadcasting industry and from the potential datacasters. Three submissions were exclusively concerned with captioning issues and another 5 (from commercial free-to-air television

1 Explanatory Memorandum, Broadcasting Services Amendment (Digital Television and Datacasting) Bill 2000.

broadcasters) requested minor amendments to the captioning requirements on the basis of cost. Most of the submissions from individuals expressed concern that the legislation might result in further restrictions in consumer choices in access to information in the digital environment.

1.5 While the Federation of Australian Commercial Television Stations (FACTS) and the regional TV operators, Prime, Southern Cross, Ten Network and WIN were supportive of the broad thrust of the Bill, the majority of submissions sought considerable amendments to the legislation relating to three main issues:

1. **the mandating of HDTV** (and the allocation of free spectrum to the free-to-air (FTA) television stations consequent upon that decision);
2. **the definition of datacasting** (and the consequent restrictions on services that datacasters can provide); and
3. **the issue of multichannelling.**

1.6 Other issues of concern raised in submissions and at the Committee's public hearings were:

- the powers given to the Australian Broadcasting Authority under the Bill;
- the timing of the various reviews required under the Bill;
- the determination of captioning standards to assist the hearing impaired in gaining access to television programs;
- the issue of Australian content for digital television and datacasting services;
- the regulation of standards (for example, an audio standard or for set-top boxes);
- the ability for ABC and SBS to use digital spectrum to simulcast their radio services to those regions that are not currently able to receive those services; and
- the lack of digital spectrum provision to community broadcasters.

1.7 A number of submissions referred to the timeframe for the passage of this Bill. With few exceptions however, there was strong support among witnesses to the Committee's inquiry for Australian television to convert to digital mode within the next year. Those who did not support the move (such as the Australian Consumers Association (ACA)) did not object to digital television per se. Rather, the ACA argued that a delay would result in the development of a better policy approach and work in favour of the Australian consumer.²

1.8 The issue of conversion to digital television has been canvassed at length in various reports over the last eighteen months. In this report the Committee will focus only on those areas of the Bill that, according to submissions and witnesses to this

2 Australian Consumers' Association, Submission No. 10, p.12

inquiry, are causing the most concern amongst the stakeholders in the television and datacasting industries.

Mandating HDTV

1.9 Under section 37 of the *Television Broadcasting Services (Digital Conversion) Act 1998*, Australia's commercial FTA television stations and the two national broadcasters are required to commence transmission in digital High Definition Television (HDTV) format in State capital cities on 1 January 2001. Each free-to-air television station (the commercial stations and the two national broadcasters) were "loaned" 7 MHz of spectrum free of charge to enable them to broadcast in HDTV while maintaining transmission of their analog signal. HDTV was the only digital standard acceptable under the Act but a minimum quota for HDTV was yet to be determined.

1.10 On 21 December 1999, the Minister for Communications, Information Technology and the Arts announced the Government's decisions in relation to digital television. The Bill before the Committee, the *Broadcasting Services Amendment (Digital Television and Datacasting) Bill 2000* is the legislative framework through which the Government seeks to implement those policy decisions.

1.11 The current Bill provides for digital transmission to be in both HDTV and Standard Definition Television (SDTV) formats with the requirement that a minimum of 20 hours per week of HDTV be broadcast after 1 January 2003 by those capital city FTA stations that would have begun their first digital transmission on 1 January 2001. (The HDTV quota requirements for the national broadcasters are slightly different and commercial FTA regional stations are required to meet the minimum 20 hours per week quota two years after their first HDTV broadcast). Since the stations need to simulcast their analog transmission at all times, there will be times after 1 January 2001 when the free-to-air television stations will be transmitting in 3 modes HDTV, SDTV and analog (triplecast).

1.12 In evidence to the Committee, FACTS was strongly supportive of HDTV as a driver for encouraging the take-up of digital television:

High definition will be very significant in promoting digital television, although we would not expect large numbers of high definition sets to be sold in the very early years ...

... We think HDTV will be very important early on to promote digital television generally. We think, without HDTV, we would have a huge uphill battle to get anyone into an electrical goods store. HDTV is going to be the drawcard.³

3 FACTS, *Proof Committee Hansard*, 31 May 2000, pp 30 and 37

Other free-to-air commercial TV broadcasters who appeared before the Committee endorsed FACTS' submission.⁴

1.13 However, the majority of submissions and witnesses to the Committee expressed grave doubts about the ability of HDTV to attract enough support to make the move to digital television successful. The representatives of the Pay TV industry were particularly confident that HDTV would fail in the Australian marketplace as it has failed overseas:

In the USA today HDTV is a bit of a joke ... The consumers of America, as has been evidenced here in previous witnesses' information, just have not taken it up. It is far too expensive and it is far too expensive to make. It is in fact a dud.

The UK rejected it altogether. We find that the multiplex model was favoured and HDTV was rejected. We find that Europe has no plans whatsoever for HDTV. We heard yesterday through FACTS that Japan has put HDTV on hold. So what are we saying here? Are we saying that HDTV's last bastion in the world is going to be here in Australia? Yet at yesterday's committee hearing I heard people say, 'No, there won't be production here in Australia, it is too expensive. No, there won't be manufacture, nobody is interested ...

... I think there is an overwhelming amount of evidence worldwide that HDTV is a non-goer.⁵

1.14 Those submissions and witnesses who told the Committee that they opposed HDTV because it was bound to fail in the Australian market fell into three categories:

- i) those who did so because of the high cost of the equipment to the consumer;
- ii) those who believed that only a wide range of new services would encourage the consumer to spend more to switch to digital; and
- iii) those whose main concern was with the 7MHz of spectrum that has been freely loaned to the free-to-air television stations to enable them to broadcast in HDTV.

4 Southern Cross Broadcasting, *Proof Committee Hansard*, 1 June 2000, p.121

5 Australian Subscription Television and Radio Association, *Proof Committee Hansard*, 1 June 2000, p.105

Cost

1.15 Mr Encel, a television retailer told the Committee that HDTV would not be successful with Australian consumers and that it should “simply [be] dropped from the current Triplecast model”:

SDTV will provide nearly all the enhancements that are currently being promoted in the media, such as datacasting, home shopping, interactivity, Internet access etc. From my company’s experience, I can advise that “cinema quality” television pictures are not high on most people’s TV requirements. Most people would like them but few would pay the premium required.⁶

1.16 According to Mr Encel, the majority of Australian consumers buy “\$500 to \$800 TVs”⁷ while, based on the American experience, HDTV sets would cost considerably more (Mr Encel referred to a figure of \$20,000).⁸ Most Australian consumers would look to use a set-top box to receive digital television and evidence to the Committee suggested that the cost of a set-top box would, in the current market be around \$1000. In relation to HDTV, set-top boxes have the added disadvantage that, while they enable the user to receive the digital signal, the High Definition quality of the picture is not obtained. Only a HDTV set can perform that function.

1.17 In response to Mr Encel’s claims about the cost of HDTV sets, FACTS’s Mr Branigan told the Committee:

What do we have to go on in terms of what HDTV equipment will retail for in this country? Very little. The only manufacturer that I can recall providing an estimate of what its equipment would cost is Sony, which told the government late last night that its first HDTV offering here would cost, I think, \$8,000 ...

We have talked to a number of Chinese manufacturers who are talking about something like half that price. Whether that turns out to be achievable or not is anyone’s guess.⁹

1.18 The Committee was of the view that given that digital technology is in its infancy, it would be unwise to close off any options. The Committee notes that there are provisions in the Bill for various reviews that will provide opportunities for reassessment of HDTV and SDTV developments. The experience of the past five years has demonstrated that technological change is occurring very rapidly in this area. The pace of change in the future could see the resolution of many of the current issues.

6 International Dynamics, Submission No. 1, p.5

7 International Dynamics, *Proof Committee Hansard*, 31 May 2000, p.6

8 International Dynamics, *Proof Committee Hansard*, 31 May 2000, p.6

9 FACTS, *Proof Committee Hansard*, 31 May 2000, p.38

Diversity of program choice and new services

1.19 In evidence to the Committee, the Deputy Chairman of the Productivity Commission's Broadcasting Inquiry stated:

... on high definition, the commission's position is that high definition television is most unlikely to be a driver of uptake; new services and new players are much more likely to be so.¹⁰

1.20 This position was supported by a number of other witnesses including the representatives of television manufacturer, Philips. While supporting the move to digital television, they argued against HDTV and suggested that new and exciting offerings (such as interactivity) and more diverse content through multichannelling would be a greater incentive than improved picture and sound quality to encourage large numbers of consumers to move to digital television. Commenting on Mr Encel's evidence to the Committee, the General Manager of Philips Sound and Vision said:

I think in principle we would share the view that there may not be enough benefit coming down the line in the near term of a digital nature to motivate the consumer to invest in new televisions ...

The dilemma that we have struggled with ourselves is that great picture, great sound in itself may not be the motivator that we think it is. Our experience internationally, looking at other markets, would suggest that content, interactivity, is probably, in true terms, a benefit that is not received today that consumers would find motivating.¹¹

1.21 The Committee notes that submissions and witnesses from the television industry and potential datacasters were unanimous in the view that the offer of new services and diversified content would be the greatest driver of digital take up. FACTS told the Committee:

Program enhancements and datacasting will be essential other services to offer viewers in these very early years.¹²

1.22 In arguing for a more flexible definition of datacasting, Telstra put forward the view that:

... datacasting will assist the driving of digital take-up. Through the provision of new interactive services, it has the potential to drive digital TV. We believe that, without the driving of datacasting, the take-up of digital will take decades.¹³

10 Productivity Commission, *Proof Committee Hansard*, 31 May 2000, p.55

11 Philips Sound and Vision, *Proof Committee Hansard*, 31 May 2000, p.45

12 FACTS, *Proof Committee Hansard*, 31 May 2000, p 30

13 Telstra, *Proof Committee Hansard*, 31 May 2000, p 48

1.23 The ABC's Managing Director arguing for the ABC to be allowed to multichannel said:

... we think the two channels operated by the ABC could improve the digital offering and, assuming agreement could be reached for carriage, would make a more attractive proposition in the market for the customer to want to take up digital.¹⁴

1.24 His view was supported by SBS's Policy Manager, Ms Christine Sharp:

SBS's view is that content is of primary interest to audiences and that, unless we can offer significantly different content, consumers will not perceive that they are getting very much from digital television. The prospect of improved technical quality alone will not be a driver for audiences.¹⁵

The issues surrounding the ability for the ABC and SBS to multichannel are dealt with in Chapter 3 of this report.

Access to spectrum

1.25 Of overwhelming concern to witnesses from the Pay TV industry and from the potential datacasters is the issue of access to scarce spectrum (especially while the analog spectrum is still being used). At the heart of this argument is the fact that it is possible to convert to digital via SDTV by using 2 MHz of spectrum. Since those groups are convinced that HDTV will fail and have a limited lifespan, they see each FTA station tying up 5 MHz of extra spectrum capacity that they have obtained free of charge. In its submission to the Committee's inquiry, Cable and Wireless Optus argued:

There is no policy justification for the FTAs retaining 7 MHz of spectrum at no charge in light of the "downgrading" of HDTV in the digital television regulatory scheme. It is not possible to defend the amendment as an economic and efficient use of the spectrum.

Accordingly, this provision should be deleted from the Amendment Bill and the allocation of 7MHz of spectrum to FTAs for this purpose should be reviewed. In particular, consideration should be given to the returning of at least some of the excess spectrum to the Federal Government where it can be the subject of a competitive auction.¹⁶

14 Australian Broadcasting Corporation, *Proof Committee Hansard*, 1 June 2000, p.1

15 Special Broadcasting Service, *Proof Committee Hansard*, 1 June 2000, p. 88

16 Cable & Wireless Optus, Submission No. 13, pp 4-5

1.26 In arguing for the proposed review of HDTV quotas¹⁷ to be brought forward, ASTRA also pointed out that dropping HDTV would “free up” valuable spectrum:

If a review were brought forward and HDTV was canned, did not go ahead, and people realised that it was not the way to go for the digital future, then five-sevenths of the spectrum, I presume, would return to the government for public auction. We took the liberty of doing some research on what that spectrum is worth ... Our conservative—and I underline ‘conservative’—figures for the five capital cities only put a value on that spectrum of in excess of \$2 billion at current market rates.¹⁸

1.27 In putting forward the case for freeing up spectrum for new players, the Productivity Commission’s Professor Snape argued for a certain switch-off date for analog transmissions:

To get anywhere near the full benefits from the new technologies, it is essential to ensure the rapid switch-off of analog television to free up the spectrum. With the vision of the potential benefits, the commission asked how to drive the take-up of digital television. A certain switch-off date is a key element. Incidentally, the existing legislation in the Act does not provide for a certain switch-off. The commission has recommended the same switch-off date for cities and the country, so as not to disadvantage rural and remote areas.¹⁹

1.28 Although coming from a different point of view, ntl also was concerned with the issue of access to spectrum for new players. It told the Committee:

... the physical availability of spectrum for new datacasting services is as important to the future of this industry as the definition of services for datacasting itself ... it is surely critical that all spectrum actually be utilised for new services—in other words, a ‘use it or lose it’ condition for datacasting licences that ensures spectrum hoarding is not permitted. We understand precedence for this exists in the Act—for example, the narrowcasting provisions—and in the bill itself—for example, the solus markets.²⁰

1.29 In a supplementary submission to the Committee, ntl made a strong case for the Bill to be amended to clarify whether the ABA has the power to clear spectrum. ntl gave examples of the role it played in assisting with spectrum clearing in the UK. In view of the fact that only one extra 7MHz datacasting channel appears to be available (using conventional tools) in the Sydney market, the Committee sees merit in ntl’s suggestion that the applicability of Single Frequency Networks (SFNs) be

17 Note: The issue of the reviews provided for under the Bill is dealt with in Chapter 4

18 Australian Subscription Television and Radio Association, *Proof Committee Hansard*, 1 June 2000, p.105

19 Productivity Commission, *Proof Committee Hansard*, 31 May 2000, p.55

20 ntl, *Proof Committee Hansard*, 1 June 2000, p 99

considered in Australia. The Committee notes that ntl's view is that such an approach could yield at least three 7MHz channels in the Sydney market and could have similar benefits elsewhere.

1.30 On a further matter related to spectrum clearing, ntl urged the adoption of a national clearance of the DTTB transmission plan similar to the one undertaken in the UK where the costs involved in carrying out the necessary changes to eliminate interference were met by the incoming multiplex licensee (the 'polluter pays' principle).²¹ The Committee sees merit in this approach and believes that its applicability to potential datacasters in the Australia context should be investigated.

Recommendation

The Committee recommends that the Australian Broadcasting Authority be given the power to rationalise and clear spectrum particularly for the creation of datacasting channels.

Spectrum provision for community broadcasters

1.31 In its submission to the Committee's inquiry, the Community Broadcasting Association called for Clause 24, Division 3, of Schedule 6 to the Bill to be amended to put an end to the current uncertainty over the availability of digital spectrum for a standard definition television service.²²

1.32 Community broadcasters are equally concerned about the future of the sixth (analog) channel which they currently have access to until 30 June 2001. The Government of Western Australia supported their call for this issue to be clarified:

Community broadcasters operate from the invidious position of realising that the scarce radio frequency spectrum could ultimately be reassigned to a future fourth commercial network. The consequences of this would be unfortunate as the community sector promotes diversity and content of local significance which is unlikely to be supported by commercial stations.

The proposed legislation has not assured that the sixth free-to-air channel will remain available as a community/education channel with local focus beyond the end of the parallel transmission period.²³

1.33 The Committee notes that in its submission to this inquiry and to the Government review on datacasting, ntl proposed that:

The first allocated datacasting transmitter licence include a "must carry" SDTV provision for community broadcasters.²⁴

21 ntl, Supplementary Submission No. 27a, p.6

22 Community Broadcasting Association, Submission No. 7, p.5

23 Government of Western Australia, Submission No. 15, p.2

Such an approach would put an end to the current uncertainty over the future of community broadcasters' access to spectrum. At the same time it would ensure that available spectrum is used efficiently.

1.34 Finally on the issue of spectrum availability, the College of Biomedical Engineers expressed its concern about the possibility of both the current analog channels 39 and 40 being allocated to broadcasting, narrowcasting and datacasting within the same geographic region. The College argued that such a situation could pose problems for patient safety and called for some spectrum protection for this reason. In particular it wants spectrum to be made available for the operation of medical telemetry systems in Australia.

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

CHAPTER 3

MULTICHANNELLING AND ENHANCEMENTS

3.1 The Broadcasting Services Amendment (Digital Television and Datacasting) Bill 2000 maintains the prohibition in the Broadcasting Services Act on the use of digital spectrum for multichannelling services, except in limited circumstances, by both commercial and national free-to-air broadcasters.

