

“SORTING OUT THE BITS” – DIGITAL TELEVISION AND DATACASTING IN AUSTRALIA

A STUDY IN POLICY AND REGULATORY DEVELOPMENT

by

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A. Introduction

Over the last two years Australia has engaged in an extraordinarily complex process to develop arrangements for conversion from analog to digital television. The process has involved almost a complete revision of what broadcasting means in Australia and has resulted in regulatory arrangements and concepts unique to Australia. It remains to be seen whether the arrangements will be successful or unworkable because they are too complex.

Our prediction is that the arrangements will prove to be unworkable. Significantly, the arrangements do not deal with the various new concepts or elements in a consistent manner. For example, distinctions between broadcasting and datacasting are based on content or genre. The same basis is used to distinguish between enhanced services and multi-channelling (together with considerations of timing and location). On the other hand, webcasting has been distinguished from broadcasting by reference to its means of delivery.

B. Background - The 1998 Framework

In mid 1998, the Australian government passed legislation containing the basic framework for the conversion of free-to-air (FTA) television broadcasting services from analog to digital mode.¹ The major features of the framework are as follows:

- the existing commercial broadcasters and the national broadcasters (the ABC and SBS) are each to be allocated an additional television channel so that they can begin transmitting digital terrestrial television services. New transmitter licences are to be

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¹ *Television Broadcasting Services (Digital Conversion) Act 1998* and *Datacasting Charge (Imposition) Act 1998*. Collectively referred to as the 1998 legislation.

issued for digital television broadcasts free of charge, in recognition of the high initial conversion costs that existing broadcasters will have to meet.²

- a moratorium on the issuing of any new commercial television broadcasting licences before 31 December 2006, again, in order to give existing broadcasters a degree of certainty in recognition of the high conversion costs they will have to meet.³
- existing broadcasters will have to simulcast their programs in both a new digital channel and their current analog channel for at least eight years from 1 January 2001. At the end of this simulcast period, the analog spectrum will be returned to the government and it may be allocated for other purposes.
- commercial broadcasters are not to provide subscription television services, but will be permitted to use the multi-channel capacity of digital transmission to transmit an additional program in digital mode, if the additional program is incidental or directly linked to a simulcast program.
- the Australian Broadcasting Authority (ABA) is to identify unused spectrum not needed for the conversion process which will be made available to "datacasters" for datacasting services on a competitive basis. This spectrum will not be made available to Pay TV operators and, although existing broadcasters (both commercial and national) will be permitted to datacast using any excess transmission capacity in the digital channels they are allocated for simulcasting, they will pay a charge for doing so and will not be permitted to apply for the unused spectrum identified by the ABA.
- digital broadcasts are to commence on 1 January 2001 in both metropolitan and regional areas (with test transmissions to be made in digital mode before then). All areas are to have digital services by 1 January 2004. High Definition Television (HDTV) was mandated on the basis that regulations would prescribe the format(s) and technical standards and quotas.

"Broadcasting service" is defined by section 6 of the *Broadcasting Services Act 1992* (BSA) in a technology neutral fashion as:

*"...a service that delivers television programs or radio programs to persons having equipment appropriate for receiving that service, whether the delivery uses the radiofrequency spectrum, cable, optical fibre, satellite or any other means or a combination of those means..."*⁴

² By virtue of amendments to the *Radiocommunications Act 1992*. See also the *Explanatory Memorandum* for the 1998 legislation.

³ *Explanatory Memorandum* for the 1998 legislation.

⁴ Section 6 of the BSA includes certain exceptions which will be discussed in more detail below. A "program" is defined in relation to a broadcasting service as "matter the primary purpose of which is to entertain, to educate or to inform an audience, or advertising or sponsorship matter whether or not of a commercial kind" (also by section 6).

"Datacasting" is a new concept that is unique to Australia's approach to digital television.⁵ A "datacasting service" was defined in the 1998 legislation as:

"...a service (other than a broadcasting service) that delivers information (whether in the form of data, text, speech, images or in any other form) to persons having equipment appropriate for receiving that information, where the delivery of the service uses the broadcasting services bands".

