



**Submission by
Free TV Australia Limited**

Department of Broadband,
Communications and the Digital Economy

National Broadband Network: Regulatory
Reform for 21st Century Broadband
Discussion Paper

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1 Executive Summary

- The National Broadband Network (NBN) will significantly boost the viability of Internet Protocol Television (IPTV) services, which are typically delivered on a subscription basis.
- This is likely to lead to a number of regulatory pressures and potential impacts on television audiences which must be considered at an early stage.
- The anti-siphoning rules do not apply to IPTV services, which could result in the migration of major sporting events onto a new, subscription-only platform. This is the very outcome the anti-siphoning scheme seeks to prevent, and this potential regulatory loophole must be addressed as soon as possible.
- Similarly, providers of broadband or IPTV services should not be able to exclusively acquire the digital rights to premium content.
- Audiences will be concerned if emerging television-like services (such as IPTV) do not meet the kinds of community service and protection standards which apply to existing broadcasting services. The Government must consider the appropriate regulatory settings for television-like services delivered on the NBN as early as possible.
- Commercial free to air television services are subject to an extensive range of regulatory measures which, whilst achieving important public service outcomes, impose significant costs that do not apply to other platforms. There is a danger of a sharp regulatory imbalance between new, television-like services and similar services provided on existing broadcasting platforms.
- Of immediate concern is the application of the full rate of licence fees to digital free to air multi-channels. These are emerging services with niche appeal which are not as influential or as profitable as main channels.
- It is not appropriate to impose the same licence fees as apply to primary services and this should be urgently reviewed, with a moratorium on licence fee payments for digital free to air multi-channels until the business model has more fully developed.
- The Government should also examine the pricing and traffic management practices of carriers and ISPs and the potential for discrimination against certain content or content providers.
- Principles should also be established which allow broadcasters to negotiate for the retransmission of their broadcast signal on IPTV services.
- Finally, before the 'Digital Dividend' can be considered as possible spectrum for the wireless component of the NBN, the Government must first ensure that all viewers who receive analogue television are able to receive free to view digital television at switchover.
- This is the fundamental consideration to be addressed before the size and future use of the 'Digital Dividend' can be determined.



2 Introduction

Free TV Australia represents all of Australia's commercial free to air television broadcasters. Free TV welcomes the opportunity to comment on the regulatory issues raised in the Discussion Paper.

Free TV confines its comments to those issues of relevance to television audiences and the television industry, and does not wish to comment on the broader telecommunications competition and consumer issues raised in the Paper. However, Free TV notes its support for competition in the provision of telecommunications services and for fair and equitable third-party access to the National Broadband Network (NBN).

Commercial free to air broadcasters have focused their consideration on the potential regulatory issues arising from the deployment of Internet Protocol Television (IPTV) services on the NBN.

Whilst IPTV services are still in their infancy in Australia, the 100 Mbps NBN will significantly boost the viability of IPTV services. Overseas experience demonstrates that wide availability of very fast broadband facilitates the deployment of IPTV services and that these services are typically provided on a subscription basis. Whilst regulatory settings must be carefully modeled so as not to restrict innovation and investment, it is important that the potential regulatory pressures arising from such services, and the potential impact on audiences, be considered at an early stage.

This submission addresses some of these potential regulatory pressures and audience impacts. Free TV would welcome further consultation on these issues in the lead-up to the establishment of the NBN.

3 Free access to sporting events

The anti-siphoning provisions in the *Broadcasting Services Act 1992* (BSA) ensure all Australians have free access to television coverage of major sporting events. The anti-siphoning provisions achieve this important policy objective by preventing a subscription broadcasting licensee from acquiring the rights to events specified on the anti-siphoning list, unless they have first been acquired by a free to air broadcaster.

The anti-siphoning scheme was introduced in 1994, ahead of the widespread introduction of subscription television services, in response to very strong community concern that the broadcast rights to major sporting events would be exclusively acquired by subscription television.

There is a strong possibility that the emergence of subscription based IPTV services will create the same potential for the siphoning of major sporting events. The migration of major sporting events onto a subscription-only platform is precisely the outcome the anti-siphoning scheme seeks to prevent, yet the provisions of the scheme would not extend to IPTV services and could not prevent this kind of outcome as currently drafted.

