



2004 DIGITAL TELEVISION REVIEWS – 1st REVIEW
Provision of Services other than Simulcasting by Free-To-Air
Broadcasters on Digital Spectrum

August 2004



Overview

Decisions made as a consequence of the Digital Terrestrial Television Broadcasting (DTTB) Reviews will impact across the entire Australian television and communications landscape. Such decisions cannot be made in isolation or without regard to the history of media regulation in this country, the background to both the 1998 and 2000 digital terrestrial TV legislation and the specific policy objective to balance the interests of the commercial and national broadcasters, the subscription television broadcasters and new and emerging communications participants in a manner that encourages competition, innovation and choice in the interests of Australian consumers.

Many regulatory hurdles have been put in place to hinder the growth of subscription television and to provide continued protection for the commercial television networks, in particular the 5-year ban on advertising on subscription television until 1997 and the sports anti-siphoning scheme. Preservation of the commercial television networks' unique protection is inconsistent with more recent Government approaches with the effect that it is detrimental to competition and consumer welfare.

Despite the extraordinary competitive advantages given to the commercial television networks through the sports anti-siphoning regime and their exclusive use of publicly-owned spectrum to provide digital services, Australian consumers are benefiting from new and growing services providing choice, diversity and innovation with most Australians who receive digital services doing so via their subscription digital set top box and remote control.

Subscription television is a champion of competition and advocates measures which will increase competition in the entire television sector. These measures must be pursued as part of an integrated strategy of increasing the competitive pressure on the commercial networks to the advantage of Australian consumers.

The Government should test any measures which are advocated against this guiding principle. Multi-channelling by the commercial networks may strengthen them, weaken the competitive potential of subscription television, and damage the prospects of potential future commercial network licensees should the Government decide to issue a fourth and subsequent commercial television licences in the future.

The issue of multi-channelling by the commercial television networks is inextricably linked to other policy issues such as the removal of the anti-siphoning scheme and the possible provision of licences for additional commercial networks. As such, any policy decision in relation to multi-channelling should take all these other matters into consideration.

While ASTRA is not opposed to permitting the commercial networks to multi-channel per se, it should only occur at a point in the future and in a way that will not unfairly harm competition in the television entertainment market or investment in the subscription television sector.

Subscription television recently committed over \$1 billion of investment in new digital services (between AUSTAR, FOXTEL and the many channels participating in digital subscription television) and is still in a development phase.

Subject to concurrent removal of the anti-siphoning scheme, a moratorium against multi-channelling by the existing commercial television broadcasters should remain at least until 2008 allowing subscription television a fair period to consolidate the investments that have recently been made in new digital services and technology that were launched in early 2004. This is consistent with the protection given by Government to the commercial broadcasters for their digital conversion by way of the moratorium on additional commercial television licences until at least 2007. Through this moratorium, the existing commercial networks were given at least 6 years of protection from the time of the commencement of their digital services in January 2001.

Further, the current framework prohibiting multi-channelling recognised the fact that the anti-siphoning scheme restricted subscription television from competing openly with commercial networks and national broadcasters for sporting events.

As such, while the anti-siphoning regime remains in place, multi-channelling by commercial television networks should remain prohibited.

Additionally, if the Government wants to issue any new commercial television licences, such licences must be offered prior to permitting free-to-air terrestrial multi-channelling by any of the existing commercial broadcasters. To do otherwise would eliminate the prospect of a sustainable 4th commercial network emerging after multi-channelling.

The Government should not assist the commercial networks to continue to use regulation to suppress the threat of competitive entry. Hence, the guiding principle for the Government in these policy areas should be: what course of action will best encourage the entry and success of sustainable competitors to the existing commercial networks, so as to maximise the welfare of Australian consumers.

Government policy changes which would further entrench the existing commercial networks – such as allowing them to multi-channel – should not occur if that merely serves to stifle competition from subscription television. Nor should it occur unless it is allied with other developments which will increase the competitive pressure on the commercial networks, and increase the competitive diversity in subscription television, such as allowing additional commercial licences to be issued. The Government needs to implement a clear strategy of properly enabling the competition that subscription television represents and allow it to grow and establish as a sustainable competitive presence in broadcasting.

Australian digital television take-up will continue to grow under the existing competition regulatory framework, even though it is particularly weakened by the anti-competitive sports anti-siphoning regime.

Viewers can already choose from a wide variety of digital services through a variety of delivery platforms, including free-to-air services, subscription services and DVD services. That growth can only be maintained through a stable and fair regulatory

environment which treats equitably all those who invest and provide services for Australian consumers.

ASTRA, representing over 50 separate subscription television businesses, recommends an integrated, pro-competition policy:

- **Do not allow singular, short term measures such as multi-channelling which will merely strengthen the competition protection for the commercial networks and weaken potential competition from subscription television and others;**
- **Do pursue measures which will enable competition from subscription television such as the abolition of the sports anti-siphoning rules;**
- **Do not allow free-to-air television services to move into a ‘pay’ TV model using publicly owned terrestrial spectrum granted to them for other purposes; and**
- **Do pursue measures which enable a competitive entertainment market, beneficial to consumers.**

ASTRA recommends that subscription television be afforded a similar level of investment certainty to that afforded to the commercial free-to-air TV networks for digital conversion.