3.2 Multichannelling was a major issue raised in submissions and by witnesses to the inquiry. The main areas of concern were that:

- national broadcasters should be allowed to use multichannel transmission capacity to broadcast television programs in digital mode; and
- digital program-enhancement content as permitted in the Bill is simply multichannelling under a different name.

3.3 As discussed in Chapter 1, witnesses to the Committee repeatedly stated that it would be necessary to fully exploit the new digital technology through offering multichannelling, enhancements and datacasting services to consumers in order to encourage them to switch to digital television.

3.4 According to Ms Christine Sharp, Policy Manager for the Special Broadcasting Service Corporation, SBS believes that the ability to multichannel is critical to its future. Multichannelling would give SBS the opportunity to provide more programming in pursuance of its Charter:

... we have a huge set of obligations and we fulfil those obligations with a very crowded television schedule. I do not know if you have noticed but, for instance, our foreign movies have moved now to 10 o'clock at night in order that we can fit in more of the programming that we think is important in pursuance of our charter. What multichannelling would allow us to do, in the first instance very cheaply, is simply to showcase more of our programming at times that better suit our audiences. The most noticeable demand on SBS television in terms of our logging of overnight audience calls, in terms of requests that come in to our SBS web site, is for programming repeats. We do not schedule like other networks. We do not have much series programming, and people will notice that there has been a documentary, for instance, of particular note and we get constant requests for repeats.¹

3.5 The ABC was surprised that the Bill did not allow for the national broadcasters to provide multichannel services under the digital regime. It had

1 Special Broadcasting Service, *Proof Committee Hansard*, 1 June 2000, p.88

understood that the underlying assumption for the review into multichannelling by national broadcasters in 1999 was that ABC multichannelling should be facilitated.² The outcomes from this review provide the reasons for the Government maintaining its prohibition on multichannelling for the national broadcasters.

Reasons behind decision

3.6 The outcome of the national broadcasters multichannelling review was that the Government did not propose to amend the Broadcasting Services Act to lift the current statutory prohibition on multichannelling by the ABC and SBS. The reasons for this stance were:

- all free-to-air broadcasters would be treated consistently in relation to multichannelling;
- unfettered ABC/SBS multichannelling would unfairly compete with the pay TV sector; and
- it would be difficult to identify specific genres of ABC/SBS programming that would not compete with the wide variety of specialised programming available on pay TV.³

3.7 In addition, according to the review, the ABC and SBS will be able to use digital technology to enhance their Charter functions by providing video and text enhancements that are linked to their digital programs. They will also have considerable flexibility to provide innovative video and text material as part of their datacasting services.

3.8 Further, the issue of whether the commercial and national free-to-air broadcasters should be permitted to multichannel will be addressed as part of the statutory review into multichannelling that is to be conducted before the end of 2005 (Broadcasting Services Act, Schedule 4, paragraph 60(1)(b)).

National broadcasters position

3.9 SBS argued in its submission that additional channels offered by the national broadcasters, as dictated by their Charters, would be distinct from the services offered on commercial free-to-air and pay television. SBS too, can offer multichannel program streams that are complementary to the ABC's programming. It would have no more adverse impact on other television sectors than the programming which it currently generates.⁴

2 Australian Broadcasting Corporation, Submission No. 20, p.2

3 Reports on Digital Television Reviews, Volume One, Department of Communications Information Technology and the Arts, 2000, p.34

4 Special Broadcasting Service, Submission No. 11, p.2

3.10 In relation to the innovative datacasting services referred to in the outcome to the review, the Bill contains restrictions on their use (see Chapter 2) which, according to the ABC, make multichannelling a more attractive proposition. Mr Jonathan Shier, Managing Director of the ABC, informed the Committee that if the ABC were allowed to multichannel it would not have to be concerned with the difficulties inherent in the datacasting definitions in relation to children's programming and the difficulty of distinguishing between education and entertainment. Additionally, multichannelling would enable the ABC to sidestep the involvement of the Australian Broadcasting Authority (ABA) in its datacasting programming decisions⁵ – provisions of the Bill which are fervently opposed by the national broadcasters and their supporters.

3.11 Even the commercial FTA television sector supported the national broadcasters' position in relation to multichannelling. When asked by Senator Bishop if there was any reason why FACTS would oppose permitting the two national broadcasters the ability to multichannel in fulfilling their respective charters, Mr Tony Branigan, Chief Executive, Federation of Australian Commercial Television Stations (FACTS) replied:

I think the key words are 'in fulfilling their respective charters'. I think we are on record in the course of the reviews last year as expressing a view that we did not oppose multichannelling by the ABC and SBS provided that it was very definitely within their charters and provided that the focus was very much on complementary programming, rather than quasi commercial programming or programming that is likely to compete in a serious sense with commercial television. We recognise that the ABC and SBS do not have the capacity on a single channel to provide a lot of the complementary programming that they already have access to. The SBS foreign language news material is an excellent case in point. Perhaps the ABC's educational programming and some of its children's programming and more localised programming is another series of good examples where we would have no serious problems with that at all, even recognising that it may, at the margin, nibble at our viewing share.⁶

3.12 Multichannelling too, would be preferable to datacasting in order to encourage consumer take-up of digital technology. Mr Colin Knowles, Head, Technology Strategy and Development, ABC, told the Committee:

... some of the datacasting delivery of things that look like multichannel do depend on caching in the [set-top] box. In other words, you have to have a more expensive box that can store your program. Those boxes are only just starting to appear and currently add \$500 to \$600 to the price of the box. Multichannelling requires no additions to the box. It can deliver programs like the existing television system and therefore is more a continuous flow

5 Australian Broadcasting Corporation *Proof Committee Hansard*, 1 June 2000, pp 72-73

6 FACTS, *Proof Committee Hansard*, 31 May 2000, p. 33

of programs ... So, from the public benefit point of view, in getting programs out to consumers to make it attractive for them to switch to digital television, multichannelling offers at the moment far more advantage than what is a bit like your PC-Internet service.

3.13 The ABC informed the Committee in its submission, that, based on the expectation that the 1999 review would recommend national broadcaster multichannelling, it had been planning its multichannel content for the last two years.⁷ Its plans included:

- lifelong learning and informative material to educate and invigorate Australians dealing with a rapidly changing world;
- stimulating children's programs at times to suit children and parents; and
- special interest material to link communities of interest and local communities across the nation.

3.14 The channels proposed by the ABC were being designed to meet the interests of audiences that are not adequately catered for at present, in particular, audiences in rural and regional areas. In carrying out SBS' public service Charter responsibilities, SBS Television too shows an enormous range of programs that are not carried by other broadcasters in the genres of sport, news, movies, world news and current affairs, and documentaries.⁸

3.15 The public benefits of allowing national broadcasters to multichannel would be considerable. With multichannelling the ABC would be able to:

- better fulfil its Charter responsibilities to meet the needs of all Australians by overcoming the television bottleneck and having the scope to deliver additional programs of wide appeal and specialised material in alternative modes;
- play an innovative role in exploring and piloting new content options for audiences and to stimulate the broadcasting industry as a whole;
- test the multichannelling market for later development by the broadcasting industry in general;
- obtain more effective use of its resources by re-versioning content for different delivery modes and platforms and thereby provide new services to audiences;
- initiate and provide opportunities for regional television input to bring benefits to rural and remote communities;
- offer specialised material for local communities and communities of interest;

7 Australian Broadcasting Corporation, Submission No. 20, p. 1

8 Special Broadcasting Service, Submission No. 11, p.3

- provide additional low-cost incentives to the community to take up digital television;
- provide important skills development opportunities for program-makers and producers to explore new technical, operational and creative possibilities of the new media; and
- provide additional outlets for original, new, Australian content including educational, children's and information content.⁹

3.16 Mr Shier from the ABC told the Committee that:

... we would like to be able to show children's programming when perhaps the main channel is showing a completely different genre of program ... a large percentage of the Australian people do not see our programming the first time it is shown. We certainly think there is an opportunity to show more of that on the second channel.

One opportunity is also to produce programming which has appeal in a particular region, which will be a possibility with rural or regional programming.¹⁰

3.17 Ms Sharp from SBS, told the Committee:

... the reason we look at [multichannelling] in the first instance from SBS's point of view is that it is very cost effective, and we have to be mindful of that. We would like, as it goes on, to develop a much more complex channel that takes in much more Australian content. We would like to provide a multicultural programming stream specifically for the second channel that would have a regional focus in terms of Australian multicultural arts and events around the country.¹¹

3.18 Clearly the opportunities provided by the new technologies have great potential to benefit the Australian people. Arguing in its submission for the Bill to be amended to allow the ABC and SBS to multichannel, the Government of Western Australia stressed the benefits to regional areas:

Digital broadcasting signals can be split into many different bands to offer viewers a choice of programs. Regional areas, even very small ones, can therefore be effectively served with programs such as local sporting events, including race meetings. Better service to regional audiences results which will counteract some of the losses to local content which have occurred previously.¹²

9 Australian Broadcasting Corporation, Submission No. 20, p.2

10 Australian Broadcasting Corporation, *Proof Committee Hansard*, 1 June 2000, p.74

11 Special Broadcasting Service, *Proof Committee Hansard*, 1 June 2000, p.88

12 Government of Western Australia, Submission No. 15, p.3

3.19 The Committee's view is that in the interest of fairness, the national broadcasters should not be permitted to multichannel since they compete with the pay TV and commercial free-to-air broadcasters for audiences and the commercial FTAs are prohibited from multichannelling under the Bill.

Pay TV's view of multichannelling

3.20 The pay TV sector is of the view that any multichannelling is in competition with it whether it be by the commercial or by national broadcasters. Ms Debra Richards, Executive Director, ASTRA, informed the Committee:

... the national broadcasters are competitors and as such they are ours. So we have not changed from the view that we put through all that public process. But if the committee is of the view that ABC and SBS should be treated differently in some way, then we would seek that whatever the national broadcasters could multichannel should be limited and in no way should it be seen as a precedent for the commercial networks to also multichannel, and that is the reason we have put forward. It would be the thin end of the wedge. They are in competition in terms of what they want to provide.¹³

3.21 The ABC refutes these concerns. It believes that the pay TV sector can no longer be regarded as a fledgling in the media landscape. Also:

[t]he addition of the very limited ABC multichannel capacity available in the 7 Megahertz of spectrum (allowing for the simulcast) can have little impact on the many channels comprised in pay television's suite of offerings.¹⁴

3.22 As Ms Sharp from SBS pointed out to the Committee in relation to the fact that the national broadcasters competed with commercial broadcasters for audiences:

[but] competition for audiences does not translate into competition for revenue. More than \$2 billion—well over \$2 billion this year—is spent each year on TV advertising. Around one per cent of that goes to SBS; and it does not matter how big the ABC audience gets, none of course goes to the ABC. The point I am trying to make is that, in our view, multichannelling will not change the size of that advertising pie for television. It will not bring more advertising revenue.¹⁵

3.23 According to the ABC, there will be no impact on commercial televisions' advertising revenue. The ABC does not compete for advertising or sponsorship

13 Australian Subscription Television and Radio Association, *Proof Committee Hansard*, 1 June 2000, pp 111-112

14 Australian Broadcasting Corporation, Submission No. 20, p.3

15 Special Broadcasting Service, *Proof Committee Hansard*, 1 June 2000, p.88

revenue and has no interest in drawing a mass audience away from commercial free-to-air or pay television broadcasters through multichannelling.¹⁶

Digital Program-enhancement content

3.24 The Bill permits FTA broadcasters to provide enhancements if these are directly linked to the main (simulcast) digital program. According to the Explanatory Memorandum to the Bill:

A key part of ‘directly linked’ will be ensuring the enhancement is provided within the same time period as the main program. Therefore, enhancements should be contemporaneous to the programs to which they are linked. In addition, enhancements should be extended to allow a limited form of overlapping of programs, where events extend into other scheduled programs because of circumstances outside the broadcaster’s control.¹⁷

3.25 Items 91 and 112 in the Bill provide exceptions to the analog/digital simulcast requirements for commercial and national FTA broadcasters respectively. These exceptions are defined in items 94 and 115 of the Bill. The effect of these amendments to Schedule 4 of the Broadcasting Services Act is to use any spectrum not required for simulcasting in digital and analog mode to provide limited opportunities for broadcasters to provide digital program-enhancement content, multichannelling transmission capacity and electronic program guides.

Digital program-enhancement content

3.26 The Bill provides for there to be two categories of digital program-enhancement content – Category A and Category B.

Category A digital program-enhancement content

3.27 A Category A digital program-enhancement may be content in any form (eg text, data, sound, still or moving images) which is closely and directly linked to the subject matter of the primary television program, is for the sole purpose of enhancing the primary program, and is transmitted simultaneously with the primary program.¹⁸ A note to new subclauses 6(14) and 19(14) provides examples of this type of content:

Note: For example, if the primary program is live coverage of a tennis match, the category A digital program-enhancement content could consist of any or all of the following:

16 Australian Broadcasting Corporation, Submission No. 20, p.4

17 Explanatory Memorandum, Broadcasting Services Amendment (Digital Television and Datacasting) Bill 2000, p.27

18 Explanatory Memorandum, Broadcasting Services Amendment (Digital Television and Datacasting) Bill 2000, pp 89-90

- (a) the match from different camera angles;
- (b) each player's results in past matches;
- (c) video highlights from those past matches;
- (d) each player's ranking and career highlights.¹⁹

Category B digital program-enhancement content

3.28 A Category B digital program-enhancement is a program that provides simultaneous live transmission of two overlapping sporting events in the same sport at a particular venue. This category would allow simultaneous live transmission of, for example, two tennis matches in a tournament on different courts in the same centre or complex. However, it would not allow simultaneous live transmission of:

- two rugby league matches at different grounds; this would not satisfy the 'same venue' requirement; or
- swimming and gymnastics at the Olympic Games, even if both occur in adjacent buildings in the same complex; this would not satisfy the 'same sport' requirement.

3.29 The transmission of the second sporting event must be live, and simultaneous with the live transmission of the first sporting event.

3.30 New subclauses 6(16)-(19) and 19(16)-(19) (items 94 and 115 respectively) provide for the Australian Broadcasting Authority to make determinations, which are disallowable instruments, clarifying whether or not two or more specified sporting events involve the same sport. According to the Explanatory Memorandum, use of this mechanism will give broadcasters greater certainty in ambiguous cases.²⁰

Program overlaps

3.31 The Bill allows for multichannelling in limited circumstances specified in new paragraphs 6(8)(d) and 19(8)d (items 91 and 112 respectively). Where a designated event, which is broadcast live, extends beyond the scheduled finishing time into another scheduled program, the broadcaster may multichannel the live broadcast and the other program, provided that the delayed finish is beyond either the broadcaster's control, or the control of any person who directly or indirectly supplied the program to

19 Broadcasting Services Amendment (Digital Television and Datacasting) Bill 2000, item 94, p.26 and item 115, p.33

20 Explanatory Memorandum, Broadcasting Services Amendment (Digital Television and Datacasting) Bill 2000, p.90

the broadcaster; and the other program was scheduled by the broadcaster at least one week before the start of the designated event.²¹

3.32 A designated event is either a sporting event or an event determined in writing by the Australian Broadcasting Authority. These determinations by the ABA are disallowable instruments. The Explanatory Memorandum states that it is “intended that this power would be available to be used for important public events, such as live coverage of Centenary of Federation celebrations”.²² This power would also cover the situation where extra time is added to a day’s play in a test cricket match to make up for rain delays.²³

Response of the pay TV sector

3.33 Evidence received by the Committee from the pay TV sector was particularly vociferous in its concerns about the digital program-enhancement and multichannelling provisions of the Bill.

Multichannelling is the core distinction between pay TV and FTA television services in the television market. It was on the basis of the legislative prohibition on multichannelling and assurances from Government that the commercial networks would be prevented from multichannelling for at least a four year period that the pay TV industry has continued to make heavy financial investments in rolling out pay TV and other services, and associated employment and training, in both regional and metropolitan Australia.²⁴

3.34 The pay TV industry is incensed at the loan of digital spectrum to the FTA broadcasters. It believes that this, combined with what it sees as inequitable anti-siphoning regulations and prohibitions on new FTA broadcasters till 2007, forms an anti-competitive bias favouring the FTA broadcasters at the expense of pay TV providers. The enhanced programming provisions of the Bill add insult to injury to the pay TV sector and, according to Cable & Wireless Optus, “will have a significantly negative impact on the Pay TV industry as they will allow the FTAs to use their free spectrum to unfairly compete with the multichannelling services offered by the Pay TV sector”.²⁵

3.35 The Committee notes that Open TV – a provider of set-top box software – put forward the view that the legislation favours the pay TV industry. Open TV argues

21 Explanatory Memorandum, Broadcasting Services Amendment (Digital Television and Datacasting) Bill 2000, p.89

22 Explanatory Memorandum, Broadcasting Services Amendment (Digital Television and Datacasting) Bill 2000, p.91

23 Explanatory Memorandum, Broadcasting Services Amendment (Digital Television and Datacasting) Bill 2000, p.89

24 Australian Subscription Television and Radio Association, Submission No. 29, p.3

25 Cable & Wireless Optus, Submission No. 13, p.6

that the triplecasting model, by forcing broadcasters to offer analog, SDTV and HDTV, will have the effect of squeezing the bandwidth to the limit. Consequently, the level of interactive services which free-to-air broadcasters can offer to consumers will be severely limited and consumers will turn to Pay TV:

Interactive services will be limited and will force consumers to subscribe to Pay TV or datacasting to obtain those services. This policy is very much biased in favour of Pay TV.²⁶

3.36 Although the Category B digital program-enhancement content provisions attracted the most criticism from the pay TV sector – with all pay TV submissions to this Inquiry calling for their abolishment – the Category A digital program enhancement content provisions too were censured.

