



**REVIEW OF THE OPERATION OF SCHEDULE 6 OF THE
BROADCASTING SERVICES ACT 1992
(DATACASTING SERVICES)**

**SUBMISSION IN RESPONSE TO THE
DEPARTMENT OF COMMUNICATIONS, INFORMATION
TECHNOLOGY AND THE ARTS
ISSUES PAPER**

**THE FEDERATION OF AUSTRALIAN
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REVIEW OF DATACASTING SERVICES

EXECUTIVE SUMMARY

- FACTS welcomes the Government's commitment to maintain the moratorium on new commercial television licences.
- Datacasting licensees should not be able to provide services which are in fact "back door" broadcasting.
- The current rules are the only service parameters proposed to date that successfully and clearly distinguish datacasting services from broadcasting services.
- International developments such as the "tech wreck" have affected the appetite of capital markets to fund speculative technology ventures and the value of spectrum internationally and domestically. These factors do not favour an auction of spectrum for datacasting licences at the present time.
- Additional factors will also impact on the development of potential business cases and consequently the value of the spectrum. These include the lack of proven business models anywhere in the world for stand-alone datacasting services and
- technical limitations on the use of the spectrum.
- The primary reason new datacasting services have not emerged in Australia is the result of commercial and economic factors, rather than any regulatory impediment.
- FACTS opposes the liberalisation of existing genre rules on the basis that this would jeopardise the moratorium.
- FACTS opposes the regulation of datacasting on a case by case assessment by the ABA on the basis that it does not deliver regulatory certainty and would require a high degree of regulatory intervention in the market.
- FACTS opposes a distinction between datacasting and broadcasting services on the basis of interactivity as being a technology- based distinction and one that would allow the provision of broadcasting services by datacasters.
- FACTS opposes the provision of open or subscription narrowcast services on the basis of regulatory uncertainty.
- There should be no automatic right of conversion attaching to any datacasting licences post 2006. The ability of the market to sustain new entrants should be assessed at the relevant time. Parliament decided in 1998 that there should be no automatic right of conversion attaching to datacasting licences. The reasons for this decision continue to apply. There is no justification for reversing this decision at the present time
- There are a number of alternatives options for use of the spectrum that are worthy of consideration, including delivery of government and local information services and continuation of technical trials.

INTRODUCTION

FACTS welcomes the opportunity to comment on the Government's Review of the Operation of Schedule 6 of the *Broadcasting Services Act 1992* (Datacasting Services) on behalf of all 46 metropolitan and regional free-to-air commercial television broadcasters.

FACTS notes that the Government has reiterated its commitment to maintaining the moratorium on new commercial television broadcasting licences. Consequently any proposals for amendment to the current datacasting rules must be considered in this context.

Australians have enjoyed diverse and high quality free-to-air television for many years. This environment is the product of the current legislative regime for broadcasting. In a small market such as Australia, there is a real question as to the number of free-to-air broadcasting services that the market can support, particularly if cultural and social outcomes are sought to be delivered through broadcasting policy. The encouragement of additional discretionary services for a smaller number of viewers should not be permitted to jeopardise the outcome for the great majority of Australians who depend on free-to-air television for information and entertainment.

1 EXISTING REGULATORY AND COMMERCIAL ENVIRONMENT

1.1 The moratorium on new commercial television services

The Issues Paper recognises that a clear policy boundary of this review is the Federal Government's commitment to a moratorium on the issue of new commercial television licences before the end of 2006. This has been a central tenet of the digital television legislation and one supported by all political parties. FACTS welcomes the reiteration of this commitment.

The moratorium on new commercial broadcasting licences was introduced to ensure the continuation of quality programming demonstrated by existing free-to-air broadcasters (such as the delivery of significant Australian content) and in recognition of the high cost of transition to digital television.¹ The reasons for enactment of the moratorium continue to be as compelling today as they were in 1998.

New services were to be permitted on the basis that they provided new and innovative services which did not resemble existing commercial television services.