All that was really clear from this definition was that "datacasting" was something other than broadcasting which used the broadcasting services bands (radiofrequency spectrum) as its delivery method.

The term "multi-channelling" and the condition that it consist of "programs incidental and directly linked" to simulcast programs (or enhanced services) were not explained in the legislation.

The legislation required the Minister for Communications, Information Technology and the Arts (the Minister) to conduct reviews into a myriad of matters before 1 January 2001, including into the following:⁶

- whether any legislative amendments should be made in order to deal with convergence between broadcasting services and other services;
- the scope of datacasting services and enhanced services;
- whether, and to what extent, the national broadcasters should be permitted to multi-channel and, if so, whether legislative amendments would be required to enable them to do so; and
- HDTV format standards.

The distinctions between broadcasting, datacasting, multi-channelling and enhanced services were intended to be fleshed out during the review process. However, the government's policy parameters were clear- datacasters were not to be permitted to become de facto commercial broadcasters (at least not before 1 January 2007) and enhanced services were not to involve de facto datacasting.

C. December 1999 - Tabling of Review Reports and Policy Decisions

On 21 December 1999, the Minister issued a document containing the policy decisions reached by the government as a result of the above reviews.⁷ In addition, a three-volume set of reports on the reviews was tabled in Parliament.⁸ In summary, the decisions were as follows:

⁵ *Report of the Senate Environment, Communications, Information Technology and the Arts Legislation Committee on the Broadcasting Services Amendment (Digital Television and Datacasting) Bill 2000*, June 2000 at p99 (Minority Report by the Australian Democrats).

⁶ *Broadcasting Services Act 1992* (as amended by the *Television Broadcasting Services (Digital Conversion) Act 1998*) Schedule 4, Part 8, clause 59(1).

- 1) a new content or genre based definition of datacasting would be introduced. Datacasters would not to be permitted to provide "traditional television programs".⁹
- 2) the national broadcasters would not to be permitted to multi-channel due to "legitimate concerns" that this would involve unfair competition with Pay TV operators.¹⁰
- 3) FTA broadcasters would be permitted to provide enhancements to their simulcast programs, provided the enhanced services were directly linked to and contemporaneous with the main program. Limited multi-channelling would be permitted for "overlaps", eg to allow transmission of the end of a sporting match if it runs over time at the same time as the next scheduled program. Enhanced programming in the form of live coverage of a different sporting event to that being broadcast as the primary program would be permitted, provided both events were being played at the same venue, in the same sport and there was an overlap in time between them.¹¹
- 4) FTA broadcasters would be required to provide a Standard Definition Television (SDTV) signal at all times. Quotas for HDTV transmission were also selected. Commercial broadcasters would be required to provide at least 20 hours of HDTV programs within 2 years of the commencement of digital transmissions in each area.¹² This would involve a "triplecast" during the time the HDTV quota was being fulfilled (ie in analog, HDTV and SDTV).

D. Consideration of the Review Process

For each of the reviews, the Department of Communications, Information Technology and the Arts (DOCITA) released an extensive Issues Paper inviting submissions from interested parties. After receipt and consideration of the submissions provided, an Options Paper was produced, followed, ultimately, by the final report. Not surprisingly, the submissions received by DOCITA were generally predictable and clearly driven by self interest.

⁷ "Digital Broadcasting and Datacasting" issued by the Minister on 21 December 1999 (Q & A format) and press release "Digital - new choices, better services for Australians" of the same day.

⁸ Three volume document, *Reports on Digital Television Reviews*, December 1999.

⁹ "Digital - new choices, better services for Australians", press release by the Minister on 21 December 1999.

¹⁰ *Report on Digital Television Reviews*, December 1999, Volume 1 at p39.

¹¹ It appears, for example, that this will permit two Wimbledon matches being played at the same time but on different courts within the same venue to be broadcast at the same time.