ASTRA recommends that any relaxation of the prohibition on commercial TV free-to-air multi-channelling not occur unless the anti-siphoning regime is completely removed. Expiry of the current anti-siphoning regime is due in 2010.

ASTRA would not oppose free-to-air multi-channelling any time after 2008, as long as anti-siphoning regulation is removed first. This then allows at least a four year period from service launch to bed down the digital investment made by ASTRA’s members and is consistent with the assistance already provided to the commercial broadcasters for their own digital investment.

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1. Introduction

The Australian Subscription Television and Radio Association (ASTRA) appreciates the opportunity to respond to the matters raised in the *Provision of Services Other Than Simulcasting by Free-To-Air Broadcasters on Digital Spectrum* (the **Issues Paper**) prepared by the Department of Communications, Information Technology and the Arts (**DCITA**).

ASTRA provides this submission on behalf of its members. ASTRA's members include the subscription television platforms and individual channels encompassing over 50 separate Australian and international businesses. A full list of ASTRA's members can be found at www.astra.org.au/members.asp.

ASTRA maintains that the policy context for this review is the environment of digital communications, wired and wireless, terrestrial and non-terrestrial. Digital television will affect all Australians, both rural and urban and a policy issue as far-reaching as terrestrial multi-channelling will have consequences for all industry participants competing to provide television entertainment.

2. Subscription Television Industry Overview

The subscription television sector has spent more than \$8 billion in the development of Australian television.

The most recent large investment has been the provision of new digital services from March 2004 on both the AUSTAR and FOXTEL platforms with a total investment of over \$1 billion. In addition, OPTUS in mid-2003 launched the C1 satellite that is largely used to deliver these new digital subscription television services.

ASTRA's members have been, and continue to be, the drivers of digital television innovation in Australia.

Since digital launch, AUSTAR and FOXTEL's digital subscription sales have passed 500,000, while albeit in a considerably longer period, more than 400,000 digital terrestrial television set top boxes have been sold.¹ A total of 350,000 digital terrestrial set top boxes were reported by Digital Broadcasting Australia (DBA) as having been sold by June 2004.²

Commercial television in Australia is very profitable. In the most recent financial results released by the Australian Broadcasting Authority (ABA), commercial television reported almost \$3.5 billion in revenue with a profit of \$506.4 million in 2002-03 delivering a 23.3% profit increase over the previous year.³

It is estimated that the commercial broadcasters have invested approximately \$600 million on digital conversion.⁴ To assist the digital conversion for commercial broadcasters, the Government has placed a moratorium on additional commercial television broadcasting licences until 31 December 2006, imposed restrictions on the services that can be provided by datacasters so as to prevent any competition against commercial broadcasters and paid \$255 million worth of direct financial assistance to regional broadcasters by way of rebates on licence fees and grants to assist in the conversion to digital.

Subscription television has received no such financial assistance or specific regulatory advantage from Government.

Subscription television is a relatively new but increasingly important competitor in the Australian television entertainment market. It has introduced new voices, new players and new outlets for Australian and international content. ASTRA's membership totals 58 entities, including platforms and channels, representing 50 different media and communications businesses, 20 of which are Australian owned or based in Australia.

Across the subscription television sector and the many suppliers which provide services from technology, to sales, to installations, to programming enterprises – the direct employment that our sector generates exceeds more than 5,000 jobs.

¹ Mark Day article "Almost a million turnover to digital", The Australian 12/8/04

² Ian McGarrity, Digital Broadcasting Australia (DBA), Network Insight 8 June 2004

³ ABA 2003-03 Broadcasting Financial Results

⁴ Ian McGarrity, DBA, 8/6/04

Subscription television is also the major investor in Australian broadcasting in the past decade – in cable and satellite infrastructure, broadcasting systems and programming investment, in new and acquired programming from a range of local, independent and overseas sources.

ASTRA's members together provide at least seven independent news and information channels along with an extensive range of movie, documentary, children's, sports, arts, general entertainment, games, music video, audio and language channels.

All participants in subscription television have invested heavily and substantial losses have been incurred by many in order to bring new and innovative services, diversity and choice to Australian consumers.

The ACCC-approved content sharing arrangements between FOXTEL and OPTUS Television in 2002 for subscription television, and the subsequent developments with the launch of the new OPTUS C1 satellite, digitisation of FOXTEL and relaunch of AUSTAR digital, providing more channels and new services, represent an opportunity for the sector to achieve sustainability and to grow, innovate and improve services to our customers.

However, the principal investors, the subscription TV platforms, remain loss-making and ongoing digital investment is required to achieve industry profitability. Clearly the sector is still in a developmental phase.

Any fundamental changes to current digital broadcasting regulatory arrangements, such as commercial network multi-channelling, threaten to return the industry to a state of uncertainty and undermine existing and future investment in digital services and technology.

Significant continued investment, competition and the evolution of new consumer services and employment cannot be robust if legislative advantage continues to be given to the dominant commercial television broadcasters whose activities in promoting interest in new digital services to date has not been overwhelming.

3. Regulatory Confinement

Background

ASTRA entered the digital debate with a submission to Government in December 1997 to provide an alternate view for Australia's transition to digital terrestrial television broadcasting.

