

# Cancelled Datacasting Transmission Licences Auction - Will the Red Faces Recover?

**The embarrassing cancellation of the datacasting transmission licence auction in May could cause ongoing damage to government revenue from the communications sector, Robert Gibson explains.**

The planned datacasting transmitter licence (DTL) auction was one step in the Government's plan for the progressive introduction of digital broadcasting services in Australia over the next 8 years. In general terms, the digital conversion scheme was intended to involve the allocation of new digital spectrum both to incumbents (FTAs) and to new participants wanting to lay their claims to spectrum which could eventually open up for full broadcasting use. New participants were to provide datacasting services until the Government reviews use of the extra spectrum at the end of the 8-year digital TV simulcast period. FTAs have certain obligations with respect to providing digital TV, and may use remaining digital spectrum for datacasting.

The Australian Communications Authority (ACA) issued its *Datacasting Charge (Amount) Determination 2001* on 19 June (Determination) and fixed the amount payable by free-to-air broadcasters (FTAs) for datacasting on revenue generated from datacasting services. In doing so, the Authority has discarded other options for digital income from FTAs based around the auction price for DTLs.

The ACA's approach in the Determination is clearly founded on concerns over the government's ability to raise revenue from DTLs if and when these licences go back on sale. As regulator and tax-collector, the ACA's job is complicated because the outcome of future negotiations on the scope of the DTLs has a double impact on fees collected from FTAs. Not only is there an impact on FTA fees resulting from the price ultimately paid for DTLs (which, under the current datacasting charge, will

be an income negative impact for the government if DTLs end up attracting a premium) but also through the extent to which FTAs are protected against competition from new entrants/aspirant datacasters.

## **DTLS, DATACASTING LICENCES: WHY THE DTL AUCTION FAILED**

The Government has given no indication when DTLs will return to the auction block, but it clearly faces redoubled efforts by would-be entrants to the broadcasting sector to have datacasting licences issued without any of the complex limitations proposed in the last round. A DTL is a transmitter licence allocated by the ACA under the *Radiocommunications Act 1992 (Radcom Act)* which authorises the licensee to operate transmitters to deliver a datacasting service. DTL licensees must not operate a datacasting transmitter before 1 January 2007 unless there is in force a datacasting licence under the *Broadcasting Services Act 1992 (BSA)*<sup>1</sup> (datacasting licence). 1 January 2007 marks the end of the legislative moratorium on the issue of new commercial television broadcasting licences<sup>2</sup> and the Government's line is that DTLs could be used to deliver commercial television broadcasts under unrestricted broadcasting licences after that date.

Until 2007, however, FTAs are protected from competition by DTL licensees. The FTA lobby succeeded in conditions being imposed on BSA datacasting licences which would prevent the broadcast of any content similar to FTA content, restricting video pieces to 10 minutes.<sup>3</sup> Although datacasting is defined broadly in the BSA and would include delivery

of content in any form, the genre restrictions and audio content restrictions, set out in Schedule 6 to the BSA, stripped datacasting licences back to allow only information/education-based content, games and email – like Teletext but with more colours. Internet content is permitted but not so as to circumvent the content restrictions.<sup>4</sup>

The failure of would-be datacasters to persuade the government to adopt a broad definition of datacasting led to the withdrawal from the auction race of News Limited, John Fairfax Holdings Limited, OpenTV, Online Media Group and OzEmail in early 2001. The process fell to pieces in May, when Telstra withdrew, and the auction was cancelled less than 2 weeks before its proposed date of 21 May. The government was left with little choice given the prospect of minimum or no returns from the possible sale of 1 national licence and 2 regional ones. Coupled with the heavy restrictions placed on DTLs, the outcome could not have been worse. As the Internet Industry Association's Peter Coroneos said in April, if the government was to go ahead with the auction "the community loses twice: less return on the sale and poorer services".<sup>5</sup>

Television program genre restrictions and audio content restrictions left DTLs looking like a waste of digital space to the majority of participants in the debate. Fairfax was one of the most vocal critics of DTL conditions, with head of corporate relations Bruce Wolpe suggesting that "datacasting should be buried quietly and never again see the light of day".<sup>6</sup> Fairfax and News Limited called for the Government to cut to the chase and issue new commercial TV broadcasting licences.

