



**Meeting the digital challenge:
reforming Australia's media in the
digital age**

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

by
Free TV Australia Limited

1 May 2006

Executive Summary

Digital Action Plan

- The Digital Action Plan should enable a transition to digital which is as smooth as possible for Australian viewers, and ensures no one loses access to free-to-air television services.

New Digital Services

- Free TV supports the Government's decision not to issue a new terrestrially delivered commercial free-to-air television licence until at least the end of the simulcast period.
- No new commercial free-to-air television licences should be issued on any platform. A further licence, whether delivered terrestrially or via another platform, would jeopardise the standard of services currently provided.
- Before issuing any new commercial television licence, the Government should conduct a comprehensive review and any decision to proceed should be approved by both Houses of Parliament.
- Free TV welcomes the Government's commitment not to permit the datacasting channels to be used to provide commercial free-to-air television services. Uses of the datacasting channels must not permit content of a kind traditionally provided by free-to-air television broadcasters.

Anti-siphoning

- Broadcasters use the listed sports they acquire and the list continues to serve all Australians.
- Any 'use it or lose it' scheme must be based on monitoring of both free and pay TV acquisition and use of rights to listed sports, if it is to accurately reflect the intention of the list.
- There needs to be comprehensive consultation with broadcasters before any 'use it or lose it' criteria are set.
- Free TV calls on the Government to close the loophole in the anti-siphoning rules to ensure that pay TV channels can not acquire rights to listed sports before free-to-air broadcasters have been given a reasonable opportunity to acquire the rights or the event has been de-listed.
- The rationale for the anti-siphoning list will not be undermined by change to media markets.

Introduction

Free TV Australia (**Free TV**) is the peak body representing all commercial free-to-air television licensees in Australia.

Free TV welcomes the opportunity to make a submission in response to the Minister of Communications, Information Technology and the Arts' Discussion Paper *Meeting the Digital Challenge: Reforming Australia's Media in the Digital Age*.

This submission addresses the following issues raised in the Discussion Paper.

- Section 1: Digital Action Plan** (Part 1 of Discussion Paper). This section addresses the need for a comprehensive process to achieve analogue switch-off, the roles of stakeholders in formulating a Digital Action Plan and incentives to assist the transition to digital.
- Section 2: New digital services** (Part 2.1 of Discussion Paper). This section argues that there is no case for issue of any new commercial free-to-air television licences on any delivery platform, that both Houses of Parliament should approve the issue of any new licence, and that uses of the datacasting spectrum must not permit de-facto commercial free-to-air television services.
- Section 3: Anti-siphoning** (Part 2.2 of Discussion Paper). This section addresses the need for ACMA to monitor free and pay TV acquisition and use of rights to listed events, the difficulties of implementing a 'use it or lose it' regime, and the need to close the existing loophole in the anti-siphoning rules.

1 Digital Action Plan

1.1 Process

Free TV supports the development of a Digital Action Plan. Analogue switch-off needs to be comprehensively planned and carefully managed to ensure that the transition is as smooth as possible for Australian viewers, and they do not lose access to free-to-air services.

As outlined in our earlier submission to the Department of Communications, Information Technology & the Arts (the **Department**) on Review of the Simulcast Period¹ we support a staged process to achieve switch-off, similar to the process followed in the UK; first, involving planning for switch-off and second, implementation of switch off.

Switch-off must be planned on a licence area by licence area basis to ensure that switch-off is managed smoothly, cost effectively and disruption to viewers is minimised.

Switch-off should be tested in one or more test markets, followed by switch-off in less populated and discrete markets, progressing to metropolitan, regional overlap areas and the most heavily populated metropolitan areas last.

A switch-off timetable needs to be informed by the impact on viewers. It is crucial that viewers do not lose access to free-to-air services. Reliance on free-to-air services as the primary means of television reception in Australia is amongst the highest in the world.