ASTRA was concerned at the give away (or free loan) of valuable public spectrum; the opportunities to exploit the spectrum for new services including subscription TV; multi-channelling and non-broadcast services; the assumptions made about what the Australian consumer wanted and was prepared to pay to participate in Australia's digital future; and the conversion costs for broadcasters.

ASTRA acknowledged the need for a conversion path into digital for the current terrestrial broadcasters and therefore proposed the multiplex model which would create greater spectrum efficiency and leave available channels for possible auction to other entrants that could carry a number of programming, communication and data streams. This model would substantially reduce the costs of conversion especially for regional commercial stations and the national broadcasters and free up public spectrum for 'other' uses.

From the outset, ASTRA believed there should be equal opportunity for others to access the spectrum for digital terrestrial broadcasting, on-line services and other emerging communications to promote diversity and provide substantial government revenue.

At the time, the commercial TV broadcasters successfully argued that they should each be given a 7 MHz channel, to broadcast digital terrestrial television. Their argument was predicated on the notion that the spectrum would be used for high definition television (**HDTV**). Given overseas experience, ASTRA found this to be a highly dubious proposition.

In the United States the broadcasters adopted a similar tactic, arguing for HDTV, but once allocated the spectrum, they moved away from the introduction of HDTV and announced plans to explore multi-channelling instead.

However, the importance of HDTV as advocated by the commercial networks was accepted by Parliament. The legislation was passed in 1998 with subsequent amendments in 2000. As such the basis for the grant of the valuable slab of 7 MHz of spectrum to incumbent broadcasters is for the provision of HDTV services – to walk away from HDTV and the other provisions is to breach the express and implied commitments which the commercial television broadcasters made to Government, commitments which were the basis of the framework agreed to and passed by Parliament.

Prohibition on Multi-channelling

ASTRA notes the significant objective for the introduction of digital terrestrial television in Australia was to ensure competitive neutrality between the commercial and

national television broadcasting sector, the subscription television sector and other communication sectors.⁵

This concern was also noted at pages 15 and 16 of the Explanatory Memorandum to the 'Digital Conversion' Bill where it states that:

“the prohibition of the provision of multi channel/pay TV services would ensure that the developing pay TV sector is not unfairly disadvantaged by digital conversion of existing commercial and national television broadcasters. ...The multi-channel service/pay TV prohibition would potentially reduce the range of broadcasting services available to viewers but there are alternative delivery mechanisms (eg. satellite and cable) for these services”.

It was on the basis of the legislative prohibition on multi-channelling and assurances from Government that the commercial networks would be prevented from multi-channelling, that subscription TV continued to make heavy financial investments in rolling out its services, and associated employment and training, in both regional and metropolitan Australia.

Parliament has recognised that commercial television companies and subscription TV companies compete in a single television entertainment market and has also recognised the importance of subscription television in the Australian broadcasting environment. Parliament has sought to assist, but not guarantee, viability of subscription television by prohibiting for a period of time the commercial networks from providing multi-channel services. The reasons for the prohibition which applied then still apply now.

The commercial broadcasters are uniquely competitively advantaged in comparison with other participants in the television entertainment market. They:

- need not compete for spectrum on the open market;
- have free and exclusive loan of public spectrum to provide digital services;
- have continued protection against any new commercial broadcasters until at least 2007;
- have financial assistance for digital conversion in regional Australia (despite their continued profitability);
- have established infrastructure upon which to build;
- have a dominant market base, and consistently profitable businesses;
- have first mover advantage for datacasting;
- have strict limits on the content of any multi-channelling by the national broadcasters, ABC and SBS;

⁵ Explanatory Memorandum to the Television Broadcasting Services (Digital Conversion) Bill 1998 (Explanatory Memorandum), page 6

- have an opportunity for ‘backdoor’ multi-channelling via enhanced programming; and
- are protected from competition from subscription television through the anti-siphoning regime.

The ban on multi-channelling of any description is a fundamental plank of the digital TV policy in light of the extraordinary competitive advantages already given to the commercial networks.

This policy was confirmed in the Government’s digital TV decisions implemented in 2000. Although there was a further concession under the guise of ‘enhanced services’ which allowed limited use of multi-channelling for unforeseen ‘overlaps’ of major events with, for example, a scheduled news bulletin, there was further confirmation of the ban on multi-channelling:

“Television broadcasters will not be allowed to use their digital spectrum for multi-channelling (the provision of multiple separate programs) or pay television” (Minister’s statement 21/12/99).

It would be an extremely poor policy outcome if the investment of over \$8 billion (and a further \$1 billion for new digital services) in Australian subscription television by infrastructure providers, content providers and creators – encouraged by Government policy - were to be undermined by the introduction of an anti-competitive terrestrial multi-channelling regime that offers unclear and indeterminate consumer benefits.

Ban on new commercial TV licence until 2007

The moratorium on the introduction of new commercial television services is also a fundamental part of the integrated regulatory policy for the introduction of digital terrestrial television broadcasting.

In fixing Australia’s digital television policy in 1998, Parliament banned the issue of further commercial television network licences until at least 2007, and linked this to a ban on multi-channelling by the incumbent commercial networks until the planned statutory reviews.

