Submission by Free TV Australia

Commercial broadcast tax review – consultation paper

Australian Communications and Media Authority

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free tv

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1. Executive Summary

- The *Commercial Broadcasting (Tax) Act 2017* (CBTA) was introduced as a 5-year interim arrangement. It represents a major financial impost on an industry facing serious challenges to its business model. These challenges in turn pose serious public policy problems, well-summarised in the federal Government's recent Media Reform Green Paper.
- Commercial TV broadcasters have a legitimate expectation that ACMA or government will examine, properly and transparently, the CBT's appropriateness going forward. The review should be completed in good time within the 5-year period.
- Free TV is very concerned that without a genuine review of the taxation arrangements, as anticipated by the legislation and supporting materials, there is no clear pathway for the proper consideration of appropriate taxation arrangements going forward. Free TV submits that a full examination of the appropriateness of the CBT, including international approaches to the level of taxation, would lead to a recommendation to repeal the CBTA.
- Work undertaken by Venture Consulting has revealed that the CBT is 52 times higher than equivalent per capita charges in the USA. Consistent with international approaches, Free TV submits that the aggregate amount of any tax levied should not exceed the ACMA costs of managing the spectrum allocated to broadcasting.
- The relationship of the present CBT to spectrum value is at best opaque. Taken together, the proposals in the ACMA paper and in the government's Media Reform Green Paper would further obscure the relationship of the tax to spectrum value, while indefinitely postponing a proper examination of the rationale for and the continuing appropriateness of the CBT.
- The present CBT appears to function as a 'disguised' tax on revenue or profitability. To adjust it to reflect the actual value of TV spectrum for alternative uses would, however, be undesirable, as it would create perverse incentives:
  - A pricing structure based on the value for alternative uses of spectrum denied by TV transmissions would heavily penalise metropolitan and metro-adjacent TV broadcasters for continuing to provide services using 600 MHz, while falling more lightly than at present on other transmitters.
  - For broadcasters to reduce their tax burden by withdrawing or rationalising services in areas reliant on 600 MHz spectrum, in direct conflict with the public policy principles of providing a ubiquitous and locally relevant television service to as many Australians as possible.
- Spectrum value for other uses is the wrong basis for taxation of TV services using the broadcasting services bands. The widespread, free availability of TV to ubiquitous receivers is integral to the public benefits identified in the Media Reform Green Paper. Any review of the CBT should give appropriate weight to Object (a) of the *Broadcasting Services Act 1992*, which is to promote the availability to audiences throughout Australia of a diverse range of television services.
- The TV industry acknowledges the rising value of 600 MHz spectrum for alternative uses. We are keen to work constructively with government on a long-term spectrum management plan while ensuring that the policy objectives set out in the *Broadcasting Service Act 1992* continue to be achieved. To this end, we expect that government, commercial broadcasters and the wider community share a common interest in finding a sustainable pathway forward for free-to-air TV.
- The pressures that have emerged since 2017 on the profitability of TV, also the sustainability of some regional services, are well-documented in the government's Media Reform Green Paper. They should be at the heart of government's deliberations on the CBT.
- The TV industry also supports changes to simplify compliance with the CBT, including the administrative arrangements reforms set out by the ACMA in the consultation paper.

2. Introduction

2.1 About Free TV Australia

Free TV Australia is the peak industry body for Australia's commercial free-to-air broadcasters. We advance the interests of our members in national policy debates, position the industry for the future in technology and innovation and highlight the important contribution commercial free-to-air television makes to Australia's culture and economy.

Free TV Australia proudly represents all of Australia's commercial free-to-air television broadcasters in metropolitan, regional and remote licence areas.

Our members are dedicated to supporting and advancing the important contribution commercial free-to-air television makes to Australia's culture and economy. Australia's commercial free-to-air broadcasters create jobs, provide trusted local news, tell Australian stories, give Australians a voice and nurture Australian talent.