In most other markets, including the UK, US and Germany many households receive free-to-air television services via cable or satellite. As such, analogue switch-off in other countries has a much smaller potential impact on the overall population than in Australia.

It is worth noting that ambitious switch-off timetables set in other countries have been driven by heavy government subsidies and other regulatory incentives. For example, in the UK the BBC licence fee is substantially underwriting analogue switch-off, and incentives have included licence fee reductions for commercial broadcasters. In the US, \$US1.5 billion has been allocated to subsidise consumer acquisition of set top boxes and a further \$US5 million has been allocated for a consumer education campaign. In Italy, there have been generous subsidies on the price of set top boxes and Germany has directly subsidised broadcasters.

1.2 Roles of various stakeholders

The Government, ACMA and broadcasters need to work together to formulate a plan and timetable for managing the switch-off process. A great deal has already been learned through digital roll-out which was coordinated by the Department, ACMA and broadcasters. A similar approach should be taken to switch-off.

A "Digital Action Plan Group" should be coordinated by the Department and ACMA in consultation with broadcasters, to address key policy issues.

The Group should be supported by Working Parties with appropriate expertise from a range of stakeholder bodies on technical and marketing (consumer education) issues. Refer to section 3.1 and 3.2 of Free TV's earlier submission regarding the appropriate role of each set of stakeholders.

One of the early tasks of the Group must be to undertake a comprehensive review of current take-up data, to identify gaps and to make recommendations regarding further research needed to give an accurate representation of take-up.

¹ Free TV submission to the Department's Review of the Duration of the Analogue/Digital Television Simulcast Period, 12 December 2005.

In the UK total digital take-up figures include both free-to-air digital and pay digital households. In Australia it is not yet appropriate to combine free and pay households as not all free-to-air television services are transmitted on the pay television platform.²

Take-up rates must also take into account the existence of two or more analogue televisions and additional receivers in many households. Many of these devices also need to be converted to digital if consumers are not to be unnecessarily deprived of access to free television services, and the same viewing options they currently enjoy in their homes.

One of the key tasks that will need to be undertaken as part of the Digital Action Plan is a full assessment of the coverage of current digital terrestrial services in order to identify any areas that may not receive equivalent coverage of analogue and digital signals. All Australians who currently receive analogue signals must be able to receive free-to-air digital services after switch-off. It is highly likely that further spectrum will be required to address coverage gaps as they are identified.

1.3 Appropriate incentives to industry

The Digital Action Plan Group will need to consider a range of measures to enhance the transition to digital. These include clear labelling of consumer equipment, measures to address reception difficulties in multi-dwelling units and the investigation of digital black spot solutions. See section 2 of Free TV's earlier submission for further discussion of recommended measures.

1.4 Appropriate incentives to consumers

It is vitally important that genuinely disadvantaged households do not lose their free television services after switch-off. Government should consider subsidies for vulnerable groups closer to the switch-off date and with the benefit of research to understand the depth of the conversion barrier and those groups most likely to be affected.

2 New digital services

2.1 Introduction

Free TV welcomes the Government's commitment not to issue any new terrestrial commercial free-to-air television licences at least before the end of the simulcast period.

This commitment should be extended to commercial free-to-air television licences on all platforms. A further licence (whether delivered terrestrially or via another platform) would jeopardise the standard of services currently provided.

The existing number of licences underpins broadcasters' ability to provide high quality Australian content, local programming and premium overseas product free of charge to all Australians.

Any decision to issue a new commercial free-to-air television licence should be made by both Houses of Parliament, following a comprehensive review by the Government of the day. No new licence should be issued, regardless of delivery platform, unless both the

² Foxtel does not re-transmit all digital free-to-view services, and Austar does not re-transmit any regional commercial free-to-air service on its satellite platform. Therefore households receiving pay television require digital terrestrial transmission to receive the digital free-to-view services. Households with pay television also rely on free-to-view services for their secondary television sets, VHS and DVD devices.

