

a trustworthy organisation (such as a bank, auditor or business association) allowing those traders who meet their conditions or code of practice to place a logo on their site. Currently some of these schemes offer a dispute resolution mechanism.

Industry-based schemes will be particularly important in cross-border transactions. Already some schemes are operating in a number of countries, with the potential to build confidence across borders by providing a mechanism to deal with disputes quickly, at low cost. As such schemes are self-regulatory in nature they are not effected by differences in substantive laws between countries.

The market for these services is still very new and it is difficult to speculate about their future, but they do face a number of problems and they do not overcome many of the complexities mentioned earlier in relation to significant differences in

countries' regulatory approaches. At present, and for the foreseeable future, they offer the best opportunity for consumers to have access to basic protection and dispute resolution.

CONCLUSION

Clearly online consumer protection poses challenges for governments. In Australia the application of the existing consumer protection framework coupled with self-regulation carried out in consultation with business and consumers will provide an excellent basis for protecting consumers online.

The issue of cross-border transactions poses particular problems to which there is no simple solution. The OECD has made significant progress towards international agreement on the fundamental business practices that provide adequate protection. Further co-

operation amongst governments together with the development of self-regulatory schemes will be necessary to provide comprehensive protection for consumers in online transactions.

¹ <http://www.consumersinternational.org>

² <http://www.treasury.gov.au/ecommerce>

³ <http://www.treasury.gov.au/ecommerce>

⁴ <http://www.asic.gov.au/page-612.html>

⁵ <http://www.oecd.org>

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Datacasting - The Long and Winding Road That Leads....???

Luke Waterson critiques the recent government datacasting decision.

On 21 December 1999, the Government announced its long awaited and eagerly anticipated decision on the permitted scope of datacasting services. The media release of the Minister for Communications, Information Technology and the Arts, *Digital - new choices, better services for Australians*, contained the following statement:

The Government is confident that its decisions will ensure that Australians enjoy the best broadcasting in the world while introducing new information and entertainment options through the establishment of a thriving and viable datacasting industry.

The purpose of this article is to determine whether the Government's confidence in the effect of its decision is justified.

EXISTING DATACASTING REGIME

A "datacasting service" is currently defined in section 2 of Schedule 4 to the *Broadcasting Services Act 1992* (Cth) ("BSA") as follows:

A service (other than a broadcasting service) that delivers information (whether in the form of data, text, speeches, 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.

The legislative concept of datacasting services in Australia was introduced in 1998 as part of the regime regulating the transmission of commercial and public free-to-air television services in digital

mode¹ ("Digital Act"). Although some services currently transmitted in analog mode are essentially datacasting services (such as the "Teletext" service), it is the spectrum efficiency and convergence technology of digital transmission that provides the opportunity for the establishment of a commercially significant terrestrial datacasting industry.

As this article will illustrate, the resolution of datacasting policy issues are inexorably linked to the existing digital broadcasting framework reflected in the Digital Act. In summary, the salient features of the digital regime most relevant to datacasting are:

- a wide definition of datacasting (as set out above) covering any information content service (other than broadcasting service)

transmitted using broadcasting spectrum;

- the existing free to air broadcasters ("FTAs") being given a "free loan" of additional spectrum to enable the transmission of their current services in digital mode ("digital spectrum")²;
- that the FTAs may provide datacasting services by means of any unused portion of their digital spectrum³;
- subject to a review, the allocation and auction of broadcasting spectrum to aspiring datacasters other than the FTAs ("new players")⁴;
- maintaining competitive cost neutrality between the FTAs and the new players by imposing a datacasting charge on the FTAs⁵;
- causing a statutory review of the scope of the definition of datacasting services to be conducted⁶;
- prohibiting the issue of additional commercial free to air broadcasting licences before 2007⁷.

