



FreeTV
Australia

**Submission by
Free TV Australia Limited**

Australian Communications and Media
Authority

Draft Guidelines relating to Narrowcasting
Services on Television

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EXECUTIVE SUMMARY

- ACMA's draft Narrowcasting Guidelines provide useful information regarding the general characterisation of narrowcasting services, however we are concerned that the Guidelines do not make a sufficiently clear distinction between narrowcasting and commercial broadcasting services.
- Further detail would assist the Guidelines to clearly distinguish between narrowcasting and commercial television broadcasting services and give effect to the Government's stated intention that the spectrum be used to provide "new and innovative services".
- Guidelines which are as clear and precise as possible will provide prospective narrowcasting providers with more certainty when making investment and programming decisions and will encourage new and innovative services.
- It is likely that the most difficult area of distinction between narrowcasting and commercial broadcasting services will relate to the category of service criteria and the requirement to limit content to targeting a *special interest group* or to provide programs of *limited appeal*.
- We suggest that ACMA include in the Guidelines some important principles drawn from its investigations into radio narrowcasting which have closely considered these areas of distinction.
- Some statements in the Guidelines are very broad and require clarification, particular in relation to services targeted to children under 10 and services targeted to cultural groups, and services providing news and sport coverage.
- A service targeted to children under 10 years old should not be regarded as narrowcasting unless it is otherwise of niche interest. Many services targeted at an audience of children under 10 years will in fact attract a much wider audience.
- A service aimed at an ethnic, religious or other group with a perceptible cultural characteristic, should not itself lead to a conclusion that the service is narrowcasting. A number of large cultural groups exist in Australia. The same general principles should be applied when determining whether such a group is a 'special interest group'.
- A service offering news coverage will not be a narrowcasting service unless it is directed to a 'niche' audience comprising a special interest group, and the news content directly serves the 'niche' interest of that group.
- Services offering coverage of mainstream sports should ordinarily be regarded as of general appeal, unless there are unique circumstances which limit the appeal of the content to a narrow group of recipients. This should apply whether or not the coverage of a sporting event involve Australian participation.



Introduction

Free TV Australia is the peak industry body representing all of Australia's commercial free-to-air television licensees.

Free TV thanks the Australian Communications & Media Authority (**ACMA**) for the opportunity to comment on the Draft Guidelines for Narrowcasting services on television (the '**Guidelines**') released by ACMA in February 2007.

Free TV welcomes the draft Guidelines and appreciates ACMA's attention to providing detail about each of the matters ACMA must have regard to when providing an opinion as to the category that a broadcasting service falls into. The additional guidance will be very useful to existing and prospective service providers. There is some additional detail, however, which would be a useful inclusion in the Guidelines.

Section 1 of this Paper provides some general comments regarding the importance of a clear distinction between television narrowcasting and commercial television broadcasting. Section 2 sets out some suggested amendments to the Guidelines which we submit will provide further clarity in determining whether or not a service is properly characterised as a narrowcasting service.



1 General Comments

ACMA's draft Narrowcasting Guidelines provide useful information regarding the general characterisation of narrowcasting services, however we are concerned that the Guidelines do not make a sufficiently clear distinction between narrowcasting and commercial broadcasting services.

Further detail would assist the Guidelines to clearly distinguish between open narrowcasting services and commercial broadcasting services. This will provide prospective narrowcasting providers with more certainty when making investment decisions regarding purchase and use of Channel A television spectrum, and give effect to the Government's policy of encouraging new and innovative services. The Government has been clear that new services are not intended to duplicate existing commercial broadcasting services

As ACMA is aware, there has been a considerable problem in maintaining a clear boundary between narrowcasting and commercial broadcasting in the radio sphere. Whilst narrowcast television broadcasting has to date had a more limited uptake in comparison to narrowcast radio broadcasting, this is unlikely to continue to be the case following the Governments' media reforms.

We suggest that ACMA draw on its experience of investigations into radio narrowcasting to provide as much detail as possible in the Guidelines on the boundaries between television narrowcasting and commercial television broadcasting. Like radio, it is likely that the most difficult area of distinction will relate to the *category* of service criteria, and the requirement to limit content to *targeting a special interest group* or to provide programs of *limited appeal*. We suggest that further detail is provided in these areas to ensure that the boundaries are as clear as possible before prospective providers make investment and programming decisions.

The following section sets out specific amendments which we suggest could provide further clarity to the Guidelines.

We also urge ACMA to actively review and monitor narrowcasting services after they have commenced broadcasting to ensure they continue to operate within the parameters of a narrowcasting service.

