



**Submission by
Free TV Australia**

The Department of Communications

*Spectrum Review – Potential Reform
Directions*

15 December 2014

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EXECUTIVE SUMMARY

- Spectrum access and certainty are critical to free-to-air broadcasting services which continue to be highly valued by Australian viewers. Without adequate access to spectrum or long term certainty, broadcasters will not have sufficient confidence to make the long-term investment and business planning decisions required to support the platform and innovate free-to-air broadcasting services provided to Australian viewers.
- It is unclear from the Consultation Paper how the Proposals will impact on broadcasting spectrum. Further detail is required in relation to the specific proposals and how they are intended to operate. In particular, it is unclear:
 - How 'highest value use' of spectrum will be determined and incentivised;
 - How the single-licensing regime will operate; and
 - The delineation of responsibilities between the Minister, the Department and the ACMA.
- Broadcasting spectrum is uniquely regulated by a complex longstanding relationship between the *Broadcasting Services Act 1992* and the *Radiocommunications Act 1992* which ensures that spectrum planning balances a range of economic, social and cultural objectives so that spectrum is used in a way that maximises its overall public benefit.
- Any reforms to the spectrum management framework must be made in the context of the ongoing importance of free-to-air broadcasting spectrum in delivering quality Australian content to the Australian public for free and in line with the existing spectrum planning objectives.
- Free TV understands that the government will shortly be releasing a separate consultation paper which specifically relates to the regulation of broadcasting spectrum, and which is intended to provide broadcasters with more flexibility in relation to how they can use their spectrum.
- In the absence of this broadcasting spectrum paper, and in the context of the broad nature of the Proposals, this submission will outline:
 - The unique regulatory framework applicable to broadcasting spectrum; and
 - The key concerns for broadcasters arising out of the Proposals.

Introduction

Free TV welcomes the opportunity to respond to the Department of Communications' Consultation Paper, '*Spectrum Review, Potential Reform Directions*' ("Consultation Paper").

Free TV Australia (Free TV) represents all of Australia's commercial free-to-air television broadcasters. At no cost to the public, our members provide fifteen channels of content across a broad range of genres, as well as rich online and mobile offerings.

As the Minister said in his keynote address to the 2014 RadComms Conference:¹

"So free-to-air television, both commercial and national, remains an important part of the Australian media landscape and while change is a constant in the world of linear television, the Government considers it important to continue to reserve spectrum for these services."

Free TV agrees with these sentiments. Spectrum is critical for terrestrial television broadcasters as the delivery platform for free-to-view services to the public. Broadcasters have licences in the VHF and UHF bands, otherwise known as the broadcasting services bands (BSBs), for their core activities. While other uses are also assigned to these bands, interference protection is very carefully managed.

In addition to the BSBs, broadcasters also use frequency bands which are auxiliary to broadcasting to support the services provided by their use of the BSBs. For example, television broadcasters use spectrum for:

- general mobile communications;
- television outside broadcast applications such as for electronic news gathering;
- interconnecting studio to transmitter microwave links for transporting television signals;
- national and international satellite connections;
- wireless microphones; and
- weather radar and aeronautical communications for helicopters.

Television broadcasters use spectrum to deliver services from all over Australia to studio and distribution centres which are vital to regional broadcasting and dissemination of news and other content.

Spectrum management and future reform directions in relation to the BSBs and related non-BSBs which impact on broadcasting are therefore key concerns for broadcasters.

The government has indicated that it also proposes to undertake a review of Schedule 4 of the BSA which will directly impact how broadcasters can use their spectrum in the future.

In this context broadcasters can only provide a preliminary response to the issues set out in the Consultation Paper and stress that much further consultation is required before any decisions are undertaken on these proposals.

¹ RadComms 2014: *Spectrum in the Age of Digital Innovation*, Keynote Address given by the Hon. Malcolm Turnbull MP, 10 September 2014.

The value of free-to-air television to the Australian public

Commercial free-to-air television is highly valued by the Australian public. Free-to-air television is the only platform that delivers high-quality Australian programmes to all Australians for free.

Australian consumers continue to expect the high levels of quality local content. On any given day, commercial free-to-air television is watched by more than 13.5 million Australians. Free TV continues to dominate other technologies in the home with 99% household penetration. Just 27.6% of Australian households have pay TV. Over 70% of Australian households rely exclusively on free-to-air television. The majority of households have two or more TVs.