This is a potential regulatory loophole which should be addressed as soon as possible. The policy objectives of the anti-siphoning scheme still remain valid, with over 70% of Australians unable to afford pay TV or choosing to rely exclusively on free to air television services.

The public interest in free access to coverage of major sporting events continues to outweigh the claimed impact of the anti-siphoning rules on Foxtel and Fox Sports.

Foxtel's direct subscriber base grew to 1,449,000 as at 31 December 2008, an increase of 7% on the prior corresponding period. Including wholesale customers, Foxtel's subscriber base has now reached 1,591,000.

Foxtel's total revenue for the first half of this financial year was \$908 million, up 12.8% for the same period last year. EBITDA was 18.5% to \$192 million. The Fox Sports group of channels (Premier Media Group) recorded revenues of \$209 million, up 14.5% and EBITDA of \$81.5 million (up 37%).¹

The very strong financial results of these businesses underlines the fact that the anti-siphoning rules, whilst preserving a core Australian value, have not damaged Foxtel or Fox Sports financially or the growth of pay TV, which can easily operate within the confines of the rules. Accordingly, extending the anti-siphoning rules to IPTV providers will not prevent them from developing viable business models, even where that includes sports coverage.

A statutory review of the anti-siphoning scheme is due to take place in 2009 and that review should consider the potential impact of new technologies on the ability of the scheme to continue to meet its policy objectives. If there is the potential for a new

¹ Refer to 1H09 Results for Consolidated Media Holdings
<http://www.pbl.com.au/Images/Document/CMH%20RESULTS%20PRESENTATION%201H09.pdf>



platform to erode the effectiveness of the scheme early regulatory action should be taken.

4 Premium content

Commercial free to air broadcasters would also be concerned if providers of broadband or IPTV services with significant market power were able to exclusively acquire the digital rights to premium content. This would not only have a negative impact on the market for content, but would also reduce competition and choice for consumers in other markets. As noted in the Discussion Paper, where a service provider has exclusively acquired a large amount of premium content and also offers carriage services (telephony and broadband), consumers seeking access to the premium content could also be locked into 'bundled' contracts for the provision of those other carriage services.

As noted in Free TV's submission to the Senate Environment, Communications and the Arts Committee's Inquiry into the Reporting of Sports News and the Emergence of Digital Media, the market for digital rights in Australia is still developing.

In the television broadcast context, there is a healthy level of competition for the broadcast rights to premium content. In contrast, there appears to be less competition for broadband rights in Australia, with one party acquiring the rights to a considerable amount of content. The ability to use premium content to leverage connectivity and infrastructure services is of serious concern. It is unclear if recent consolidation in the sector may also lead to a lessening competition for digital media rights.

Free TV supports limits on access to rights for premium content for entities with market power in telecommunications connectivity to ensure that there is an appropriate level of competition.

5 Future television-like services – the regulatory balance

The likelihood of subscription-based IPTV services becoming available on the NBN raises a number of important issues relating to the regulation of content, audience expectations and community standards.

A ubiquitously available IPTV service, delivering high quality media content to the main television set in the home will likely be viewed by the audience as 'television', regardless of the method of delivery.

However, Free TV understands that as currently drafted, the broadcasting regulatory framework would not apply to television-like services delivered over IP networks.² This may lead to audience concern if such services do not meet the basic public service requirements of other broadcasting services in areas such as classification and the provision of captioning.

² *Determination under paragraph (c) of the definition of "broadcasting service" (No. 1 of 2000)*

Free TV acknowledges it is important that innovation and investment in new platforms is not stifled by overly burdensome regulation. However, it would be anomalous to regulate the same or very similar services differently purely on the basis of the delivery platform (for example, spectrum, cable, Internet, satellite).

If IPTV services develop into a mature offering in Australia, there is a danger of a sharp regulatory imbalance between these new services and similar services provided on existing broadcasting platforms. This situation will need to be reviewed prior to the rollout of new services to consider:

- What are the minimum regulatory requirements needed to ensure that broadcasting-like services meet community standards; and
- The extent to which there should be greater parity in the regulation of broadcasting-like services irrespective of the delivery platform.