2 Specific Amendments

2.1 Audience Characteristics

Special interest groups – general characteristics

The Guidelines make some broad comments regarding the general characteristics of ‘special interest groups’. The principle set out in the Guidelines is that “*a prospective narrowcasting licensee will need to demonstrate that the characteristics of the target audience are such that the audience can be distinguished from the general public, and that the reception of the service is therefore limited.*”

Free TV submits that the Guidelines should provide far more definition of the concepts of a ‘*special interest group*’ and how the content must ‘*target*’ the special interest group. It is these concepts that have caused considerable uncertainty in the radio sphere for many years. In this context, we note that the ABA has previously suggested that:

Targeted means directly serving the interest of a special interest group.

Special interest group means a particular readily identifiable group whose members choose to belong to it and who are organised for the predominant purpose of participating in or furthering a special interest.¹

We suggest that definitions along these lines are included in the Guidelines. The remainder of this section discusses further detail which we suggest be included in the Guidelines to further clarify the concept of a ‘special interest group’. The following section 2.2 discusses the concept of ‘targeting’ and suggests further detail to clarify that concept.

Whether a group is a ‘special interest group’ has been the subject of a number of past investigations into radio narrowcasting services. We suggest ACMA draw upon its investigation experience to provide some further helpful detail as to:

- the characteristics that a ‘special interest group’ must ordinarily have; and
- characteristics which will ordinarily indicate that a group is *not* a ‘special interest group’

We suggest that further text be included in the Guidelines to incorporate the following principles (drawn from past radio investigations) which will provide more clarity for prospective narrowcast service providers and commercial television broadcasters.

¹ ABA, Discussion Paper, *Open Narrowcasting Radio Services; Clarifying the Criteria Discussion Paper*, March 2001, at 2.2-2.3.

- a. A "special interest" which is generic and encompasses a broad range and diversity of interests (such as a genre of music or drama) will not ordinarily be a sufficient "special interest".²
- b. Popular and mainstream interests and genres will not ordinarily be "special interests", for example, mainstream television genres such as drama, reality, lifestyle, news and current affairs, variety programs, comedy, English language movies. In addition, mainstream (even if not "popular") entertainment areas and subjects that have enjoyed success in mainstream are likely to have broad appeal to the public.³
- c. The target must be to a particular *niche* market of any generic interest to be a "special interest" and ordinarily should not include a considerable proportion of other interests within the generic "special interest".⁴
- d. A "special interest" which is enjoyed by, or of interest to, a *significant* section of the population (more than 10%) within the licence area will not ordinarily be an interest which could be said to be of a "special interest group".⁵
- e. The licensee should be able to establish that the "special interest group" ordinarily considers themselves as belonging to a sub-group within the population because of their enjoyment of their niche interest.⁶ They must be sufficiently isolated, and consider themselves so isolated, as a group.⁷
- f. "Business people" do not constitute a "special interest group". They have many characteristics commonly held by the general population and do not constitute a recognisable special interest. Even if they did, the programming will usually be of such a general nature that it could not be regarded as being "targeted" to those people.⁸ For example, a very large number of Australians are now shareholders and property investors and share market, business market and business and property investment information is regularly reported in mainstream media in a way which did not occur a number of years ago. Such information is now widely available and generally of interest to the general population.

Children under 10 years old

The Guidelines suggest that a service targeted to persons less than 10 years old may limit the appeal and reception of a service to the extent that it is regarded as a narrowcasting service. The Guidelines cite a *Broadcasting Services Clarification Notice* issued in relation to radio narrowcasting which

² ABA Investigation Report – Bundaberg Broadcasters Pty Limited – CQ-FM 97.1Mhz, 1999/0363; ABA Investigation Report – ONC services 96.3 KFM Kingaroy and 87.6 Nanango, 2001/5655

³ ABA Investigation Report – Bundaberg Broadcasters Pty Limited – CQ-FM 97.1Mhz, 1999/0363; ABA Investigation Report – Toowoomba Country FM 91.5, 2002/0113; ABA Investigation Report – FNQ Broadcasters Cairns Pty Limited – The Breeze 104.3 Mhz, 2000/0266; ABA Investigation Report – Best FM 87.6Mhz, 1999/0275

⁴ ABA Investigation Report – FNQ Broadcasters Cairns Pty Limited – The Breeze 104.3 Mhz, 2000/0266

⁵ ABA Investigation Report – Bundaberg Broadcasters Pty Limited – CQ-FM 97.1Mhz, 1999/0363

⁶ ABA Investigation Report – Toowoomba Country FM 91.5, 2002/0113

⁷ ABA Investigation Report – LPONC Smooth FM, 1998/0261

⁸ ABA Investigation Report – ONC services 96.3 KFM Kingaroy and 87.6 Nanango, 2001/5655

suggests that an audience of children under 10 years of age might constitute a special interest group.

Free TV submits that this particular clarification should not be translated into the television broadcasting medium. An audience defined only by age is not a 'special interest group'. Television program material rarely 'targets' *only* 'special interests' of an age-defined audience. Television programs directed generically to a demographic band will generally cover a broad range of interests.