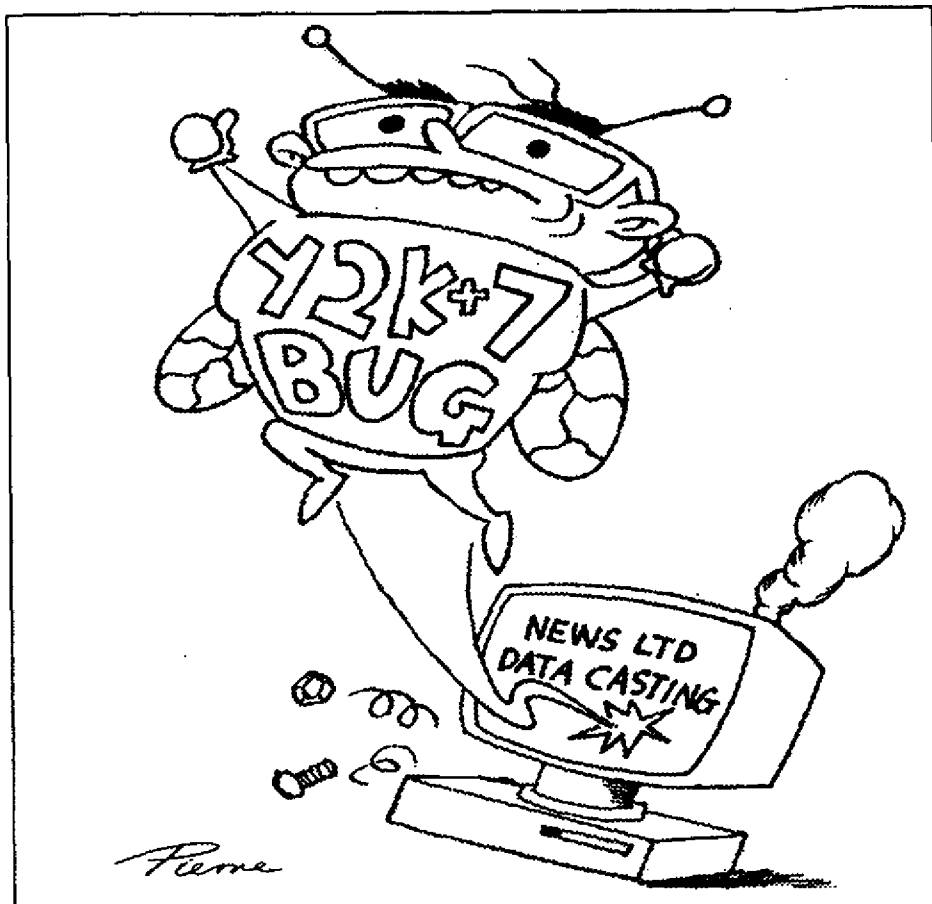
When the Digital Act was before the Parliament, the Government's policy on some issues arising from the introduction of digital television, including the exact scope of datacasting services, was incomplete. Accordingly, the Digital Act provided for a number of statutory reviews to be conducted including a review into the scope of datacasting services.

DATACASTING REVIEW

The terms of reference for the review were as follows:

Whether any amendments of laws of the Commonwealth should be made to deal with the scope of the services that are categorised as datacasting services.⁸

The review was conducted by the Department of Communications, Information Technology and the Arts ("Department"). Interested parties made written submissions to the review including Telstra Corporation Limited, News Limited ("News"), The Federation of Australian Commercial Television Stations ("FACTS"), John Fairfax Holdings Limited ("Fairfax") and the Australian Broadcasting Authority ("ABA").



The final report of the review will be published when it is tabled in Parliament as required by the BSA⁹. In mid 1999, the Department published a paper titled "Reviews into the Scope of Datacasting Services and Enhanced Services, Discussion of Options" ("Options Paper")¹⁰. The Options Paper outlined the key issues for the review including those arising from the submissions and outlined the various policy options available to the Government.

In general, the Options Paper is a useful publication which methodically outlines the policy options and their advantages and disadvantages. Quite correctly, the Options Paper identified the method of distinguishing datacasting services from broadcasting services as the fundamental issue.

The Options Paper outlined three potential methods for making the datacasting/broadcasting distinction:

- the *look and feel* method;
- the *interactive* method;
- the *subscription* method.

Principally advocated by FACTS, the *look and feel* method distinguishes by means of the appearance of the transmitted

material to the end user. Under this model, there would be restrictions on the genre of datacasting material (for example, no drama, comedy, sport, news etc.) and its format (for example, limited video).

Principally advocated by the new players (particularly News), the *interactive* method looks at the level of communication between the end user and the service provider in relation to the service rather than the nature of the material being delivered by the service. With a broadcasting service, there is no such communication - the timing and content of the service being wholly within the control of the service provider. With a datacasting service, pursuant to this method, the end user is in control of the timing of delivery and content of the service. In terms of the mode of delivery of material, a broadcasting service is delivered "point to multi point" while, pursuant to this method, a datacasting service is delivered "point to point".