3.37 Telstra believes that the linking of the enhancements to the *subject matter* of the primary broadcast rather than the linking of them to the *primary broadcast* as was the original concept in the Digital TV Review - *Datacasting and Enhanced Programming*, has the effect of significantly broadening the scope of the provisions. According to Cable & Wireless Optus, Category A is defined extremely broadly with no limit on the amount of video that can be broadcast as the secondary program and “in many cases will result in defacto multichannelling”.²⁷

3.38 ASTRA’s submission states:

In addition, the generous provisions for ‘Category A enhanced programming’ which allows unlimited video linked to the primary program appears to allow multichannelling and of all program genres, for example past episodes of *Seinfeld* directly linked to the primary program of *Seinfeld*.²⁸

When this example was put before officers from the Australian Broadcasting Authority for comment however, whilst acknowledging that the example would need to be looked at, Professor David Flint, Chairman of the Australian Broadcasting Authority, replied “It is not my understanding of the intention of the enhanced services provision [that this would be allowed].” Nevertheless, ASTRA recommends that Category A be limited to exclude separate video streams.

3.39 The Category B digital enhancement content provisions are particularly objectionable to the pay TV industry. According to Cable & Wireless Optus, the restrictions imposed by the anti-siphoning regime have led the pay TV sector to develop schedules of sporting programs based on events which have traditionally not been broadcast by the FTAs due to either a lack of interest or a lack of space in program schedules.

26 Open TV, Submission No. 32, p.2

27 Cable & Wireless Optus, Submission No. 13, p.7

28 Australian Subscription Television and Radio Association, Submission No. 29, p.9

The proposed amendments will enable the FTA broadcasters to use Category B digital enhancements to offer these ‘second tier’ sporting events, such as the lead up matches to Wimbledon, with the benefit of the anti-siphoning regime and using spectrum that has been obtained at no cost. This is clearly anti-competitive and inequitable.²⁹

3.40 The submissions received by the Committee from the pay TV industry are unanimous in predicting that the effect of these two categories of enhancements will be less, rather than more, sport being available to viewers. They reason that this is because FTA broadcasters will be able to acquire the rights to sporting events but without any obligation to show more sport.³⁰ Also, pay TV subscribers will start to have their viewing choices diminished because of the reducing opportunities for pay TV to acquire sports rights and, in turn, afford to buy them.³¹ Additionally, the ability of sports fans to see FTA multichannel sport will be constrained by the pace of consumer investment in digital TV receiving equipment.³² And finally, sports fans in rural, regional and remote areas will suffer the most because digital services will not be available until several years after capital city services commence.

3.41 Telstra recommends that if the Category B digital program-enhancement provisions are not removed from the Bill, the only way to address the anti-competitive impacts of the provisions is to include a requirement that FTA broadcasters pay for their digital spectrum, over and above what is required for SDTV simulcast, and also that the anti-siphoning regime be overhauled.³³ Fairfax too submitted that a spectrum use charge should apply to everything other than traditional broadcasting (ie enhancements, multichannelling, and Electronic Program Guides) as well as datacasting.³⁴

3.42 Mr Branigan from FACTS told the Committee:

Certainly we are not looking at large numbers of hours of [enhanced] programming each year—I would be surprised if it amounted to more than a few score hours each year, which is not huge—and does not really seem to justify the ‘we’ll all be rooned’ cries from pay TV.³⁵

3.43 Some witnesses raised the issue of Electronic Program Guides (EPG) within the context of “enhanced programming. EPGs are discussed in Chapter 2 of this report.

29 Cable & Wireless Optus, Submission No. 13, p.9

30 Australian Subscription Television and Radio Association, Submission No. 29, p.8

31 Foxtel Management Pty Limited, Submission No. 26, p.5

32 Foxtel Management Pty Limited, Submission No. 26, p.5

33 Telstra, Submission No. 16, p.9

34 John Fairfax Holdings Limited, Submission No. 25, p.7

35 FACTS, *Proof Committee Hansard*, 31 May 2000, p.32

3.44 The Committee concluded that the concerns of the Pay TV industry with respect to possible adverse impacts on them arising from the FTAs being able to offer program enhancements are unlikely to be realised in practice. In any case, the BSA and the current Bill provide that all aspects of the operation of the digital television regime are subject to review.

Underserved regional licence areas

3.45 An underserved regional licence area or market is one in which there are fewer than three commercial television services. Markets with only one commercial service are referred to as solus markets.³⁶ Regional broadcasters are allowed up to three years more than metropolitan broadcasters before they have to transmit in digital mode.

3.46 As required by Schedule 4 of the Broadcasting Services Act, a review was conducted into underserved regional licence areas as to whether they should be provided with up to the same number of commercial television broadcasting services as are provided in metropolitan areas. The new digital technology provides relatively low-cost options, through multichannelling, to expand the range of broadcasting services in underserved markets.

Solus markets

3.47 There are currently four solus markets with a total licence area population of 234,739. Under section 38A of the Broadcasting Services Act an existing licensee in a solus market may apply to the ABA for an additional commercial television broadcasting licence for the area and the ABA is legislatively obliged to grant the licence, subject to the availability of spectrum.³⁷ Section 38A licence applications are exempt from the moratorium on new commercial licences. The existing licensees have all applied for section 38A licences in all four solus markets.

3.48 Both the existing service and additional service are required to be simulcast in analog and digital formats after the introduction of digital terrestrial television broadcasting. The new section 38A analog services will be required to commence from one year after the relevant amendments to the Broadcasting Services Act. The digital services are required to commence before 1 January 2004.

3.49 The Bill aims to encourage the early introduction of these additional section 38A services by providing licensees with options for lower rollout costs of their digital services through permitting multichannelling of both digital services in the

36 Explanatory Memorandum, Broadcasting Services Amendment (Digital Television and Datacasting) Bill 2000, p.54

37 Explanatory Memorandum, Broadcasting Services Amendment (Digital Television and Datacasting) Bill 2000, p.54

same channel, with an exemption from HDTV requirements to be made available.³⁸ The appropriateness of this exemption will be reviewed in 2005. New subclause 6(5A) (item 86) allows the licensee to elect to multichannel the existing and new services in digital mode. No additional 7 MHz spectrum is therefore required.

3.50 New subsection 38A(2) (item 22) adds a 'use it or lose it' condition to an additional licence granted under section 38A.

Two service markets

3.51 There are ten markets across Australia with two commercial services available with a total licence area population of 1,566,163. The section 38A option does not apply to two service markets. In order to encourage the introduction of new services in these markets, the Bill inserts a new section 38B in the Broadcasting Services Act (item 23).

3.52 New section 38B will allow one additional licence to be allocated in each two-station market. However, an additional licence cannot be allocated under new section 38B if one of the existing licences was issued under section 38A. The additional licence allows only digital transmission of the broadcasting service concerned. The licensee must commence providing the additional service in SDTV digital mode by 1 January 2004, or an earlier date notified by the ABA.

3.53 Under new subsection 38B(1), there are three alternative mechanisms for the allocation of the additional licence:

- a) application by a joint-venture company jointly owned by the existing licensees to provide a combined third 7 MHz digital-only service to be provided in both SDTV and HDTV formats;

If the incumbents do not wish to provide a combined service, a licensee will be permitted to multichannel a new digital service using the 7 MHz allocation for the digital transmission of their existing analog service. Only one of the two licensees in each two-service market will be permitted to multichannel. In this instance, the new licence will be allocated by:

- b) separate applications from both licensees, with the licence to be allocated via a price-based allocation process, with bidding limited to the two incumbent licensees; and
- c) application by one of the existing licensees.³⁹

38 Explanatory Memorandum, Broadcasting Services Amendment (Digital Television and Datacasting) Bill 2000, p.62

39 Explanatory Memorandum, Broadcasting Services Amendment (Digital Television and Datacasting) Bill 2000, pp 63 and 74-76

3.54 Where multichannelling takes place, the two services are exempt from HDTV requirements. SDTV requirements will apply. The HDTV exemption will be reviewed in 2005.⁴⁰

3.55 For the additional licence to be allocated, the two existing licensees may, within 90 days of commencement of the section (which will be a day to be proclaimed), give the ABA a joint written notice specifying one of the above alternatives and the additional licence may be applied for within 12 months of the commencement of the section.

3.56 New subsections 38B(20) and (21) provide that both the parent and additional licensees continue to provide services under the licence for at least 2 years after the commencement of the provision of the commercial television broadcasting service under the additional licence.

Reaction in submissions

3.57 WIN Corporation and Southern Cross Broadcasting (Australia) Limited (current incumbents in solus or two service markets) supported the provisions made in the Bill for solus and two service markets. WIN states that the introduction of any further competition in those markets would not be in the public interest as it might delay the early introduction of digital services given cost considerations, market size and revenue projections.⁴¹

3.58 Prime Television Limited has applied to the ABA for a licence to enter two of the four solus markets (Riverland and Mount Gambier) and has been considering the feasibility of seeking a licence in the other two (Broken Hill and Spencer Gulf). Prime contends that the proposed legislation should be amended and that new licences should be made available in each of these markets on a price-based allocation system.⁴²

Multichannelling by Commercial FTAs in Regional Areas

3.59 Prime argues that the relaxation of the multichannelling requirements in the South Australian market should remain, enabling the existing analog operators and the new licensees to share facilities and costs for the transmission of the new digital services.

40 Explanatory Memorandum, Broadcasting Services Amendment (Digital Television and Datacasting) Bill 2000, p.63

41 Southern Cross Broadcasting, Submission No. 35, pp 1-6, and WIN Corporation Pty Limited, Submission No. 30, pp 4 and 5

42 Prime Television Limited, Submission No. 17, pp 3-6

3.60 Prime contends that a precedent for removing the automatic right of Solus Licensees to the allocation of a second licence has been set by the NBN in Newcastle when the commercial TV equalisation legislation was introduced in 1987.

3.61 Prime supports the amendments proposed for the two service markets except for Tasmania because Tasmania has not yet undergone the ABA's licence area plan process to determine the sustainability of three commercial TV providers. Prime recommends that the ABA undertake the licence area plan process in Tasmania as a matter of urgency so that the feasibility of an additional commercial station can be determined.

3.62 Southern Cross Broadcasting is concerned that the introduction of a third commercial broadcaster in Tasmania could have disastrous results for the two incumbent broadcasters given the stagnant economy and declining population. It would lead to the cancellation of locally produced programming and job losses.

3.63 Mr David Carr, Legal Adviser to Prime Television Pty Ltd, suggested to the Committee that at least in the formative stages of digital television, a limited form of multichannelling as a means of reducing the costs of establishing digital television in smaller regional and remote locations should be allowed. He informed the Committee that the principle of shared facilities was one of the factors that enabled the rapid rollout of news services to regional areas under the aggregation process in the late 1980s and 1990s. During that time the three broadcasters shared such common facilities as transmission towers and antennas which significantly reduced their costs.

3.64 Mr Carr suggests that the advent of digital television offers additional opportunities to share not only the hardware, but also the transmission system and the spectrum used to deliver the service to viewers.

An example of where this relaxation of the multichannelling prohibition would benefit viewers is the city of Cobar in western New South Wales. Cobar has a population of about 6,000 people. It is presently served by three commercial television services, each with a separate transmitter but combining through a common transmission tower and antenna. Replication of that system in digital would be costly. However, if the three commercial broadcasters and maybe even the ABC were permitted to multichannel on the same digital channel, there is more likelihood of the people of Cobar receiving digital television at an earlier date than otherwise would be the case.⁴³

3.65 The Committee supports the provisions in the Bill which encourage new broadcasting services through multichannelling in underserved regional areas of Australia.

43 Prime Television, *Proof Committee Hansard*, 1 June 2000, p.116

CHAPTER 4

CAPTIONING AND OTHER IMPORTANT ISSUES

Captioning standards

4.1 Under the amendments made to the *Broadcasting Services Act 1992* through the *Television Broadcasting Services (Digital Conversion) Act 1998*, a requirement was introduced for the determination of a captioning standard. Subclause 38(1) of the BSA requires regulations to be made determining standards for the closed captioning of television programs for the deaf and hearing impaired.

4.2 With the introduction of the Broadcasting Services Amendment (Digital Television and Datacasting) Bill 2000, the Government has outlined the captioning quotas applicable to metropolitan licence holders from 1 January 2001 (at the start of their digital broadcasts). Regional broadcasters will need to meet the required captioning quotas when they begin to broadcast in digital mode. The quotas proposed by the Government are:

- all prime time viewing hours programming; and
- all news and current affairs programming outside these hours.

4.3 Item 128 of the Bill amends the captioning requirements of Subclause 38 to exempt a television program (or part of one) that is wholly in a language other than English and to exempt incidental or background music and television programs whose audio component consists only of music “that has no human vocal content that is recognisable as being in the English language”.¹

4.4 The Explanatory Memorandum to the Bill states that:

An estimated 1.7 million deaf and hearing impaired Australians have limited access to free to air television services.²

It also quotes a table that shows that overall, about 19% of all television programs were captioned last year.

4.5 The Committee received 8 submissions on the issue of captioning. Three in favour of the captioning requirements in the legislation (two of those requesting a move to full captioning, by 2005 – in the case of the National Working Party on Captioning – and in the case of Mr Tayeh, full captioning of the Olympic Games and subsequent major sporting event broadcasts).

1 Broadcasting Services Amendment (Digital Television and Datacasting) Bill 2000, p.49

2 Explanatory Memorandum, Broadcasting Services Amendment (Digital Television and Datacasting) Bill 2000, p.47

4.6 The Australian Caption Centre stressed in its submission that it was:

well advanced in its preparations for assisting the broadcasters in complying with the proposed legislation by the start-up date of 1 January 2001.³

and that:

There are no technical or human resource impediments to implementing the legislation as proposed by the Government's Bill.⁴

4.7 In addition to recruiting stenocaptioners overseas and training more local stenocaptioners, the Centre told the Committee that it was testing remote live captioning to avert the difficulty of television stations having to find stenocaptioners in rural and regional locations.

4.8 Five submissions, one from FACTS and four from regional television broadcasters pointed to the costs and operational difficulties they would face in meeting the captioning requirements.

4.9 WIN Corporation's Chief Executive, Mr John Rushton explained his difficulties to the Committee in these terms:

I can quickly tell you how we put news to air in, say, Victoria. We have journalists and cameramen right across the state. We produce six different news bulletins a day. All of those go to air from our mother station in Ballarat each night at 6 p.m. So five of them are prerecorded and the sixth one is going to air live. Those stories are coming in on the microwave link to Ballarat probably from about 2 p.m. onwards and they are all edited remotely. Then there is a producer in each area putting each bulletin to air. So there could be some stories still coming in from areas, say, at 4 o'clock when it has to be prerecorded at 4 o'clock, so they get slotted in further down the bulletin. As soon as they have done the prerecord for the 4 o'clock one—and the prerecord is just for the intros, and it probably takes 10 or 15 minutes per bulletin—they then move on and do the next one and so on down the track.