Government and Parliament are convinced that the potential social and cultural costs of a new licence are outweighed by the benefits.

Free TV welcomes the Government's commitment that the two unallocated datacasting channels "will not be permitted to be used for a new free-to-air commercial television service." Uses of this spectrum must not permit content of a kind traditionally provided by free-to-air television broadcasters, which would undermine the Government's policy position.

2.2 Maintaining existing number of commercial free-to-air licences

The existing number of commercial free-to-air television licences is critical to broadcasters' ability to deliver high quality broadcasting services to all Australians, which fulfil a range of public interest broadcasting objectives.

Australians have access to more television networks per capita than comparable international markets. The Table below illustrates that the UK and US, with populations 3 times and 14 times the size of Australia respectively, have the same number or less free-to-air national networks. The UK advertising market is more than twice the size of Australia's but supports the same number of commercial free-to-air national networks. The US advertising market which is more than 20 times larger than Australia's supports only 5 commercial free-to-air national networks.

Country	Population (millions)	Commercial National Networks	Public National Networks	Size of Advertising Market (US\$ nearest billion)***
Australia	20	3	2	7
United Kingdom	60	3*	1	16
United States	290	5**	1	156

* One of these, Channel 4, is part public funded.

** The US has four major commercial free-to-air national networks: ABC, NBC, CBS and FOX; and 2 much smaller networks, UPN and WB, which are currently merging, effective September 2006

*** CEASA, *Advertising Expenditure in Main Media*, year ended 31 December 2005 (for expenditure in 2004 calendar year)

In Australia, free-to-air commercial broadcasters play an important role in ensuring television meets a range of social and cultural public interest objectives, including the delivery of broadcast services to all Australians for free and the broadcast of high levels of quality Australian content, programs of local relevance and premium overseas programs.³

Unlike many countries, including the UK where public interest objectives are predominantly funded by the public purse, Australian governments have relied heavily on an advertiser-funded model. A limit on the number of licences ensures sufficient revenue and audience share to enable free-to-air commercial broadcasters to meet these objectives.

Maintaining the ability of free-to-air commercial broadcasters to continue to deliver social and cultural objectives has never been more important than it is in today's increasingly global media market.

³ See Section 3 of Free TV's submission. In 2003/04 commercial free-to-air broadcasters spent \$674.7 million on Australian programs. Australian programs represent almost 70% of total programming spend.

The media sector is undergoing rapid change. The traditional free-to-air commercial business model is being challenged by new digital technologies, a consolidated pay television sector and dramatic growth in on-line and below-the-line advertising.⁴

A new licence would damage the existing Australian free-to-air commercial broadcasting sector by further fragmenting advertising revenue and audience share and driving up prices for premium content. This will create financial instability in the broadcasting sector and force broadcasters to cut costs.⁵

Content costs are the largest single outlay for commercial free-to-air television broadcasters, accounting for nearly two-thirds of total costs of metropolitan networks. Spending on Australian programs makes up around 70% of the total program expenditure by metropolitan television networks. There is a huge cost disparity between local and imported programs, because the cost of an Australian production must be recovered in our small local market.

Relatively modest variations in the financial environment can make a major difference to the affordability of expensive local programming. A revenue contraction would mean existing broadcasters would have to rely on programming of much lower cost, and reduce many hours of non-quota Australian and local programming they currently broadcast. The impact on viewers would be less quality, less Australian content, less drama, cut-backs to news and current-affairs and less local content such as local news.

A considerable revenue contraction could cause financial difficulty for one or more existing metropolitan networks. Regional broadcasters would also be severely affected by a re-allocation of advertising expenditure to a new network.⁶

2.3 New services on other platforms

The Government has concluded that there is no case supporting allocation of any new terrestrially-delivered commercial free-to-air television licence at least before the end of the simulcast period. For the same reasons there is no case for allocation of any new commercial free-to-air television licence on any delivery platform. Any new services would have the same effect on the existing broadcasting sector, the local production sector and viewers.