The *subscription* method simply concentrates on whether the service is delivered on a subscription basis - thus avoiding the more difficult characterisation issues raised by the other methods.

In practice, the Government was faced with a choice between the *look and feel* method and the *interactive* method - the *subscription* method being considered more as an adjunct to either of these two, primary methods.

The motivations behind some of the submissions supporting either the *look and feel* or *interactive* method become clearer when the submissions are considered in terms of their accommodation within the existing regulatory framework.

The existing definition of "broadcasting service" already contains an exception for services delivered "point to point"¹¹. As outlined above, the *interactive* method is based on characterising a datacasting service as being delivered in this manner, thus automatically taking a datacasting service outside the scope of a "broadcasting service". Accordingly, if the *interactive* method were adopted, this could lead to a new player delivering the same types of programs as an FTA as long as the programs were accessed at the time of choosing of the end-user.

So, for the FTAs, the defeat of the *interactive* method was the highest priority. Conversely, for News, the adoption of the *interactive* method was essential to its plans to become a "backdoor" FTA through the provision of datacasting services.

However, in addition to the rejection of the *interactive* method, the FTAs also argued for the imposition of a positive restriction on the genre and format of material that could be delivered as part of a datacasting service. In essence, the

FTAs argued for restrictions on the provision of "entertainment" genre material and video formatted material.

THE DECISION

In summary, the decision largely represents a triumph for FACTS and the *look and feel* method. The table set out below outlines the decision in terms of the permitted delivery of genres/format of material.

It is clear that the datacasting decision was primarily driven by the overall broadcasting policy framework underpinning the Digital Act - in particular, the decision to prevent the issue of additional commercial free to air television licences before 2007. In simple terms, having already decided to maintain the status quo on commercial free to air television licences, the Government could hardly adopt a method, such as the *interactive* method, which could have led to a datacaster providing services that, to all intents and purposes, were commercial free to air television services.

In his media release, the Minister pulled no punches in describing the prime motivating factor behind the decision:

"Last year's legislation, supported by both Government and Opposition parties, prohibits the introduction of new free to air broadcasters before 31 December 2006. Accordingly, the new datacasting regime has been crafted so as to ensure that datacasters cannot offer a de facto broadcasting service."

This was also a constant theme running through the Options Paper. For example, in the section titled "Scope", the Options Paper stated:

"The policy boundaries for these reviews are set by the Digital Conversion Act. A number of provisions of this Act require that a regulatory distinction between broadcasting and datacasting be determined. In summary, the Digital Conversion Act provides that:

- there should be no new commercial television broadcasting licences allocated prior to 2007. Therefore datacasting by players other than FTA broadcasters should not be a de facto way of providing new commercial television broadcasting services."*

In commenting on the *interactive* method, the Options Paper stated:

"This approach... would also allow the delivery of services which are very similar to current television services - such as video-on-demand - which, although they would technically be datacasting, may be inconsistent with the requirement that datacasting services not be a back-door method of providing FTA broadcasting services."

REACTION TO THE DECISION

Predictably, reaction to the decision from the FTAs was positive. Reaction from new players was, in general, negative.

Not permitted

Television programs in the following genres:

- news, sports news*
- financial market and business information*
- weather*
- drama
- current affairs
- sport
- music
- infotainment
- lifestyle
- comedy
- documentary
- reality television
- children
- light entertainment and variety
- compilation

*some limited use of video permitted

Permitted

Material in any format that comprises:

- information on products, services and activities
- interactive home shopping
- banking and bill paying
- web pages (excluding those delivering television programs)
- e-mail
- education
- interactive games

Limited use of video permitted for:

- news
- sports news
- financial market and business information
- weather
- quiz and game shows

The most vehement criticism of the decision came from News, which, as described, was a vigorous supporter of the *interactive* method:

*"This digital policy is in line with the Government's overall policy on TV broadcasting, which for some time has lacked vision and which has failed to keep pace with the real world. A policy that seeks to control and restrict the delivery of information, entertainment and news is fundamentally anti-competitive and undemocratic."*¹²

Fairfax was more upbeat:

"For Fairfax, we are cautiously optimistic that today's decision gives us adequate scope to create a commercially viable datacasting business."