¹² The government initially imposed the same obligation on the ABC and SBS (although SBS was to be allowed to include some material produced in SDTV and "upconverted" to HDTV). The quotas for the national broadcasters were later made somewhat more flexible to take into account their diverse programming sources: *Broadcasting Services Amendment (Digital Television and Datacasting) Bill 2000*, Second Reading Speech at p2.

In relation to the scope of datacasting services, for example, the potential datacasters (which include Fairfax Holdings, News Limited, Ozemail, Telstra and AOL Bertelsmann On-Line Services) argued that datacasting should be defined as widely as possible. There appears to have been general acceptance, that the distinction between broadcasting and datacasting should remain, and that one or other concept should be redefined in order to clarify the distinction. AOL Bertelsmann On-Line Services (a joint venture between AOL and Bertelsmann AG) submitted that broadcasting should be redefined.¹³ News Limited submitted that the distinction should be based on whether it is the bit stream originator or the customer who has control over the timing of participating in the multimedia experience at the reception device and that there is an essential "experiential difference" between datacasting and broadcasting.¹⁴

By contrast, Cable & Wireless Optus (in its capacity as a Pay TV operator) submitted that the definition of datacasting should be restricted so as to exclude services that are de facto broadcasting services (such as video on demand, near video on demand, cached/stored video and audio services) which could be exploited by the existing FTA broadcasters to "entrench their dominant position in the electronic communications market".¹⁵

The Pay TV operators also strenuously opposed the granting of generous multi-channelling rights to the FTA broadcasts. The FTA broadcasters were naturally keen to see the most expansive possible approach to enhanced services, while potential new datacasters such as Telstra submitted that the FTA broadcasters will have a market advantage because they can use spectrum allocated to them for simulcasting during the conversion process for the provision of enhanced services.¹⁶

E. The 2000 Amending Legislation

The government introduced the *Broadcasting Services Amendment (Digital Television and Datacasting) Bill 2000* and the *Datacasting Charge (Imposition) Amendment Bill 2000* into Parliament on 10 May 2000 (collectively referred to as the 2000 legislation). Not surprisingly, the passage of the legislation was controversial. The government insisted that the legislation be dealt with before Parliament rose for the winter break on 30 June 2000 so that digital transmissions could still commence on 1 January 2001. The opposition and the Democrats accused the government of leaving insufficient time for consideration and debate.¹⁷ In truth, though, the positions of the various stakeholders had been fairly clear for a considerable period.¹⁸

¹³ Submission from AOL Bertelsmann On-Line Services to the Review into the Scope of Datacasting Services, December 1998 at page 7 - "to capture the essence of broadcasting services - those key attributes that makes it more appropriate to be more heavily regulated than other information services".

¹⁴ News Limited, *Submission to the Review into the Scope of Datacasting Services*, December 1998 at page i.

¹⁵ Cable & Wireless Optus, *Submission to Review on Datacasting*, 22 January 1999, at p1.

¹⁶ *Report on Digital Television Reviews*, December 1999, Volume 2 (Review into the Scope of Datacasting Services and Enhanced Services at p5ff) and Appendix 1 (at p83ff).

¹⁷ Shadow Minister, Stephen Smith: *Hansard*, 5 June 2000 at p17018. Despite the short time available, the

Throughout the parliamentary process, intense lobbying by stakeholders, particularly by potential datacasters and the FTA commercial broadcasters continued.¹⁹

Each of the major minority parties tried unsuccessfully to introduced substantially revised regulatory arrangements for datacasting during the consideration of the 2000 legislation by the Senate in Committee. The Democrats proposed an approach where datacasting would simply not be or include broadcasting services or provide access to stored video programming which would function substantially as broadcasting services.²⁰ Labour proposed that a datacasting service be one with the following attributes:

- it uses the broadcasting services bands;
- it is interactive;
- it is non-contemporaneous;
- it is non-linear;
- it offers frequent user-defined choices;
- it makes frequent use of static graphic interfaces;
- it complies with any determinations or clarifications to be made by the ABA.²¹

