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Convergence Review Secretariat  
Department of Broadband, Communications and the Digital Economy  
GPO Box 2154  
CANBERRA ACT 2601

Dear Sir/Madam

#### **SUPPLEMENTARY SUBMISSION – FRAMING PAPER**

I refer to the Convergence Review's Framing Paper and recent consultation process. Free TV Australia made a submission to that process addressing the proposed principles of media and communications regulation, suggesting some additional principles and raising a number of regulatory and policy issues which we believe should be addressed as part of the Review.

Free TV would like to make a further, supplementary submission addressing an additional regulatory issue which is likely to emerge as part of the Review.

#### **Retransmission of free-to-air commercial television services**

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.

There is a clear potential for new entertainment platforms, such as IPTV and Internet television, to use free-to-air signals under existing retransmission rules in order to build their businesses. As such, the current retransmission scheme that enables any form of retransmission without the consent of the broadcaster should be reconsidered as part of the Convergence Review.

The current retransmission scheme was originally introduced to ensure that areas such as black spots and self-help providers could retransmit broadcast services without the need to obtain consent. It was not intended as a means to allow a new service provider to profit from existing broadcast services. The retransmission right can be seen as a clear example of regulation which has failed to adapt to technological and market developments and is now operating in a way not intended when it was first introduced in 1968.

As the relevant provisions of the *Broadcasting Services Act 1992* and the *Copyright Act 1968* stand, broadcasters have no say in whether their signals are retransmitted and how. The broadcaster cannot give permission or negotiate the terms of the retransmission (except where a pay TV provider might seek payment from the relevant broadcaster). By contrast, in the United States the retransmission right for free-to-air broadcasters has long been recognised and generates significant revenue for network operators.

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.

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.

Under a US-style scheme, free-to-air services must be carried on a cable provider's system if the free-to-air broadcaster requests this ('must-carry'). Alternatively, the free-to-air services have the option to negotiate a fee or other compensation for their programming ('retransmission consent'). Simply put, carriage of a commercial broadcast station without consent is not an option.

- FCC rules mandate that locally licensed TV stations must be carried on a cable provider's system. This rule only applies if the TV stations wants the cable provider to offer its programming in this way.
- Local broadcasters also have the option to negotiate a fee or other compensation for their programming ('retransmission consent'). The law requires that once every three years, local stations must elect between 'must carry' and 'retransmission consent'.
- Under 'retransmission consent' arrangements, a cable operator is prohibited from carrying the local stations' signals until an agreement is reached.
- The FCC has also applied rules which require local stations to negotiate with cable operators in good faith.

The US rules recognise the value to cable and satellite service offerings of over-the-air network stations and provide a framework for commercial negotiations for a fair return.

'Must-carry' rules also exist in many European jurisdictions, ensuring that broadcast networks can not be forced to pay for carriage of their services on subscription platforms. The European Commission, drawing on the conclusions from their Convergence Green Paper<sup>1</sup> implemented 'must carry' provisions in Article 31 of the Universal Service Directive. Article 31 recognised the ability of Member States to impose or maintain reasonable must-carry rules on network providers under their jurisdiction.<sup>2</sup>

'Must carry' has been implemented into domestic European law in a number of countries (see table at Appendix A). For example, in the Spanish market, the must-carry regulation requires that both parties agree on suitable financial compensation.

A technology-neutral must-carry/retransmission consent regime should be implemented in Australia, so that it applies regardless of the technical means chosen for the delivery of television and television-like services in the future.

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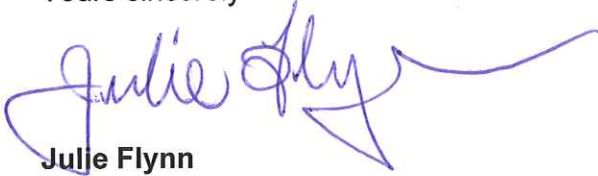
<sup>1</sup> ([http://ec.europa.eu/avpolicy/docs/library/legal/com/greenp\\_97\\_623\\_en.pdf](http://ec.europa.eu/avpolicy/docs/library/legal/com/greenp_97_623_en.pdf))

<sup>2</sup>

[http://ec.europa.eu/information\\_society/policy/ecom/doc/current/broadcasting/working\\_doc\\_must\\_carry.pdf](http://ec.europa.eu/information_society/policy/ecom/doc/current/broadcasting/working_doc_must_carry.pdf)

Thank you for the opportunity to make this supplementary submission to the Convergence Review.

Yours sincerely

A handwritten signature in blue ink that reads "Julie Flynn". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

**Julie Flynn**  
**CEO**

APPENDIX A

MUST-CARRY

Country	Year of Implementation	Legislation/ Decree	Beneficiaries of the Must Carry Provisions
Austria	1997	The Cable and Satellite Broadcasting Act BGBl.I Nr. 42/1997, Article 11	the public service broadcasting company.
Belgium, Flemish Community	1995	Co-ordinated Decrees on Radio and Television, Article 112	specified radio and television programs of the Flemish and French public broadcaster, as well as authorised private and regional broadcasters.
Belgium, French Community	1987 (last modified 1999)	The Media Decree, Article 22	French public broadcasters, authorised local and private broadcasters, television programs relating to international organisations, and other broadcasters as agreed to from time to time.
Belgium, Regional of the Capital Brussels	1995	The Federal Law of 30 March 1995, Articles 13, 16 and 19	television and radio public service broadcasters of the Flemish and French communities, as well as other broadcasters as agreed to from time to time.
Denmark	2000	Danish Broadcasting Act nr 551/2000, Article 4	public service broadcasters, including regional programs
Finland	1998	Act on Television and Radio Operations, Article 42	public Finnish broadcasting companies
France	1986, amended 2000	French Law of 30 September 1986 on Freedom of Communication, Article 34	services broadcast via hertzian means, and possibly also communal authorities and not-for-profit associations
Germany	2001	Inter-State Agreement on Broadcasting Services, sections 51 and 52	public broadcasters and broadcasters who are otherwise appropriately licensed; other broadcasters as determined by location.
Republic of Ireland	1974, amended 1988	Radio and Television Act 1988, section 17; Wireless Telegraphy (Wired Broadcast Relay Licence) Regulations 1974, section 3 and Wireless Telegraphy	national public service broadcasting company and television programs of the independent television station.

		(Television Programme Retransmission) Regulations, 1989, section 3.	
The Netherlands	1987	The Media Act 1987/249, Article 82	the three television channels of the Dutch public service broadcasting companies, two local public service broadcasting companies, and television programs transmitted by the two channels of the Flemish public service broadcasting company.
Portugal	1997	Decree No. 241/91, Article 12	the two television channels of the public service broadcaster, Article 12
Spain	1996	Cable Telecommunications Act, Article 11 and	the two channels of the public service broadcasting service; the television programs transmitted by the three channels of private broadcasting companies; and the local television channels.
Sweden	1996	Radio and Television Act, Chapter 8, Section 1	two television channels of public service broadcasting company and one television channel of the private broadcaster
United Kingdom	1990	Broadcasting Act 1990, Schedule 12, Part III, paragraph 4 and section 78A	The following channels: BBC1, BBC2, ITV, Channel 4 and the Public Teletext Service.