"With regard to the definition of datacasting, we wanted to secure the ability to provide a different kind of service - not television broadcasting - that is fundamentally interactive and which can provide news, finance, weather, commerce and Internet services. Under this definition, virtually our entire Internet and e-commerce offerings, provided by f2, and supplemented by video, could become datacasting services."

IMPLICATIONS OF THE DECISION

To assist it to conduct the review, the Department commissioned a report on the development of potential datacasting services¹³. The Report contains the most comprehensive publicly available analysis on the type of datacasting services that are likely to be provided in Australia. The effect of the Government's datacasting decision on the potential services outlined in the Report would seem to provide the best available evidence with which to measure the commercial implications of the decision.

The Report concluded that there were three potential datacasting service models.

Pursuant to the first model, (what I will describe as the *walled garden model*), the datacasting service primarily provides specially prepared multimedia material - comprising information (news, weather, sport) but would also "routinely contain"¹⁴ video material.

Pursuant to the second model, (what I will describe as the *web tv model*), the

datacasting service combines the features of the *walled garden model* with substantially greater interactivity (most likely full Internet access and e-commerce capability through a telephone "back channel") and the integration of the *walled garden* material with material delivered as part of a traditional television broadcast.

Pursuant to the third model (what I will describe as the *video on demand model*), the datacasting service primarily delivers high quality video material that can be viewed "live" or stored for later viewing together with full interactivity for e-commerce applications.

In terms of the impact of the Government's decision, it would appear that the *video on demand model* will not be an option for new players. It is doubtful whether datacasters would be permitted to provide sufficient video material in genres that could commercially support this model.

This leaves the *walled garden* and *web tv* models.

WEB TV MODEL

In its most simple form, the *web tv model* allows an end user to surf the web on a television, while, at the same time, view the broadcast material - the broadcast material is "framed" by the web material which is delivered to the television through a modem equipped set top unit by means of the telephone system¹⁵.

At this level, the *web tv* model does not appear to involve datacasting as defined in the BSA because there is no material being delivered by means of the broadcasting services bands other than the broadcast signal. The Internet material is delivered in the "normal" way by means of the telephone system - the difference being that the material is viewed on a television rather than a personal computer.

At a more advanced level, the *web tv model* involves the terrestrial delivery of material that is integrated with the broadcast signal. This material could consist of *walled garden* multimedia information (see below) as well as links to sites on the web itself (to be accessed through a modem equipped set top unit by means of the telephone system).

The commercial development of services pursuant to this model would appear to be subject to the control of the FTAs because it depends on the integration of

the datacasting material with the broadcast signal. In other words, either the FTAs themselves will be the providers of this datacasting service (using their spare digital spectrum), or a new player wishing to provide this service will form an alliance with one or more of the FTAs in order to integrate the datacasting material with the broadcast material.

This appears to leave only the *walled garden model* for new players to pursue independently of the FTAs.

WALLED GARDEN MODEL

In essence, the *walled garden model* is based on the provision of web-like multimedia material - in simple terms, "Internet over the air".

For service providers, the *walled garden model* may offer cost advantages over traditional modem delivered web material due to the ubiquity of the datacasting signal (compared to the one to one nature of modem based connections) and the lower cost of the STU reception device (compared to the cost of a PC). For the end user, a *walled garden* service will not have the down load delays of a modem delivered service. One potential disadvantage of the model is its inability to efficiently deliver full Internet access and e-mail. However, these services can be delivered by modem and integrated with the datacasting service.

The key implication of the datacasting decision for the *walled garden model* is the restriction on providing video material. It is no secret that most web sites are making more and more use of video material in order to offer a truly multimedia experience. This is emphasised in the Report¹⁶ in a passage worth quoting in full:

"At the core of digital datacasting is its multimedia nature. This underwrites the ability of the producers of datacasting content to use text, still pictures, graphics, video and audio in the creation of their datacasting applications. In the datacasting services described in this report, the ability to range across these data formats is usually taken as a given by those involved. The trend, as with the Internet, is to use multimedia elements liberally in the composition of datacast services..."

This does not mean that it is not possible for many successful applications of digital datacasting to be built around the delivery of single format data. Timely financial

information, video or audio downloads of popular or specialist material, the daily transmission of the morning newspaper to the TV screen, the job-search classifieds, are unlikely to demand complex multimedia treatment.