As stated by the Minister in a speech given in June 2000, *"it is axiomatic that the definition of datacasting must set boundaries which ensure that there is no back-door or de-facto broadcasting under the guise of datacasting – otherwise the clear intent of the parliament would be circumvented."*²

¹ Media Release, Senator Alston, 3 July 1998.

² Speech by Senator Alston to "New Broadcasting and Datacasting Symposium" 14 June 2000

1.2 Challenges in the commercial environment

- Potential datacasters and free-to-air broadcasters alike face an uncertain economic environment as well as a number of significant challenges in the context of digital television take-up, which remains in its infancy both in Australia and internationally.

Commercial free-to-air broadcasters have invested significantly in the transition to digital and will spend over \$1 billion in total on the digital rollout in the next 6 years. This cost is being incurred in an uncertain international economic climate and at a time of significant new threats to advertising revenue and viewer patterns in the form of pay TV, internet usage and bundled service offerings.

- A number of factors contributed to the withdrawal of interest in, and subsequent cancellation of, the auction for datacasting transmitter licences in 2001. One of the most significant factors was the worldwide sharemarket devaluation of the technology sector (the “tech wreck”) that saw the market value of internet and telecommunications entities and the value of spectrum fall significantly. Only weeks prior to cancellation of the auction of datacasting transmitter licences, the auction of 3G mobile telephony spectrum raised significantly less than the government had budgeted prior to the “tech wreck”. Other auctions of spectrum around the world were similarly affected.

One of the immediate consequences flowing from the “tech wreck” was the substantially reduced ability of new service providers seeking to test unproven business models to source funding from capital markets. This cautious investment environment remains, particularly in light of the events of September 11 2001 and a number of high profile failures of technology ventures in areas previously regarded as more reliable such as telecommunications. These factors do not favour an auction of spectrum for datacasting licences at the present time.

- No proven business model currently exists anywhere in the world for stand-alone datacasting services. To the extent that new digital television services have been successful, they have been in the area of broadcast-related services and some gambling and gaming services provided by broadcasters. In the US, aspirant datacasters have folded and in the UK, BskyB has recently refocused its strategy of providing additional services to enhance its primary broadcast services. The broadcast model represents the only compelling business model for these new services at this time.
- The broadcasting services bands are only suitable for provision of services receivable on broadcast consumer equipment. Consumer equipment suitable for provision of non-broadcast services in this spectrum band (for example, telecommunications services) does not currently exist and these technical limitations on the scope of potential services will clearly have an effect on the development of potential business cases and consequently the value of the spectrum. It is possible however that in the future such technological limitations may be overcome.

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- As datacasting services must be receivable on commonly available television equipment the existence of a common platform between existing broadcasters and any new players is an essential feature of any new proposed model.

Without a common platform a datacast business model would need to incorporate funding of additional consumer equipment in the home, either through subscription fees or direct purchase by consumers. Such a model could also lead to the “pizza box” effect with consumers wishing to access a full suite of services being required to have a number of set top boxes in the home.

The success of digital television and datacasting services depends on adoption of a common technical platform that ensures that viewers can access their choice of services, regardless of which set top box or receiver they use. The free-to-air broadcasters (through the DTV Strategy Group) have been monitoring the development of standards overseas and recently confirmed their support for the DVB-MHP standard for the Australian market. The Group is working with consumer electronics manufacturers to get MHP products into the Australian market as soon as possible. The Group is continuing to study the means by which receivers and interactive services can be provided to the Australian market in an earlier timeframe by continuing to investigate open solutions leading to the implementation of DVB-MHP.

Comments made by the Minister in 1999 highlight the vital importance of a technology base and one capable of supporting new services:

“Much has been said about the types of services that could be offered as datacasting. However, many of these services require additional functionality in the receiver. Memory storage capacity, conditional access, interoperability and other capabilities to enable provision of certain services will add to the cost of the basic digital receiver. The balance between the cost of receiver versus the nature of new services will be a matter requiring close assessment by service providers.”³

While significant progress has been made by free-to-air broadcasters towards the implementation of a platform which will support the provision of new and different services, specifically interactive services, the ability of datacasters to provide such services may be dependent on completion of that process.

