



# **Australian Competition and Consumer Commission**

**Submission to the Department of Communications,  
Information Technology and the Arts**

**in response to**

***Provision of commercial television broadcasting services after 31  
December 2006 Issues Paper***

13 October 2004

## Introduction

The Australian Competition and Consumer Commission (the ACCC) is the independent statutory authority responsible for compliance with, and enforcement of, the *Trade Practices Act 1974* (the TPA). The statutory object of TPA is to enhance the welfare of Australians through the promotion of competition and fair trading and provision of consumer protection.

This submission provides the ACCC's response to the Department of Communications, Information Technology and the Arts (DoCITA) Issues Paper, *Provision of commercial television broadcasting services after 31 December 2006* in July 2004 (Issues paper). The Issues paper outlines the scope of the review relating to the end of the moratorium on the issue of new commercial television broadcasting licences. The review is intended to address the following broad issues:

- the changes to legislation that could be made to ensure that the Government reclaims its decision-making role in the selection and allocation of commercial television broadcasting licences
- whether changes should be made to licence conditions relating to commercial television broadcasting licences, in particular whether licence conditions applying to any new commercial television broadcasting licences allocated after 1 January 2007 should be different from licence conditions applying to existing commercial television broadcasting licences and if so, how,
- if there are datacasting transmitter licences allocated before 31 December 2006, the appropriate competitive, regulatory and financial arrangements for datacasting transmitter licences to convert to other uses from 1 January 2007

The Issues paper raises a number of matters relating to the administrative and operational processes and arrangements for the allocation and conditions of use of additional commercial television broadcasting licences and the conversion of datacasting transmitter licences to other uses after 1 January 2007. This submission, however, focuses principally on the issues of competition and efficiency in relation to the proposed arrangements for conversion of datacasting transmitter licences to other uses from 1 January 2007.

Importantly, the ACCC notes that the threshold decision of whether additional commercial broadcasting licences should be allocated is beyond the scope of this current review. In this regard, the ACCC would welcome the opportunity to provide a detailed submission on this issue at a later stage when this decision is formally considered by the Government. Similarly, the ACCC does not propose to comment on the nature of any changes to the *Broadcasting Services Act 1992* (BSA) to enable the Government to reclaim its decision-making role in the selection and allocation of commercial TV broadcasting licences.

## **Regulation of datacasting**

### *ACCC's previous views*

The ACCC has previously commented on the content restrictions applying to datacasters and the issue of additional commercial Free-to-air (FTA) licences in its *Emerging market structures in the communications sector* report (EMS report) released in June 2003. The EMS report noted that these two issues are inter-related because removing restrictions on datacasting provisions would allow a datacasting licence to closely replicate the service provided by existing FTA broadcasters. DoCITA highlighted this point in a review conducted in 2002 on datacasting, where it recommended no change to the rules that specify the content which can be provided under a datacasting licence.<sup>1</sup>

In the EMS report, the ACCC stated that there is a strong case for the removal, or at least an easing, of restrictions applying to datacasters. It noted that the datacasting regime has not achieved the social objective of encouraging the development of a range of innovative services that are different from traditional broadcasting services. This was consistent with the views the ACCC gave to DoCITA in the course of the 2002 review on datacasting. In relation to the issue of additional FTA commercial licences, the ACCC recommended that the planned review of the moratorium on the number of commercial licences, set for 2005, be brought forward.

More recently the ACCC has provided comments on broadcasting regulation in its submission to the Productivity Commission's review of National Competition Policy arrangements<sup>2</sup> and its submission in response to the DoCITA Issues Paper, *Provision of services other than simulcasting by Free-to-air broadcasters on digital spectrum*.<sup>3</sup>

These submissions argue that the costs and benefits of current broadcasting legislation need to be fully analysed and understood. Moreover, the ACCC considers that the onus should be on advocates of continued restrictions on competition and restricted supply to demonstrate that the benefits of these restrictions outweigh the costs, and that the stated policy objectives can not be achieved without restricting competition.

### ***Conversion of datacasting licences***

The ACCC maintains its view that existing restrictions on the use of the datacasting spectrum have not achieved their desired policy outcome of encouraging the provision of innovative services that are different from traditional broadcasting services.

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<sup>1</sup> DoCITA, *Review of the Operation of Schedule 6 of the Broadcasting Services Act 1992 (Datacasting Services)*, December 2002, p. 7.

<sup>2</sup> ACCC, *Submission to the Productivity Commission Review of National Competition Policy Arrangements*, 13 July 2004.

<sup>3</sup> ACCC, *Submission to the Department of Communications, Information Technology and the Arts in response to Provision of services other than simulcasting by Free-to-air broadcasters on digital spectrum Issues Paper*, 23 August 2004

The auction for the spectrum that had been allocated for datacasting was cancelled in May 2001 due to a lack of interest. Several companies with a potential interest in datacasting were critical of the restrictions placed on the use of the spectrum.<sup>4</sup> Indeed, one of the key outcomes of the 2002 review on datacasting was that the Government decided not to proceed with the long-term allocation of datacasting transmitter licences due to the perceived lack of interest by potential bidders.<sup>5</sup>

In this context, the conversion of datacasting transmitter licences presents an opportunity to more effectively use scarce spectrum for the provision of new and additional services to consumers, in turn providing a means both to increase efficiency in spectrum use and consumer welfare.

As noted in the Issues paper, under current provisions, on or after 1 January 2007 a datacasting transmitter licence can also be used for transmitting other types of services licensed under the BSA, provided a licence has been allocated by the ABA. This could include the transmission of services such as narrowcasting, commercial television broadcasting or subscription television, subject to the provider of such services having the relevant BSA licence.