A recent report by Screen Australia reaffirmed the fundamental role of the Australian broadcast television industry in bringing local content to Australian audiences, noting that:

“The survey results reaffirm the role of the broadcast television industry in bringing local content (including Australian films) to Australian audiences both as programmed television and the broadcasters’ own catch-up services.

....

Australian broadcasters and their programming decisions will...remain very important for access to Australian content for the foreseeable future.”²

Similar findings internationally also reaffirm the central role of the free-to-air television platform to culture and society. For example, the Report prepared by Pascal Lamy, Chair of the High Level Group on the future use of the UHF band, noted that:

“The European audio-visual model has provided citizens with a broad range of quality programming free at the point of access (so-called free-to-air) and fulfils major public policy objectives such as cultural diversity and media pluralism. This is particular important for the most vulnerable in society and must be maintained.”³

The inherent value of free-to-air television is recognised by the existing regulatory framework which is outlined below.

Unique regulatory framework applicable to BSBs

1. Complex relationship between BSA and RadComms Act

The regulatory framework applicable to the BSBs is unique and complex compared with the framework that regulates other non-BSB spectrum.

Unlike other spectrum, which is regulated solely by the Radiocommunications Act (“RadComms Act”), the BSBs are regulated by both the Broadcasting Services Act (“BSA”) and the RadComms Act.

² Screen Australia, *Online and on demand: Trends in Australian online video use*, 2.

³ Lamy, P. Report to the European Commission, *Results of the Work of the High Level Group on the Future Use of the UHF Band (470-790 MHz)*, 3.

Upon drafting and enactment in 1992, the two pieces of legislation were interlinked through a number of provisions in both Acts, including provisions which relate to the planning and licensing of the BSBs, as discussed below.

The intention of the Parliament when enacting this regulatory framework was to bring broadcasting planning, licensing and content regulation together under the umbrella of the (then) Australian Broadcasting Authority.⁴ This intention is clear from the objectives of the original Broadcasting Services Bill which included the following:

- to promote the availability to audiences throughout Australia of a diverse range of radio and television services offering entertainment, education and information;
- 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;
- to promote the role of broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity;
- to promote the provision of high quality and innovative programming by providers of broadcasting services; and
- to encourage providers of broadcasting services to respect community standards in the provision of program material.⁵

The result of this interlinked and complex relationship between the BSA and the RadComms Act was that spectrum planning and licensing of the BSBs became directly linked to the service quality, including content quality, which the community expects from free-to-air television.

Unique requirements of planning of BSBs

While s 31 of the RadComms Act gives the Minister the power to allocate spectrum to be used for broadcasting services, and to refer it to the ACMA for planning, the substantive provisions in relation to how that spectrum should be planned are in Part 3 of the BSA.

The practical implications of this are that planning for BSBs requires additional and more complex considerations than planning of non-BSB spectrum. In planning spectrum referred under Part 3 of the BSA, the ACMA is required to promote the objects of the BSA, including the economic and efficient use of the radiofrequency spectrum, having regard to factors such as the social and economic characteristics within the licence area, developments in technology and the demand for radiofrequency spectrum for services other than broadcasting services.⁶

Part 3 of the BSA also requires the ACMA to undertake wide public consultation in preparing frequency allotment plans and licence area plans, and in determining planning priorities between different areas and different parts of the broadcasting services bands.⁷ This kind of accountability is not required for non-BSB spectrum.

⁴ For example, see the Revised Explanatory Memorandum to the Broadcasting Services Bill 1992, 2.

⁵ See the Revised Explanatory Memorandum to the *Broadcasting Services Bill 1992*, 2.

⁶ BSA, s 23.

⁷ BSA, s 27.

Unique requirements of licensing BSBs

BSB licences are issued under Part 4 of the BSA, and s 102 of the RadComms Act requires the ACMA to issue a BSB licensee with a transmitter licence that authorises operation of one or more transmitters to transmit the broadcasting service. The two licences work together to enable delivery of the broadcasting service. The BSB licence is the main licence, issued on the basis of planning undertaken by the ACMA, and once allocated, a corresponding transmitter licence is allocated. The ACMA is required to renew BSB licences except in very limited circumstances.⁸

By contrast, non-BSB spectrum only requires an apparatus licence under the RadComms Act.

2. Link between broadcasting planning & licensing and content regulation

As indicated above, the integrated relationship between the BSA and the RadComms Act links the regulation of spectrum (the BSBs) with the regulation of the content that is transmitted via that spectrum.