The need for services to be receivable on affordable equipment makes it essential that consumers are able to buy a single piece of equipment which can receive all services offered in the broadcasting services bands.

1.3 Existing datacasting rules

- FACTS recognises that the existing datacasting rules have been criticised as limiting potential service offerings by new entrants. However, the fact remains that the current rules are the only service parameters proposed to date which successfully distinguish datacasting from traditional broadcasting services,

³ “Digital Television and Datacasting – TV’s new dawn” Keynote address by Senator the Hon. Richard Alston, 19 August 1999.

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thereby accommodating the moratorium on new commercial television licences that is supported by all political parties.

The problems inherent in devising new rules for datacasting were clearly articulated by the Minister in a speech delivered in June 2000:

*"It is difficult to see how one can come up with a significantly broader definition while at the same time retaining the principles of the 1998 legislation. Indeed those who rail against the datacasting definition as being too tight are implicitly arguing for a roll-back of the original limit on new entrants although they seem strangely reluctant to say so publicly."*⁴

The current rules were the result of extensive public consultation and considerable debate and scrutiny by Parliament. To date there has been no alternative model proposed which does not undermine the government's commitment to the moratorium by allowing "backdoor broadcasting".

Indeed more recently, some potential new datacasting entrants have not been quite so reluctant to outline their real commercial agenda. For example following cancellation of the datacasting auction, a spokesman for Fairfax (one of the most prominent potential datacast bidders) stated *"We already have Seven, Nine and Ten, perhaps it is time for 11 and 12 ... Datacasting should be buried quietly and never again see the light of day.."*⁵

In a statement to ABC radio on 14 January 2002, the same spokesman stated:

*"I think the issue is really what does digital television look like after 2006 when new television licenses and new television stations can come on line and that's really the main game. **The main game isn't datacasting, the main game is digital television**, Australian households taking up digital television, but more importantly the new services available to all Australian television households. **That's what we want to talk about, datacasting is only an interim issue.** Let's talk about how do we expand digital TV, get consumers to take it up and really bring new benefits to the Australian people, that's what this is all about."*(emphasis added)

The Minister has more recently made further comments on this subject, stating:

*"media groups only wanted to use datacasting as a backdoor entry to television ... those remarks indicated non-TV media groups wanted to subvert the datacasting rules, designed to prevent new media players from offering television services. It is interesting that people like Fairfax actually said "look all along we wanted a full scale entertainment licence"."*⁶

⁴ Speech by Senator Alston to "New Broadcasting and Datacasting Symposium" 14 June 2000.

⁵ "Coalition screen goes blank on digital TV", Sydney Morning Herald, Friday 11 May 2001, page 24.

⁶ "Alston flags review of rules limiting digital TV", The Australian, Wednesday 16 May 2001, page 4.

1.4 Difficulties in international implementation of digital television

Experience overseas strongly suggests that the take-up of digital television will be a gradual process. In January 2002, the UK Government announced that it would delay its analog switch-off from the preferred date of 2006 until at least 2010. Although far more advanced in its rollout of digital television, only 40% of the British public has access to digital television despite the industry offering viewers a plethora of channels to choose from, clearer picture definition, surround sound and an increasing number of home computer-like services including email and internet content.⁷

The difficulties which have been encountered in other markets internationally point to the importance of new revenue streams to assist viability and new services to stimulate consumer demand.

Australia is alone in its endeavour to implement a new service category known as datacasting. No such services exist elsewhere in the world independently of broadcasters. International experience demonstrates that even business cases associated with broadcast services have proved uncertain. In these circumstances, the business case for any form of non-broadcast related service must be seriously examined.

High penetration of free-to-air digital television may allow the commercial justification for stand-alone datacasting services to be revisited. However, such opportunities will be dependent on first achieving a successful transition to digital television for all Australians.