The moratorium is designed to preserve the economic viability of profitable commercial free-to-air services during the start up of digital terrestrial television. Similarly, any changes to the existing rules should not undermine the commercial or legislative framework under which subscription television has been founded in Australia nor its substantial investment in developing and delivering its digital services. This is discussed further below.

Sports rights – reform of the ‘anti-siphoning’ regime

The current digital terrestrial broadcasting legislative framework prohibiting multi-channelling recognized the fact that the anti-siphoning scheme prevented the subscription television industry from competing openly for sporting events.

ASTRA appreciates the recent limited reform to the anti-siphoning regime but reaffirms its call for further substantive reform so its members can expand the amount of live national coverage of sports events and give a better deal to the consumer and sports viewing public as well as increase the potency of competition from subscription television.

As is well documented, the Australian Competition and Consumer Commission (ACCC) joins the Productivity Commission and the ABA in recommending reform of the scheme. Sports bodies and their representative sports management companies have called for reform and in some cases abolition of the scheme. Advertisers, through the Australian Association of National Advertisers (AANA), have called for reform of the scheme.

The only sector opposed to real reform is the free-to-air television industry, whose interests continue to be protected under the current scheme in the form of a statutory competitive advantage. Any impartial observer would seriously question why the commercial networks continue to oppose reform and even seek to increase the number of listed events and to extend the duration of the application of the list – when they have a long established track record of hoarding and not broadcasting ‘protected’ listed events to the direct detriment of the Australian television consumer.

ASTRA’s monitoring of both the current anti-siphoning list of events and the revised list to take effect from 1 January 2006 shows continuing disregard by the networks to broadcast the ‘protected’ listed events. Just 10% of the listed events received any coverage in May 2004 and this becomes a mere 2% of such events broadcast live. In June 2004, again only 10% of events on the current list (and 11% of the revised list) received any coverage and just 5% of such events were broadcast live.⁶

As mentioned earlier, the guiding principle for the Government in these policy areas should be: what course of action will best encourage the entry and success of sustainable competitors to the existing commercial networks so as to maximise the welfare of Australian consumers.

ASTRA recommends reform of the anti-siphoning regime by its complete abolition – certainly prior to any multi-channelling by the commercial networks - or at a minimum and independent of multi-channelling, substantive relaxation of the rules, in order for subscription television to provide competition to the commercial television networks to the ultimate benefit of consumers.

Clearly, there has not been and currently is no incentive or encouragement for the commercial broadcasters to broadcast most of the programming protected by the list

⁶ ASTRA monthly monitoring report of free-to-air broadcast coverage of listed events, 30 July 2004

live and full as most consumers prefer. Continued preclusion of competition for broadcast of sports programming is not in the best interests of Australian consumers.

4. International Experience

United Kingdom

Overview

The television industry in the United Kingdom (**UK**) is truly unique - dominated since its inception by the Government run BBC. A cosy duopoly with ITV gave way to some competition from the new commercial operators - Channel 4 and Channel 5, until very recently when the subscription television industry through BSkyB began providing significant competition for consumer attention.

On 15 November 1998, digital terrestrial broadcasting commenced in the UK. Six multiplexes were allocated by the Independent Television Commission (**ITC**) allowing the broadcast of both free-to-air and subscription digital services. Three of these multiplexes were used to provide new digital pay TV services first launched as ON DIGITAL then relaunched as ITV Digital in April 2001.

ITV Digital collapsed in a mire of debt on 24 May 2002, almost three and a half years after its original launch.

The ITC announced on 4 July 2002 that it was to award the digital terrestrial multiplexes operated by ITV Digital to a consortium made up of BBC and Crown Castle. This service began being retailed to consumers as 'Freeview'.

The Freeview platform is supported by a separate service company owned by the BBC, Crown Castle and BSkyB called 'ServiceCo' which provides marketing and technical services. It is currently made up of 32 television channels of which 8 are owned by the BBC and 2 more of which are jointly owned by BBC Worldwide and Flextech (through the joint venture UKTV); 21 radio services, 10 of which are owned by the BBC; and 4 interactive and text services, 3 of which are BBC services.

In the UK, there are now 32 free-to-air digital channels and five analogue channels.

By the end of March 2004, 3,699,100 households had Freeview. Overall 53% of UK households had switched to digital television.⁷

In March 2004 a subscription extension aimed at consumers able to access the old ITV Digital boxes was launched: TopUP TV. TopUP TV consists of 10 channels costing subscribers an initial installation fee and an ongoing monthly fee. There is no return path and therefore no interactivity and no 'on demand' services offered.

In terms of subscription television services, by the end of March 2004 digital satellite was being subscribed to by 6,956,000 households. At the same time approximately 3,300,000 households were cable television subscribers of which 2,400,000 were digital cable subscribers (72% of the overall cable number). The total of digital

⁷ OFCOM Report on Digital Television Q1 2004

subscription television households was 9,373,194 and the total overall number of subscription television households was 10,289,939.⁸

Analysis

Both Freeview and TopUP TV have been cited in various forums and by various industry participants⁹ as successful examples of models of multi-channel services – the implication being that such models would be useful to pursue in Australia. The penetration and success of these services are longingly viewed as solutions to the slow take up of free-to-air digital television in Australia.