2.2 Context of the ACMA review of the interim broadcasting tax

The current broadcasting taxation regime was included as an interim measure as part of a broader package of media industry reforms in 2017.

Section 216AA of the *Broadcasting Services Act 1992* (BSA Act) provides that:

> *after 30 June 2019, the ACMA must conduct a review of whether the Commercial Broadcasting (Tax) Act 2017 should be repealed or amended on or before 1 July 2022. The ACMA is required to give the Minister a report of the review before 1 July 2021 and must also review "such matters (if any) as are specified" by the Minister.*

This section was introduced into the BSA by the *Broadcasting Legislation Amendment (Broadcasting Reform) Bill 2017*, which (amongst other things) abolished broadcasting licence fees. It was introduced alongside the *Commercial Broadcasting (Tax) Bill 2017*, which imposed a new interim tax on transmitter licences associated with commercial broadcasting licences (under which the industry pays about $40m per annum).

As noted in the Explanatory Memorandum, the ACMA review under s 216AA:

> *"will help ensure that taxation arrangements (and any future replacement spectrum use charging pricing arrangement) remain appropriate and consistent with the broader review of spectrum pricing currently underway by Government".*

Similarly, in the second reading speech, Minister Paul Fletcher noted that:

> *As a part of this package, the legislation will require the Australian Communications and Media Authority after 30 June 2019 to undertake a review and report on whether the new tax law should be repealed or amended on or before 1 July 2022. ACMA will consult on the review, enabling broadcasters to input into the development of future tax arrangements. The report would be tabled in parliament.*
>
> *This review will be a valuable input into future spectrum taxing arrangements. In the meantime, the government's policy is that broadcast spectrum taxes remain stable for the next five years to provide certainty. The government acknowledges industry's desire for certainty beyond this period. While the*

broader spectrum management framework may change, this government does not expect large increases in taxes for broadcast spectrum.

From the outset Free TV notes its very strong concerns that the current ACMA review process does not undertake the scope of the review anticipated by the legislation and extrinsic material. In particular, as we expand on in the next section, the review does not adequately meet the legislative requirement to review whether the tax should be repealed or amended.

The interim nature of the tax is reinforced by the arrangements put in place to ensure that regional broadcasters were no worse off as a result of the 2017 changes. With the change to a per transmitter rather than revenue-based tax, a small number of broadcasters in regional areas faced an increase in fees compared to the previous licence fee. To address this issue, the interim tax was implemented alongside a transitional support package over five years. This package was to fully compensate these broadcasters for any additional fees incurred. However, this support package ends after five-years, clearly reinforcing that both the tax and the support package were interim measures pending a detailed examination by the ACMA and advice to Parliament on the appropriate taxation arrangements from 2022 onwards.

2.3 Implications of COVID-19 and soft advertising market

The period since 2017 has seen a continuing decline in the financial position of commercial TV broadcasters as well as the extraordinary economic disruption of the COVID-19 pandemic. The challenges of digital disruption, the threats it poses to public interest journalism and local content, and the pressing need for regulatory relief for the commercial TV industry are well-documented in chapter 2 of the government's own Green Paper.

In response to the Covid-19 pandemic, on April 15 last year the government announced a 12-month waiver of the spectrum tax. The temporary (COVID-19 related) relief is scheduled to end later this year. The transitional support package for those regional broadcasters that would otherwise pay more tax than under the previous regime is scheduled to end in 2022 (see above).

In response to these unprecedented market conditions, the Government suspended the commercial broadcasting tax for 12 months from 14 February 2020. In addition, the Minister asked the ACMA to complete its legislatively required review of the tax by 30 March 2021. The industry understood that this review was brought forward to enable a consideration of the ongoing spectrum licence fees, to minimise disruption to the industry from the interim tax being suspended, then reapplied and then adjusted again from 2022. However, as it stands now, there is no clear pathway for the genuine consideration of appropriate taxation arrangements going forward. We address the inter-relationship with the Government's Green Paper process in the next section.