For us to have that done remotely would mean that we would have to send a story up the line somewhere to the remote position for them to view it and then steno it—or whatever the terminology is—and then send it back to us. There just would not be time to do it because we do this prerecorded technique so we can offer a lot of different news bulletins to the community.⁵

3 Australian Caption Centre, Submission No.5, p.3

4 Australian Caption Centre, Submission No.5, p.3

5 WIN Corporation, *Proof Committee Hansard*, 31 May 2000, pp.42-43

4.10 In its submission to the Committee, WIN suggested that an American automatic captioning system called the electronic newsroom (ENR) might provide a partial solution to the problem. Using that approach, each bulletin would have the presenter's introduction and journalists' voiceovers captioned as well as full captioning of weather and news updates. The Committee raised the ENR issue with the Australian Caption Centre's Mr Robert Scott who answered:

The electronic newsroom system can work in a situation like that if the text files are there for everything that is going to air. If they are not there and you have live interviews or taped items or taped stories from overseas where a script is not available, then there will be no captioning there unless somebody creates it.⁶

4.11 Mr Scott pointed out that some regional stations appear to be able to caption at reasonably low cost:

One thing we did notice when we were looking at how the news was put together in some of these regional television stations is that in a lot of cases where the news is being put together on a shoestring budget where they have the small staff numbers, which Senator Calvert referred to before, they tend to produce a lot more of the bulletin in advance and they tend to ensure that everything in the bulletin is scripted on a central newsroom computer system. There was one station, in particular, that we looked at in Mount Gambier which was a very small operation and ironically it worked out that captioning a news bulletin like theirs was very inexpensive. I think in one of our submissions to the review we indicated that they could probably do their bulletin for maybe \$50,000 a year. That was mainly because it was produced so far in advance and everything was scripted and any national items were on a news service that was coming from major metropolitan networks and would already be captioned.⁷

4.12 Ms Clark from the National Working Party on Captioning argued strongly for the requirement for full captioning of news by regional broadcasters to be maintained:

I still stand by my previous point that I believe that all prime time captioning is achievable and I believe that people in the regional areas should not miss out. I know that when the announcement was made by Channel 7 that one of the regional television stations would be captioning their news there was a lot of enthusiasm and support from the community and it made life a lot more accessible for those people in those regional areas. I think the country people are isolated enough, and if you are talking about a deaf or hearing impaired person in the country then they have that double isolation.⁸

6 Australian Caption Centre, *Proof Committee Hansard*, 31 May 2000, p.16

7 Australian Caption Centre, *Proof Committee Hansard*, 31 May 2000, p.16

8 National Working Party on Captioning, *Proof Committee Hansard*, 31 May 2000, p.16

4.13 The Committee supports the Government proposals for captioning quotas as a means of ensuring access to information for hearing impaired television viewers. However, the Committee recognises the particular difficulties faced by regional television in one (solus) and two-station markets and would hope that the Government will consider the other options proposed by regional broadcasters.

Reviews required under the Bill

4.14 In addition to the reviews of the process of introduction of digital television already in the BSA, the proposed Bill requires a number of other reviews to be carried out in the next few years after digital television broadcasting commences. These are:

Before 1 January 2004

- whether the provisions relating to HDTV quotas should be repealed (proposed subclause 60 A of Schedule 4);
- the regulatory arrangements for transmission of TV programs by commercial television broadcasting licensees in HDTV digital mode in remote licence areas (proposed subclause 60 A of Schedule 4);
- the regulatory arrangements that should apply to the transmission of television programs by national broadcasters in HDTV digital mode in remote coverage areas (proposed subclause 60 A of Schedule 4); and
- whether any amendments should be made to Schedule 6 which sets out the regulatory scheme for datacasting (clause 61 of proposed Schedule 6).

Before 31 December 2005

- the provisions associated with additional commercial television broadcasting licences in solus and two-station markets (proposed subclause 60 (1) of Schedule 4); and
- the regulatory arrangements and revenue arrangements (if any) 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 (proposed subclause 60 (1) of Schedule 4).

4.15 Whilst not in the legislation itself, the second reading speech indicates that the ABA will receive a reference from the Minister to examine whether services such as streamed audio and video, available on the Internet are, legally, broadcasting services. It is expected that the ABA will examine this issue in the context of the general

convergence of broadcasting with other services and report within twelve months of the passing of the legislation.⁹

4.16 In response to questioning from members of the Committee, a number of witnesses urged that the timing of the various reviews should be brought forward and that they should be undertaken as soon as possible as there is still a degree of uncertainty about the regulations in some areas.

HDTV Quota Review

4.17 There seemed to be some confusion at the public hearings about the nature of the proposed review. Some witnesses suggested that a review should be conducted into the viability of HDTV in the Australian context and the likelihood of commercial FTAs offering very much HDTV on their loaned 7 MHz of spectrum. However, the proposed review is to examine whether HDTV quotas are still necessary and not to re-visit Government policy decisions about HDTV as a basis for the introduction of DTTV.

4.18 FACTS expressed the view in its evidence to the Committee, that it is difficult to know what the right time for the review is, however, there should be a couple of years to test the market, both in terms of equipment and program availability. FACTS had not considered whether the review should be statutory or departmental and stated that either would be acceptable.¹⁰

4.19 The ABC supported this view:

We know that the take-up in the early stages will be low, so there is a question of how robust the data will be if you do the review too early.¹¹

4.20 ASTRA called for an immediate statutory review to determine if HDTV is to go ahead or not

In fact, the impression I got listening to FACTS yesterday was that nothing will happen with HDTV in the next two years. So, based on that, ASTRA feels: why wait two years; why wait until 2004 for the review; why not have the HDTV review right here and now? Let us bring it forward. Let us have it and let us clear the air once and for all on whether this is a dead duck or whether there is some validity in HDTV.¹²

9 Second Reading Speech, Broadcasting Services Amendment (Digital Television and Datacasting) Bill 2000, p.4

10 FACTS, *Proof Committee Hansard*, 31 May 2000, p.34

11 Australian Broadcasting Corporation, *Proof Committee Hansard*, 1 June 2000, p.75

12 ASTRA, *Proof Committee Hansard*, 1 June 2000, p.107

4.21 ASTRA argued that if the review found that HDTV would not go ahead, the FTAs would no longer need 7 MHz of spectrum and the unused spectrum should be returned to Government and auctioned.

Can I just add to that in terms of bringing it forward. There has to be an outcome. If the decision is that HDTV is not a goer, then the outcome must be that that spectrum goes back to public auction. That is part of the review. There needs to be a reconsideration of that, because that was the original decision and one of the main planks of the decision in the first place.¹³

Schedule 6 and regulatory scheme for datacasting post 2006 reviews

4.22 In its evidence, Fairfax called for more information to be given about the proposed review of datacasting regulations and expressed the view that this was necessary so that datacasting licence bidders might obtain some certainty:

We certainly think there should be guidelines, legislative guidelines, as to how those reviews should be undertaken and what should be taken into account. Given the importance of the scarce resource that we are talking about, public review is better than private review. Most importantly, there is a need for certainty. I can understand the notion 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.¹⁴

4.23 Telstra also supported the statutory review approach and the need for certainty as quickly as possible and indicated that:

Ideally, to give you certainty, you would have the review before you had to fork out for the licence. But the practicality of that seems to be not there.¹⁵

4.24 Telstra indicated that the pertinent issues for the review into post 2006 regulatory arrangements should be:

to address issues of convergence. A lot of the issues that have been addressed by the Productivity Commission need to be considered. The fundamental question seems to be: to what extent can converging industries, including broadcasting, be liberalised?

Telstra has a preference for the provisions in this bill for the separation of the spectrum licensing process from the service licensing process. We would like to see spectrum licensing subject to market based principles as it

13 ASTRA, *Proof Committee Hansard*, 1 June 2000, p.112

14 Fairfax, *Proof Committee Hansard*, 1 June 2000, pp 96-97

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

is in telecommunications today—namely, auctioned with a presumption of renewal. In relation to services licensing and broadcasting or other content type services, it would happen presumably under the ABA, similarly to how it does now.¹⁶

4.25 In evidence to the Committee, Optus indicated that it too is concerned at the degree of uncertainty which exists in relation to possible regulations for datacasters post 31 December 2006.¹⁷

4.26 FACTS agreed that the situation post 2006 is fuzzy at present and resolution sooner rather than later would be beneficial.¹⁸

ABA reference on streamed audio and video as broadcasting or datacasting

4.27 When questioned by the Committee, FACTS agreed that this review should be conducted urgently, preferably prior to the commencement of digital broadcasting and datacasting.¹⁹

4.28 The ABC was of the view that its Board should make such decisions about ABC programming. However, if the ABA had to do the review, it should be done earlier rather than later.²⁰

Australian content

4.29 A number of submissions referred to the effect that conversion to digital television transmission could have on the Australian film and multimedia production industries. The matter was also raised in evidence to the Committee. The Screen Producers Association of Australia (SPAA) called for a quota system to be introduced requiring that the 20 hours of mandated HDTV should be original, first run Australian content and pointed out that:

Australian programs contribute to the community's sense of character, identity and reflect its rich diversity and history.²¹

4.30 SPAA also asked that content shot on 35mm film, Super 16 film and high definition video should be counted as high definition production format for the purpose of meeting the 20 hours HDTV quota. Recognising the high cost of conversion for Australian producers, SPAA suggests that the licence fees of

16 Telstra, *Proof Committee Hansard*, 31 May 2000, p.54

17 Cable and Wireless Optus, *Proof Committee Hansard*, 1 June 2000, p.113

18 FACTS, *Proof Committee Hansard*, 31 May 2000, p.34

19 FACTS, *Proof Committee Hansard*, 31 May 2000, p.34

20 Australian Broadcasting Corporation, *Proof Committee Hansard*, 1 June 2000, p.74

21 Screen Producers Association of Australia, Submission No. 24, p.8

commercial broadcasters should be increased and the additional funds collected used to assist the independent production sector.

4.31 FACTS told the Committee that there would not be any Australian program available for digital transmission “initially”:

That is for a number of reasons, the most significant of which is that there are no real HD capable production facilities at the moment. Naturally, the networks have been focusing on the first order of business, which is getting the transmission structure up and operating. Production facilities have always been seen as the second stage. I would not expect any serious progress on that front until well into next year.

... It is likely that commercial television stations will want to present their most popular programming in high definition as early as they sensibly can. At least five out of the top 10 programs on commercial television in any week are local programs; often it is seven or eight. Some of those programs may be very difficult to produce in high definition television for some little time.²²

4.32 The Productivity Commission’s Professor Snape argued that in the longer term it would become necessary to have an inquiry to look at other means of reaching a minimum acceptable standard for Australian content in the digital broadcasting and datacasting environments:

We said, ‘Leave most of the existing quotas in place for the time being because taking them off would be disruptive at a time of change; but have an open, public inquiry into the desirable means of pursuing the cultural and social objectives that would target the sources of the social and cultural production rather than the platforms on which they are disseminated.’²³

4.33 The Committee recognises that Australian content is a very important issue in this debate and it believes that the situation will have to be monitored closely in the first two years after conversion to assess the impact of digital television and datacasting on the levels of Australian content available through the new services.

Interoperability

Audio standard

4.34 In the second reading speech introducing the Bill, the Government stated:

As part of the requirement to provide SDTV at all times, the government expects that broadcasters will provide an audio stream using the MPEG sound standard. The government would encourage the industry to reach a

22 FACTS, *Proof Committee Hansard*, 31 May 2000, p.36

23 Productivity Commission, *Proof Committee Hansard*, 31 May 2000, p.57

common position on this issue, but may be willing to consider regulating a standard, using existing powers in the legislation, if this appears necessary in the interests of consumers.²⁴

4.35 In its submission, FACTS did not refer specifically to the audio standard but indicated its strong support for the

principle of common technical standards across all digital program and datacasting service ‘platforms’.²⁵

4.36 ASTRA called for MPEG to be adopted as the common audio standard. The Committee received a submission from Dolby Laboratories supporting AC-3 sound technology the system for which FACTS has indicated a preference.²⁶

4.37 In answer to a question from the Committee about the interoperability of set-top boxes, Mr Colin Knowles from the ABC stated that:

All of the boxes currently sold in the US are in fact multistandard compatible. There are no boxes sold in Europe that are HD and SD because nobody is broadcasting in HD ...

It is technically possible. In fact, the chip designs are already done to do that. Likewise, the same argument applies to the audio standard. The chip that can decode AC-3 and MPEG is already in place in almost every DVD player that is sold.²⁷

4.38 The Committee’s view on this issue is that it is in the interest of all involved and especially in the best interest of the consumer that the systems used should be fully interoperable. Furthermore, in view of the rapid changes in technology in this area, the Committee concurs with FACTS’s comment that if standards need to be mandated, whatever standards are adopted, should:

... wherever possible be open standards which allow the “headroom” necessary for the 20 or more years service expected from the DVB-based digital transmission system.²⁸

24 Second Reading Speech, Broadcasting Services Amendment (Digital Television and Datacasting) Bill 2000, p.2

25 FACTS, Submission No. 21, p.12

26 FACTS, *Proof Committee Hansard*, 31 May 2000, p.37

27 Australian Broadcasting Corporation, *Proof Committee Hansard*, 1 June 2000, p.78

28 FACTS, Submission No. 21, p.12

APPENDIX 1

LIST OF SUBMISSIONS

1, 1a & 1b	International Dynamics Pty Ltd
2	Mr Stewart Fist
3	Mr Robert Draper
4	Mr William A. Godfrey
5	Australian Caption Centre (ACC)
6 & 6a	Mr Nicholas Tayeh
7	Community Broadcasting Association of Australia
8	Australian Information Industry Association
9	TVSN Limited
10	Australian Consumers' Association
11	SBS
12 & 12a	Confidential
13	Cable & Wireless Optus
14 & 14a	Dolby Laboratories Licensing Corporation
15	Government of Western Australia
16	Telstra
17	Prime Television
18	National Working Party on Captioning
19	Fox Sports
20	Australian Broadcasting Corporation (ABC)
21 & 21a	Federation of Australian Commercial Television Stations (FACTS)
22	Friends of the ABC (NSW) Inc
23	News Limited
24	Screen Producers Association of Australia (SPAA)

25	John Fairfax Holdings Limited
26	Foxtel Management Pty Limited
27 & 27a	ntl
28	College of Biomedical Engineers Institution of Australia
29	Australian Subscription Television and Radio Association (ASTRA)
30	WIN Corporation Pty Limited
31	Network Ten Pty Limited
32	Open TV
33	Dr Duane Varan
34	Australian Broadcasting Authority
35	Southern Cross Broadcasting (Australia) Limited
36	Mr Paul Budde
37	OzEmail Internet
38	Mr Robert G. Otto

APPENDIX 2
INDIVIDUALS WHO APPEARED BEFORE THE COMMITTEE
AT PUBLIC HEARINGS

Wednesday 31 May 2000, Parliament House, Canberra

International Dynamics Pty Ltd (Submission 1)

Mr Alex Encel

Mr Nicholas Tayeh (Submission 6)

Ms Joan Hughes

Australian Caption Centre (Submission 5)

Mr Robert Scott, CEO

National Working Party on Captioning (Submission 18)

Ms Catherine Clark

Screen Producers Association of Australia (Submission 24)

Mr Nick Herd, Executive Director

Mr Stewart Fist (Submission 2)

FACTS (Submission 21)

Mr Tony Branigan, General Manager

Mr John Rushton, Chief Executive, WIN Corporation

Ms Creina Chapman, Manager, Regulatory and Corporate Affairs, Nine Network

Ms Susan Oddie, General Manager Business Affairs, Network Ten

WIN Corporation (Submission 30)

Mr John Rushton, Chief Executive

Mr David Sturgiss, Chief Financial Officer

Philips Sound & Vision

Mr Harry van Dyk, General Manager, Philips Sound & Vision

Mr Ciril Kosorok, Information & Digital Technologies Manager, Philips Sound &
Vision

Mr Howard Jones, Business Development Manager, Philips Digital Networks

Telstra (Submission 16)

Ms Jane van Beelen, Manager, Regulatory, Convergent Business

Mr Greg Willis, Director, Telstra Media

Productivity Commission

Professor Richard Snape, Deputy Chairman & Presiding Commissioner, Broadcasting Inquiry

Mr Stuart Simson, Associate Commissioner

Mr Robert Kerr, Head of Office

Dr Geraldine Gentle, Assistant Commissioner

Open TV (Submission 32)

Ms Miranda Dyson, Director of Business Development, Australia & New Zealand

Mr Michael Ivanchenko, Director of Applications, Australia & New Zealand

TVSN (Submission 9)

Mr Charles Lloyd Jones, Chief Operating Officer

Mr George Frame, Senior Corporate Adviser

Australian Consumers Association (Submission 10)

Mr Charles Britton, Senior Policy Officer, Information Technology and Communications

Thursday 1 June 2000 Parliament House Canberra

Australian Broadcasting Corporation (Submission 20)

Mr Jonathan Shier, Managing Director

Mr Ian Carroll, Editor, Digital Programs and Content

Mr Colin Knowles, Head, Technology Strategy & Development

Community Broadcasting Association of Australia (Submission 7)

Mr Barry Melville, Policy Adviser

Special Broadcasting Corporation (Submission 11)

Ms Christine Sharp, Policy Manager

Mr Hugh James, Manager, Transmission Services

John Fairfax Holdings Ltd (Submission 25)

Ms Gail Hambly, Group Counsel

Mr Bruce Wolpe, Manager, Corporate Affairs

ntl (transmissions services) (Submission 27)

Mr Clive Morton, Director, Broadcast Services

Mr Peter Strohkorb, Business Manager, Digital Systems

ASTRA (Submission 29)

Mr Michael Lattin, Chairman, ASTRA; Director, Optus Television

Mr Bruce Meagher, Head of Corporate Affairs, AUSTAR

Ms Debra Richards, Executive Director, ASTRA

Ms Kaaren Koomen, Group Manager, Multimedia Regulation and Strategy, Cable & Wireless Optus

Foxtel (Submission 26)

Mr Mark Furness, Director, Corporate Affairs

Mr Donald Brooks, Engineering Manager

Fox Sports (Submission 19)

Mr Jon Marquard, Vice President, Business & Legal Affairs

Mr David Malone, CEO

C &W Optus (Submission 13)

Mr Michael Lattin, Director, Optus Television

Ms Kaaren Koomen, Group Manager, Multimedia Regulation & Strategy

Prime Television (Submission 17)

Mr David Carr, Legal Adviser

Southern Cross Broadcasting (Australia) Ltd (Submission 35)

Mr Anthony Bell, Managing Director

Dolby Laboratories (Submission 14)

Mr John Couling, Professional Product Manager

Dr Duane Varan, Chair, Marketing and Media Program, Murdoch University
(Submission 33)*(videoconference)***Department of Communications, Information Technology and the Arts**

Dr Rod Badger, Deputy Chief Executive, NOIE & Executive Director IT

Ms Susan Page, Chief General Manager, Broadcasting and Film

Dr Simon Pelling, General Manager, Digital Television

Mr Rohan Buettel, General Manager Legal and Parliamentary

Australian Broadcasting Authority (Submission 34)

Professor David Flint, Chairman

Mr Giles Tanner, General Manager

Mr John Corker, General Counsel

Mr Fred Gengaroli, Director, Engineering

APPENDIX 3

TABLED DOCUMENTS

TVSN Limited—

Code of Practice, 1 November 1999

Snapshot of the TVSN customer

Welcome to TVSN

Video

**BROADCASTING SERVICES AMENDMENT (DIGITAL TV AND
DATACASTING) BILL 2000**

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EXECUTIVE SUMMARY

Datacasting

- The definition of datacasting, as it stands, is overly restrictive, complicated and goes beyond restricting datacasting to services that do not constitute broadcasting. Labor Senators believe that while datacasting cannot be de facto broadcasting, the definition should be amended to remove the artificial and unnecessary limitations on datacasting.
- Labor Senators believe it is crucial that this emergent industry is not stifled in its development and innovative capacity by overly restrictive regulation and that the benefits for Australia's technological advancement, improved consumer services and employment and economic opportunities should not be constrained.
- Labor Senators oppose the genre-based content definition of datacasting and call upon the Government to withdraw from that approach.
- Labor Senators support an approach that favours flexibility, minimises barriers to entry, and allows new services to develop over time.