Free TV supports the statements in the Discussion Paper that “Governments need to be vigilant about assessing the continued appropriateness of existing regulations in the face of rapid technological change.” Whilst the Government has stated that it intends to “wait until the [NBN] is more advanced before launching a full-scale review of convergence related issues”, these are vitally important issues that must be fully explored *before* the widespread rollout of IPTV or other television-like services.

These are also matters that will be of significant interest to those investing in the NBN and in services to be delivered over it and should therefore be considered as early as possible to ensure investment certainty in these areas. Certainty regarding the regulatory framework for such services will be important for both consumers and potential service providers alike.

6 The regulatory balance for existing services

The emergence of a new range of television-like services also raises questions regarding the appropriate regulatory framework for existing television services.

Commercial free to air broadcasting, consistent with its ubiquitous nature and extensive reach, is subject to a high degree of regulatory control. Broadcasters must meet a range of statutory obligations including providing adequate and comprehensive coverage, meeting minimum quotas of Australian content including sub-quotas applying to adult drama, children’s programming and documentaries, and meeting local content requirements that apply to regional broadcasters.

Broadcasters are also subject to other requirements concerning captioning, the content of programming delivered to children, restrictions on the types of programs that can be shown at certain times of the day, and limits on amounts and types of advertising and many others. Broadcasters also pay substantial licence fees - \$270 million in 2006/07.³

³ Refer to ACMA Broadcasting Financial Results for 2006/07.

The table below compares the regulatory measures applying to television services across various platforms and demonstrates the existing and emerging regulatory imbalance.

Regulatory measure	FTA Commercial Television	Pay Television	IPTV
Classification of content	Extensive requirements for pre-classification of content, display of classification symbols and viewer guidance information.	Requirements for pre-classification of content, display of classification symbols and viewer guidance information.	Assuming Schedule 7 of the BSA applies, R18+ content and above prohibited. Restricted access requirements for MA15+ content.
Classification time zones	The broadcast day is strictly divided into classification time zones, restricting the time at which different kinds of content can be shown.	No classification time zones. Content can be shown at any time of day.	No classification time zones. Content can be shown at any time of day.
Licence fees	Annual licence fees of up to 9% of gross earnings. ⁴ \$270 million in licence fees in 2006/07. ⁵	None.	None.
Children's programming	Minimum annual requirement of 390 hours of children's and pre-school programming, with sub-quotas for first-release, drama and pre-school programs. Content must be pre-assessed by the ACMA. ⁶	None.	None.
Australian content quotas	Annual transmission quota of at least 55% Australian content (6am – midnight). Sub quotas for drama, documentary and children's programming. ⁷ Translates to over 500 hours of first run Australian adult drama and \$790 million spent on local content each year. ⁸	10% of program expenditure of nominated drama channels must be on Australian drama. Translates into around \$26.4 million a year.	None.
Advertising regulation	The amount and type of content of advertising that may be shown, and the time at which it can be shown is highly regulated.	The type of advertising which can be shown is regulated.	Assume general Schedule 7 restrictions would apply.

⁴ Refer to section 6 of the *Television Licence Fees Act 1964*

⁵ ACMA Broadcasting Financial Results 2006/07

⁶ Children's Content Standard 2005

http://www.acma.gov.au/webwr/aba/contentreg/codes/television/documents/childrens_tv_standards_2005.pdf

⁷ Australian Content Standard 2005

<http://www.acma.gov.au/webwr/aba/tv/content/documents/broadcasting%20svces%20-%20australian%20content%20standard%202005.pdf>

⁸ ACMA Broadcasting Financial Results 2006/07

Local news and information	Minimum local news and information requirements for regional television licensees in Eastern States. Translates to roughly 60 minutes of local news each week, or 120 minutes of other locally relevant material (or a combination of both). ⁹	None.	None.
Captioning	All prime time programming and all news and current affairs must be captioned. ¹⁰ Additionally, over 70% of all 6am to midnight programming must be captioned. This will increase to 85% by 2011. ¹¹	Minimum captioning requirements (increasing percentages of channel hours) apply to an increasing number of subscription television channels	None.