1.5 Existing datacast services

Current rules permit broadcasters to offer datacasting services. All three commercial broadcasters are well advanced in planning to provide such services using their broadcast spectrum. One broadcaster has obtained the necessary licence and commenced providing datacasting services, through an electronic program guide. All broadcasters have made investment decisions based on the current scope of the digital television rules. In considering any change to the datacasting rules, the current ability of broadcasters to provide datacasting services must be preserved as a minimum.

Many of the services which are considered a natural part of the digital television experience currently require a datacasting licence. For example, a functional electronic program guide including program information, news, weather, advertising and additional content can only be provided with a datacasting licence. This applies equally to other interactive services currently being planned by broadcasters.

An additional factor relevant to this issue relates to the requirement that an enhanced service be "contemporaneous" with the program to which it relates. An enhanced service may become a datacasting service within the meaning of the *Broadcasting*

⁷ "Big switch to digital TV put off until 2010 – Broadcasting counter revolution – Viewers want to stick with old style sets", independent.co.uk, 13 January 2002.

Services Act if, for example, the enhanced service continues to run during an advertisement break in the main program. For example, an advertisement for a car may have an enhancement which allows a viewer to find out more about the available features. If the enhancement continues to be transmitted after the program has resumed, the continuation would be classified as datacasting.

2 OPTIONS FOR CHANGE

2.1 Option 1: Liberalise the genre rules

As noted above, the current datacasting rules represent the only framework that has been proposed to date that did not permit the provision of “back door” broadcasting services. Any liberalisation of the current rules is likely to permit provision of such services and therefore jeopardise the moratorium on new commercial broadcast services.

The current list of genres to which the rules apply were intended to specify all programming types integral to the provision of commercial television services. The elimination of any of the listed programming types would therefore permit provision of broadcast services. Indeed, FACTS argued prior to passage of the legislation that some categories of datacasting services such as information programs and educational programs may already permit the provision of some services similar to broadcast.

For example, datacasters can provide educational services which, although largely restricted to material which is supplied by an educational institution or related to a course of study or instruction, is also broad enough to include material of a more general nature (such as many of the educational programs broadcast by the ABC) provided it is clear from the substance of the program and the way in which it is promoted that it is predominantly of an educational nature.⁸ It would not be possible to remove the restrictions in relation to any of the remaining program genres without opening the door to the provision of defacto broadcasting services.

The policy imperative behind the introduction of the datacasting category was to encourage new and innovative services to be offered that complement broadcasting services, rather than overlapping them⁹. Earlier this month, Senator Alston confirmed

his commitment to the principles that “*datacasting can not be broadcasting*” and that “*datacasting must be new and innovative*”.¹⁰

Liberalisation of the current rules will not encourage the provision of new and innovative services. The lack of viable business models for stand-alone non-broadcast services means that datacasters would seek to establish a core business based as far as possible on broadcast services before expanding into innovative and less certain territory.

⁸ Explanatory Memorandum to Television Broadcasting Services (Digital Conversion) Act 1988, page 57.

⁹ The Explanatory Memorandum to the *Television Broadcasting Services (Digital Conversion) Bill 1998* states that the intention of “non broadcasting uses of the broadcasting services band spectrum (datacasting)” is to provide “a wide range of new information/data services.”

¹⁰ “Minister for Change”, *The Australian*, Thursday 3 January 2002, page 5.

2.2 Option 2: Case by case assessment by ABA

FACTS opposes this suggestion on the basis that it would not provide sufficient regulatory certainty for investment. Such a proposal simply shifts the debate to a different and less accountable arena. At some point, it would still be necessary to determine whether a proposed service was in effect a broadcasting service. Under this model it would be the ABA rather than Parliament which would be required to determine the parameters of a broadcasting service.

Such a model would also require a high degree of regulatory monitoring and intervention by the ABA to ensure that services that have been approved do not subsequently become defacto broadcasting services. The potential for disputes and legal action is high.

FACTS notes that these policy deficiencies are also identified in the Issues Paper.