ABA regulatory power

- Labor Senators note the ABA's regulatory role in the area of determining datacasting content. Labor Senators note the Bill denies interested parties the ability to access stay powers or seek injunctive relief in relation to decisions of the ABA. Labor Senators urge deletion of relevant exclusions in the Bill.
- Labor Senators acknowledge the legitimate concerns of the national broadcasters that the genre-based content definition of datacasting might impinge on programming decisions properly the province of their Boards. The definition of datacasting in the Bill gives occasion to this concern. Specific provisions that might apply to datacasting by the ABC and SBS might more appropriately be contained within the *Australian Broadcasting Corporation Act 1983* and the *Special Broadcasting Service Act 1991*.

National broadcasters and datacasting

- The nonsensical decision to impose datacasting fees on the national broadcasters should be reversed, and they should be exempted from payment of the fees.
- National broadcasters should be allowed to broadcast radio programs for datacasting purposes.

Datacasting transmission licences after the broadcasting moratorium

- Labor Senators believe it is important that the post-moratorium arrangements for datacasting licences, which have a term of 10 years with a 5-year option, be considered by early review.

Multi-channelling by the national broadcasters

- There is broad support for allowing the national broadcasters the ability to multi-channel. Labor Senators see no valid justification for denying the national broadcasters the ability to multi-channel, particularly when those arguments are balanced against the resultant benefits.

Spectrum loan to commercial television stations and HDTV

- There is some industry criticism of the Government's policy decision to loan spectrum to the commercial free-to-air television broadcasters for the purpose of conversion to digital and HDTV.
- Labor Senators believe that the arrangements mandating HDTV require early review to assess the continued mandating of HDTV broadcasting.

Enhanced programming

- On the evidence, it is not an unreasonable conclusion that the provisions of the Bill allow simultaneous, multiple broadcasts of distinct substance which could constitute de facto multi-channelling. This allows the free-to-air broadcasters to compete with the multi-channelling services offered by the pay TV sector.
- It is clear to Labor Senators that these proposed provisions may cross the boundary between what was conceived to comprise 'enhancements' pursuant to the Act and the Minister's media release of 21st December 1999, into the domain of de facto multi-channelling. The provisions are substantively different from those previously proposed.
- Labor Senators believe that the Bill should be consistent with the Minister's previous policy indications of what would comprise enhanced programming and the circumstances in which multi-channelling in the case of an 'overlap' would be permitted, so that commercial free-to-air stations do not engage in de facto multi-channelling.

Reviews

- In recognition of the transitional nature of the legislation, it is highly desirable that its consequences and efficacy are measured over the coming years to ensure that Parliament's policy objectives are being properly and effectively implemented.
- Labor Senators believe that it is critical for the proposed reviews to be instigated, completed and their findings considered in a timely manner consistent with the industry's requirement for certainty.

- Labor Senators believe it is pertinent for the reviews to be transparent and accountable to Parliament. As such they should be statutory and required by this legislation.

Community broadcasting

- Labor Senators consider some degree of legislative certainty consistent with the Minister's undertakings for community broadcasters to be warranted and appropriate.

Captioning arrangements

- Labor Senators welcome the captioning requirements, which have considerable benefit for a significant sector of the community.
- Whilst it is acknowledged that regional television broadcasters will inevitably bear a disproportionate burden of costs of the captioning requirements relative to metropolitan stations, the importance of captioning to those with hearing impairments or deafness should not be under-estimated.

INTRODUCTION

Inquiry process

Interested parties have eagerly awaited the tabling of the *Broadcasting Services Amendment (Digital TV and Datacasting) Bill 2000* for several months. The breadth of issues covered by the Bill has proven somewhat overwhelming for those who have had to analyse the detail and impact of the legislation over the last three weeks. The Committee received 38 submissions and held around 20 hours of public hearings over two days.

Detailed investigation of the *Broadcasting Services Amendment (Digital TV and Datacasting) Bill 2000*, which is the subject of this Inquiry, has been constrained by the timeframes imposed by the Government. The Government has sought to have Parliament enact the Bill at the end of a particularly eventful session.

The unreasonably short timeframe for conduct of the Inquiry, combined with the Government's undue haste, has compromised the ability of relevant industries to adequately formulate detailed responses to the many issues which the Bill addresses or raises.

It is in this context that Labor Senators have identified the issues we consider critical to the efficacy of the Bill in realising the policy objectives it explicitly seeks to achieve.

Development of commercial free-to-air television broadcasting regulation

Regulation of the commercial free-to-air television stations (and other broadcasting services) is achieved predominantly by the *Broadcasting Services Act 1992* (hereafter the "BSA"). The BSA and Australian broadcasting policy more generally, are predicated on various structural divisions within the broadcasting industry that are increasingly becoming less discrete as a result of technological developments.

An example of the inherent complexities of the framework for Australian broadcasting policy can be seen from the way the important policy objective of promoting Australian content on commercial television has been used to justify competitive restrictions for the entry of new broadcasters. Commercial television stations have argued that the imposition of the higher costs of Australian content on them necessitates protection of their revenues. At the same time, the consequence of limitations on competition has led to the risk of overly concentrated media ownership. In response to the fear that concentration of media ownership is not in the public interest, ownership and control of licences has been regulated. This chain of regulatory responses is illustrative of the inbuilt convolutedness of the BSA.

Regulation of the commercial television broadcasting industry has often involved a degree of technological specificity that is inflexible for an industry where technologies are so rapidly converging.

1998 legislative policy framework

The Government's policy framework for the introduction of digital television was established by the *Television Broadcasting Services (Digital Conversion) Act 1998* (hereafter "the Act"). There has been, in the intervening period, an announcement of Government policy by the Minister for Communications, Information Technology and the Arts on the 21st December 1999 to effect and implement that framework. It has been contended in evidence to the Committee's Inquiry into the *Broadcasting Services Amendment (Digital TV and Datacasting) Bill 2000* (hereafter "the Bill"), that the Bill contains significant variations from the policy framework as originally legislated.¹

Since the passage of the Act the importance of some its provisions to the success or failure of the digital conversion has become apparent. Notably, the Act provided for:²

- the requirement for digital transmission to commence on 1st January 2001 for metropolitan broadcasters and by 1st January 2004 in regional areas;
- the loan of 7 megahertz of spectrum to commercial free-to-air television broadcasters for the requisite period of analog and digital simulcasting;
- a moratorium on the allocation of new commercial television licences until 1st January 2007;
- mandatory quotas for digital transmission in high definition format;
- prohibition of multi-channelling by the commercial broadcasters;
- 'datacasting' (provisionally defined as a service other than broadcasting that delivers information) by existing broadcasters and new players;
- the capacity for broadcasters to provide 'incidental and directly linked' (undefined in the Act) enhanced programming.

1 Foxtel, Submission 26, pp.1-2; ASTRA, *Proof Committee Hansard*, 1/6/00, p.106.; Fox Sports, Submission 19, pp.1-2.

² *Television Broadcasting Services (Digital Conversion) Act 1998*.

Criticisms of framework

Since the introduction of the *Television Broadcasting Services (Digital Conversion) Act 1998* the bases for the legislative provisions, which implement the Government's policy objectives have been criticised by sections of the industry, including suggestions that achievement of the policy objectives is in jeopardy of failure.

In 1998, it was suggested that high definition digital television would provide significant improvements in picture quality and consumer services, it was anticipated that consumer demand would consequently drive take-up of the technology and there was a presumption that HDTV would be the predominant technology in Western Europe, the United States and Japan.

It is yet to be seen whether these forecasts prove accurate, and consumer demand drives the consumer take-up that is critical to the affordability of the technology and success of the legislative framework.

The criticisms of the high definition format include international experiences involving disappointing results for HDTV. The US is the only other market to have legislated for high definition television and is therefore, with Japan, the only market with high definition content.³

The United States experience of high definition television is suggested as evidence of the inefficiencies of HDTV, particularly in the consumer marketplace. ASTRA has called HDTV "a dud" and noted "it is not working in America and there seems to be no enthusiasm for it."⁴ Mr. A. Encel of International Dynamics agreed with this statement, and advised "HDTV is acknowledged as a consumer product failure in the USA, and there are even fewer reasons for it to succeed in Australia".⁵ The Screen Producers Association of Australia has indicated that take-up of HDTV in Australia "is likely to be extremely low, especially in the early years of digital television" if the American experience can be extrapolated into the Australian setting.⁶

In the UK HDTV was rejected and a multiplexing, standard definition model was adopted. UK policy specifically facilitates the entry of new players into the commercial market, and this is suggested to be part of the explanation for the general consideration of the UK digital scheme as a success, and for the resultant substantial take-up rates. Similarly Europe has no plans for a high definition standard.⁷

3 SPAA, Submission 24, p.10.

4 ASTRA, *Proof Committee Hansard*, 1/6/00, p.103, p.112.

5 Submission 1, p.3.

6 SPAA, Submission 24, p.10.

7 ASTRA, *Proof Committee Hansard*, 1/6/00, p.103.

In Japan, HDTV transmission has been delayed until 2003.⁸ This suggests that there are some doubts remaining about the conversion to high definition format digital television.

There is some support for removal of the mandated HDTV transmission. Labor Senators believe it is important that this issue be reviewed at an early opportunity.

8 *ASTRA, Proof Committee Hansard, 1/6/00, p.112; FACTS, Proof Committee Hansard, 31/5/00, p.37.*

DATACASTING

Definition – criticisms

Considerable concerns have been raised with the Committee, by a wide range of organisations, relating to the scope of the definition of “datacasting” in the Bill. The Government has sought to confine datacasting, the wisdom of which is dubious in view of the denunciation by a range of interested parties of the means that has been chosen for implementing this restraint.⁹

The Productivity Commission, in its recent report on broadcasting, noted that the Government’s policy relating to datacasting “stifles competition and innovation and is at odds with major tenets of mainstream broadcasting policy”.¹⁰ It considers the regulatory restrictions:

“will be costly to Australian consumers and businesses alike, .. delay consumer adoption of digital technology and deprive business of opportunities to develop new products and services for the world as well as Australian markets.”¹¹

Telstra and the ACA¹² have concurred with the Productivity Commission’s position that prescriptive regulation is detrimental to the emergent industry and consumers. The Bill is considered likely to have a negative impact on Australian consumers due to the inability to provide the full range of new digital services, and on the emergent industry whose viability is significantly limited by the provisions of the Bill.¹³ Labor Senators believe it is crucial that this emergent industry is not stifled in its development and innovative capacity by overly restrictive regulation, with consequences for Australia’s technological advancement, improved consumer services and employment and economic opportunities.

Criticisms of the datacasting regime include:

- the constraint that 10 minute segments cannot be “self-contained” involves difficulty with objective definition of what is “self-contained”;¹⁴

9 Fairfax, *Proof Committee Hansard*, 1/6/00, p.92; Telstra, Submission 16, pp.2,4; Productivity Commission, *Broadcasting: Inquiry Report*, 3 March 2000, p.15; ACA, Submission 10, p.6; ABC, Submission 20, pp.4-5; SBS, Submission 11, p.2.

10 Productivity Commission, *Broadcasting: Inquiry Report*, 3 March 2000, p.14.

11 Productivity Commission, *Broadcasting: Inquiry Report*, 3 March 2000, p.15.

12 Telstra, Submission 16, pp.2,4; ACA, Submission 10, p.6.

13 Telstra, Submission 16, p.1; ACA, Submission 10, p.6.

14 SBS, *Proof Committee Hansard*, 1/6/00, p.89; Telstra, *Proof Committee Hansard*, 31/5/00, p.51; Telstra, Submission 16, p.2.

- restriction of the entertainment value of datacasting is likely to render it a commercially unattractive or inviable service to potential datacasters and undesirable to consumers;¹⁵
- restrictions are likely to stifle innovation and technological opportunities for consumers;¹⁶
- restricted definition of education will effectively exclude children's educational programs and programs that have considerable value to the community;¹⁷
- objections to restriction of datacasting according to content genre have been extensive;¹⁸
- the complexity of the definition will result in uncertainty;¹⁹
- the degree of technological specificity in the Bill will prevent datacasters from responding to technological advancements and offering new services as they become available;²⁰
- the definition of information and whether it precludes provision of opinion;²¹
- distinction between news and current affairs – a distinction which is difficult and inappropriate to make and has no apparent policy justification;²²
- the definition of foreign language programming requires no English content at all.²³

15 SBS, *Proof Committee Hansard*, 1/6/00, p.90; Fairfax Ltd, *Proof Committee Hansard*, 1/6/00, pp.92, 93; SPAA, *Proof Committee Hansard*, 31/5/00, p.20; ACA, *Proof Committee Hansard*, 31/5/00, p.67. Note however contrary opinion of FACTS, which considers the definition as able to accommodate "services that operate successfully, profitably and freely within the rules": *Proof Committee Hansard*, 31/5/00, p.30.

16 SPAA, *Proof Committee Hansard*, 31/5/00, p.20, 21; ACA, *Proof Committee Hansard*, 31/5/00, p.66.

17 Fairfax Ltd, *Proof Committee Hansard*, 1/6/00, p.94; ACA, *Proof Committee Hansard*, 31/5/00, pp.67, 68; ACA, Submission 10, p.6.

18 SBS, *Proof Committee Hansard*, 1/6/00, p.88; Fairfax, *Proof Committee Hansard*, 1/6/00, p.92; SPAA, *Proof Committee Hansard*, 31/5/00, pp.21, 22; ASTRA, *Proof Committee Hansard*, 1/6/00, p.107.

19 ACA, *Proof Committee Hansard*, 31/5/00, p.67; C & W Optus, *Proof Committee Hansard*, 1/6/00, p.108.

20 SPAA, *Proof Committee Hansard*, 31/5/00, p.22.

21 Fairfax Ltd, *Proof Committee Hansard*, 1/6/00, p.93.

22 Fairfax Ltd, *Proof Committee Hansard*, 1/6/00, p.93.

23 Fairfax Ltd, *Proof Committee Hansard*, 1/6/00, p.93; Submission 25, p.5.

Recommendation

Labor Senators believe the definition of datacasting, as it stands, is overly restrictive, complicated and goes beyond restricting datacasting to services that do not constitute broadcasting. Labor Senators believe that while datacasting cannot be de facto broadcasting, the definition should be amended to remove the artificial and unnecessary limitations on datacasting.

Alternative definitions

There are arguments that the proposed legislative categorisation goes beyond just prohibiting datacasters from broadcasting.²⁴ To this end, alternative distinctions have been recommended to the Committee including:

- removing the unnecessarily complicated restrictions from those programs which are permitted to be broadcast (without Category A/B distinction) whilst maintaining the 10 minute limitation of length;²⁵
- complete removal of the genre-based restrictions, and general relaxation of the limitations of the definition as detailed above.