The debate about datacasting led to some rather extraordinary statements by the Minister in relation to broadcasting. At the same time as trying to draw a policy-based distinction between datacasting and television broadcasting, the Minister said that "It has now reached a point where definitions of broadcasting are not of any great assistance in interpreting which is meant

2000 legislation was considered by the Senate Environment, Communications, Information Technology and the Arts Legislation Committee which took submissions from interested parties (generally along the same lines as such parties had already submitted to the DOCITA reviews) and held public hearings on 31 May and 1 June 2000. A report was produced on 8 June 2000 (see note 5 above) which recommended only some minor changes to the legislation, some of which were adopted (including that the ABC and SBS be permitted to broadcast their radio services through their digital channels to enable more rural areas to be reached).

¹⁸ In response to the Shadow Minister, Gary Hardgrave said (*Hansard*, 5 June 2000 at p17022) that he was "disappointed those opposite are still flopping around trying to find reasons to be negative and scare people".

¹⁹ One Democrat Senator, Vicki Bourne, who was heavily involved in the debate about the 2000 legislation, described the lobbying as having been "reasonably intense": *Hansard*, 21 June 2000 at p15383. At the very last minute substantial government amendments were introduced which permitted the national broadcasters to undertake extremely restricted forms of multi-channelling when it had earlier looked as if more generous arrangements might be agreed. These restrictions seems to have been heavily influenced by the interests of the FTA commercial broadcasters.

²⁰ Senate Committee debate, *Hansard*, 27 June 2000 at p15731ff.

²¹ Senate Committee debate, *Hansard*, 27 June 2000 at p15737ff.

by datacasting" and that "...the meaning of the term 'broadcasting services' is quite uncertain in this day and age".²²

When the review/consultation process and the amending legislation are analysed systematically, it becomes clear that the changes achieved by stakeholders as a result of participating in the review process were minimal. While it perhaps goes too far to say that the outcome of the reviews was always a foregone conclusion, the government's declared policy objective of protecting the interests of the incumbent commercial FTA broadcasters did not leave the government very much room to manoeuvre, particularly on the issue of datacasting.²³ Nevertheless, it took the government an unexpectedly long time (from December 1999 to early May 2000) to prepare amending legislation to effect the decisions made as a result of the review/consultation process, which may indicate that there was something of a struggle with some of the more complex issues.

The major changes achieved by the review process seem to have been the "must carry" requirement for SDTV²⁴ and a slight expansion (or at least clarification) of the concept of enhanced services. Although the government's general approach to datacasting has not changed, the way in which it has been defined creates considerable uncertainty.

F. Datacasting

Defining datacasting services and the regulatory arrangements for such services have proved to be the most contentious aspect of the digital conversion process in Australia. During the course of the Reviews on the Scope of Datacasting Services and of Enhanced Services, DOCITA identified three, not necessarily mutually exclusive, means of distinguishing between datacasting and broadcasting:²⁵

- 1) the appearance and nature of the transmitted material - whether or not the relevant services have the appearance of television;
- 2) whether or not the service is interactive (the type of approach advocated by News Limited, see above);
- 3) whether or not the service is provided on a subscription basis.

²² Hansard, 27 June 2000, at p15745 and 15747, respectively.

²³ During debate about the 2000 amending legislation in the House of Representatives, Gary Hardgrave, a liberal (government) member said that "We have, without doubt, a desperate need to make sure the mature players in our television industry understand this government is giving them the tools to go ahead and do what they say they can do": *Hansard*, 5 June 2000, at p17019. The traditional justification for this policy is the protection and continuation of a high standard of FTA broadcasting, including high levels of Australian content.

²⁴ The SDTV requirement was apparently introduced because a number of potential datacasters argued that their business cases depended on reasonably low priced digital receivers: *Reports on Digital Television Reviews*, December 1999, Volume 1, at p60.