Can Fairfax and others afford to take such an aggressive bargaining position with the government on the future of broadcast media? It depends whether you think there is a downside in delaying (or not proceeding with) the allocation of DTLs and datacasting licences. There is a view that, while the government fiddles over the digital conversion scheme and gives FTAs 6 years' lead time over new commercial broadcasting rivals to recover the costs of going digital, datacasting could go up in smoke as internet streaming technology advances. The current government does not consider internet streaming "broadcasting" for the purposes of the BSA<sup>7</sup> so it is unregulated for the time being. Internet streaming technology is gradually providing smoother pictures and companies like Nokia are developing set-top boxes with PCs to allow viewers to access internet content at their TVs.<sup>8</sup> Whether or not streaming could provide a viable alternative to FTA broadcasts before 2007 is debatable, but so are the consumer benefits of datacasting as currently proposed.

#### **WHAT HAPPENS TO DIGITAL SPECTRUM NOW?**

As it could be a new government which decides what happens to datacasting licences, the process is likely to stretch well into the next term of government. In the meantime, FTAs have retained their patch of turf, and when datacasting does eventually commence, the outcome of the government's last DTL auction failure has ensured that FTAs will be levied for datacasting on a low risk-low reward basis by the ACA.

Datacasting is only a part of the digital conversion scheme set out in the BSA and the Radcom Act. Schedule 4 to the BSA was amended by the *Broadcasting Services Amendment (Digital Television and Datacasting) Act 2000 (Amendment Act)*, which came into force on 1 January 2001, and sets out the digital service obligations of FTAs. FTAs commenced standard definition TV (SDTV) broadcasts over digital spectrum on 1 January 2001. Part 2 of Schedule 4 sets out the core of the conversion scheme for FTAs (Part 3 sets out a complementary, although less restrictive, regime for the

ABC and SBS). Essentially, in metropolitan areas FTAs are required to digitally simulcast SDTV with their analog broadcasts for 8 years from 1 January 2001. Then, 2 years after commencing SDTV simulcasts, FTAs will additionally be required to simulcast at least 20 hours per week of high definition TV (HDTV). A simulcast does not have to be faithful reproduction of the analog broadcast – digital enhancements, different advertisements and some multi-channelling are allowed.<sup>9</sup> "Digital enhancements" basically means the choice of several camera angles from which to watch the footy on Saturday afternoon.

While digital enhancements might be the perceived "kicker" for digital TV uptake by the archetypal Australian viewer, current indications are that the government will have a hard time forcing FTAs to comply with their digital service obligations by 2003. Set top boxes are available but consumer uptake is slow, while high definition TVs are not easily available in Australia yet and are expensive (in the region of \$5000). There are also basic technical shortcomings affecting the conversion scheme. While digital enhancement will be available on SDTV, the transmission spectrum is not wide enough to allow multiple signals on HDTV, so it's a choice between a collection of good pictures or one very good one.

It is not drawing a particularly long bow to suggest that consumers will not confidently stride into the new digital broadcast era while the government struggles to implement one of its supposed cornerstones, datacasting. The reality appears to be that datacasting was only ever an introductory gimmick for digital conversion. It seems unlikely there will be significant consumer uptake of digital TV equipment (digital TVs or set-top boxes) on the merits of datacasting.

Under the digital conversion scheme, FTAs are allowed to use spare digital capacity (ie capacity not required to meet digital television service obligations) to provide a datacasting service. However, a FTA can't start datacasting until the earlier of 1 January 2002 (12 months after

the commencement of SDTV transmissions in the digital spectrum) and the first datacast under a DTL in the same coverage area. Clearly there will not be any DTL transmissions in the near future. However, on 19 June 2001, the ACA prepared FTAs for 1 January 2002 by issuing its Determination on the FTA datacasting charge. The Determination fixes the datacasting charge as a percentage of gross revenue attributable to datacasting, using the formula for standard television licence fees set out in the *Television Licence Fees Act 1964*.