Children's programs are produced with a younger audience in mind. However, the *primary purpose* of the content is not the relevant consideration for narrowcasting purposes. Rather, ACMA would need to consider the appeal and actual reception of the programming content. Children's television can appeal to a wide sector (and age) of the community and it rarely encompasses *only* the purpose of targeting a particular special interest.

To the extent that a television broadcasting service includes content of appeal to a wide sector (and age) of the community, *even if not the primary audience*, and to the extent that such content is found on commercial television and is of not further 'niche' interest, then it can not be properly characterised as a narrowcast service.

Ethnic, religious and cultural characteristics

The draft Guidelines state that "ethnicity, religion or other perceptible cultural characteristics such as the main language spoken in home" may help define an audience as one for narrowcast television services. Free TV submits that this statement is far too broad. Australia has a number of large cultural groups and programming directed to such a group could have wide appeal. For example, a service (in English) which featured Italian food, travel, culture and sport could have wide appeal.

The mere fact that a sub-culture or group can be identified should not, of itself, lead to a conclusion that the relevant service is a narrowcasting service. The same principles (outlined above) should be applied when determining whether such a group is a 'special interest group'. To establish a 'special interest group' the licensee should be able to establish that:

- the cultural group in question is of such a small size and/or has such a unique common characteristic/interest (or group of common characteristics/interests) that:
 - the characteristic or interest could not be considered generic;
 - the characteristic or interest could be considered "niche"; and/or
 - the group considers themselves truly isolated by their characteristic or interest from the mainstream of any overarching community; and
- the overall content of the service being offered is such that it would be of limited appeal to the mainstream of the general population, other

cross-sections of the community or of any encompassing sub-cultural group.

2.2 Targeting and program content

We welcome ACMA's recognition that the mix of programs provided by a licensee and the content of those programs are likely to be significant determinants of the category that a licensee's service falls into. In a multi-channel environment, it is important that ACMA has regard to the whole package of program content offered by a licensee.

Narrowcasters should not be permitted to provide a package of programs which has wide appeal, when considered as a whole. A service which incorporates program components that are common to mainstream television (such as drama, English television shows, Australian news, Australian sport) will rarely fall within the definition of an open narrowcast service.⁹

When considering the category that a service falls into ACMA should have regard to the range of services provided by a single licensee on Channel A and B. A licensee should not be permitted to program across channels, so as to provide a package of programs which has broad appeal.

Where a narrowcasting service's reception is limited by being targeted at a special interest group, the Guidelines state that the narrowcasting licensee would need to demonstrate that the proposed program content is of specific interest to the group to be targeted by the service, and it would not be sufficient to demonstrate merely that the target audience likes a particular type of program, which may also have audience appeal. Free TV agrees with this statement.

We suggest that this concept can be further clarified by including the following further principles (drawn from previous investigation reports) in the Guidelines.

- Where elements of the service (other than the targeting to a "special interest group"), are designed to appeal to public beyond the interest group, the interest group will not be regarded as the sole target of the service.¹⁰
- Within the mix of content, elements of the service (other than those specifically targeted to "special interest groups") should be "brief interruptions", a "bridge", "filler for short gaps", and incidental and not have a substantial role or substantial airtime.¹¹ Otherwise, the content is unlikely to be of limited appeal or considered to be targeting the "special interest group".
- The programming must be at least predominantly aimed at a restricted group and no other. Programming (incidental or otherwise) which is

⁹ ABA Investigation Report – Open Narrowcasting Service 2KY Racing Radio 100.9FM Bathurst, 2000/0157; ABA Investigation Report – Best FM FM 87.6Mhz, 1999/0275; ABA Investigation Report – Best FM FM 87.6Mhz, 1998/0582

¹⁰ ABA Investigation Report – Category of Service provided by KFM 88 Kingaroy, 1998/0502, 1998; ABA Investigation Report – Open Narrowcasting Service 2KY Racing Radio 100.9FM Bathurst, 2000/0157

¹¹ ABA Investigation Report – Bundaberg Broadcasters Pty Limited – CQ-FM 97.1Mhz, 1999/0363; ABA Investigation Report – Open Narrowcasting Service 2KY Racing Radio 100.9FM Bathurst, 2000/0157; ABA Investigation Report – Classic Hits FM, 1998/0143

intended to interest the targeted "special interest group" but also would appeal to others is not therefore targeted to the "special interest group".¹² It cannot target multiple special groups if they represent a cross-section of the community and interests.¹³

- All advertising material (including on air advertisements) along with general descriptions of the services by the licensee, should promote the content to only the target "special interest group".¹⁴ The labelling of the service and content may be evidence of who the intended audience is although it is not determinative.¹⁵

Consistent with the guidelines and determinations for radio broadcasting, and the investigation reports, the Guidelines should clarify that news, sports and music programs *will ordinarily not* fall within the definition of open narrowcast services. These programs are ordinarily unlikely to be services targeted at "special interest groups" or of limited appeal.