These regulations achieve a number of important public service outcomes. However, they also impose significantly higher costs on free to air broadcasters compared with other categories of broadcasting services and restrict the flexibility of the broadcasting business model, for example, by affecting the programs that a broadcaster can schedule. As the mix of broadcasting like services evolves, it is appropriate for the Government to reconsider whether public service objectives remain relevant, and if so, the best means of implementing them.

7 Multi-channel licence fees

For commercial free to air broadcasters, the question of the appropriate regulatory balance between existing and new services is of immediate concern. Commercial free to air broadcasters are currently in the process of launching and establishing digital free to air multi-channels. As it currently stands, the statutory licence fee structure under the *Television Licence Fees Act 1964* imposes the same licence fee on these start-up channels as applies to broadcasters' primary services. Licence fees are set on a sliding scale with metropolitan licensees generally paying 9% of their gross receipts. This requires urgent review.

Broadcasters have been encouraged by Government to invest in new digital multi-channels as part of an overall strategy towards accelerating digital television take-up. The Government has recently announced funding for an ABC children's channel and SBS has launched a new multichannel. Neither of these new services, nor any competing pay TV channel, are subject to any licence fee payments.

However, multi-channels pose a number of challenges for broadcasters. Launching a multi-channel involves significant investment by broadcasters in content, technical infrastructure, operational support and marketing. The business model for digital free to air multi-channels is still developing and broadcasters are facing an uncertain

⁹ Refer to section 43A of the BSA and the *Broadcasting Services (Additional Television Licence Condition) Notice 8 November 2007*

¹⁰ Clause 38 of Schedule 4 to the BSA.

¹¹ Under the terms of a temporary exemption from the *Disability Discrimination Act 1992*



revenue market at present. Multi-channels tend to have greater niche appeal compared with the broad reach of main channels. They are not as influential or profitable as main channels because the size of the audience is smaller with only around half of Australian households capable of receiving digital channels. Consequently, it is inappropriate to impose the same licence fee on multi-channels as on main channels.

These unique circumstances must be recognised through a moratorium on licence fee payments for digital free to air multi-channels as occurred for pay TV when it was established. Free to air multi-channels are solely reliant on advertising revenue for commercial viability. It is not reasonable or appropriate to regulate fledgling digital free to air multi-channels in the same way as established services, whose operating model and profitability are well established.

Indeed, to apply the same licence fees across primary and multi-channels is inconsistent with the underlying regulatory policy for multi-channels. Broadcasting legislation sets down a 'light touch' regulatory policy for multi-channels, reflecting the broader policy objective of encouraging a diverse range of services,

This was articulated in the Explanatory Memorandum to the Broadcasting Legislation Amendment (Digital Television) Bill 2006, which noted that the initial smaller audience reach of digital multi-channels means "it is appropriate that a lighter regulatory burden be placed on [those channels]" (p 30). This is also consistent with the regulatory policy of the BSA more broadly, which states that different levels of regulatory control should be applied across broadcasting services, according to their level of influence within the community.

The continued application of high licence fees to digital multi-channels stifles investment, innovation and threatens the establishment of a viable free to air digital multi-channel platform. It should be urgently reviewed and multi-channel licence fees suspended until such time as a the business model for the platform has more fully emerged.

8 Availability and pricing of services on the NBN

Whilst not addressed in the Discussion Paper, Free TV wishes to note its support for the principle of net neutrality. The Government should closely monitor the pricing practices of ISPs and carriers in the lead-up to and following the establishment of the NBN to ensure no operator misuses its market power to discriminate against certain content or content providers.

The application of differential pricing to favour certain kinds or providers of content (typically with the aim of favouring a carrier or ISP's own content or that of a commercial partner) lessens competition and inhibits investment, consumer choice and diversity of services. Media reports suggest this is already an issue in Australia, with concerns regarding the behaviour of carriers who are also content providers when negotiating pricing and access with other, third-party content providers.¹²

¹² <http://www.theaustralian.news.com.au/business/story/0,28124,25565328-7582,00.html> Viewed 1 June 2009

Traffic ‘shaping’, whereby differential download speeds are applied for certain kinds of content stands to have the same impact. Practices such as these are inconsistent with the open and neutral design of the Internet.