2.3 Option 3: Define datacasting services as interactive services

The proposal to differentiate broadcast and datacast services on the basis of interactivity is not a new one. FACTS has consistently opposed such an approach and continues to do so. FACTS does not consider that this option offers a workable proposal for the following reasons:

- Interactivity does not distinguish datacasting from broadcasting. Broadcasting does not require interactivity, but it frequently involves interactivity, for example through the use of telephone lines. Basic elements of interactivity are already present in many traditional television programs that encourage viewer response of various kinds via telephone or email. Channel Ten's *Big Brother* is highly successful recent example of viewer interactivity. In future, such services will be delivered through the capabilities of digital television technology. Already in the UK, the Big Brother program provided this type of interactivity.
- As identified in the Issues Paper and acknowledged by Senator Alston¹¹ in recent statements, there will be great difficulties in defining datacasting services as interactive services. For example, would a service require constant viewer interaction or only occasional? Would it be sufficient to invite viewers to vote on a particular issue or enter a competition or would the content need to be inherently based on interactive input from viewers? How sophisticated would the technology be? Would interactivity by way of a telephone line be sufficient, or would something more be required?

For example, the popular game show *Who Wants To Be A Millionaire* allows contestants to telephone a viewer to debate a response. If, at some time in the future, the telephone call is made by means of an interactive backchannel rather

¹¹ "Minister for Change", The Australian, Thursday 3 January 2002, page 5.

¹³ The Explanatory Memorandum to the *Television Broadcasting Services (Digital Conversion) Bill 1998* states that the intention of "non broadcasting uses of the broadcasting services band spectrum (datacasting)" is to provide "a wide range of new information/data services."

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than standard telephone line, will *Who Wants To Be A Millionaire* and numerous game shows like it become datacasts not broadcasts? A distinction on this basis would be nonsense.

This approach could allow datacasters to provide a wide range of traditional television programming by simply adding an interactive element. On the other hand, a requirement to offer only interactive services would preclude service providers from offering some services permitted under the current rules. Such a regulatory tool would produce very arbitrary outcomes.

- The option contains a number of regulatory holes. To define broadcasting in terms of point-to-multipoint transmission to a non-interactive audience, and datacasting in terms of inherent interactivity, would leave much activity in a regulatory “no man’s land”, outside both datacasting and broadcasting. This would make no regulatory sense.

It was clearly Parliament’s intention that free-to-air broadcasters be able to offer a full suite of services possible through digital television. While the models for digital terrestrial television around the world are still emerging and developing, what is clear is that any successful digital television model will require the provision of new services by broadcasters to stimulate consumer demand and new revenue streams to justify the capital costs of migration. In these circumstances, the free-to-air broadcasters need a high degree of certainty to develop appropriate commercial strategies to assist the transition to digital television.

The Government has previously rejected the option of distinguishing between broadcasting and datacasting on the basis of technology. This proposal should be rejected for the same reasons.

2.4 Option 4: Allow the provision of open narrowcasting services

FACTS does not support this option on the basis that it has the potential to permit the provision of commercial broadcasting services.

As noted above, the clear intention behind the concept of datacasting was to encourage new and innovative services to be offered that complement broadcasting services, rather than overlapping them¹³.

As such, it is FACTS strong contention that datacasting does not belong in an existing broadcasting services category. Datacasting should be a distinct category that does not duplicate existing service categories.

The scope of narrowcasting services in the *Broadcasting Services Act* is often unclear. In particular there is considerable potential for overlap between open narrowcasting services and commercial broadcasting services. The inherent uncertainty in the definition of narrowcasting services has been recognised by the ABA which recently published a Clarification Notice in relation to the definition of

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open narrowcasting radio services¹⁴. The Clarification Notice seeks to ensure that open narrowcasting radio broadcasters do not use their largely unregulated licences to provide commercial radio services.

FACTS notes that many of the service categories specified in the ABA clarification would already be permitted under the current datacasting rules.