2.4 The Green Paper does not address the fundamental basis of charging for broadcast spectrum

In a separate but related exercise, the Government in November 2020 released its Media Reform Green Paper inviting comments on a proposal to create a new TV broadcasting licence type that would be exempt from tax under the CBTA. TV broadcasters who do not elect to transition to the new licence type would continue to pay the CBT. If enough broadcasters elect to transition, the government may migrate the holders of new licences to shared multiplexes. All broadcasters (both new and old licence types) would then be required to retune out of the 600 MHz band, yielding a 'digital dividend' for the government.

Given there is consensus about the need for regulatory reform, it is disappointing to find the ACMA proposing to amend the CBTA, but only on the limited (and uncontentious) basis that there are some issues with its administration that could be mitigated with a new pricing methodology and simplified administrative arrangements. Three pricing options, designed to address these concerns, are canvassed in detail. Side-stepped is the pressing issue of the appropriateness of the current overall level of taxation. The ACMA proposes to review the tax caps only in the event the government agrees to modifying the method of calculating the CBT:

> *… as the amount of the tax caps have been calculated with reference to the current pricing methodology, they should be reviewed so that CBT can reflect changes in the value of the spectrum over time.*

The implication of ACMA's proposals is that the promised review of the level of taxation faced by the commercial TV industry - the need for which is now pressing - will take place at some unspecified future date, if it takes place at all.

To enable the ACMA to review the CBT in the manner envisaged by the legislation and supporting material, Free TV sets out the relevant considerations in the following sections.

3. Should the CBTA be repealed or amended?

3.1 The ACMA should not postpone a proper review of the CBT

The relationship of the CBT to spectrum valuation was unclear from the outset, with government statements confirming that spectrum valuation was only one of several considerations. In the words of Minister Fletcher: 'The bill balances industry concern about remaining competitive, the obligations placed on them by government, and the need to value spectrum appropriately.'[1]

As set out above, the CBTA was presented to parliament as a 5-year, interim arrangement, with the legislated expectation it would be properly reviewed after five years. Instead, by implication, government and the ACMA now propose to postpone a full and transparent review of the tax indefinitely. While ACMA's reluctance to examine the spectrum value issue may be understandable in light of the Media Reform Green Paper, the latter's proposals contradict the ACMA's own expressed commitment to spectrum pricing.

In rejecting the option of repealing the CBTA, the ACMA argues:

- Spectrum pricing reflects that broadcasters have planned access to particular spectrum (which may have alternative uses); and
- Spectrum pricing, 'where appropriate,' can also reflect benefits derived by broadcasters from ACMA spectrum management functions, and from regulation and licensing arrangements that 'promote the efficient use of spectrum'.

Under the government's Green Paper proposals, by contrast, broadcasters electing to transition to new licences would be permanently exempted from the CBT, even though they would continue to use spectrum and derive benefits from the ACMA's spectrum management functions. Any broadcasters that elect to remain with their existing licences would continue to pay the CBT, even though they could be required – along with 'new' licence-holders – to migrate out of the only part of the broadcasting services bands with substantial potential value for other uses (UHF TV Blocks D and E), and operate only in parts of the broadcasting services bands with little or no value for alternative uses (VHF Block A and UHF Blocks B and C).

The practical effect of these proposals on the CBT would be to exempt broadcasters who fall in with Government endeavours to re-farm 600 MHz spectrum from any obligation to pay for spectrum access, while any holdouts would continue to face the current, high, opaquely-derived CBT, even if they move to spectrum with little or no alternative value.

With the five-year interim period for which the CBT was designed approaching its end, the need for a transparent review of its rationale and continuing appropriateness is pressing. The ACMA, as an independent regulatory agency, should not seek to defer the issue.