But from our research so far, it is clear that the freedom to use the full range of formats in creating datacasting material is considered an essential component of the scope of datacasting, and a key aspect of its appeal.

By restricting the use of video formatted material, the datacasting decision restricts the use of an essential ingredient of the attractiveness of the *walled garden model*. This not only applies to specially created material but also the datacasting of existing web sites. The Government's decision permits datacasting services to deliver web sites "(other than ones designed to carry TV programs)"¹⁷. As the most popular web sites inevitably incorporate increasing amounts of video material, the Government's decision will inevitably restrict the delivery of these sites as part of a datacasting service,

thereby robbing the *walled garden* of one of its essential elements.

CONCLUSION

Based on the effect of the datacasting decision on the development of the potential datacasting services identified in the Report, the Government's confidence that its decision will establish a thriving and vibrant datacasting industry appears misplaced.

By severely restricting the use of video formatted material, the decision robs datacasters of the opportunity to deliver a true multimedia experience - something that the Report identifies as essential to the commercial success of most types of datacasting services.

1 *The Television Broadcasting Services (Digital Conversion) Act 1998* (to be referred to in this article as "the Digital Act").

2 BSA Schedule 4 section 6(d), (e).

3 BSA schedule 4 section 6(3)(k).

4 BSA section 34(3); schedule 4 section 13, 27.

5 *Datacasting Charge (Imposition) Act 1998*.

6 BSA schedule 4 section 59(1)(dd).

7 BSA section 28.

8 BSA schedule 4 section 59(1)(dd).

9 BSA schedule 4 section 59(4).

10 To be referred to in this article as "the Options Paper".

11 BSA section 6.

12 "Murdoch lashes TV's channel to the future" Sydney Morning Herald, December 22 1999, page 1.

13 "The Development of Datacasting Technologies and Services", A Report for the Department of Communications, Information Technology and the Arts, Commonwealth of Australia, Communications Strategies & Management Pty Limited, February 1999 (to be referred to in this article as "the Report").

14 Report page 67.

15 The Report concludes that the point to multi point logic of terrestrial datacasting makes it technically inefficient to deliver full Internet access as opposed to the delivery of selected web site material (see Report page 86).

16 Ibid in 13 at page 4, 5.

17 See section titled "What is datacasting?" in the fact sheet titled "Digital Broadcasting and Datacasting" dated 21 December 1999.

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Access Through Cable: Who Will Control the Cable Internet Gateway?

Washington DC attorney, Ellen P Goodman, analyses cable access issues in the US.

At the turn of the millennium, the most controversial issue in US telecommunications policy has been whether or not cable companies should have to allow ISPs to use cable broadband infrastructure on a non-discriminatory basis. Dubbed the "open access" issue by ISPs and consumer advocates, and the "forced access" issue by the cable industry, the "access" question has attracted attention at all levels of government: the FCC, the federal courts, and the local franchising authorities, which have limited authority to regulate cable.

At stake in the debate is how cable broadband facilities should be regulated. Should they be treated like traditional cable services in which the cable operator negotiates freely with content providers and transmits content of its choosing (subject to limitations like must carry, leased access, and public interest

channels that are reserved for policy reasons)? Or should cable broadband facilities be treated more like a common carrier telecommunications facility in which operators must carry all comers on a non-discriminatory basis. But something more is at stake as well. The FCC is challenged in this arena to do what Congress did not do in the *Telecommunications Act of 1996*: determine what services are functionally equivalent notwithstanding technical differences and reshuffle the regulatory categories to treat like-services alike.

THE ARGUMENTS

When a consumer signs up for a cable modem service through its local monopoly cable provider, such as AT&T, the cable operator will usually provide Internet access through a wholly or partially owned or affiliated ISP, such as

Excite@Home.¹ The consumer can use other ISPs, but has to subscribe to his preferred service on top of the price already paid for the affiliated ISP. In addition, even though the consumer may be able to bypass the cable operator's affiliated ISP, the cable operator can make competing access services less attractive by controlling what kind of caching abilities competitors have and what sorts of services (e.g., video streaming) they can offer. In this way, open access proponents argue, the cable operator can exercise control over its customer's choice of ISP as well as its customer's access to certain content. By forcing the customer to pay twice for access, the cable operator can diminish the attractiveness of an independent ISP; by slowing or even denying access to full motion video, the operator can disable content that might compete with the cable operator's affiliated programming.