Given the opportunity to define datacasting ab initio, suggested definitions included:

- a definition based on the distinction between datacasting and broadcasting being the interactivity of the former, rather than genre-based regulation;²⁶
- specify broadcasting as being the linear, passive, scheduled production of television programs on a repeatable or ongoing basis, and datacasting by reference to its not being broadcasting; that is differentiating datacasting from broadcasting by reference to the known quantity of broadcast, rather than by reference to the unknown quantity, datacasting;²⁷
- definition of datacasting as “services which ... are not broadcasting services”.²⁸

24 SBS, *Proof Committee Hansard*, 1/6/00, p.88; Fairfax Ltd, *Proof Committee Hansard*, 1/6/00, p.92.

25 SBS, *Proof Committee Hansard*, 1/6/00, p.88; Fairfax Ltd, *Proof Committee Hansard*, 1/6/00, p.93.

26 Fairfax Ltd, *Proof Committee Hansard*, 1/6/00, pp.93, 96.

27 ACA, *Proof Committee Hansard*, 31/5/00, p.67. This definition has the advantage of defining broadcasting, and people know what broadcasting is, rather than datacasting which we do not know at all: *Proof Committee Hansard*, 31/5/00, p.67. ACA, Submission 10, p.6.

28 C & W Optus, *Proof Committee Hansard*, 1/6/00, p.108.

The Government's approach appears to widely define broadcasting and expressly limit datacasting to a tightly limited range of services that were characterised by the ACA as "worthy but dull". The Government's policy approach fails to comprehend the scope of change in these industries, the undeniable and legitimate need for datacasters to package their products in attractive forms to succeed in emerging markets with products they create.

There is nothing wrong with datacasters packaging content in an attractive fashion. Labor Senators reject the argument of FACTS that this is or should be the sole domain of free-to-air broadcasters.

Recommendations

Labor Senators oppose the genre-based content definition of datacasting and call upon the Government to withdraw from that approach.

Labor Senators support an approach that favours flexibility, minimises barriers to entry, and allows new services to develop over time.

ABA regulatory power

The definition of datacasting in the legislation according to Category A prohibitions and Category B restrictions is likely to cause a "regulatory nightmare"²⁹ from the perspective of potential datacasters, although the Federation of Australian Commercial Television Stations considers the definition imminently workable.³⁰

Notably, the ABA considers itself well-positioned and well-qualified to make determinations according to the genre-based definition.³¹ However as a matter of practice, the ABA will make determinations only where there is a dispute over content transmitted by datacasting and decisions as to content for transmission will, in the first instance, be made by datacasters. As such, it is troubling that datacasters are so uncomfortable with the existing definition.

Labor Senators are similarly concerned that the Bill denies interested parties the ability to access stay powers or to seek interlocutory injunctive relief in relation to decisions of the ABA. The ABA failed to adequately justify this breadth of the ABA's power in the context of concerns raised by Fairfax Ltd that section 57 (Schedule 1) of

29 SBS, *Proof Committee Hansard*, 1/6/00, p.88.

30 FACTS, *Proof Committee Hansard*, 31/5/00, pp.30-31.

31 ABA, *Proof Committee Hansard*, 1/6/00, p.141.

the Bill does not permit the courts to grant interlocutory injunctive relief relating to ABA determinations that are appealed.³²

The national broadcasters have objected to the impact of the ABA's regulatory role in datacasting on their ability and right to determine their programming as they consider such decisions as properly being the province of their Boards as regulated by their Acts.³³ As discussed above, concerns at the extent of the ABA's decision-making powers have been disclosed to the Committee,³⁴ especially in light of the perceived complexities and the difficulty in objectively defining datacasting.

Recommendations

Labor Senators note the Bill denies interested parties the ability to access stay powers or to seek interlocutory injunctive relief in relation to decisions of the ABA. Labor Senators urge deletion of the relevant exclusions in the Bill.

The definition of datacasting in the Bill gives occasion to concern that the genre-based content definition of datacasting might impinge on programming decisions properly the province of their Boards. Specific provisions that might apply to datacasting by the ABC and SBS might more appropriately be contained within the *Australian Broadcasting Corporation Act 1983* and *Special Broadcasting Service Act 1991*.

The national broadcasters and datacasting

The national broadcasters have expressed their opposition to the overall restrictiveness of the scope datacasting permitted by the Bill; particularly that it prevents them from broadcasting radio programs for datacasting purposes..³⁵ This will preclude utilisation of that spectrum to deliver radio broadcasts to regional and remote areas which presently cannot access these broadcasts.³⁶

Additionally, the national broadcasters consider the imposition of the licensing charge on them illogical, as should Government funded broadcasters be required to pay that fee to the Government, the Government will have to increase their funding

32 ABA, *Proof Committee Hansard*, 1/6/00, p.142; Fairfax, *Proof Committee Hansard*, 1/6/00, p.94.

33 ABC, Submission 20, p.6; SBS, Submission 11, p.2; SBS, *Proof Committee Hansard*, 1/6/00, p.89; ABC, *Proof Committee Hansard*, 1/6/00, p.73. Note that the Department of Communications, Information Technology and the Arts does not agree that the ABA will, in effect, have power to determine content: *Proof Committee Hansard*, 1/6/00, pp.139-141.

34 ACA, *Proof Committee Hansard*, 31/5/00, p.67; Fairfax Ltd, *Proof Committee Hansard*, 1/6/00, p.94.

35 SBS, *Proof Committee Hansard*, 1/6/00, p.88; SBS, Submission 11, p.2; ABC, *Proof Committee Hansard*, 1/6/00, pp.71,73; ABC, Submission 20, p.6.

36 SBS, *Proof Committee Hansard*, 1/6/00, pp.90, 91; ABC, *Proof Committee Hansard*, 1/6/00, pp.80-81.

accordingly.³⁷ This is in the context of the recent triennial funding decisions by the Minister, which have not provided funding for the fee. In effect, a refusal by the Government to provide funding for payment for the fee would be a reduction in the funding of the national broadcasters, whilst provision of the additional funding would be tantamount to paying the datacasting fee to itself. This situation is nonsensical and requires resolution.

Recommendation

That the ABC and the SBS be exempted from payment of the datacasting licence fee.

Datacasting transmission licences after the broadcasting moratorium

The decision that licences for datacasting will be for 10 years with a 5-year option poses a problem regarding the termination of the moratorium period on broadcasting at the end of 2006. Potential datacasters have expressed concern at the uncertainty of ongoing licensing arrangements.³⁸ At this time, datacasters will hold datacasting licences, but what they will be permitted to do with those is presently unclear. A review is scheduled into the regulation of datacasting regulatory and revenue arrangements for 2007, however precisely what services a datacasting transmission licence will permit should be determined prior to that time so that datacasters have some degree of certainty.

The Department has indicated that use of the spectrum occupied by a datacaster will be able to be used “for any licensed services under the BSA”. A datacasting transmitter licence will not automatically convert to a broadcasting licence, rather it will leave open the option of taking out a broadcast licence.³⁹

Recommendation

Labor Senators believe it is important that the post-moratorium arrangements be considered by early review.

37 ABC, Submission 20, p.6; SBS, Submission 11, p.2; SBS, *Proof Committee Hansard*, 1/6/00, p.89; ABC, *Proof Committee Hansard*, 1/6/00, p.73.

38 For example, Telstra, Submission 16, p.2, Fairfax Ltd, Submission 25, p.9.

39 DoCITA, *Proof Committee Hansard*, 1/6/00, p.126-127.

MULTI-CHANNELLING BY THE NATIONAL BROADCASTERS

It has been made patently clear, by the national broadcasters, that they regard multi-channelling as critical to their future. The grounds for their request that they be exempted from the prohibition on multi-channelling are noteworthy. The ABC and the SBS believe that the capacity to multi-channel, pursuant to their Charters, is important because it will:

- enable them to better fulfil their Charters – giving viewers real additional choice by allowing more programming to be showcased, and at times that suit their audience;⁴⁰
- allow the ABC and the SBS to program content with a regional focus, and for the SBS to program additional Australian and multi-cultural content with that focus;⁴¹
- be cost-effective;⁴²
- encourage take-up of digital technology to the benefit of the industry as a whole.⁴³

The rationale for the decision to prohibit multi-channelling by the national broadcasters is not easily ascertained. Interestingly the commercial stations have indicated that they do not oppose multi-channelling by the ABC and SBS provided that the multi-channelling is:

“... very definitely within their charters and provided that the focus [is] very much on complementary programming, rather than quasi commercial programming or programming that is likely to compete in a serious sense with commercial television.”⁴⁴

The ABC and SBS dispute that their ability to multi-channel will have a detrimental impact on the pay television and free-to-air commercial television broadcasting industries.⁴⁵ FACTS indicated in evidence to the Committee that it competes with the ABC and the SBS for audience, and with the SBS for advertising.⁴⁶ Mr. S. Fist agreed; “if the ABC gets better, the commercials are going to lose out”.⁴⁷

40 SBS, *Proof Committee Hansard*, 1/6/00, p.88; ABC, *Proof Committee Hansard*, 1/6/00, p.71.

41 SBS, *Proof Committee Hansard*, 1/6/00, p.88; ABC, *Proof Committee Hansard*, 1/6/00, p.74.

42 SBS, *Proof Committee Hansard*, 1/6/00, p.88.

43 ABC, *Proof Committee Hansard*, 1/6/00, p.71.

44 FACTS, *Proof Committee Hansard*, 31/5/00, p.33.

45 ABC, *Proof Committee Hansard*, 1/6/00, p.71; SBS, *Proof Committee Hansard*, 1/6/00, p.88.

46 FACTS, *Proof Committee Hansard*, 31/5/00, p.33.

47 Mr S Fist, *Proof Committee Hansard*, 31/5/00, p.26.

Labor Senators consider that the SBS's share of one per cent of advertising revenue is insufficient to justify prohibition of multi-channelling by the national broadcasters for competitive reasons. Furthermore, Labor Senators do not believe the national broadcasters compete with commercial broadcasters in the true sense of that word.

Other sections of the industry have come out in support of permitting multi-channelling by the ABC and SBS. The Community Broadcasting Association of Australia indicated its regret that multi-channelling of national broadcasting services has been ruled out in the Government's legislative proposals. The CBAA has canvassed its interest in the potential alternative carriage option for community television, arising from the national broadcasters being permitted to multi-channel; namely the use of a digital multiplex shared with one or other of the national broadcasters.⁴⁸

The Screen Producers Association of Australia (SPAA) conveyed its perplexity at the Government's prohibition of multi-channelling by national broadcasters, and its opinion that permission to multi-channel would complement the broadcasters' charters.⁴⁹

The pay television industry does not support multi-channelling generally, and considers any multi-channelling by the national broadcasters to be in competition with their industry.⁵⁰

Labor Senators do not agree with the subscription television industry's view that the national broadcasters are in competition with them, and its conclusion that as such, the ABC and SBS should not be permitted to multi-channel for the same reasons commercial broadcasters are prohibited from multi-channelling. As such Labor Senators see no valid justification for denying the national broadcasters the ability to multi-channel, particularly when those arguments are balanced against the resultant benefits.

Recommendation

That the prohibition on the ABC and the SBS be removed to permit them to multi-channel within the constraints of their respective Charters.

48 CBAA, Submission 7, p.6.

49 SPAA, *Proof Committee Hansard*, 31/5/00, p.20.

50 ASTRA, *Proof Committee Hansard*, 1/6/00, p.110.

SPECTRUM LOAN TO COMMERCIAL TELEVISION STATIONS AND HDTV

There has been some industry criticism during the Inquiry of the Government's policy decision to loan spectrum to the commercial free-to-air television broadcasters for the purpose of conversion to digital and HDTV transmission, and of the policy decision to mandate transmission in high definition format. The *Television Broadcasting Services (Digital Conversion) Act 1998* implemented the Government's policy for digital conversion and provided for transmission in high definition format. Subsequently, as reflected in the Bill, the Government adopted a triplecast regime whereby broadcasters are required to transmit digital broadcasts in standard definition, with prescribed high definition quotas commencing in 2003.

Criticisms of the high definition requirement have centred on international digitisation strategies.⁵¹ In the context of the international experience, the mandating of HDTV and the consequent significant spectrum requirements are alleged to significantly compromise the efficacy of the Bill in effecting the digital conversion.⁵² No other country in the world has mandated HDTV quotas.⁵³

It has been suggested that there is no reason to mandate HDTV and that it should be left to market forces to determine whether demand will drive transmission in that format rather than to accept the restrictive consequences arising from directing that it be provided.⁵⁴

That HDTV is not necessary to receive new digital services (it may in fact reduce the diversity of digital services)⁵⁵, and that the improved picture quality is not distinguishable to the average consumer on normal size television screens (and as such may not warrant the substantial cost), are factors that will influence likely take-up rates in Australia.⁵⁶

The Federation of Australian Commercial Television Stations (FACTS) verified its support for high definition to the Committee stating:

“We are effectively betting our future on our ability to persuade Australian viewers to make the digital transition with us. To be successful we will need to be able to offer viewers a wide range of digital services. High definition will be very significant in promoting

51 ACA, *Proof Committee Hansard*, 31/5/00, p.69; International Dynamics, *Proof Committee Hansard*, 31/5/00, p.5, ASTRA, *Proof Committee Hansard*, 1/6/00, p.103.

52 International Dynamics, Submission 1.

53 ABA, *Proof Committee Hansard*, 1/6/00, p.125.

54 Submission 1, pp.3-4.

55 Productivity Commission, “Broadcasting: Inquiry Report”, 3 March 2000, p.237.

56 Submission 1, p.3.

digital television, although we would not expect large numbers of high definition sets to be sold in the early years.”⁵⁷

The production sector of the broadcasting industry (through SPAA) has expressed concern at the mandated HDTV quota. Should high definition continue to be mandated in the legislation, it is considered appropriate that Australian content quotas be imposed to ensure that the Australian production industry and the cultural importance of Australian content are retained in the digital environment

The Community Broadcasting Association of Australia (CBAA) has endorsed the Productivity Commission’s finding that the mandating of HDTV and the restriction against multi-channelling will discourage consumer uptake of digital.⁵⁸

The ABC has noted that should they ultimately be permitted to multi-channel the obligation to triplecast will essentially preclude them from offering datacasting services due to the resultant unavailability of spectrum.⁵⁹

Recommendation

Labor Senators believe that the arrangements mandating HDTV require early review to assess the continued mandating of HDTV broadcasting.

57 FACTS, *Proof Committee Hansard*, 31/5/00, p.30.

58 CBAA, Submission 7, p.6.

59 ABC, *Proof Committee Hansard*, 1/6/00, p.61.

ENHANCED PROGRAMMING

It has been argued to the Committee that the scope of enhanced programming permissible pursuant to the Bill is significantly wider in scope than allowed under the policy articulated by the Minister for Communications, Information Technology and the Arts on the 21st December 1999.⁶⁰ Those arguments have opposed the new definition contending that the enhanced services permitted by the Bill are tantamount to multi-channelling, contrary to the Government's express policy to prevent multi-channelling.

FACTS has disputed that the provisions differ in substance from the preceding policy announcement, and is of the opinion that the provisions simply "spell out some of the things that were implicit or slightly uncertain in the form of words that we have been operating on since 1998."⁶¹

The *Television Broadcasting Services (Digital Conversion) Act 1998* provided for additional 'incidental and directly linked programming' by commercial free-to-air television broadcasters. The term 'incidental and directly linked' was not defined in the legislation.

The Minister's policy announcement on the 21st December 1999 stated that:

"The Government will allow the free-to-air broadcasters to provide digital enhancements to their main simulcast programs, provided they are **directly linked to, and contemporaneous with, the main program**. This could take the form of additional camera angles on a sports match, statistics about a player or additional information about a segment in a lifestyle or magazine program. The Government will allow the broadcasters to multi-channel when dealing with "overlaps" – for example to allow the end of a sporting match to be shown even if it runs overtime and **clashes with a news bulletin** which commences at its scheduled time."⁶²

60 Foxtel, Submission 26, pp.1-2; ASTRA, *Proof Committee Hansard*, 1/6/00, p.106.; Fox Sports, Submission 19, pp.1-2.

61 FACTS, *Proof Committee Hansard*, 31/5/00, pp.32, 33.

62 Media Release "'Digital – new choices, better services for Australians'" Minister for Communications, Information Technology and the Arts, Media Release, 21 December 1999, p.2.

Category A enhancements

The primary concerns with the Bills provision for Category A digital program enhancement content is the breadth of the definition to include:⁶³

- content in the form of text, data, speech, music or other sounds, visual images or any other form or combination of forms,
- transmitted in digital mode,
- which has a “sole purpose” of enhancing a television program,
- has a subject matter which is closely and directly linked to the subject matter of the primary program,
- is transmitted simultaneously with the primary program, and
- where the primary program is transmitted in analog and SDTV mode.