The Paper proposes to treat free-to-air commercial television services on other platforms differently on the basis that any new operator would face barriers compared to existing broadcasters. The Paper suggests that these barriers include the need for any new operator to access infrastructure for delivery and carriage and the need for viewers to acquire reception equipment.

These assumptions are questionable and do not justify treating commercial free-to-air television services on a new platform any differently from terrestrially-delivered services. To do so would be contrary to the philosophy of the *Broadcasting Services Act (BSA)*, which regulates services according to their nature, not the technical means of delivery.

⁴ Commercial Economic Advisory Service of Australia (CEASA), *Advertising Expenditure in Main Media Report 2005*, and *Direct Marketing Report, 2004*. The latter report shows a 56.6% increase in direct marketing advertising expenditure over the 2003-04 calendar years.

⁵ Broadcasters have already stripped out a lot of excess costs (other than programming) in the most recent advertising recession period. This means that any savings in these costs going forward is likely to be limited.

⁶ It is likely that national advertisers will first cut spending on regional networks to accommodate spend on a new metropolitan network, As national advertising makes up around 64% of regional television advertising spend, so a re-allocation of spend away from regional networks could have a substantial adverse impact on regional viability.

Any new commercial free-to-air television service will jeopardise the high quality services currently provided to all Australian viewers for free.

Access to infrastructure for delivery and carriage

Any new free-to-air television operator will have a choice of infrastructure options available, including satellite, cable and broadband.

A new operator may already have access to delivery infrastructure as well as the ability to bundle their service with an existing service currently delivered to the home.

If a new operator requires access to infrastructure, the range of options available suggests that this is unlikely to pose a significant barrier.

The operating costs faced by a new operator may be significantly lower than for existing broadcasters. Depending on the identity of any new entrant, they may also have access to extensive content libraries at low cost, combined with no requirement to produce expensive local content.

The costs to existing broadcasters of maintaining terrestrial infrastructure is formidable. Australia's mainland aggregated markets each cover thousands of square kilometres (the largest covers over 4 million square kilometres). Complex transmission chains and scores of subsidiary transmitters are required to disseminate signals to all significant settlements within these huge markets.

Further, it is much cheaper and involves much less complex infrastructure to deliver a single service (as proposed in the Paper), than it is for existing broadcasters to meet the requirement to deliver separate services to individual licence areas. Infrastructure costs borne by existing broadcasters are compounded by the licence conditions imposed on East Coast regional licensees that require them to broadcast minimum levels of local content.

Any other exemptions from licence conditions that apply to existing broadcasters would further significantly reduce the operating costs faced by a new operator.

Finally, the Paper notes that unlike existing broadcasting services, licences for services delivered on other platforms would not carry with them the "automatic right" to access spectrum. This ignores the fact that commercial free-to-air television broadcasters pay considerable licence fees for the rights attached to their licences. These licence fees are set on a sliding scale with metropolitan licensees generally paying 9% of their gross receipts. In 2004-05 broadcasters paid licence fees of more than \$225 million in addition to other taxes. Over the last ten years licence fees have amounted to almost \$2 billion.

Viewer reception equipment

The perceived barrier to viewer acquisition is also questionable and likely to be more than offset by lower infrastructure and regulatory compliance costs. Again, any new operator may have the ability to bundle their service with an existing service already delivered to the home via broadband, satellite or cable. It is unlikely that the relatively low cost of consumer electronics equipment would pose a significant barrier for a new operator.

2.4 Decision-making process

Given the potential impact of a new commercial free-to-air television licence, any decision to issue a new licence on any platform should be made by both Houses of Parliament, not just the Government of the day.

Before Parliament makes any decision to issue a new licence, the Government should be required to conduct a comprehensive review to determine if the small Australian market is

able to support more than 3 commercial and 2 public national networks and continue to deliver designated social and cultural objectives at the current standard.