BSB licences have a range of conditions and obligations attached to them, including (in the case of commercial television):

- ownership and control restrictions;
- a requirement to meet minimum quotas of Australian content including sub-quotas applying to adult drama and children's programming and documentaries;
- local content requirements that apply to regional broadcasters; and
- the payment of annual licence fees.⁹

Broadcasters are also subject to other requirements contained in the BSA and the Commercial Television Industry Code of Practice,¹⁰ concerning the content of programming delivered to children, restrictions on the types of programs that can be shown at certain times of the day, a requirement to deliver a minimum amount of closed captioning, limits on amounts and types of advertising and many others.

By contrast, non-BSB spectrum is not regulated in this way. The RadComms Act does not impose obligations on non-BSB spectrum licensees in relation to the content that is transmitted via non-BSB spectrum.

The proposals and key concerns for broadcasters

The proposals in the Consultation Paper are very broadly framed and do not take into account or explain how the proposed broad approach to spectrum planning in the future will impact on the complex relationships set out above between the BSA and the Radcomms Act. Free TV submits that any reforms to the spectrum management framework must be made in the context of the above spectrum planning objectives in the BSA.

⁸ BSA, ss 47 and 41(2)

⁹ BSA, Part 4.

¹⁰ Developed in accordance with s 123 of the BSA.

The Consultation Paper itself notes that “it will be important to maintain certainty for incumbent spectrum users throughout the review process and beyond”, and states that where changes are proposed, “techniques such as transition plans, grandfathering of existing licences and early reviews of new arrangements will be used”.¹¹

Free TV understands that the proposals are effectively intended to:

- Provide the Minister and the Department with overarching responsibility for setting spectrum policy;
- Provide the ACMA with authority and flexibility in relation to day-to-day spectrum management matters;
- Investigate provision of a single-licensing regime; and
- Provide incentives to move to highest value use of spectrum.

As indicated above, Free TV’s key overarching concern is that there is no indication of how the proposals will apply to broadcasting spectrum. In relation to the individual proposals Free TV has a number of concerns.

1. Continued certainty and lack of interference are essential for the free-to-air platform

The current regulatory framework for broadcasters:

- balances the range of economic, social and cultural objectives set out in the BSA so that spectrum is used in a way which maximises its overall public benefit; and
- provides broadcasters with the necessary certainty to make long-term investment decisions in content and infrastructure, so that high quality services can continue to be provided.

Free TV is of the view that this approach should continue. Free-to-air television broadcasting requires a very stable regulatory environment in relation to radiofrequency spectrum. Security of tenure and appropriate interference protection are vital to facilitate investment and business decisions for free-to air broadcasters. Without security of tenure, broadcasters cannot have sufficient confidence to make the long-term investment and business planning decisions required to support the platform.

Broadcasters require a high degree of certainty regarding interference protection to ensure the continued availability and quality of free to air digital television services. This is particularly important as broadcasters continue to innovate and establish platforms for successful migration to future digital television broadcasting technologies.

Whereas previously in analogue, viewers would suffer a ‘snowy’ or ‘noisy’ picture from interference, interference with a digital signal is more likely to result in a digital viewer suddenly receiving no service at all. This is referred to as the ‘cliff-effect’. These factors mean the tolerable level of interference to digital television broadcasting from other services in the BSBs is low.

Such low levels of tolerance for interference in the planning for digital television services make full consultation in relation to any changes in the BSBs essential. Changes in spectrum planning arrangements have the potential to impact on

¹¹ Consultation Paper, 6.

broadcasting use of spectrum and should first be thoroughly assessed in relation to the impact of the proposed changes on the availability and quality of free to air television services to the public.

2. Price-based allocation and moving spectrum to its 'highest value use'

Proposals 4 and 11 discuss incentivising and moving spectrum to its 'highest value use'. However, while the Consultation Paper notes that the ACMA should continually consider what factors need to be present to enable highest value use, there is no indication how 'value' will be determined.

Free TV raised similar concerns in response to an ACMA paper on Spectrum Management Principles in July 2008. At that time Free TV questioned the lack of detail "as to how the (highest value) Principles will be applied in practice" and noted that the lack of detail meant that it "is difficult to predict how effectively they will work within the existing policy and regulatory framework".¹²

Those concerns remain valid today and require further explanation and detail before any considered response can be provided to Proposal 11 in relation to moving spectrum to alternative/higher value uses.