It is however important to recognize that both services are specific to a set of circumstances peculiar to the UK.

Freeview's success and high penetration rate is a product of the failed ITV Digital project. The ITV Digital business lost the £1.2 billion investment made by its investors (which included a considerable amount of Government money). It is worth noting that as ITV Digital began to crumble, it had turned to the BBC for help – a plea which the BBC rejected, knowing that once ITV Digital collapsed, the BBC would be in a strong position to take over its digital platform. ITV Digital's success however, lay in introducing into thousands of UK households digital set top units that have been able to be exploited and capitalized upon by the Freeview consortium.

The Freeview consortium is heavily invested in by the Government backed BBC (itself the largest and most impressively funded broadcaster in the world¹⁰).

Here therefore lies Freeview's success:

1. the initial 'leg up' it received from the failures of ITV Digital; and
2. the continued involvement of the BBC.

Committed to drive digital take up and to be accessible to as many payers of its licence fee, the BBC's involvement in Freeview has provided the backbone to the Freeview service. It was seen as the 'last chance' for digital terrestrial television and crucial to assist the Government to be able to realize an analogue switch off by 2010, a policy to which the Government is committed so as to free up spectrum for lucrative public auction. Since experience around the world has indicated that those countries which auction spectrum first (as new technologies are introduced) tend to raise most revenue, the industry was under pressure from Treasury to come up with a solution which would ensure that analogue switch-off would not be delayed. It also coincided with the BBC's mandate to ensure universal access to its services for free wherever possible.

⁸ OFCOM Report on Digital Television Q1 2004

⁹ Briget Godwin, Regulatory & Business Affairs, Seven Network; Paul Walsh, Network Manager-Regulatory, Network Ten – Network Insight 8 June 2004

¹⁰ The UK Government granted the BBC £2.6 billion to fund its activities in 2002/03

“[The successful launch of the Freeview service] enabled the BBC to offer subscription-free access to all its digital television and radio services, while rescuing the ailing Digital Terrestrial Television (DTT) platform.”¹¹

For example, the initial marketing plan for Freeview relied in part on a major on-air and off-air promotion campaign by the BBC such that in one year every UK adult would have on average been exposed to a minimum of 100 on-air messages from the BBC promoting Freeview. The BBC also received significant Government support for its involvement in Freeview.

Freeview costs the BBC £1.25 million per year in marketing, £1.5 million per year for coding and multiplexing and between £7.2 and £8 million per year for retransmission. The overall cost of Freeview is approximately £10.7-£11.5 million each year funded through the BBC’s licence fee income.¹²

Crown Castle’s continuing involvement with Freeview was crucial to protect its investments made in 1998 with both the BBC and ITV Digital.

BSkyB’s involvement in the project was valuable in being able to “increase the awareness of the Sky brand in a wider range of households and increase its advertising revenue.”¹³

The BBC and Freeview are clearly not driven by commercial objectives or discipline as would be necessary for any Australian alternative. There is no need to provide a return on investment for private shareholders. In Australia, there is no equivalently funded body to take the BBC’s role in such an arrangement.

TopUP TV is a ‘subscription’ extension to a consumer’s regular digital service providing additional programming for a monthly fee. Consumers must either have the ITV Digital set top unit or be willing to purchase a set top unit in order to receive the service. The business model works in part through the monthly subscriptions that are received but also through revenue from advertising which is sold at a premium based on the pitch that this audience is a ‘hard to reach’ audience that does not have other subscription services through which such messaging can be delivered.

TopUP TV in part encourages users of services such as Freeview to ‘upgrade’ and eventually to become fully committed subscription television consumers. The service as it currently stands is not seen as being value for money relative to other comparable digital subscription television offerings (i.e. BSkyB’s lowest cost package, Telewest’s cable starter package and NTL’s cable base pack).

¹¹ National Audit Office review: The BBC’s investment in Freeview – Response from the BBC’s Board of Governors - May 2004

¹² National Audit Office review: The BBC’s investment in Freeview – Response from the BBC’s Board of Governors - May 2004

¹³ National Audit Office review: The BBC’s investment in Freeview – Response from the BBC’s Board of Governors - May 2004

United States

The United States has the most developed television market in the world. It also enjoys one of the most unregulated environments relative to other countries. There are no local content requirements and no sports anti-siphoning regimes.

The cable television industry commenced in 1955 and has been offering competition to free-to-air stations for almost 50 years.

Digital terrestrial broadcasts began in the United States on 1 November 1998 with a deadline to commence broadcasting by 1 May 2002. There were 1155 stations broadcasting in digital in 203 geographic areas by February 2003.