The pay TV industry is concerned that there is no limit on the amount of video that can be broadcast and as such, significant amounts of video programming would be permitted as the secondary program, amounting to de facto multi-channelling.⁶⁴ The fear is that ‘Category A’ program enhancements would allow broadcasters to broadcast a re-run or different program of the same series of a sequential drama program, sitcom or miniseries at the same time as the primary program. Similarly the broadcast of a secondary program in which an actor stars could be broadcast where that actor was a special guest on a primary program. These broadcasts are considered multi-channelling by the pay television industry.⁶⁵ The pay TV industry believes that this kind of enhancement is permissible under the provisions of the Bill and believe the example in the section that ‘video highlights from past matches’ would be considered a program enhancement pursuant to ‘Category A’ supports their argument.

Category B enhancements

‘Category B’ digital enhancement content is a program providing simultaneous, live transmission of two sports events, in the same sport, at the same venue.⁶⁶ This enables free-to-air broadcasters to broadcast separate and distinct sporting matches at the same time. The pay television industry considers the impact of this provision to be particularly noteworthy for the reason that sport programs give pay television a

63 C & W Optus, Submission 13, p.8; the Bill’s proposed clause 6(14) of Schedule 4 of the BSA.

64 Ibid.

65 Ibid.

66 Amendments in Bill to clause 6(15) of Schedule 4 of the BSA.

competitive edge, and this competitive edge is used to justify the anti-siphoning regime.⁶⁷

Overlap multi-channelling

The Bill makes specific provision for ‘overlap multi-channelling’ in the amendments to clause 6(8), Schedule 4, of the BSA. The circumstances where this kind of multi-channelling is permitted are considerably more extensive originally contemplated, as understood by the pay television industry. The Minister’s announcement of the 21st December 1999 clearly indicated that multi-channelling would be permitted where events ran into a ‘news bulletin’.⁶⁸ The new clause allows multi-channelling where the overlap is into any scheduled program.

The concern that the provisions of the Bill might allow simultaneous, multiple broadcasts of distinct substance, so as to permit de facto multi-channelling⁶⁹ is not an unreasonable conclusion on the evidence. This will negatively impact the pay television industry, in its view, by allowing the free-to-air broadcasters to use their free spectrum to unfairly compete with the multi-channelling services offered by the pay TV sector.⁷⁰

It is clear to Labor Senators that these proposed provisions may cross the boundary between what was conceived to comprise ‘enhancements’ pursuant to the Act and the Minister’s media release of 21/12/99, into the domain of de facto multi-channelling. The provisions are substantively different from those previously proposed. Labor Senators believe that the Bill should be consistent with the Minister’s previous policy indications of what enhanced programming would comprise.

ASTRA and Fox Sports are seeking the deletion of Category B enhancements, and amendment of Category A so as to exclude the simultaneous broadcast of stand-alone, separate programs.⁷¹

The pay TV operators present an point of view which is irreconcilable with that of the free-to-air industry. Their concern is for the continued viability of the pay television industry, and they are apprehensive at the impact the effective multi-channelling on

67 C & W Optus, Submission 13, pp.8-10.

68 Media Release “Digital – new choices, better services for Australians” Minister for Communications, Information Technology and the Arts, Media Release, 21 December 1999, p.2.

69 C & W Optus, Submission 13, p.6.

70 C & W Optus, Submission 13, p.7.

71 ASTRA, *Proof Committee Hansard*, 1/6/00, p.107.

their industry particularly as to how it will affect their capacity to continue to provide a wide range of sporting events, in regional areas in particular.⁷²

The Bill in its present form is likely to have a detrimental impact on the services offered by subscription television to Australians living in regional and rural Australia, particularly in terms of sports programming.⁷³ The reasons for this impact on the regions are stated to be:⁷⁴

- that the commercial free-to-air broadcasters will have the capacity to ‘starve’ pay TV of the rights to, for example secondary sporting matches, by utilising anti-siphoning rules to their advantage; or
- the pay TV sports channels might decide not to broadcast those programs because they do not have the metro market available to them or that is being whittled away. This would result in a loss of existing programming.

Recommendation

Labor Senators believe that the Bill should be consistent with the Minister’s previous policy indications of what would comprise enhanced programming and when multi-channelling in the case of an ‘overlap’ would be permitted, so that commercial free-to-air stations do not engage in de facto multi-channelling.

72 C & W Optus, Submission 13, p.9.

73 ASTRA, *Proof Committee Hansard*, 1/6/00, p.107.

74 ASTRA, *Proof Committee Hansard*, 1/6/00, p.107.

REVIEWS

In recognition of the transitional nature of the legislation, it is highly desirable that its consequences and efficacy are measured over the coming years to ensure that Parliament's policy objectives are being properly and effectively implemented. Due to the doubts that have been raised during the process of this inquiry, it has become apparent that any reviews undertaken in analysis of the legislative scheme should be conducted as early as practicable.

Concerns have also been elicited relating to the transparency of these reviews. Transparency is best achieved by making the reviews statutory and required by this legislation and hence open and accountable to Parliament. Many witnesses before the Committee have concurred with the view that it is appropriate for the reviews to be statutory.

The ABC has expressed a general preference for the reviews to be statutory:

“We start from the premise that the ABC reports to Parliament, so we will always be more comfortable in any review that assumed that that was the process we go through.”⁷⁵

There have been indications that there is a general preference for the reviews to be done sooner rather than later in the interests of certainty, that transparency of these review processes is critical, and that it is, as a consequence, appropriate for the reviews to be statutory.⁷⁶

ABA review – video/audio streaming

In the second reading speech,⁷⁷ the Government indicated that the ABA would undertake, “over the next 12 months” a review of whether transmission of audio and video streaming are regulated by the *Broadcasting Services Act*. How these transmissions are characterised is determinative of the nature of regulation, or if indeed, they are regulated at all by the BSA. The ABA has indicated that the terms of reference for the inquiry have not yet been formulated, and the ABA has not formally commenced the inquiry.⁷⁸

75 ABC, *Proof Committee Hansard*, 1/6/00, p.74.

76 Fairfax Ltd, *Proof Committee Hansard*, 1/6/00, p.94.

77 Second Reading Speech, *House Hansard*, 10/5/00, pp.15337ff.

78 ABA, *Proof Committee Hansard*, 1/6/00, pp.128-129.

The ABC has indicated that it would prefer that the matter to be investigated was a matter for the Board. However, Mr. Shier, Managing Director of the ABC, agreed that “if it was to be done by the ABA, much as I would prefer that not to be the position, I think the review should be done earlier rather than later”.⁷⁹ The Australian Consumers’ Association indicated that it favours a statutory review over investigation by the ABA.⁸⁰

Overall there was a general eagerness within the industry for the review to be completed without delay to provide certainty prior to the commencement of broadcasting of the regulatory scheme applicable to video and audio streaming. It is noteworthy that this issue reflects the difficulties associated with technological convergence of the industry and the present regulatory structure which is transmission mode specific.

HDTV review

The legislation provides for a review of the HDTV transmission requirements in 2003 to assess the efficacy of digital uptake and the mandating of HDTV transmission by broadcasters.

The pay television industry, represented by ASTRA, has indicated that the review of the HDTV arrangements should be an open statutory review. Furthermore, it should be brought forward immediately because, in ASTRA’s opinion, HDTV is not going to work and once this is recognised Australia can “get on with the digital development...”.⁸¹

The ABC, however, expressed the contrary view that it was advisable for the review to take place later rather than earlier for HDTV to allow for consumers to have opportunity to see the technology before take-up rates are analysed, and policy changes made pursuant to that analysis.⁸²

The apparent problems that broadcasters will face in sourcing the requisite content for high definition quotas will have a disproportionate impact on the ABC, in the opinion of the ABC. The ABC anticipates problems with sourcing original content because much content comes from Europe where an HDTV standard has not been adopted. The ABC cannot commence production until probably 2003, hence a delayed timetable for the review will suit the ABC.⁸³

79 ABC, *Proof Committee Hansard*, 1/6/00, p.74.

80 ACA, *Proof Committee Hansard*, 31/5/00, p.68.

81 ASTRA, *Proof Committee Hansard*, 1/6/00, p.108.

82 ABC, *Proof Committee Hansard*, 1/6/00, p.74.

83 ABC, *Proof Committee Hansard*, 1/6/00, pp.74-75.

Recommendation

Labor Senators believe that the arrangements mandating HDTV require early review to assess the continued mandating of HDTV broadcasting.

Simulcast review

The *Broadcasting Services Act 1999* already requires a review be conducted before 31 December 2005 into the amendment or repeal of the requirement that a broadcaster must broadcast the same program in both analog and digital mode during the simulcast period. It has been recommended to the Committee that it is critical that analog transmissions cease as soon as possible. This cannot be done, however if adequate levels of digital take-up are not achieved. Accordingly, Labor Senators recommend that the implementation of digital policy be closely observed with the aim of achieving analog disconnection as soon as possible.

Review of datacasting arrangements

There are two reviews provided for in the Bill which are of particular significance to datacasting. The Bill requires a number of reviews to be undertaken before 1 January 2004, and one of these relates to whether any amendments should be made to Schedule 6, dealing with datacasting services. In light of the potential for this review to alter the arrangements applying to providers of licensed datacasting services and holders of datacasting transmitter licences, those interested in the emerging industry are keen for this review to be completed as soon as possible. Timeliness will afford the new industry with the certainty that it seeks.

Review of regulatory and revenue arrangements for datacasting licences

The Bill provides for a review of regulatory arrangements that should apply to, and the revenues to be raised by the Commonwealth in connection with the operation of, a datacasting transmitter (under a datacasting transmitter licence) to transmit licensed broadcasting services on or after 1st January 2007.

The timing of this review appears to be tardy considering the moratorium on the issue of broadcasting licences ends on 31st December 2006. Fairfax lends its support to the significance of expeditious completion of the review.⁸⁴ Similarly, C & W Optus

84 Fairfax Ltd, *Proof Committee Hansard*, 1/6/00, p.94.

considers certainty for datacasting licensees to be critical, and if a shorter timeframe for this review will bring that certainty, then that is welcomed.⁸⁵

Recommendations

Labor Senators consider it critical that all of these proposed reviews are instigated, completed and findings considered in a timely manner consistent with the industry's requirement for certainty.

Labor Senators believe it is pertinent for the reviews to be transparent and accountable to parliament. As such they should be statutory and required by this legislation.

85 C & W Optus, *Proof Committee Hansard*, 1/6/00, p.110.

COMMUNITY BROADCASTING

The Community Broadcasting Association of Australia (CBAA) has expressed concern at the omission of provisions in the Bill for the digital transition of community broadcasters.

The Minister for Communications, Information Technology and the Arts announced on the 24th March 1998 that:

“... the community television sector ... will be guaranteed free access to the spectrum needed to broadcast one standard definition digital channel.”⁸⁶

Since then, the Minister’s announcement of the 21st December 1999, has been the only further indication that the Government intends to fulfil its original promise:

“Community television will be broadcast in digital. This will be done in conjunction with datacasting services, as part of a ‘multiplex’.”⁸⁷

In evidence to the Committee the Department of Communications, Information Technology and the Arts conceded that the Department has not been asked or directed to do the policy work on community broadcasting which is preparatory to the technical work on the allocation and planning of spectrum. Nor is the Department aware of any plans to allocate the promised one standard definition digital channel in the next 12 months.⁸⁸

The CBAA appealed to the Committee for legislative provision of the regulatory detail that will apply to the digital conversion by commercial broadcasters.⁸⁹ Labor Senators concur with the CBAA that some degree of legislative certainty consistent with the Minister’s undertakings is warranted and appropriate for the continuation of this important industry.

It is pertinent to note that review of the arrangements applying to community broadcasters will be necessary should the Bill ultimately be amended to provide for multi-channelling by the national broadcasters.⁹⁰

86 Media Release, “Digital – A New Era in Television Broadcasting”, Minister for Communications, Information Technology and the Arts, 24 March 1998, p.2.

87 Fact Sheet appended to Media Release “Digital – new choices, better services for Australians”, Minister for Communications, Information Technology and the Arts, Media Release, 21 December 1999, p.2.

88 Department of Communications, Information Technology and the Arts, *Proof Committee Hansard*, 1/6/00, p.130.

89 CBAA, *Proof Committee Hansard*, 1/6/00, pp. 81-82.

90 CBAA, *Proof Committee Hansard*, 1/6/00, p.83.

Recommendation

Labor Senators recommend that some degree of legislative certainty consistent with the Minister's undertakings be provided for the community broadcasting industry.

CAPTIONING ARRANGEMENTS

Accessibility to broadcasting services is a crucial policy objective. The Bill provides mandatory quotas for captioning for free-to-air commercial television broadcasters which will empower those with hearing impairments or deafness to understand programs. The National Working Party on Captioning (NWPC) and Mr. N. Tayeh, who have long been campaigning for increased captioning on Australian television, have welcomed this initiative.

Criticism has arisen on two grounds:

- that the Bill does not go far enough in that it does not prescribe future increases in captioning quotas facilitating eventual full captioning;⁹¹
- that the captioning requirements place an undue burden on regional broadcasters.⁹²

Compared with the United Kingdom and the United States, Australia's achievements in advancing the interests of those with deafness or hearing impairments are deficient at best.⁹³ That does not deny the fact that the provisions are a necessary improvement.

Regional broadcasters have expressed dismay at the provisions arguing that the financial burden on their organisations is untenable. They have submitted to the Committee that regional broadcasters provide a higher proportion of local content in regional news and current affairs than metropolitan stations. Consequently, they will be forced to either cut into their already low profit margins or make the commercial decision to reduce local content to the detriment of regional communities.⁹⁴

Suggestions that remote stenocaptioning would overcome the difficulties associated with attracting properly qualified staff to regional areas were refuted by Prime and WIN Corporation. Prime and WIN consider the impracticality of remote captioning (as a result of regional services' last minute, multiple news bulletins and the cost of transmission of the news to and from the remote stenocaptioner) as excluding the viability of this option.⁹⁵

91 National Working Party on Captioning, Submission 18; Mr. N. Tayeh, Submission 6.

92 Prime, *Proof Committee Hansard*, 1/6/00, p.115, WIN, *Proof Committee Hansard*, 31/5/00, p.38, Southern Cross Broadcasting, *Proof Committee Hansard*, 1/6/00, p.118.

93 National Working Party on Captioning, *Proof Committee Hansard*, 31/5/00, p.16

94 ASTRA, *Proof Committee Hansard*, 1/6/00, p.107.

95 Prime, *Proof Committee Hansard*, 1/6/00, p.115; WIN, *Proof Committee Hansard*, 31/5/00, pp.42-43.

Prime requested that the requirement for captioning of local news by regional and remote broadcasters be relaxed until such time as affordable technology is available to facilitate the process in a cost efficient and affordable manner.⁹⁶

Whilst it is acknowledged that regional television broadcasters will inevitably bear a disproportionate burden of costs of the captioning requirements relative to metropolitan stations, the importance of captioning to those with hearing impairments or deafness cannot be under-estimated. This is the cost of achieving an important policy goal, and was provided for in the Act, which provided the framework in 1998. Broadcasters have been given ample notice and opportunity to investigate the most efficient means of achieving this goal.

Further, there is evidence that the requirements imposed by the Bill do not represent significant change to the existing captioning levels by the networks. The most significant consequence of the Bill is that the captioning levels are now legislatively imposed and become enforceable. Particularly for the Seven Network, the legislation does not require significant change to existing captioning levels, and the Nine and Ten Networks figures for overall captioning have not been improving over time.⁹⁷ This supports the conclusion that legislative captioning requirements are necessary for real industry improvements to the amount of captioned programming provided by broadcasters.

96 Prime, *Proof Committee Hansard*, 1/6/00, p.114.

97 Explanatory Memorandum to the *Broadcasting Services Amendment (Digital Television and Datacasting) Bill 2000*, Table p.45.

CONCLUSIONS AND RECOMMENDATIONS

Datacasting

Definition

The definition of datacasting, as it stands, is overly restrictive, complicated and goes beyond restricting datacasting to services that do not constitute broadcasting. Labor Senators believe that while datacasting cannot be de facto broadcasting, the definition should be amended to remove the artificial and unnecessary limitations on datacasting.

Labor Senators believe it is crucial that this emergent industry is not stifled in its development and innovative capacity by overly restrictive regulation and that the benefits for Australia's technological advancement, improved consumer services and employment and economic opportunities should not be constrained.

Labor Senators oppose the genre-based content definition of datacasting and call upon the Government to withdraw from that approach.

Labor Senators support an approach that favours flexibility, minimises barriers to entry, and allows new services to develop over time.