#### **ACA ALTERNATIVES**

In its Report to the Minister on the Determination of the Datacasting Charge (**Report**),<sup>10</sup> the ACA floated 2 alternatives to the revenue-based model – capacity-based charging and usage-based charging. Capacity-based charging would have seen FTAs charged based on the DTL auction price, leading to "competitive neutrality between FTA datacasters and non-FTA datacasters". The Report said that the majority of the seven submissions received in response to the ABA's September 2000 discussion paper on the issue favoured this approach. Given the then growing disinterest in the DTL auction and ultimate withdrawal by Telstra, News Limited, Fairfax and the smaller players, it is hardly surprising that FTAs would take a punt on the auction price as the field for licences narrowed. The national race ended up with just one bidder, British cable company NTL. Australian Datacasting Corporation and Barwix also remained in the auction, for area licences in Perth and Sydney/Melbourne respectively.

The Report cited limited support for usage-based charging. This option also set charges by reference to the DTL auction price, but on a "metered rate" basis rather than the flat fee model used in capacity-based charging. The final option, the revenue-based model ultimately adopted by the ACA, was adopted in spite of gaining less support from the industry. The ACA's reasons for choosing a revenue based model centred on administrative difficulties in:

- adjusting the DTL auction price for application to FTAs; and

- auditing an FTA's allocation of digital spectrum between SDTV/HDTV and datacasting.

The ACA's chief concern in relation to using the DTL price as a basis for charging FTAs appeared to be the possibility of a DTL price hike if the government decided to allow datacasting licences to be used for services closer in nature to broadcasting. Clearly the ACA is mindful of the battle the government would face if it wanted to charge FTAs for datacasting based on a de facto broadcasting premium paid for DTLs, quite apart from the debate over the scope of datacasting licences. Equally, the ACA can pick a loser when it sees one. The recent auction failure has left it with insufficient faith in blue-sky DTL auction returns to sacrifice a proven income model from FTAs (revenue-based charging as used for standard TV licences).

Meanwhile, the chunk of digital spectrum set aside for datacasting sits dormant. If early introduction of new FTA licences would leave existing commercials exposed during their vulnerable transition to digital, at least the HDTV timetable could be sped up and the dormant spectrum allocated for better digital TV services. But in the current climate there is little chance that the Government will wholeheartedly revisit its allocation plans, in spite of the fact that the spectrum revenue pot is far from full and a little tarnished. The 3G auction in March 2001, while successful by comparison with the plans for DTLs, realised only marginally more than the reserve price, and total revenue raised from spectrum sales sits at \$1.32 billion – half of what the Government forecast in the last Budget.

The way it's been managed so far, digital broadcast spectrum is unlikely to plug the Budget hole. Consumers won't have any compelling reasons to invest in digital TV equipment until FTAs have commenced innovative use of the digital spectrum, and critical mass will take some years to achieve while staple programming remains available via analogue broadcast. Datacasting, which might have been a catalyst for consumer uptake of digital equipment, has failed but the Government has no plans to redeem full value for the

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spectrum in other ways. At this stage, the community benefits of digital broadcasting are less than clear, and the Government's timetable for going digital looks fuzzy.

1 Radcom Act, s 109A(1)(h).

2 BSA, s 28.

3 See, generally, BSA Schedule 6, inserted by the Broadcasting Services Amendment (Digital Television and Datacasting) Act 1999.

4 BSA, Schedule 4, Division 2A.

5 The Industry Standard, 24 April 2001.

6 Fairfax calls for more TV licences instead of datacasting, Australian Financial Review, 10 May 2001.

7 Minister for Communications, Information Technology and the Arts, Determination under paragraph (c) of the definition of broadcasting service" (No 1 of 2000), 27 September 2000.

8 Channel-surfing into free-for-all, Australian Financial Review, 12 May 2001.

9 See Suzanne Shipard, "Broadcasting Regulation in Review", C 2001] 20 CLB 1

10 Report of the Australian Communications Authority to the Minister for Communications, Information Technology and the Arts: Principles for Determining the Amount of Datacasting Charge, March 2001.

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