The deadline for the full switchover to digital is 31 December 2006. However, broadcasters may keep their analog television service beyond this date if:

1. one or more of the largest television stations do not begin digital transmission by the deadline through no fault of its own; or
2. less than 85% of television households in a market can not receive digital signals (either from free-to-air signals or from a retransmission on a cable service that supplies all the local digital free-to-air services).¹⁴

A significant flexibility has been provided to broadcasters as to what services they are able to provide using the 6 MHz of bandwidth provided for the purpose of digital services. However there are still significant recognitions made to the value of this bandwidth:

“Broadcasters are granted great flexibility in how they use their new spectrum, provided that uses do not interfere with the provision of over-the-air television programming. Broadcasters are still bound by the public interest standards that apply to broadcast television. DTV licence holders must also pay the Federal Government a fee for ancillary and supplemental (subscription) DTV services. In requiring fees for proposed subscription services, Congress’ goal is to ensure that broadcasters pay approximately what they might pay if the spectrum were auctioned. Thus, the public receives some portion of the value of the spectrum assigned to broadcasters.”¹⁵

ASTRA is mindful of the unique distinctions between the US and Australian markets and seeks the opportunity to comment further should any of these US experiences be seen as attractive enough to warrant detailed consideration in an Australian context.

Subscription Services and Competition

More than 80% of American households receive television services from subscription providers. In June 2003 over 21% of subscription TV subscribers or 20.4 million

¹⁴ Balanced Budget Act of 1997

¹⁵ United States Federal Communications Commission’s Working Paper 37: “Broadcast Television: Survivor in a Sea of Competition”, September 2002, pg 87

households were satellite customers. Most terrestrial free-to-air services are retransmitted on cable and satellite.

With regard to advertising, despite the subscription television industry's advertising revenue growing year on year in the United States, it has done nothing to reduce the commercial free-to-air share of revenue which, over the last few years, has grown at a faster rate than subscription television.

It is in the context of this developed market environment that recommendations made by US bodies such as the Advisory Committee on Public Interest Obligation of Digital Television Broadcasters to encourage development of digital services (as has been included in the Department's Issues Paper) need to be read. In developed markets, such as the United States, subscription television is not as vulnerable to the offering of various incentives and advantages to commercial free-to-air broadcasters, as the sector is in Australia.

5. Free-to-Air Terrestrial Multi-channelling

Background

As described previously, the digital terrestrial television broadcasting legislative framework incorporates a prohibition on multi-channelling by commercial television broadcasters and limits on multi-channelling by national broadcasters. In part this was designed to minimize the impact of new digital FTA services upon subscription television which was then, as it is now, in a developmental stage.

This also recognised the inability of the subscription television industry to compete openly for sporting events due to the competitive advantage given to the free-to-air networks under the anti-siphoning scheme.

Current Entitlements

National Broadcasters

National broadcasters are able to provide ‘multi-channelled national television broadcasting services’ for programs that include educational programs, regional news and current affairs, science and arts programs, children’s programs and occasional dramas. This is a very broad range of programming opportunities provided to the national broadcasters that for the most part they have failed to capitalize upon.

Commercial Broadcasters

Multi-channelling by commercial broadcasters is prohibited. However there are some limited opportunities to exploit and experiment with enhanced programming provisions.

Demand for multi-channelling?

ASTRA understands that NO commercial network seeks the ability to multi-channel independent of any other policy change.

The Seven Network has proposed that multi-channelling while initially free should be operated under a subscription basis after 2007. Network Ten has only recently indicated its interest in being able to multi-channel but only on the basis that it too can operate such services on a subscription basis and that only the incumbent terrestrial broadcasters be allowed to do so. In other words, Network Ten wants to exclude any new entrants to competition.

The Nine Network has indicated that it does not support movements towards multi-channelling citing decreases in program quality, audience fragmentation and consequently insufficient advertising revenue to support additional associated costs.¹⁶ The fragmentation of audiences due to the number of niche channels offered by the UK’s ITV Digital service and the low advertising revenues that it was able to

¹⁶ Creina Chapman, Director, Regulatory & Corporate Affairs, PBL Media – Network Insight 8 June 2004

subsequently generate are seen as one of the most significant contributors to ITV Digital's failure.

ASTRA's View

ASTRA sees the issue of multi-channelling of the commercial networks as being inextricably linked to other policy decisions such as the removal of the anti-siphoning scheme and the issue of the possible provision of licences for additional commercial television services.

Multi-channelling by commercial television licence holders and broader multi-channelling abilities for national broadcasters should not be introduced until the subscription television sector has moved away from its developmental stage. The sector continues to incur heavy losses by the major providers and has only recently begun the marketing of its new investments in digital services. Furthermore the subscription television industry is now only in its ninth year whereas the commercial television industry has had over 48 years of protected opportunities for growth and profit.

ASTRA seeks for its members a comparable policy position to that which was delivered to the commercial television industry which, in order to protect their digital conversion investments, received a moratorium from competition in the form of a ban on any additional commercial television licences being issued until at least after 31 December 2006. For consistency, the moratorium against terrestrial multi-channelling should be continued until at least 2008 – providing similar opportunity for subscription television to consolidate the investments that have been made in digital technology without major change in the competition framework.

There is no good policy objective to be achieved by changing the rules to allow free-to-air television services to move into a 'pay' TV model using public spectrum granted to them for other purposes.

In addition, to retain anti-siphoning regulation while giving exclusive multi-channelling opportunity to the existing commercial broadcasters would have deeply destabilising consequences for the capital markets and for investment confidence in legislated Government policy; and for the development of competition and sustainable services in subscription television which has never sought anything other than a level playing field.

As indicated previously, ASTRA considers it would be poor public policy to introduce multi-channelling prior to a decision on whether or not to introduce additional licences for the commercial television industry and then and only then multi-channelling should only be introduced at a point when the anti-siphoning scheme has been dismantled.