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[1] CBT Bill 2017, Second Reading Speech, at: https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22chamber/hansardr/3219af20-da22-4762-b08e-ad4cf9b7009e/0017%22

3.2 The CBT is not a real spectrum tax

The CBT appears to function as a 'disguised' tax on revenue or profitability. To adjust it to reflect the actual value of TV spectrum for alternative uses would, however, be counterproductive, as it may further increase the costs of TV transmission for some broadcasters and would be likely to create perverse incentives.

The CBT formula treats the spectrum TV broadcasters use uniformly, whereas the likely value of TV VHF (Block A), 500 MHz (Blocks B and C) and 600 MHz (Blocks D and E) spectrum for alternative uses varies considerably. Blocks A, B and C have little or no value for alternative uses.

- 600 MHz spectrum in Blocks D and E is rising in value for other uses under the influence of the North American 600 MHz wireless broadband allocation.
- Despite similar technical characteristics to 600 MHz spectrum, the 500 MHz spectrum comprising Blocks B and C is currently not used or planned for use by wireless broadband anywhere in the world and is required for terrestrial TV broadcasting for the foreseeable future.
- There is little current or foreseeable alternative demand for Block A (VHF) spectrum.

A CBT that was based on the value of spectrum for alternative uses would need to reflect the value of spectrum denied to that alternative use by TV operations. It would impose the highest charges on broadcasters using UHF Blocks D and E, to the extent this use denied spectrum for wireless broadband in major population centres. Use throughout the more populous areas of regional Australia could be expected to attract relatively high charges. By contrast, TV spectrum in VHF (Block A) would conceivably have no value for any alternative use. A broadcaster using VHF spectrum might expect to pay only for their share of any costs of relevant ACMA spectrum planning work.

- Such a tax would be likely to fall heavily on regional broadcasters making use of Blocks D or E, especially those that deny or limit use of the spectrum for wireless broadband in high or medium density areas.
- It would also affect a sub-set of metropolitan area TV services (notwithstanding these have their main channels on VHF) insofar as they also make use of Blocks D or E for infill transmitters. Thus, commercial broadcasters in Adelaide (VHF Block A, with low power translators using Block C) would pay very little.
    - Regional TV stations in large, aggregated licence areas surrounding capital cities would face amongst the highest taxes.
    - Most major city commercial broadcasters would need to pay for spectrum denial in Blocks D or E, but could reduce their tax by switching off one or more infill transmitters. (Commercial broadcasters in Melbourne, for example, each make use of 7MHz of the more 'valuable' block D, for a series of co-channelled infill transmitters at Ferntree Gully, Rosebud, Safety Beach and South Yarra).
- As broadcasters are legally at liberty to turn off one or more of their transmitters, surrender of these licences should have the corollary of reducing their tax accordingly.

The effect of such a pricing approach would be highly undesirable, with its disincentives for the continuation of wide-coverage terrestrial TV services in regional Australia and its incentives for metropolitan TV stations to axe low-power infill services. The CBT has only avoided these kinds of perverse outcomes by the unusual step of disregarding the differences in the value of each channel block for alternative uses, instead treating low-value VHF spectrum the same as it treats potentially very valuable 600 MHz spectrum. In this way, also by imposing differential taxes based on transmitter

power and the geographical location of transmitters, the tax appears to have been formulated to fall most heavily on the shoulders of those who previously paid most under the revenue tax: metropolitan TV services. Only lip service has been paid to the value of TV spectrum for potential alternative uses and the relevant spectrum denial characteristics of TV.

3.3 Spectrum value is the wrong basis for broadcasting licence taxation

Maximisation of terrestrial TV coverage is integral to the several public benefits free-to-air TV delivers and should be encouraged and safeguarded. Through its support of VAST, the government itself makes a large financial contribution to ensuring Australians living in regional and remote areas enjoy commercial TV services broadly comparable to those in the metropolitan markets. The expensive infrastructure regional commercial TV broadcasters use to provide services broadly equivalent to those in the largest cities results in large measure from government assistance during analogue TV closure. Government measures to extend commercial TV coverage, and to 'equalise' service offerings between city and country, are both public policy responses to the problem that many Australians live in areas where it would not otherwise be commercially feasible to provide commercial TV services, or commercial TV services of such variety and picture quality.