In any consideration of what constitutes 'highest value use', it must be recognised that purely market-based approaches to spectrum management have the potential to overlook the full range of non-market based values derived from spectrum use.

Non-market based values are particularly important in relation to spectrum used for broadcasting purposes because the provision of free-to-air broadcasting services provides public benefit outcomes that are overlooked in a purely market-based approach.

Australians continue to rely on free to air television to receive highly valued news, entertainment and information services. Any consideration of what represents the 'highest value use or uses' of spectrum must acknowledge the value of free-to-air commercial television to the Australian public, and the fact that free-to-air television broadcasting provides these services free of charge to 99% of Australian homes, in contrast to the much smaller reach of subscription based models that operate on other competing platforms.

Public expectations of television content and its role in Australian society are high.¹³ It is the content that consumers receive via the spectrum allocated to commercial free-to-air broadcasters, not just the spectrum itself, that has value.

A recent UK report, *The Value of Digital Terrestrial Television in an era of increasing demand for spectrum*, found that "DTT's case for spectrum can be made purely on the consumer and producer surpluses it creates from the use of spectrum".¹⁴

It noted that the DTT platform "supports a large share of TV sector income, and in turn helps support TV production and jobs".¹⁵

¹² Submission by Free TV Australia, ACMA Review of Spectrum Management Principles, July 2008.

¹³ Screen Australia, *Online and on demand: Trends in Australian online video use*, 2.

¹⁴ Kenny, R. et al, *The value of digital terrestrial television in an era of increasing demand for spectrum*, January 2014, 71.

The report also measured the value created for advertisers by the DTT platform.

In other words the 'highest value use' is not necessarily determined by who will pay the most for the spectrum.

Price-based allocation is not necessarily an effective way to determine 'highest value use'. The value generated to third parties by the use of the spectrum must also be taken into account.

Clarification and consultation is therefore required in relation to:

- which non-market-based values can be attributed to spectrum use;
- how they will be measured;
- how they will be weighed against market-based values; and
- how public expectations regarding the ongoing availability, quality and diversity of existing services, will be dealt with.

These important issues are unclear from the Consultation Paper.

In relation to the process by which the ACMA would determine higher-value use, the Consultation Paper notes that it would be required to indicate options for alternative/higher value use of spectrum and propose options for change as part of its annual workplan. Free TV submits any reporting in relation to broadcasters' use of spectrum should not create an additional annual regulatory burden on broadcasters, but should rather be done on a needs basis.

The Consultation Paper also notes that a central part of the proposals recognises that more efficient compression technologies will allow broadcasters to use their existing spectrum much more efficiently to deliver more channels and/or more content in high definition. Free TV agrees with this but notes that broadcasters require additional spectrum to be able to make the transition to more efficient technologies. All available spectrum within the BSBs should be retained for the migration to new TV broadcasting technologies.

The clearing of the 700 MHz band has left broadcasters with no clear pathway to adopting the new technologies critical for competing and continuing to underwrite expensive Australian content.

Decisions of whether and when to begin transmissions in MPEG4 should remain commercial decisions for individual broadcasters and should not be compulsory. Broadcasters' preferred pathway is to move to DVBT2 and HEVC with the ability for individual broadcasters to move to MPEG4 in line with audience accessibility. By the time any efficiency gained from MPEG4 is converted to a useable dividend, MPEG4 will itself be superseded by DVBT2/HEVC. A move to MPEG4 may delay the greater efficiency gain from DVBT2/HEVC, impose an unnecessary transition on viewers and leave broadcasters with no viable pathway to more efficient and relevant technologies.

3. Single licensing framework

Proposal 2 discusses moving to a single licensing framework.

Free TV is not opposed to considering ways to improve the existing licensing framework. However, in designing a new licensing system it will continue to be

¹⁵ Ibid, 18.

important to appropriately balance the flexibility to accommodate new technologies and changing demands on spectrum as a resource, with the certainty necessary for long term business planning.

For broadcasters, security of tenure and appropriate spectrum planning which determines protection from interference to television services are vital to facilitate investment and business decisions.

Further detail is required to understand how it is proposed that this balance will be achieved, how the proposed single-licensing framework would operate and how it would be implemented to create a more flexible licensing system. In particular, it is unclear:

- What the parameters and conditions of the single-license would be;
- How the parameters and conditions would be determined and applied;
- Whether there would be some mandatory or core conditions and others that would be applied on a case-by-case basis;
- Whether and which conditions would be determined by legislation and which would be administratively determined;
- How the transition to the single-licence would work;
- The time-frame over which such a transition would occur; and
- How disputes would be resolved.