The subscription TV sector in Australia now accounts for 13-15% of national TV viewing. The free-to-air networks still dominate with 85% of viewing. Allowing free-to-air multi-channelling by the existing, protected commercial networks would be to effectively give new commercial television licences to those companies only – and they would use their first-mover advantage to lock up and hoard available programming (as they continue to do with sport using the anti-siphoning regime) and corner any additional advertising revenue that may be squeezed out of the market. The

prospect of a sustainable 4th network emerging after such multi-channelling would be eliminated.

If, at some point in the future, the commercial networks are allowed to multi-channel using public spectrum, it will be important that they continue to face the same regulatory obligations in respect of each individual channel, for example to provide Australian content. Any other approach would effectively release the commercial networks from the terms of the public policy bargain which has historically applied.

Other Options for Changing the Rules - Suggested in the Issues Paper

Current flexibilities for Free-to-Air Broadcasters

ASTRA does not support any additional flexibilities being offered to commercial or national broadcasters. Current flexibilities to the existing framework which were argued for by the free-to-air broadcasters to be used as additional drivers for digital services have not been fully utilised by the commercial broadcasters and in the main have not succeeded when implemented by the national broadcasters.

For example free-to-air broadcasters have the ability under the BSA to use multi-channels to transmit a live event designated by the ABA which has run over schedule and would otherwise clash with a scheduled news program. They may also develop data services and products to enhance their existing services.

Relaxation of Program Enhancement Restrictions

ASTRA seeks the ability to comment further when details of any specific suggestions are provided.

Permission to Time-Shift Programming

This does not appear to be a viable option assuming the continued importance to the Australian community (and to the free-to-air broadcasters) of having regulated time zones on free-to-air television in order that children can be protected from material that may be harmful to them or to ensure that programming which is unsuitable for children is limited to being shown at times when children will not be watching, such as later in the evening.

Variations between Analogue and Digital and SDTV/Analogue and HDTV Program streams

There are a number of suggestions given with regards to possible variations between Analogue and Digital or between SDTV/analogue and HDTV program streams - all of which require the spectrum for one stream being traded off for another stream. This problem is obviously avoided under the current simulcast provisions. The trade-off would not only affect consumers of television including those that have invested in different equipment formats. It would also affect producers of television who have invested in certain production equipment on the basis of government regulation.

Variations between metropolitan and regional licence areas

Significant concessions were made for regional commercial broadcasters to encourage their conversion from analogue to digital terrestrial services in recognition of 'cost' pressures for such licensees. These include a delayed digital start-up and delayed analogue switch off date (currently scheduled in metropolitan areas for 2008); financial assistance from Government; and limited ability to vary simulcast requirements.

The principles for an integrated, pro-competition digital policy, as set out by ASTRA apply equally to metropolitan and regional areas.

6. Subscription Terrestrial Multi-channelling

Paragraph 7(1)(p) to Schedule 2 and clause 36 of Schedule 4 of the BSA prevent commercial television broadcasting licensees and national broadcasters from using their digital spectrum for the provision of commercial radio, subscription broadcasting or subscription or open narrowcasting.

The Issues Paper asks the question of whether to allow the commercial networks to provide subscription terrestrial multi-channelling using the publicly-owned spectrum they were loaned exclusively and at no extra charge, i.e. the normal unchanged licence fee structure, which ranges from 5% to 9% of gross revenue, to provide “free” television services.

ASTRA does not support any change to the current policy.

The issue of “subscription” terrestrial multi-channelling is critical to the health and sustainability of Australian broadcasting and health and sustainability of competition within the industry.

Commercial television networks have been loaned a scarce public asset – broadcasting spectrum and given a unique legislatively enshrined protection to provide “free” digital television services. There can be no public benefit in allowing these same networks to provide “pay” television services using a public asset given to them for the opposite purpose.

Clearly, any form of subscription multi-channelling on the public spectrum loaned to the commercial networks to provide “free-to-air” digital services is unacceptable and would be a complete subversion of the purpose for which the public asset was loaned.

“... it is like giving them use of publicly-owned waterfront land on the condition that they provide a public park - and then allowing them to lock the gate to the park and build themselves blocks of apartments for private sale.”¹⁷

In the UK, it is also a risky business proposition – evidenced by the collapse of ITV Digital in 2002. Recent models, such as recently launched TopUP TV have been more about leading consumers to subscribe to a larger subscription television service and less about a sustainable long term outcome.

¹⁷ Kim Williams, FOXTEL, Australia-Israel Chamber of Commerce Lunch 27 May 2004

7. The Long Term Integrated Approach towards the Development of Digital Television

It is crucial that the Government carefully balance any change to the digital television regulatory framework as well as any other accompanying regulatory framework that may affect the broader television industry in order to provide a stable environment for investment by industry and for consumers.

Digital Television's Growth

It would be unwise for Government to make an erratic and isolated policy decision without reviewing the development of digital television and the projected growth of this entertainment service in the context of all developments and activities.

It is too early to say whether free-to-air digital services can be claimed a success or failure. The previous Minister for Communications Information Technology and the Arts, the Hon Daryl Williams recently claimed that “the rollout of digital free-to-air television is progressing very well”¹⁸ and that he was “confident that the Government’s policies are enabling [a smooth transition to digital television broadcasting] to take place”¹⁹.