²⁵ *Report on Digital Television Reviews*, December 1999, Volume 2 at p65ff.

The government opted for a complex content or genre based model.²⁶ First, the definition of "datacasting service" was changed slightly from the version in the 1998 legislation so that it now means:

"...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 a combination of forms;*

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

A person providing a datacasting service will be a "datacasting service provider" and must hold a datacasting (content) licence to be issued by the ABA. Datacasting content is subject to restrictions (licence conditions) "designed to encourage datacasting licensees to provide a range of innovative services that are different to traditional broadcasting services".²⁷ The types of content or programs regarded as content genres traditionally considered to be FTA television have been divided into two categories (A and B). Category A programs are: drama, sports, music, infotainment or lifestyle programs, documentaries, reality television, childrens' entertainment, light entertainment or variety, compilations, quiz or games programs, comedy programs or any combination of these types of programs. Category A programs do not include information-only or educational programs. Category B programs are: news or current affairs, financial, market or business information bulletins, or bulletins or programs that consist of a combination of these types of programs. Category B programs do not include information-only or educational programs or foreign-language news bulletins.

Datacasting licensees may not provide Category A programs, except short extracts of up to 10 minutes in length. Extracts may not be combined to constitute Category A programs. Licensees may not provide Category B programs, except short extracts of up to 10 minutes in length. Again, extracts may not be combined to constitute Category B programs. Extracts of Category B programs may not be changed, eg updated, more frequently than every half hour. However, licensees may transmit a bulletin or program (of a Category B nature) provided it:

- (a) is not presenter-based; and
- (b) is either made up of only one item of news, or a compilation of items less than 10 min-

²⁶ Incorporating some minor changes to the regulatory approach to datacasting made during parliamentary debate about the 2000 legislation (see below).

²⁷ *Broadcasting Services Amendment (Digital Television and Datacasting) Act 2000, Schedule 6.*

utes in length and of the same or directly related subject matter, or a weather bulletin or program; and

- (c) can only be accessed by an end-user who makes a selection from an on-screen menu.

Similar distinctions are drawn in relation to audio content to prevent datacasting licensees engaging in radio broadcasting.

Datacasting licensees may provide the following types of content: information-only programs (including those enabling people to carry out transactions), educational programs, interactive computer games, content in the form of text or still visual images, Parliamentary broadcasts, "ordinary electronic mail" and Internet content.

The ABA is given powers to enforce the distinctions between broadcasting and datacasting, including, if necessary, a power to make written determinations as to whether or not content falls within a particular genre, for example, because a datacasting licensee is unsure.

Datacasters will also be required to hold transmitter licences to be issued by the Australian Communications Authority (ACA) to use radiofrequency spectrum. These licences will be issued for an initial term of 10 years with a single renewal of 5 years.²⁸ From 1 January 2007 when the moratorium on new commercial broadcasting licences comes to an end, these licences could be converted into FTA television broadcasting licences.²⁹

The government's approach to datacasting can most favourably be described as complex! It has been called, with some justification, "dull but worthy".³⁰ It also gives rise to some perhaps unintended but nevertheless absurd results. For example, permissible datacasting content must be educational but may not be entertaining. Surely educational content needs to be entertaining in the sense of being engaging in order to be of interest.³¹ Similarly the line between enhanced services and multi-channelling is likely to be difficult to identify in practice.

²⁸ Under the *Radio communications Act 1992* as amended by the *Broadcasting Services Amendment (Digital Television and Datacasting) Act 2000*. The ACA has issued a Discussion Paper to "promote discussion and invite comments" on issues relating to the issues of these licences such as the allocation method, lot arrangements ("national coverage" or by geographical regions), competition issues etc. It is anticipated that an auction to allocate licences will be held in November/December 2000. Spectrum will be allocated in channels of 7MHz and will be located in bands 4 or 5 of the television broadcasting bands. Content licences will not be issued for a particular period but, like individual commercial broadcasting licences, will continue provided the licence conditions are met and the datacasting charges paid.