4. Other comments on the Proposals

Policy framework

Free TV supports the stated intention in Proposal 1 of having a clear and simplified framework of policy accountability. However, it is unclear from the Consultation Paper how the new framework will achieve this. For example, it is unclear what the precise delineation between the roles of the Minister, the Department and the ACMA will be, and how the consultative processes will work. Further clarity is sought in relation to the proposed framework.

Allocation and reallocation

Proposal 3 discusses providing the ACMA with the authority to allocate licences that are encumbered 'to provide flexibility for both existing and future spectrum users to encourage higher value use of the spectrum' and to provide for the emergence of private band managers.

As indicated above, the tolerable level of interference to digital television broadcasting from other services in the BSBs is low. As such, broadcasters require full consultation before change is considered in the BSBs or to related spectrum. Any changes to spectrum planning arrangements that could potentially impact on broadcasting use of spectrum must be subject to full consultation and a thorough prior assessment of the impact of the proposed changes on the availability and quality of free to air television services.

Structuring payment schedules for licences

Proposal 5 discusses the provision of increased flexibility in the timing and approach for payment of licence fees.

Free TV recognises that there is value in providing the ACMA with flexibility to determine payment structures and timing in relation to payment of licence fees,

however notes that there is also value in industry having certainty in relation to licence conditions.

Open data approach to improving information provided to support efficient spectrum market

Free TV recognises the benefits of timely fact based decision making. However, Free TV is concerned that the proposal may have time and resource implications for business operations. Further clarification is sought in relation to how this proposal would operate in practice.

Compensation

Free TV agrees that compensating affected stakeholders when moving spectrum to different uses over time is appropriate. However, further information is required in relation to how such a scheme would work.

User involvement in spectrum management

Proposal 8 discusses allowing the ACMA to delegate spectrum management functions to other entities.

While broadcasters are supportive of user involvement in spectrum management and maximum flexibility to self-manage their spectrum, Free TV is not supportive of the ACMA outsourcing its functions in relation to the BSBs to third party band-managers. Planning of spectrum for broadcasting services is subject to a system of detailed regulation set out in the BSA which is not comparable with any other spectrum. As indicated above, it requires wide public consultation to be undertaken and consideration of a wide range of economic, social and cultural objectives. Such a role would not be appropriate for a third party band manager.

Questions for stakeholders

1. What changes should be made to the proposals outlined in this paper to make them work more effectively?

The proposals in their current form are broadly drafted and it is unclear how they are intended to operate in practice.

Further detail is required in order for stakeholders to be able to provide specific comments in relation to how the proposals might work more effectively.

We suggest the Department set out a formal series of discussions, including an industry roundtable and smaller discussion groups to explain what is contemplated.

2. What additional proposals should be considered?

These proposals do not address what is intended for the future management of broadcasting spectrum, and how the Department sees the existing regulatory framework in the context of the high level principles about managing spectrum more broadly.

3. What timeframes (short-term and longer-term) should apply to implementation of the reform proposals?

Nothing should be done until industry stakeholders have been given an opportunity to hear from the Department in relation to how these proposals may play out in practice.

At that point, a more detailed consultation paper may be required to enable stakeholders to respond specifically to each of the proposals. For instance, moving to a single-licensing regime is likely to be a major undertaking given the fact that there are numerous licences currently issued across the various classes of licences.

It's not appropriate to consider longer term timeframes until there is a better understanding of the practical implications of these proposals.

4. What transitional arrangements should be put in place?

Again, no transitional arrangements should be put in place until all stakeholders have an opportunity to understand the practical import of these proposals.

Conclusion

Free TV thanks the Department for the opportunity to comment on its Consultation Paper in relation to potential reform directions regarding spectrum management.

While Free TV agrees that there is scope to provide a spectrum management framework that is more flexible and more responsive to changing technologies, Free TV is concerned that it is unclear how the proposed reforms will impact on the management of broadcasting spectrum. Further clarification is required in relation to the details of the proposals outlined in the Consultation Paper to determine if they appropriately balance flexibility and certainty for broadcasters as well as for other spectrum holders.

Any reforms to the spectrum management framework must be made in the context of the ongoing importance of free-to-air broadcasting spectrum in delivering quality Australian content to the Australian public for free.