Overseas jurisdictions have nominated the preservation of net neutrality as one of the key challenges facing policy makers considering the future of the Internet. The European Commission responsible for Information Society and Media has identified net neutrality as essential, and has expressed concern that the same network management techniques used to guarantee good quality of service may also be used for anti-competitive practices. The Commission is working towards greater powers for national regulators to prevent the misuse of traffic-prioritisation techniques.¹³

The Canadian Radio-television and Telecommunications Commission has commenced an inquiry into the anti-competitive impacts of traffic shaping and discriminatory content pricing.¹⁴ The Federal Communications Commission (FCC) in the United States has recently made a ruling to preserve the open character of the Internet, finding that the traffic throttling activities of Comcast were illegal.¹⁵ The United States Congress is also considering a Bill to mandate principles of net neutrality and require an FCC review into unfair content pricing and access practices.¹⁶

Free TV would welcome further consultation on these issues in the lead-up to the establishment of the NBN.

9 Re-transmission of free to air television services

IPTV services have the potential to raise significant competition concerns. When pay TV was introduced into Australia, service providers were able to build their businesses on the back of free to air services through rules allowing the retransmission of free to air broadcasts without the permission of the broadcaster.

The current retransmission scheme that enables any form of retransmission without the consent of the broadcaster should be reconsidered. It was originally introduced to ensure that areas such as black spots and self help providers could retransmit broadcast services without consent. It was not intended as a means to allow a new service provider to profit from existing broadcast services. A retransmission right should be introduced for broadcasters to enable them to exploit the value of their services in the new environment. In particular, broadcasters should have the option to negotiate with emerging IPTV service providers in relation to the use of their signals.

¹³ Speech by Viviane Reding, Member of the European Commission responsible for Information Society and Media *Internet of the Future: What policies to make it happen* 11 May 2009, <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/231&format=HTML&aged=0&language=EN&guiLanguage=en> . Viewed 3 June 2009

¹⁴ Canadian Radio –Television and Telecommunications Commission Review of the Internet traffic management practices of Internet Service Providers – Telecom Public Notice CRTC 2008-19 <http://www.crtc.gc.ca/eng/archive/2008/pt2008-19.htm>

¹⁵ In the Matters of Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications Broadband Industry Practices Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC’s Internet Policy Statement and Does Not Meet an Exception for “Reasonable Network Management” - WC Docket No. 07-52 – 1 August 2008

¹⁶ Internet Freedom Preservation Act 2008 H.R.5353 <http://www.opencongress.org/bill/110-h5353/show>



A regime similar to that existing for US cable providers should be introduced, which allows broadcasters to either negotiate for provision of their broadcast signal or elect to participate in a 'must carry' scheme. Broadband has the potential to become an important connection to the home and broadcasters should not be prevented from accessing homes where IPTV may become the primary means of access.

Similarly, when the NBN is rolled-out, rules should be introduced to prevent the removal of free to air aerial connections when the home is connected to the network.

10 Allocation of spectrum for wireless component of the NBN

Whilst the majority of the NBN is to be rolled-out through a fibre optic network, it is expected that satellite and wireless delivery will also play a role. The availability of suitable radiofrequency spectrum is therefore an important consideration for the Government.

In the context of its discussion of wireless and satellite technology, the Government's Paper expressly notes the spectrum which will be made available through the cessation of analog television (the 'Digital Dividend'). However, before a decision can be taken on the allocation of Dividend spectrum, whether in relation to the NBN or otherwise, there are a number of other, vitally important decisions to be made regarding the size and shape of the Dividend.

Free TV understands that separate consultation on the Digital Dividend will shortly commence and we look forward to engaging in that process. In the current context, Free TV restates its view that in decisions regarding the Digital Dividend, the fundamental consideration must be the need to ensure that all viewers who receive analogue television are able to receive free to view digital television at switchover. This is the single most important issue to be addressed before the size and shape of the 'Digital Dividend' can be finally determined.