²⁹ ACA, *Discussion Paper on Datacasting Transmitter Licence Allocation* at p6-7.

³⁰ *Hansard*, transcript of hearing of Senate Environment, Communication, Information Technology and the Arts Committee on 31 May 2000, Senator Mark Bishop at p67.

³¹ *Report of the Senate Environment, Communications, Information Technology and the Arts Legislation Committee on the Broadcasting Services Amendment (Digital Television and Datacasting) Bill 2000*, June 2000 at p100 (Minority Report by the Australian Democrats).

G. Convergence

That part of the government's report on the reviews dealing with convergence issues (volume 3) is somewhat unusual. Despite the terms of the review, the report is not restricted to convergence between telecommunications, information technology, broadcasting and other forms of media, but purports to be an outline of a framework for the government to address the impacts of "structural" convergence on policy formulation generally. Without any real analysis of the regulatory arrangements relating to broadcasting and telecommunications, the report concludes that regulatory arrangements for communications generally will "remain sound" for some time although there is some ambiguity in the split of responsibility for spectrum management between the ABA and the ACA.³² The government's review on convergence forms an interesting background to the events that subsequently occurred in relation to the treatment of webcasting under the 2000 amending legislation.

H. Internet Streamed Audio and Video Content Issue

The definition of "broadcasting service" in section 6 of the Broadcasting Services Act 1992 (BSA) contains a number of exceptions including "a service that makes programs available on demand on a point-to-point basis, including a dial-up service". For some time prior to the introduction of the 2000 legislation, there had been uncertainty in Australia as to whether the making available of media/content to end-users over the Internet constituted a broadcasting service or whether it fell within this exception. The possibility that it might constitute a commercial broadcasting television service (as defined in the BSA) was particularly problematic because of the offences that are committed by any person who broadcasts a commercial service without a licence and because of the moratorium on the issuing of any new licences for such services contained in the 1998 legislation. This uncertainty was acknowledged by the Minister in his Second Reading speech when he introduced the 2000 legislation into Parliament.

It was originally proposed that the ABA would consider this issue at the Minister's request and report by the beginning of 2002. The very existence of this planned review caused great unease in the Australian Internet industry. For many operators setting up Internet streaming businesses, uncertainty was better than a decision that the exemption did not apply (although of course uncertainty involved some risks).

The Internet Industry Association (IIA) undertook intensive lobbying of the Minister for assurances the streaming did not constitute broadcasting and that clarifying amendments would be made. On 28 June 2000, very late in debate on the 2000 legislation, a provision was included at the opposition's instigation requiring the Minister to conduct a review into the issue by 1 January 2002 and the preparation of a report on the outcome to be tabled in Parliament. Interestingly, the ABA gave evidence at the hearing of the Senate Environment, Communications, Information Technology and the Arts Committee on the 2000 legislation on 1 June 2000 that it had not yet commenced the review it was to undertake at the Minister's request. After more

³² Reports on Digital Television Reviews, December 1999, Volume 3, section 8.

intense lobbying by the IIA, the Minister suddenly announced on 21 July 2000 (after the 2000 legislation had been passed but not yet assented to) that the government had completed a review and decided that Internet video and audio streaming should not be regarded as a broadcasting service. The Minister also announced that any necessary legislative changes would be made to clarify the situation.³³ However, where the broadcasting services bands are used to deliver such content it will be regulated under the new arrangements contained in the 2000 legislation.

Clearly the IIA prevailed. It is interesting that the government made this decision without going through the full process of discussion and option papers and submissions etc as occurred in relation to the other reviews. It is possible that the government took this approach in relation to the internet industry because of the controversy which arose last year when the government sought to impose regulation on internet content.³⁴

Because it only seeks to regulate datacasting using the broadcasting services bands, the 2000 legislation has failed to deal with the interface between Internet services provided using telecommunications networks and services provided using the broadcasting services bands.³⁵ Presumably this will have to be revisited as technological convergence continues.