ABA regulatory power

Labor Senators note the ABA's regulatory role in the area of determining datacasting content. Labor Senators note the Bill denies interested parties the ability to access stay powers or seek injunctive relief in relation to decisions of the ABA. Labor Senators urge deletion of relevant exclusions in the Bill.

Labor Senators acknowledge the legitimate concerns of the national broadcasters that the genre-based content definition of datacasting might impinge on programming decisions properly the province of their Boards. The definition of datacasting in the Bill gives occasion to this concern. Specific provisions that might apply to datacasting by the ABC and SBS might more appropriately be contained within the *Australian Broadcasting Corporation Act 1983* and the *Special Broadcasting Service Act 1991*.

National broadcasters and datacasting

The nonsensical decision to impose datacasting fees on the national broadcasters should be reversed, and they should be exempted from payment of the fees.

National broadcasters should be allowed to broadcast radio programs for datacasting purposes.

Datacasting transmission licences after the broadcasting moratorium

The decision that licences for datacasting will be for 10 years with a 5-year option poses a problem regarding the termination of the moratorium period on broadcasting at the end of 2006, and the licensing arrangements applicable from that date. Labor Senators believe it is important that the post-moratorium arrangements be considered by early review.

Multi-channelling by the national broadcasters

There is broad support for allowing the national broadcasters the ability to multi-channel. Labor Senators see no valid justification for denying the national broadcasters the ability to multi-channel, particularly when those arguments are balanced against the resultant benefits.

Labor Senators do not believe the national broadcasters compete with commercial broadcasters in the true sense of that word, and that accordingly, there is no reason to deprive the national broadcasters of the benefits multi-channelling will provide. Labor Senators urge that the prohibition on the ABC and the SBS be removed to permit them to multi-channel within the constraints of their respective Charters.

Spectrum loan to commercial television stations and HDTV

There is some industry criticism about the Government's policy decision to loan spectrum to the commercial free-to-air television broadcasters for the purpose of conversion to digital and HDTV.

Labor Senators believe that the arrangements mandating HDTV require early review to assess the continued mandating of HDTV broadcasting.

Enhanced programming

The concern that the provisions of the Bill allow simultaneous, multiple broadcasts of distinct substance, so as to permit de facto multi-channelling is not an unreasonable conclusion on the evidence. This will allow the free-to-air broadcasters to compete with the multi-channelling services offered by the pay TV sector.

It is clear to Labor Senators that these proposed provisions may cross the boundary between what was conceived to comprise 'enhancements' pursuant to the Act and the Minister's media release of 21st December 1999, into the domain of de facto multi-channelling. The provisions are substantively different to those previously proposed.

Labor Senators believe that the Bill should be consistent with the Minister's previous policy indications of what would comprise enhanced programming and when multi-

channelling in the case of an ‘overlap’ would be permitted, so that commercial free-to-air stations do not engage in de facto multi-channelling.

Reviews

In recognition of the transitional nature of the legislation, it is highly desirable that its consequences and efficacy are measured over the coming years to ensure that Parliament’s policy objectives are being properly and effectively implemented.

Labor Senators believe that it is critical for the proposed reviews to be instigated, completed and their findings considered in a timely manner consistent with the industry’s requirement for certainty.

Labor Senators believe it is pertinent for the reviews to be transparent and accountable to Parliament. As such they should be statutory and required by this legislation.

Community broadcasting

The Community Broadcasting Association of Australia (CBAA) has expressed concern at the omission of provisions in the Bill for the digital transition of community broadcasters, notwithstanding the Minister’s promises.

Labor Senators concur with the CBAA that some degree of legislative certainty consistent with the Minister’s undertakings is warranted and appropriate for the continuation of this important industry.

Captioning arrangements

Whilst it is acknowledged that regional television broadcasters will inevitably bear a disproportionate burden of costs of the captioning requirements relative to metropolitan stations, the importance of captioning to those with hearing impairments or deafness cannot be under-estimated. This is the cost of achieving an important policy goal, and was provided for in the framework Act in 1998. Labor Senators welcome this initiative which has considerable benefit for a significant sector of the community.

SENATOR MARK BISHOP
(A.L.P., W.A.)

SENATOR STEVE HUTCHINS
(A.L.P., N.S.W.)

Broadcasting Services Amendment (Digital Television and Datacasting) Bill 2000

AUSTRALIAN DEMOCRATS' REPORT

The Chair's Report presents a thorough and accurate account of the evidence presented to the Committee during the brief period of the hearings. Composed under tight time constraints, it is a credit to its authors. While the Australian Democrats disagree with some of its conclusions, we are in broad agreement with the thrust of the few recommendations that it makes.

The Australian Democrats are particularly concerned about the brevity of this inquiry and the haste with which it was forced to be conducted. The reason given to us is a need to guarantee certainty for the broadcasting industry by ensuring the completion of the passage of legislation by the end of the Winter sitting period. The Government presented an outline of the broad shape of the legislative changes included in this Bill in December 1999. Having generated with their announcement the expectation that the Bill would become available for scrutiny and an appropriately measured inquiry in the early months of 2000, the Government then continually delayed its exposure. The result is that consideration of the Bill has been rushed to a farcical degree. Individuals and organisations were given ten days to construct submissions to the Senate inquiry, a ridiculous period for responding to a Bill of this size and complexity. Hearings were held over two days, a time constraint that meant that the Committee was forced to cut short questions to a number of witnesses.

The Australian Democrats deplore this rushed timetable. It does not reflect a reasonable or responsible approach to legislation that has complex ramifications for the Australian broadcasting and information technology industries. The Australian Democrats maintain that haste is no guarantee of certainty, particularly when dealing with a multifaceted issue of this kind. We reject the need for a resolution of issues by the beginning of July 2000, if the price of that resolution is an inadequate opportunity for proper Parliamentary scrutiny and debate.

As might be expected from a lengthy and detailed piece of legislation, the inquiry raised a great number of interlinked issues, which we will consider in turn.

High Definition Television

As the Chair's Report indicates, the majority of submissions and witnesses argued that High Definition Television (HDTV) will fail in the Australian marketplace (para.1.13). It is particularly noteworthy that the submissions and witnesses most directly attuned to the interests of consumers all questioned the adoption of HDTV, largely on the grounds that they expect the relevant hardware to be largely unaffordable.

This evidence was of little surprise to the Australian Democrats. During the initial debate of the proposed digital regime in 1998, we questioned the wisdom of pursuing HDTV as a primary driver of the uptake for digital television. Nonetheless, the

Australian Democrats acknowledge that the will of the Parliament, as communicated in 1998, is for the adoption of HDTV and have operated on that assumption.

In this light, the Australian Democrats apply to this legislation the principle that, as HDTV must be done, it must be done properly. We question the wisdom of a review of HDTV quotas during 2003, when all positive projections of the adoption of HDTV suggest that it will be at least five years before any trends are discernible.

In a similar vein, the Australian Democrats believe that all attempts should be made to ensure that HDTV production be done in Australia and take seriously the proposal made by the Screen Producers' Association of Australia (SPAA) that the HDTV quotas be amended to ensure a minimum level of Australia content.¹ The Committee's conclusion at paragraph 4.33 would seem to echo our concerns. We note also SPAA's concerns about the increased cost to local producers of generating material in acceptable high definition formats.² If this is unlikely to be matched by an increase in the price paid for HDTV material, it would seem appropriate for the Government to adopt measures to ensure that local producers engaging in HDTV production are supported.

Datacasting

Datacasting is a concept unique to Australia's approach to digital television. It results from the desire, enshrined in the 1998 legislation, to allow the creation of interactive digital information services that are transmitted via the broadcasting services bands, but which are not themselves television broadcasts. As datacasting is an entirely new and untested medium, it is not possible to determine at the outset what datacasting services will eventually look like, and as much scope as possible should be permitted within legislation to allow the nascent datacasting industry to evolve over time into a viable and sustainable segment of the Australian media and information industries.

The Australian Democrats have long maintained that the rules governing datacasting should be as flexible as is possible within the constraint that they not permit datacasting services to provide *de facto* television channels. In this light, we are not satisfied with the Government's "genre-based" approach, as it regulates datacasting on the basis of its content, rather than its specificities as a medium. However, we are yet to be satisfied that any of the specific alternative definitions proposed in submissions to the inquiry and at its hearings provides a suitable alternative.

In the absence of a satisfactory alternative, it seems that changes to the proposed legislation will be necessary. It is in this light, for instance, that we would endorse the Committee's fourth recommendation, which broadens the scope of video content of an

1 Screen Producers Association of Australia. Submission No.24, p.13

2 Screen Producers Association of Australia. Submission No.24, pp.15-16.

educational nature that is allowed under the datacasting rules. Likewise, we note the curious inversion that results in the requirement that datacast video content not be entertaining, even in circumstances, such as educational and informational programming, where a certain degree of entertainment value is a necessary part of making the material suitably engaging to ensure its success.

The Australian Democrats acknowledge the good sense of the proposal made, by ntl Australia, that the allocation of spectrum for datacasting should be subject to a “use it or lose” rule similar to the one governing digital television in the existing legislation as a means of preventing spectrum hoarding.³

Enhanced Programming

The extension of the concept of broadcasting by program enhancements would seem to be a logical step in the evolution of television. However, careful scrutiny of the limits of such enhancements is clearly necessary in light of the pay television industry’s robust opposition to them. Representatives of the pay television stations raised a series of concerns about the rules for enhanced services proposed in the legislation, arguing that they extend enhanced services substantially beyond the limits of the Minister’s December announcement.

Concerns were raised that the definition of Category A enhancements has been extended from programs closely and directly linked to the primary program to programs closely and directly linked to the *subject matter* of the primary program. The pay television argued that this would permit *de facto* multichannelling by broadcasters, as it allows for the possibility of previous episodes of a program or other similarly related matter to be broadcast under this provision. While the ABA indicated that they thought such multichannelling seemed contrary to the intent of the legislation, it is unclear what improvement the definition proposed in the legislation makes over the earlier formulation.

If the proposed Category A enhancements caused concern among members of the pay television industry, Category B enhancements excited outright anger. The industry argued that such enhancements eat into their already restricted ability to carry sports programming. The Australian Democrats have sympathy for their objections.

Finally, there is the question of “overlap multichannelling,” which is intended to provide broadcasters with the ability to maintain their programming schedules when live events run unforeseeably over time. As such, the concept is commendable. However, as pay television representatives argued, it would appear that there is a potential for *de facto* multichannelling if program scheduling is based on a deliberate underestimation of the duration of live events. While this is by no means the intention

3 ntl. Submission No.27, pp.5-6.

of the legislation and the free-to-air broadcasters maintain that they intend to use the capacity for overlap multichannelling only as intended, the pay television industry have nonetheless identified a plausible loophole in the Bill. Their proposed solution—allowing overlaps to extend only to news—seems unreasonably genre-based. A better solution may be to rely upon time limits to constrain program overlaps.

The National Broadcasters

As with so much of the current Government's policy, this Bill treats the national broadcasters very poorly. Where a distinct effort has been made to accommodate the desires and concerns of the rest of the television industry, no effort has been made to recognise the unique and important contribution that ABC and SBS make to Australia's cultural life or to recognise the specific needs and obligations of these national treasures.

In this light, it is heartening to see the Committee's recommendation that the ABC and SBS be permitted to transmit their radio programs as part of their datacasts. The Australian Democrats wholeheartedly endorse this recommendation.

Less heartening is the Committee's refusal to endorse multichannelling by the national broadcasters (para. 3.19). The national broadcasters provide complementary services that, among other things, provide content that commercial television stations will not touch. Multichannelling offers a means for the national broadcasters to extend the programming that they are able to offer and thereby to better meet their Charter obligations. The Australian Democrats reject the conclusion that there is any case for preventing them from multichannelling. We believe that the ABC and SBS should be permitted to multichannel and that the only restrictions on their multichanneling should be their respective Charters, Boards and budgets.

Similarly, the Australian Democrats reject the proposal contained in the legislation that datacasting services provided by the ABC and SBS should be subject to the jurisdiction of the ABA and reject the Committee's conclusion to that effect (para.2.63). It is one thing to create datacasting rules and require that the ABC and SBS adhere to those rules under the guidance of their respective Boards. It is another thing entirely to risk compromising the national broadcasters' independence by making them subject to the determinations of the ABA.

The Australian Democrats accept the arguments of the national broadcasters that, as non-commercial entities funded through Parliamentary appropriation, they should be exempted from the datacasting charge.

Community and other broadcasting sectors

Evidence presented by the Community Broadcasting Association of Australia (CBAA) indicated that the community broadcasting sector has been poorly treated in the development of this legislation. Whether by design or oversight, the Government has failed to follow through on its promise to ensure that community broadcasters will be provided with spectrum to allow them to broadcast in digital mode.⁴ Further, community broadcasters continue to labour under one year licences that undermine their ability to ensure a secure financial footing.

The Australian Democrats strongly suggest that the legislation be amended both to provide community broadcasters with certain access to digital spectrum and to ensure that their licences extend for a more substantial duration than one year.

The Australian Democrats also note the Productivity Commission's comments, both in evidence before the Committee and in their *Broadcasting Report*, on the possibility of creating a new category of broadcasting licence for indigenous broadcasters.⁵ The Australian Democrats believe that this is an excellent suggestion that should be pursued vigorously. While the need is perhaps not immediate, digital spectrum should be set aside in anticipation of the creation of indigenous broadcasting licences.

Access to spectrum

The Australian Democrats acknowledge the need for spectrum to be rationalised to maximise the number of channels available for datacasting, especially in the Sydney metropolitan area, which is recognised as a particularly significant market. In this light, we would submit that the Committee's second recommendation, which relates to channel clearance by the ABA, does not go far enough. It should be strengthened so that the ABA are not only empowered, but also *directed* to rationalise and clear spectrum, particularly for the creation of datacasting channels.

Reviews and timing of the transition to digital television

Much was made during the hearings of the type and timing of various proposed reviews of digital broadcasting regime. In particular, there was discussion of whether these reviews should be conducted by Departmental officers under the Minister's direction or as public, statutory reviews. Given that Departmental reviews will essentially be conducted for the benefit of the Minister, rather than to allow the Parliament scrutiny of the progress of digital television, the Australian Democrats' preference would be for public reviews. In the interests of employing the expertise

4 Community Broadcasting Association of Australia, Submission No.7, pp.1-2.

5 *Proof Committee Hansard*, pp.58-59; Productivity Commission 2000, *Broadcasting*, Report No.11, pp.282-291 and C.1-C.18.

collected within the Department, it might be wisest if these reviews were to be built around reports by Departmental officers.

Discussion of the timing of reviews tended to focus on questions of certainty for aspirant datacasters. Numerous witnesses called for reviews to be conducted sooner, rather than later. However, the most compelling argument made was that the need for certainty is best served by settling the details of licences before there is a call for applicants. The Australian Democrats do not believe that the spectre of modifications to licence conditions after datacasting licences have been granted provides any particular certainty to datacasters.

While it is not a subject of the Bill at hand, the Australian Democrats believe that any inquiry into whether streamed audio and video content constitutes a broadcast should be conducted publicly.

Electronic Program Guides

A number of witnesses presented compelling arguments in favour of the introduction of formal rules dealing with electronic program guides (EPGs). The Australian Democrats believe that the legislation should include rules governing EPGs such that programming information is passed freely between broadcasters in a standardised format, and that in cases where broadcasters provide programming information for a service other than their own, they are obliged to provide the same information about all other corresponding services. A strong priority in formulating the EPG rules should be ensuring that they guarantee fair and equal presentation of the content of all services represented within a given EPG.

Interoperability

The issue of ensuring interoperability of digital television hardware was raised by a number of witnesses. In particular, the argument was made that it would be better to avoid the “pizza box” effect, where numerous incompatible set-top boxes are stacked atop or beside television sets to provide access to different services. This phenomenon began with video recorders and pay television receiver boxes, and seems set to be exacerbated by the advent of digital television receiver boxes. The Western Australian Government is one of the few bodies in the country with any real experience of the difficulties of interoperable digital equipment. Their submission makes clear the inconveniences and costs associated with incompatible hardware.⁶

6 Government of Western Australia, Submission No.15, Attachment—“Submission to Productivity Commission Broadcasting Inquiry”, pp.2-3.

A similar argument was made that the datacasting industry requires a single middleware standard upon which datacasting content can be built. Such a platform will provide a stable platform for datacasting content development. Ideally, the industry should agree upon a standard, which should be based on open standards, if not open source code. However, overseas experience with digital interoperability standards suggests that if the industry is unable to quickly agree upon a standard, government intervention may prove necessary.

The Australian Democrats endorse the need for standards to ensure device interoperability and standardised middleware.

Captioning

The Australian Democrats endorse the captioning requirements proposed in the Bill. While evidence was received from regional broadcasters about potential difficulties of providing closed captioning of live content, we do not find it sufficiently compelling to reduce the public benefits that closed captioning will bring to the Australian community.

Senator Andrew Bartlett
Australian Democrats (QLD)