The 'public good' nature of universal TV coverage suggests that spectrum value is the wrong basis for taxation of broadcasting services using the 'broadcasting services bands'. Incentives for switching off infill transmitters, and regional broadcasters being priced out of being able to provide TV services equivalent to those in metropolitan markets, would both fail the 'sniff' test. It should come as no surprise, then, that neither outcome is supported by the legislative scheme. The 'broadcasting services bands' spectrum used by TV broadcasters in Australia has been designated as 'primarily for broadcasting purposes' and set aside for planning under Part 3 of the *Broadcasting Services Act 1992*. In exercising these planning powers, the ACMA is enjoined to 'promote the objects of the Act,' which relevantly include:

> *(a) to promote the availability to audiences throughout Australia of a diverse range of radio and television services offering entertainment, education and information; …*

Changes in the highest value use of broadcasting bands spectrum may be addressed, as the need arises, by the ACMA and the Minister to the extent current law allows, also, where appropriate, by changes to primary legislation, as has already occurred in relation to the 700 MHz band. Government is also the largest user of TV broadcasting spectrum, currently using or warehousing 50% of it. The commercial television industry is open to dialogue with government about the rising value of 600 MHz for alternative uses and is engaging constructively with the Media Reform Green Paper. While spectrum remains part of the broadcasting services bands, however, application to commercial TV operators of spectrum pricing approaches that actively mitigate against the maximisation of free, terrestrial TV coverage to Australians, wherever they reside, cannot be reconciled with the objects of the Broadcasting Services Act.

3.4 Breaking with the past: the alternative to high, revenue-based taxation of broadcasting licences

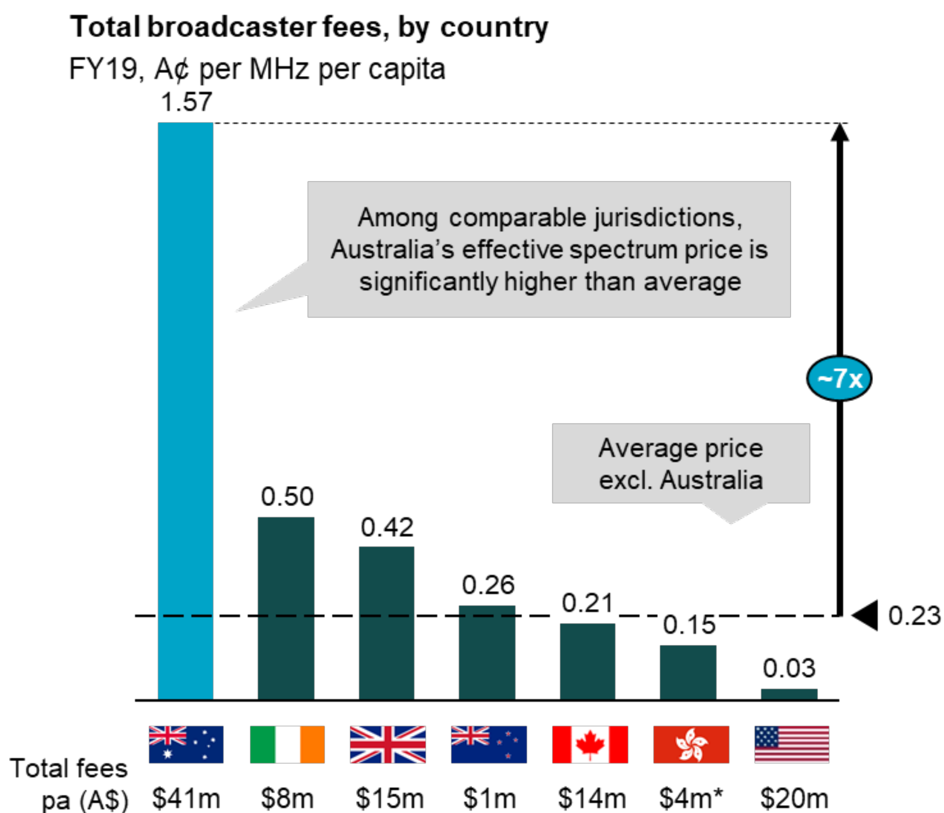
In the past, the unique revenue tax on TV broadcasters (along with other regulatory impositions) was regarded as a 'quid pro quo' for the market power conferred by control of scarce TV channels permitting delivery of television to a mass audience. There is no dispute that the time for quid pro quo taxation of TV revenues is past. Many of the changes since commencement of the CBTA, which have