No new commercial free-to-air television licences should be issued on any platform unless both the Government and Parliament are convinced that the potential social and cultural costs of a new licence are outweighed by the benefits.

2.5 Uses of datacasting spectrum

Free TV welcomes the Government's commitment that the two unallocated datacasting channels "will not be permitted to be used for a new free-to-air commercial television service" and accordingly, any new services must not mirror traditional free-to-air television services.

The Paper proposes that, in addition to datacasting, this spectrum may be licensed for other uses, such as free-to-air 'narrowcast' channels or mobile television services.

The definition of datacasting was designed to ensure that any new services on this spectrum would not undermine the decision not to grant any further commercial free-to-air television licences by allowing them to provide content of a kind traditionally provided by free-to-air broadcasters. To date, no other definition has been proposed which satisfactorily distinguishes between commercial television and other new services.

Free TV is concerned that if the Government permits additional services beyond those that meet the definition of datacasting, this policy objective will not be achieved. For example, Free TV is particularly concerned about the proposal to permit use of the spectrum for 'narrowcast television services', given that the current narrowcasting definition has led to numerous instances of narrowcasters providing commercial broadcasting services. The lack of clarity in the criteria for defining narrowcasting has been compounded by case law which suggests that courts will adopt a broad interpretation.⁷

The Department and ACMA have acknowledged the significance of this problem, particularly in the radio sphere where most open narrowcasters currently operate.⁸ ACMA reports that over the 11 year period from 1 January 1993 to 10 December 2003, 84% of complaints against narrowcasters related to operation of free-to-air commercial services outside the terms of their licence. Breaches were found in 47% of these cases.⁹

3 Anti-siphoning

3.1 Monitoring and 'use or lose it' proposal

Free TV welcomes the Government's continued support of the anti-siphoning rules and the recognition in the Discussion Paper that "Australian free-to-air broadcasters continue to provide high quality coverage of a large variety of sports valued by Australian audiences".

The anti-siphoning list remains as important to Australian viewers today as when the list was first legislated in 1994. It enables all Australian viewers to continue to see major sporting

⁷ *Sportvision v Tallglen Pty Ltd* (1988) NSWLR 103, as referred to in Professor Ramsay's Report, *ibid* at page 38.

⁸ Professor Ian Ramsay, "Reform of the Broadcasting Regulator's Enforcement Powers", November 2005. This report was prepared for the Department of Communications, Information Technology and the Arts and released in conjunction with its Issues Paper concerning *Proposed Reforms to the Broadcasting Regulatory Powers of the Australian Communications and Media Authority* (November 2005). See page 33.

⁹ *Ibid*.

events for free. Over 75% of Australians can not afford or choose not to subscribe to pay TV and they should not be deprived of access to major sporting events for free.

The list was reviewed extensively and the revised list issued in March 2004 reflects those sports consistently broadcast by free-to-air broadcasters and that are genuinely events of national importance.

The Paper proposes a 'use it or lose it' regime that will be based on the monitoring being undertaken by ACMA in accordance with the Minister's Direction last year.¹⁰

ACMA must also monitor the acquisition and usage by Pay TV of listed sports if it is to provide a comprehensive picture of the operation of the list.

As stated in the Explanatory Memorandum at the time the anti-siphoning regime was introduced:

"[The anti-siphoning list] should ensure, on equity grounds that Australians will continue to have free access to important events. *It will, however, allow subscription television broadcasters to negotiate subsequent rights to provide complementary or more detailed coverage of events.*"¹¹ [italics added].

The intent of the list is being achieved. However, this will not be demonstrated unless ACMA monitors both free and pay acquisition and usage of events on the list.

Free TV is confident that the monitoring process will demonstrate that commercial free-to-air broadcasters use the listed sports that they acquire.