On the other hand there were only 345,000 digital receivers sold to retailers by suppliers as at the end of April 2004²⁰. This amounts to just over 4% of homes being able to receive digital terrestrial television.

With this level of penetration it would appear unwise to allow for a variation on service between the analogue and digital service. There was a sound policy rationale for the simulcast provision in the first place. The assumption here was that consumers of analogue services should not be disadvantaged should they choose not to move to digital early in the conversion period. Given the take-up rate it would be clearly unwise to change this policy at this point given the level of disadvantage that is likely to be created for consumers who have not yet adopted digital.

In addition, when the national broadcasters have attempted to use their extended opportunities under the legislation there have been some spectacular disappointments. For example in May 2003, ABC Kids and Fly TV ceased being broadcast by the ABC due to an absence of funding for these services.

The facts are:

- There has been a small amount of promotion so far invested into the marketing of digital terrestrial television, the most significant of which has been a television campaign by the commercial free-to-air broadcasters that ran during 2003.

¹⁸ Minister’s address to the Australian Broadcasting Authority 24 June 2004

¹⁹ Minister’s address to the Australian Broadcasting Authority 24 June 2004

²⁰ Minister’s address to the Australian Broadcasting Authority 24 June 2004

- Digital terrestrial television is estimated to be accessible to between 85% and 90% of Australia’s population. 75% of the population has access to digital terrestrial services by all broadcasters in their licence areas.²¹
- There is a parallel able to be drawn from the growth in numbers of sales of digital receivers and the re-launch of AUSTAR Digital and FOXTEL Digital services – i.e. the encouragement of people to invest in digital technologies in the subscription television sector encourages an expansion in the investment in other services and equipment such as digital television sets and receivers. Subscription television is helping to stimulate growth in terrestrial digital television.

Sequence of Events

Carefully unwinding the trade-offs

The reality of broadcast policy is the interdependency both historically and presently of policies and trade-offs. ASTRA is supportive of unwinding these trade-offs to progress the development of digital terrestrial television inter alia but in a managed and appropriate way and so as to maintain the public policy goal of ‘competitive neutrality’ i.e. that similar services should not receive any significant advantage or detriment.

This is consistent with the objective of the BSA “*to provide a regulatory environment that will facilitate the development of a broadcasting industry in Australia that is efficient, competitive and responsive to audience needs.*”²²

The steps that are most appropriate to achieve this competitive neutrality are:

Step One – Allow for the introduction of additional commercial licences

To introduce multi-channelling without deciding whether or not to permit additional commercial television licences to be offered to the community is poor public policy that will further entrench the incumbent commercial television operators and further unbalance competition. It would in effect give new commercial television licences only to the incumbent commercial broadcasters and lock out the benefits of new competition, diversity and investment growth in television broadcasting.

Step Two – Remove Anti-siphoning Provisions and permit Free-to-Air Multi-channelling

The anti-siphoning scheme preventing the subscription television industry from competing with the commercial television networks for the acquisition of sporting rights in Australia must be abolished well before the start date for any commencement of “free-to-air” multi-channelling.

²¹ Attachment C – DCITA Issues Paper: “Provision of Services other than Simulcasting by Free-to-Air Broadcasters on Digital Spectrum” – May 2004

²² BSA 1992 section 3(b)

Both multi-channelling and anti-siphoning are discussed at length in the 2000 Productivity Commission report into the BSA as well as the 2003 ACCC Report on Emerging Market Structures in the Communications Sector which addressed the integrated Government policies of multi-channelling, anti-siphoning and additional commercial television licences.

The prohibition on terrestrial multi-channelling should remain so long as the commercial broadcasters have the unique and massive competition advantage of the sports anti-siphoning regime.

8. Conclusion

As stated, the issue of multi-channelling by the commercial television networks is inextricably linked to other policy issues such as the removal of the anti-siphoning scheme and the possible provision of licences for additional commercial networks. Any policy decisions regarding digital terrestrial television cannot be taken in isolation.

ASTRA recommends an integrated, pro-competition policy:

- Do not allow singular, short term measures such as multi-channelling which will merely strengthen the competition protection for the commercial networks and weaken potential competition from subscription television and others;
- Do pursue measures which will enable competition from subscription television such as the abolition of the sports anti-siphoning rules;
- Do not allow free-to-air television services to move into a 'pay' TV model using publicly owned terrestrial spectrum granted to them for other purposes; and
- Do pursue measures which enable a competitive entertainment market, beneficial to consumers.

ASTRA recommends that subscription television be afforded a similar level of investment certainty to that afforded to the commercial free-to-air TV networks for digital conversion.

ASTRA recommends that any relaxation of the prohibition on commercial TV free-to-air multi-channelling not occur unless the anti-siphoning regime is completely removed. Expiry of the current anti-siphoning regime is due in 2010.

ASTRA would not oppose free-to-air multi-channelling any time after 2008, as long as anti-siphoning regulation is removed first. This then allows at least a four year period from service launch to bed down the digital investment made by ASTRA's members and is consistent with the assistance already provided to the commercial broadcasters for their own digital investment.