It is unlikely that this proposal will provide sufficient certainty about what is allowed or is not allowed to be broadcast as part of an open narrowcasting service. It will also require a high degree of regulatory monitoring and intervention by the ABA to ensure that, in practice, an appropriate line is drawn between an open narrowcasting service and a commercial broadcasting service. The potential for disputes and legal action is high.

2.5 Option 5: Allow the provision of subscription narrowcasting or broadcasting

FACTS notes that the current genre rules already permit the provision of subscription services.

Subscription broadcasting is not datacasting. Any proposal to permit the provision of such services would require re-examination of the original policy decision to reserve use of the broadcasting spectrum for provision of free-to-air broadcasting and new service providers in the form of datacasting.

2.6 Alternative options

Significant changes have occurred in the world economy and international developments in digital television since the original decision to auction the datacasting spectrum was made. These suggest the need for a re-examination of whether the Australian market can support new entrants providing non-broadcast services at this time. The questionable commercial viability of any service not aligned to a broadcast service calls for reconsideration of whether the allocation of datacasting licences can be justified in the current environment.

In a speech given in August 1999, the Minister made the following remarks:

*“Currently, the consumer proposition and business case for datacasting is untried. At the moment, no one really understands how consumers will adapt to new digital services. Television viewing is traditionally passive, and datacasting and like services may require more dynamic interaction.”*¹⁵

The Minister’s comments are just as relevant now as they were at the time they were made.

¹⁴ Broadcasting Services Clarification Notice 2001.

¹⁵ Keynote address by Senator the Hon. Richard Alston, “Digital Television and Datacasting – TV’s new dawn”, 19 August 1999.

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There are a number of possible alternatives for use of the spectrum that are worthy of consideration:

- Use the spectrum to deliver government and local information services. Given the difficulties in achieving broadband connection into many homes and therefore the provision of important information services, particularly in regional and remote areas, this may be one way of bridging the digital divide. FACTS notes that the current datacasting rules would already permit the delivery of such services.
- Continue to use the spectrum for trial purposes (as per the current testing of hierarchical modulation and wireless internet trials).
- Defer allocation of the spectrum given current market factors. This possibility was canvassed by Senator Alston earlier this month when he stated, *"The review may find there is still no demand for other services on the digital TV spectrum. We may end up doing nothing. We may see that nothing is happening so we could put it on ice, otherwise you are throwing the spectrum away."*¹⁶

The Issues Paper suggests expanding the criteria for allocation of the spectrum beyond a price based allocation to a combination of price, and other factors such as service innovation, roll out schedule, or commitments, described as a "beauty contest".

If the Government was to proceed to allocate the spectrum for specific purposes such as the delivery of Government services, this allocation basis would enable the Government to consider the merits of interested operators who would like to offer innovative or experimental new services but may not be in a position to compete on price alone.

This would give the Government a means to assess the capability of a potential datacaster to provide new and different services that are not broadcasting.

FACTS is open to discussions on potential models for the delivery of such services. One possible approach could be to allocate spectrum for this specific purpose, which we note is already permitted under the current datacasting rules.

3 Arrangements post 2006

When launching the digital television legislation in 1998, Senator Alston set out very clearly the policy reasons for the moratorium on issue of new commercial television

¹⁶ "Minister for Change", The Australian, Thursday 3 January 2002, page 5.

¹⁸ Digital Broadcasting - Questions and Answers, document accompanying Media Release "Digital - a New Era in Television Broadcasting", Senator the Hon Richard Alston, 24 March 1998

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broadcasting licences:

- *“Australia is well served by the current commercial television arrangements. The range of programming available to Australian audiences on free to air television is substantial and of high quality, with significant levels of Australian content.*
- *A fourth commercial channel would undermine the available advertising revenue base and thus the commercial viability of the existing three players particularly during the expensive conversion process to digital. Lifting the three licence restriction could result in negative consequences for the existing commercial television industry, without any significant offsetting benefits for the community.*
- *It is also questionable whether a fourth commercial broadcaster could provide sufficient quality Australian programming.”¹⁸*

Nothing has occurred that suggests that a change from this policy which was endorsed by all parties in 1998 is necessary or appropriate at the present time, particularly given the cautious progress of digital television worldwide.