Setting the criteria for a 'use it or lose it' scheme will involve a complex set of considerations. There should be detailed consultation with broadcasters before any criteria are set.

The acquisition of sports rights varies from sport to sport. In many cases the rights holder negotiates a package of rights with a free-to-air broadcaster and a complementary package with a pay broadcaster.

Rights packages are not necessarily fixed. Obviously, in multi-round events, the public interest in individual games will not be known in advance (e.g. a broadcaster will not know which games in any round will involve Australian players, and therefore be of greater interest to Australian viewers. The Australian Open is a good example of this).

In these instances, rights packages give free-to-air broadcasters the first opportunity to select games in a round when the draw becomes clear. This may not occur until the day of or day before the game is played.

This maximises the opportunity for Australian viewers to see the best parts of an item for free, while ensuring those who are prepared to pay receive a complementary coverage.

Free TV is opposed to 'partial de-listing' of events as this would deprive the large majority of Australians who choose not to pay from receiving the best possible coverage.

It should also be remembered in establishing criteria for any "use it or lose it" regime that the anti-siphoning list is first and foremost about maximising viewers' access to major sporting events and not about determining broadcast schedules which is properly the responsibility of the broadcaster, not the regulator.

Further the aim of maximising coverage will not always be met by a true live broadcast.

In a country the size of Australia with up to 5 time zones depending on the time of year, it is also important to ensure that viewers in all parts of the country receive coverage at an

¹⁰ *Broadcasting Services (Anti-siphoning Monitoring) Direction (No. 1) 2005*

¹¹ Explanatory Memorandum to *Broadcasting Services (Subscription Television Broadcasting) Amendment Act 1992*, section 115(2)

appropriate viewing time. And in some sports the rights holder sees a benefit in being able to bundle events so that a full event can be seen at a convenient time for the viewer ensuring the maximum number of people are able to see it.

3.2 Loophole

Free TV welcomes the Government's commitment to continue to monitor the loophole in the anti-siphoning rules and believes the Government should act now to close it.

The loophole exists because the anti-siphoning rules cover platform operators (Foxtel, Optus, Austar), but not channel providers (such as Foxsports). In practice it is the channel providers who bid for sports rights, not the platform operators thus creating the loophole.

The regulations covering Australian content rules on subscription television were similarly applied, but were subsequently reviewed and amended to ensure that channel providers were regulated as well as platform operators.

Evidence given to the Senate Environment, Communications, Information Technology and the Arts Committee last year makes it very clear that the Pay TV rights for the Ashes 2005 series were sold to Foxsports before all free-to-air broadcasters had been given a reasonable opportunity to acquire the rights or the event had been delisted.

The Committee recommended that the Minister examine the loophole issue to determine "whether it undermines the efficacy of the anti-siphoning scheme".¹²

This issue has been raised over a number of years and in the context of the current proposals, legislation should be introduced to ensure that Pay TV operators cannot exploit the loophole to undermine the effectiveness of the anti-siphoning rules. Otherwise there is a substantial risk that sports which Government intends to be available free of charge to the Australian public will be shown only on pay television because pay TV channel providers will acquire the rights before free-to-air broadcasters have had a reasonable opportunity to do so.

3.3 Review of the list

The Paper also proposes that a review of the anti-siphoning list "be undertaken during 2009 to consider the ongoing rationale for the anti-siphoning scheme after the expiry of the current list on 31 December 2010".

While it is to be expected that the current list will be reviewed prior to its expiry, Free TV does not support the suggestion that "rapid changes" in the Australian media market will undermine the rationale for the list.

Regardless of those changes, the majority of Australian viewers will continue to expect to see major sporting events for free. Even in countries like the United Kingdom there has been no suggestion that the rapid changes in the media market will change the need for an anti-siphoning list.

¹² ECITA report on the Inquiry into the Provisions of the *Broadcasting Amendment (Anti-siphoning) Bill 2004*, March 2005, p 25