I. HDTV/SDTV

Australia has very much struck out on its own in relation to format standards by mandating HDTV with a "must carry" SDTV requirement as well. When HDTV was first mandated in the 1998 legislation, it was anticipated that HDTV would be the predominant technology in the United States, Western Europe and Japan. Although that has not proven to be the case, Australia has stuck with its original selection. In the United Kingdom, SDTV has been selected. The United States is the only other country to have so far imposed the HDTV format by legislation and take-up has been disappointing due to the cost of the technology required to view the format.³⁶

Again, further reviews will be held in relation to HDTV/SDTV issues. Should broadcasters be finding it difficult to fulfil their quotas due to a lack of available HDTV content, because

³³ Senator Alston, press release "Video and Audio Streaming" 21 July 2000. The Minister made a Determination under section 6(1)(c) of the *Broadcasting Services Act 1992* confirming this on 12 September 2000.

³⁴ The *Broadcasting Services Act 1992* was amended in late 1999 to include a regulatory regime for internet content (in Schedule 5) which commenced on 1 January 2000.

³⁵ Although clause 23B of the new Schedule 6 of the *Broadcasting Services Act 1992* is intended to deal with schemes set up to provide datacasting services that consist of internet carriage services in order to avoid the application of the datacasting licensing arrangements.

³⁶ *Report of the Senate Environment, Communications, Information Technology and the Arts Legislation Committee on the Broadcasting Services Amendment (Digital Television and Datacasting) Bill 2000*, June 2000 at p69 (Minority Report by Labour). Japan had also done so but implementation dates have been deferred, suggesting a reconsideration of the format.

so few other countries are using the format and are therefore not producing content in that format, the current arrangements may need to be revised.

J. The Reviews Are Not Over Yet - Where To From Here?

Despite the extensive fleshing out of Australia's digital conversion arrangements which is contained in the 2000 legislation, much remains to be done. The government is continuing its approach of extensive reviews due to the difficulties of predicting future technological developments. The 2000 legislation again provides for multiple reviews with various deadlines over the next 5 years, including (by 1 January 2003) into whether any amendments should be made to the new datacasting regulatory arrangements.

K. Conclusion

No one seems to be happy with the outcome of the regulatory process except the FTA commercial broadcasters. The potential datacasters who had spent two years developing business cases which they now say are rendered marginal by the new arrangements are particularly unimpressed.³⁷ The government has also imposed a heavy review workload on itself and a potentially substantial new role on the ABA (without providing the ABA with any additional resources).

Although a complete overhaul of the broadcasting arrangements might have been preferable, including consideration of the meaning of a "broadcasting service" it was possibly just too early because it is not yet known what some of the new concepts such as datacasting will look like in practice. Perhaps the most optimistic approach would be to assume that the conceptual distinctions now imposed will become meaningless once the moratorium protecting the existing FTA commercial broadcasters is lifted after 31 December 2006.

It is also interesting to note that during 1999, a separate but concurrent review of Australia's regulation of broadcasting was undertaken by the Productivity Commission, at the request of the Treasurer. The Productivity Commission reported on 3 March 2000.³⁸ Its report recommends wide-reaching changes, including revisions to the arrangements relating to foreign ownership and control which are beyond the scope of this paper and about which the government has yet to announce its view. However, the Productivity Commission also expressed the view that the government's policy in relation to datacasting "stifles competition and innovation" and that regulatory restrictions on datacasting, multi-channelling and interactive services:

"... will be costly to Australian consumers and businesses alike. They will delay consumer adoption of digital technology and deprive business of opportunities to develop new products and services for the world

³⁷ As soon as the 2000 legislation was passed a number of the potential datacasters withdrew from digital transmission trials.

³⁸ Productivity Commission, *Broadcasting Inquiry Report*, Report No. 11, 3 March 2000.

as well as Australian markets. They could have a particularly severe effect on regional consumers who have limited access to other broadband digital platforms".³⁹

³⁹ Ibid, at p14-15.