adversely affected the profitability of commercial TV and the sustainability of some regional TV services, are documented in the Media Reform Green Paper. Advertising spend has continued to shift to digital media, while the increasing popularity of SVOD services has further reduced the audience for free-to-air TV. The Covid-19 pandemic has exacerbated these pressures, with linear TV advertising revenues shrinking by 14-16% in the year to June 2020. These changes are adversely affecting the ability of commercial broadcasters to deliver public policy objectives - including meeting the high, fixed costs of transmitting a comprehensive range of TV services to all but the most remote households.

At the same time, the local TV industry remains subject to extensive regulatory obligations, imposing significant additional costs. Some of these obligations include:

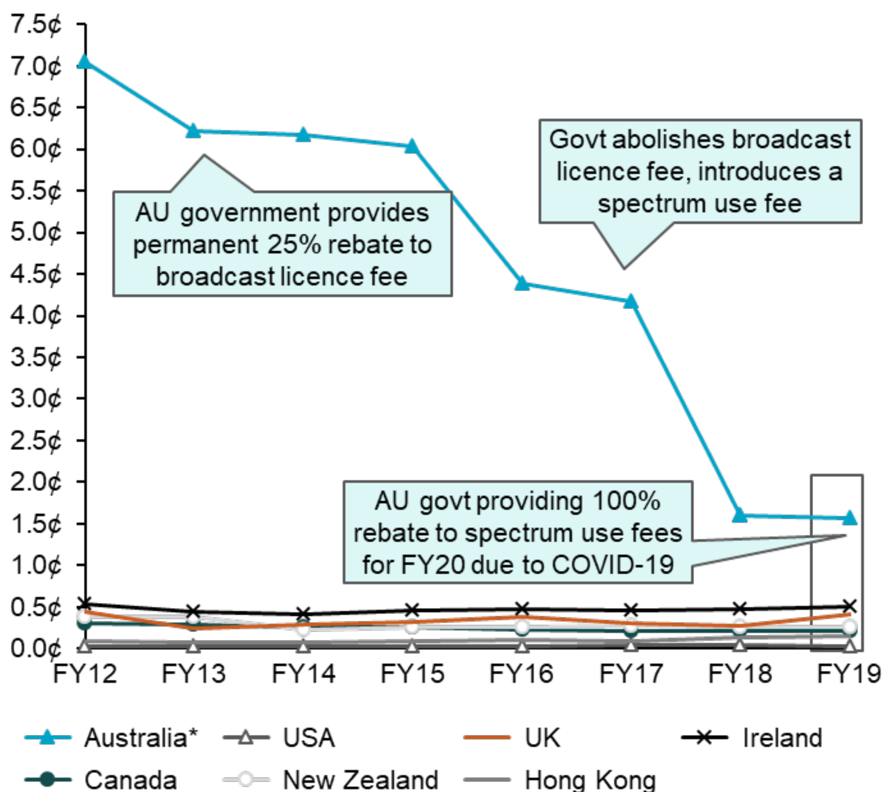
- Content obligations
    - 55% requirement of local content on all programming
    - 1,460 hours of Australian programming on non-primary channels
    - 250 points of Australian genre content in each calendar year, including commissioned Australian drama and documentaries, and acquired Australian films
- Additional obligations
    - Extensive closed captioning requirements
    - Political advertising licence conditions, including record-keeping requirements and election advertising blackout rules.