FACTS is strongly opposed to the introduction of any right of automatic conversion from a datacasting to a commercial broadcasting licence post 2006.

The question of whether any new licences ought to be issued requires high level consideration and public debate. For example whether or not a new licence would be consistent with the objectives of the *Broadcasting Services Act*, such as facilitating “the development of a broadcasting industry in Australia that is efficient, competitive and responsive to audience needs” (section 3, *Broadcasting Services Act 1992*).

The Government is not in a position at this time to assess the ability of a post 2006 market to support additional free-to-air services which are able to deliver important social and cultural policy objectives such as Australian content.

These issues will require detailed consideration in light of the economic and technological environment current at the time as well as developments in the broadcasting and related sectors internationally. Further, a number of key aspects of the regulatory environment are required to be considered by the Minister as part of a review to be conducted before 1 January 2005.

Introduction of an automatic conversion right at the present time would threaten the ongoing ability of broadcasters to meet digital television capital and operational commitments and to continue to deliver quality services due to anticipated market

erosion post 2006. Viewers and the local production industry would inevitably suffer.

Australian broadcasting policy has long enshrined the benefits of broadcasting services available free to all Australians which offer quality services of wide appeal as well as local relevance. Australia has one of the most comprehensive free-to-air broadcasting systems in the world. There is no other national television marketplace of comparable size and economic development which offers free-to-air services of such diversity, quality and local relevance. Free-to-air television reaches 98% of

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Australia's population, is in over 7 million homes and is the most accessible source of news, current affairs, entertainment and information for the vast majority of Australian households.

Regulatory limits on the number of commercial services have been critical to achieving this outcome. Australia is a very small market by international standards. Our small and scattered population base generates only a limited amount of advertising revenue with little room for growth¹⁹. Further, maintaining high levels of Australian content and high levels of local service across extensive geographical areas is expensive²⁰.

A restriction on licence numbers ensures each licensee, operating at a high level of efficiency, is able to achieve sufficient revenue to meet these statutory requirements and to meet a strong audience demand for high standards of Australian programming. The commercial free-to-air networks spent \$596.6million on Australian content in 2000 and they are the main support for Australia's independent audio visual production industry underpinning 69% of the production industry's output (and over 80% including advertisements).

Australian broadcasting policy since the 1950s has rested on maintaining a limited number of broadcasters to ensure the health of the industry. This policy was reviewed in the mid-1980s, which resulted in regional commercial television "aggregation". It was reviewed again in 1992, and renewed in a form which allowed the introduction of competing services in some smaller markets, but retained the overall limit of three commercial licences in any market. The limit was reviewed again in 1997, and was renewed on the Government's determination that there would be no net community benefit in introducing a fourth licence.²¹ In 1998, Parliament extended the prohibition on new commercial free-to-air licences in any market until 2007.

As recently as June 2000 Senator Alston confirmed his commitment to the importance of maintaining the benefits of Australia's strong free-to-air broadcasting sector when he stated:

"It has ...long been recognised that Australia has one of, if not the best, free-to-air television systems in the world - a fact not seriously contested by anyone on either side of the digital television debate.

Australia also has strict local content rules that apply to free-to-air television but do not apply to the same extent to other mediums like subscription television and datacasting. Local content rules, I might add, that will continue to apply in the simulcast digital environment.

¹⁹ The minutes of advertising per hour of broadcast time are limited by regulation, so the aggregate supply of advertising audience minutes can not be increased; unlike newspapers or magazines. Further there is little scope to increase overall viewing or attract significant amounts of revenue from other media. Viewing levels have been steady at about 3.25 hours a day since the early 1990s, so audience growth, at best, is pegged to population increase. Further the impact of pay TV, internet usage and bundled service offerings is likely to have an increasingly negative impact on viewing levels in coming years. In such a market, if the number of players is increased, the existing advertising revenue will be fragmented between existing and new players.