In this regard, the ACCC considers that service providers who wish to use the datacasting spectrum should be given the widest possible scope to deliver the services they wish to offer, allowing them the flexibility to test and respond to consumer tastes and demand. This would mean allowing the holders of datacasting transmitter licences to provide any of the following services:

- narrowcasting,
- commercial television broadcasting, or
- subscription television.

### ***Increased competition and efficiency gains from conversion***

Allowing datacasting transmitter licensees to use their licences for the provision of narrowcasting may assist in the development of a viable business case by datacasters and encourage more efficient use of scarce spectrum. The use of datacasting spectrum for the provision of narrowcasting services has the potential to provide additional services to consumers.

The conversion of datacasting transmitter licences for the supply of subscription television services has the potential to introduce additional pay TV providers. This

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<sup>4</sup> For example, Fairfax commented that ‘There is...at present an irreconcilable contradiction, for as long as the current content restrictions are in place, between the investment required and the prospect of any commercial return. For this reason, Fairfax will not bid on datacasting licenses that are burdened with such restrictions.’ in Fairfax, *Response to the Datacasting Services Review*, 24 January 2002, p. 5.

<sup>5</sup> The ACCC understands that Broadcast Australia commenced trials of its datacasting service, comprising 8 different programming channels, in Sydney in March 2004.

may lead to increased competition in the market for pay TV services, providing lower prices and more innovative service offerings for consumers.

Similarly, the use of datacasting spectrum for the provision of additional commercial broadcasting services has the potential to encourage greater competition within Australia's FTA sector. This may be seen as an important consideration given that the FTA market in Australia appears to be highly concentrated relative to other developed countries.<sup>6</sup> Increased competition can function as a driver for productive efficiency gains and greater innovation in FTA broadcasting. In addition, the provision of additional commercial broadcasting services has the ability to provide a greater choice of viewing options which are better able to satisfy the diverse needs of Australian audiences.

These outcomes are consistent with the objects of the BSA, including the objective to 'provide a regulatory environment that will facilitate the development of a broadcasting industry in Australia that is efficient, competitive and responsive to audience needs'.<sup>7</sup>

However, the ACCC considers that the potential for increased competition and efficiency gains from allowing the conversion of datacasting transmitter licences to full FTA licences, as discussed above, may be constrained if datacasting transmitter licensees are precluded from providing commercial television broadcasting services. A number of respondents to DoCITA's review on datacasting contended that allowing the provision of narrowcasting or subscription broadcasting services would not sufficiently improve the business case of potential datacasters. Moreover, DoCITA reached the following conclusion in its report on the review:

It is unclear whether the ability to provide additional services, such as open narrowcasting or subscription narrowcasting and broadcasting, would significantly increase the potential viability of a datacasting operator. Given the risks of regulatory uncertainty and the concerns about the side-stepping of established process for allocation of these licences, and the lack of clear benefit to datacasters or consumers of providing these services, it was not considered appropriate to allow datacasters to provide narrowcasting or subscription broadcasting services.<sup>8</sup>

Thus it appears that the extent to which datacasters may be willing to convert their datacasting transmitter licences may be linked to whether the conversion to commercial broadcasting licences is an available option under the legislation after 1 January 2007. In this regard, providing regulatory certainty with respect to whether datacasting transmitter licensees will be able to convert their licences to provide commercial television broadcasting services post 2006 should be seen as a priority. This certainty would assist investment by potential new entrants using datacasting

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<sup>6</sup> Refer to the report by LECG commissioned by the ACCC titled, *Impacts of removing multicasting regulations on competition and efficiency in commercial free to air and pay TV markets in Australia*, August 2004, p.17

<sup>7</sup> Section 3(1)(b) of the *Broadcasting Services Act 1992*.

<sup>8</sup> DoCITA, *Report on Review of the Operation of Schedule 6 of the Broadcasting Services Act 1992 (Datacasting Services)*, December 2002, p.6.

spectrum, as well as encourage a faster transition to a more efficient use of spectrum by broadcasters.

Notwithstanding the issue of which services may be provided using datacasting spectrum, a key objective should be to ensure that competitive neutrality between new services providers using converted datacasting transmitter licences and incumbent services providers is achieved.<sup>9</sup> Differences in regulatory and financial requirements imposed on competing firms may distort competition and undermine any efficiency gains from conversion. For example, datacasting transmitter licensees providing commercial television broadcasting should face the same effective licence fee as incumbent commercial television broadcasters in order to enable effective competition.<sup>10</sup> More generally, the method for the allocation and use of licences should be based on a pricing mechanism which reflects the opportunity costs of spectrum used by broadcasters.

### *Conclusion*

The ACCC considers that there appears to be a strong case for the removal, or at least the easing of restrictions applying to datacasters. Moreover, the costs and benefits of current restrictions on broadcasting need to be fully analysed, with the onus on those advocating the continuation of current restrictive policies to demonstrate the benefits of these restrictions outweigh the costs, and that stated objectives cannot be achieved in any other way.

Ultimately, the success of datacasting is likely to depend on providing regulatory certainty around the ability of datacasting transmitter licensees to convert their licences not just to narrowcasting and subscription services but also commercial television licences.

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<sup>9</sup> The principle of competitive neutrality dictates that similar services should be regulated in a similar manner.

<sup>10</sup> The financial and regulatory arrangements for the conversion of datacasting transmitter licences to other uses should safeguard against service providers gaining financial windfalls from any differentials in licence fees based on the manner in which a licence is allocated (ie, whether a licence to provide a service is allocated directly or through the conversion of a datacasting transmitter licence).