We make some further comments below on news and sports programs. Such programs are central elements of any commercial television broadcasting service, and we suggest, that programs providing news or sports content will rarely be of limited appeal.

News programs

The Guidelines recognise that television news is popular with Australian audiences. A service that features regular coverage of general news matters is therefore more likely to be a broadcasting service than a narrowcasting service, unless its coverage is limited for other reasons. The Guidelines go on to state that a service that specialises in news coverage, or provides news on a particular subject or from a particular geographic region may be considered to have limited audience appeal, and therefore be a narrowcasting service.

Free TV submits that further guidance should be provided in relation to news content and when it may be considered a narrowcasting service. News broadcasts are very popular and are a central element of all commercial television services. Commercial broadcasters schedule up to 5 separate dedicated news programs each day as well as regular news updates. Current affairs programs are also very popular.

News and current affairs programs, even in relation to subjects which may be considered a 'special interest' topic, are often of significant appeal to a wide cross-section of the community.

We submit that ordinarily, services offering news broadcasts in English should not be considered to be targeted to a "special interest group" or of limited appeal unless there are unique circumstances which make the subject news

¹² ABA Investigation Report – Category of Service provided by KFM 88 Kingaroy, 1998/0502, 1998; ABA Investigation Report – Open Narrowcasting Service 2KY Racing Radio 100.9FM Bathurst, 2000/0157; ABA Investigation Report – Toowoomba Country FM 91.5, 2002/0113; ABA Investigation Report – LPONC Smooth FM, 1998/0261

¹³ ABA Investigation Report – Classic Hits FM, 1998/0143

¹⁴ ABA Investigation Report – Bundaberg Broadcasters Pty Limited – CQ-FM 97.1Mhz, 1999/0363

¹⁵ ABA Investigation Report – Category of Service provided by Classic Hits FM, 1998/0143

matter of limited appeal. It is not sufficient that the service ‘specialise in news coverage’ To be narrowcasting the news service must be directed to a ‘niche’ audience comprising a special interest group, and the news content must directly serve the ‘niche’ interest of that group.

Sport

The Guidelines recognise that coverage of sporting events, particularly involving Australian participation, is hugely popular with Australian audiences. However, the Guidelines go on to cite a New South Wales Supreme Court decision in *Sportsvision v Tallglen*¹⁶ as an example of a broad approach to what services might be characterised as narrowcasting.

Sportsvision v Tallglen is not a precedent of general application to the narrowcasting licensing regime and should not be used as such. The decision by Bryson J to characterise the sports AFL subscription service as a narrowcasting service was based on very specific factors concerning the context in which the service was provided. In particular it was the high access barrier (in this case, price) rather than the content of the service per se, which persuaded Bryson J that the AFL subscription service was not intended to target or appeal to the broader public.

Free TV submits that services offering coverage of mainstream sports should ordinarily be regarded as of general appeal, unless there are unique circumstances which limit the appeal of the content to a narrow group of recipients. The fact that a sporting event is limited in time, should not lead to a conclusion that coverage of the event will have limited reception. Sporting events such as the Olympics and Commonwealth Games attract huge audiences and are of general and widespread appeal. Their reception is not limited simply because they are conducted over a limited time period. In fact, their limited time period often increases their audience appeal. Broadcasters are precluded from broadcasting these events on a multichannel, and it would be a significant competitive disadvantage if a Channel A licensee was permitted to provide coverage of events with general and wide appeal.

The Guidelines also suggest that coverage of sporting events that do not involve Australian participation may attract only viewers with specific interest in particular teams or athletes. A service which includes such coverage as a significant component is less likely to appeal to the general public.

Free TV submits that the same general principles discussed in sections 2.1 and 2.2 above should apply to coverage of sporting events that do not involve Australian participation. Program content containing coverage of such sporting events will only be a narrowcasting service if the content is targeted to a special interest group who have a niche interest in the particular sport. This would not, for example, apply to most mainstream sports played at a national or international level, whether or not there happens to be Australian participation in any particular competition.

¹⁶ *Sportsvision Australia Pty Ltd v Tallglen Pty Ltd & Anor Matter No 2816/97 [1998] NSWSC 221 (Sportsvision v Tallglen)*



2.3 Other

We agree with ACMA's comments regarding s22(d) **Scheduling of Service**. In particular, we agree that the availability of a service for part of the day may determine the category it falls into. Services that only or predominately schedule programs through prime-time are much more likely to attract a wide audience and fail to meet the limited reception criteria required to be characterised as a narrowcasting services.