²⁰ It costs significantly more to produce Australian content than purchasing off the shelf foreign content.

²¹ The conclusion was based on advice to that effect from the ABA and Bureau of Transport and Communications Economics.

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History also demonstrates that free-to-air television has stood the test of time. It reaches virtually every household in the country. It continues to be one of the favoured and most frequently undertaken leisure activities for Australians of all ages. And just as free-to-air television was not supplanted by VCRs in the 1980s or by Pay TV in the 1990s, so it is premature to predict the death of television (as George Gilder did some ten years ago) in the first decade of the 21st century despite the widespread uptake of computer technologies and the Internet.

In other words, free-to-air television is an important part of our lives and its continuing healthy existence is something that the vast majority of Australians would support. High quality free-to-air television also does not come by accident. It involves television networks, both commercial and national, being willing and financially able to make the necessary ongoing investment in the production of innovative (and often expensive) local content in a highly competitive environment.

Ever since television was introduced to Australia just before the Melbourne Olympics in 1956, there has been a legislative limit on the number of free-to-air networks, in recognition of the relatively small size of the market. Indeed, three free-to-air and two national networks offers greater qualitative and quantitative diversity than many other countries including the US and the UK.

The 1998 all-party decision to maintain the limit was therefore based on a longstanding concern that our quality product with its attendant local content requirements should not be put at risk²².

Introduction of an automatic conversion right at a time of major industry expenditure on the transition to digital television, new threats to advertising revenue in the form of pay TV, internet usage and bundled service offerings and difficult economic times, would have an immediate and detrimental impact on the market perception of the television industry and its current revenue earning ability. In such an environment, due to the threat of market erosion post 2006, free-to-air broadcasters would have difficulty in meeting their current digital television capital and operational commitments as well as continuing to deliver quality services. In addition, the local production industry would inevitably suffer.

Digital television remains in its infancy and no-one can predict the economic and technological environment that will exist post 2006 or the developments in the broadcasting and related sectors internationally. Further, a number of key aspects of the regulatory environment are required to be considered by the Minister as part of a review to be conducted before 1 January 2005.

All of these factors clearly point to one conclusion - that the Government is not in a position at the present time to determine whether any additional free-to-air services should be issued post-2006. For the same reasons, there should be not be any automatic conversion from a datacasting licence to a commercial broadcasting

²² Speech by Senator Alston to "New Broadcasting and Datacasting Symposium" 14 June 2000.

licence post 2006. To do so would be to jeopardise Australian free-to-air broadcasting and the high quality of free programming which the Australian public has come to expect.

4 Carriage of government services and community television

FACTS supports the allocation of spectrum for community television, provided digital community television services are subject to the same regulatory requirements which apply to analog community television services to ensure that digital community television services are used for community purposes and not for profit.

Additional comments on this issue can be found at paragraphs 2.6 and 7.

5 Datacasting licensing

FACTS notes that the value of spectrum is affected by international trends pointing to a reduction in spectrum value as well as the sustainability of business models for use of the spectrum. In this context we refer to our earlier comments concerning the potential uses of the spectrum and the need for new services to be receivable via broadcasting consumer equipment. This is a significant technical limitation on use and will have a direct effect on the value of the spectrum.

The Australian public might be better served if licences are allocated on the basis of quality of services rather than financial return. See our comments in paragraph 2.6 in relation to the "beauty contest" proposal.

In relation to licence allocation, FACTS considers that the service areas of any such licences should mirror current broadcast licence areas to facilitate efficient and compatible planning processes in the broadcasting services bands. Further, there should be parity in service reach, that is, the same reach rules should apply to both service categories in same spectrum bands. Currently, free-to-air broadcasters are restricted to a 75% population reach.

6 Current Ministerial Determination exempting datacasters from carrier licence post 30 June 2005

FACTS is of the view that the current Ministerial Determination exempting datacasters from the obligation to hold a carrier licence should be extended to the same date as the moratorium. The need for continuation of any such Determination should be reviewed at the same time as consideration of regulatory arrangements post 2006 takes place.