These obligations are onerous compared to international peers. As shown in the graph below, examination of other jurisdictions also reveals Australia is an outlier in exacting such high taxes in return for TV spectrum access.



*Source: Venture Consulting Analysis. * HK license fee calculated by estimating program hours by broadcaster and adding annual fee.*

Rather than a bona fide spectrum tax, the current 'interim' CBT is best viewed as the latest step in a progressive reduction over time in the bespoke, revenue-based taxation of commercial TV. International comparisons confirm that Australia still has some distance to go, to end the de facto revenue-based taxation of TV licences.



*Source: Venture Consulting Analysis. * Due to delay in fee collection, ACMA consolidated both the FY18 and 19 licence fees into the FY19 statement. Used the FY20 licence fee (A$41m) across FY18-FY19 as same methodology used for fee calculation*

Transmission of a comprehensive range of commercial TV services to all Australians is a public good. Any taxation of broadcasting licences should not operate as a disincentive to maximise TV coverage. While the value of TV spectrum for alternative uses does not provide a sound basis for calculating broadcasting licence taxes, the practice in other, similar jurisdictions suggests some level of taxation is appropriate. This typically has regard to the value to industry of certain spectrum planning and other services provided by the regulator.

3.5 Industry supports changes to simplify compliance with the CBT

Free TV supports measures to simplify administration of the CBT. However, the appropriateness and the quantum of current taxes also needs urgent examination. Any tax in aggregate should not exceed the value of benefits derived by broadcasters from ACMA spectrum management functions. Nor should it create incentives for broadcasters to reduce the availability of free-to-air TV services.

4. Specific comments in response to ACMA questions

4.1 The legislative and policy environment that the ACMA should consider in making recommendations about repealing or amending the CBTA

For the reasons outlined above, the ACMA should consider and give weight to:

- The pressing need for regulatory relief for the TV industry, as documented in the Media Reform Green Paper.
- The TV industry's legitimate expectation that a proper review of the rationale and the continuing appropriateness of the CBTA should take place before the end of the five-year interim period for which the tax was designed;
- The relevance of the objects of the *Broadcasting Services Act 1992*, including the object of promoting the availability to audiences throughout Australia of a diverse range of radio and television services offering entertainment, education and information.

4.2 The ACMA preference not to repeal the CBTA, but to improve the pricing methodology and administrative arrangements

For the reasons outlined above, the ACMA should undertake a proper review of the pricing methodology, including the implications, and the appropriateness, of charging TV broadcasters for the value of spectrum denied to alternative uses. The aggregate value of any tax should not exceed the ACMA's costs of managing the spectrum allocated to broadcasting services.

4.3 Any comments of pricing methodologies ACMA is considering and its preference for the $/MHz/Pop

As acknowledged by the ACMA, adopting a different charging framework will have a varied impact on different individual broadcasters. Accordingly, it is crucial that the proposed formula and the aggregate level of the tax are calibrated to ensure that no broadcaster is worse off as a result of any charging formula considered by the ACMA.

Individual broadcasters will need to be consulted directly by the ACMA on the impact of proposed taxation models on their businesses.

4.4 Any comments on the ACMA's proposal to recommend that all CBT taxes are assessed on one particular day of the year

To the extent that the CBT continues to rely on an assessment of transmitter licences, Free TV supports the proposal to undertake this assessment once annually.

4.5 Any other matters pertinent to considering whether to amend or repeal the CBTA

For the reasons outlined above, a full review of the rationale and continuing appropriateness of the CBTA should take place within 5 years of the commencement of the CBTA. It should not be conditional on acceptance by government of the fine-tuning proposals in the current ACMA paper.