



2004 DIGITAL TELEVISION REVIEWS – 2nd 3rd & 4th REVIEW

- Provision of Commercial Television Broadcasting Services after 31 December 2006
 - Review of the Broadcasting Services Bands Spectrum: Identification and Structural Efficiency
 - Review of Underserved Regional Television Licence Areas
- December 2004

Overview

As ASTRA has previously stated in its submission to the first digital television review, 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. Due regard must be afforded to the background of both the 1998 and 2000 digital terrestrial TV legislation and the specific policy objective of balancing 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.

In particular ASTRA sees the issue of any change to the prohibition on multi-channelling by the commercial networks as being inextricably linked to other policy decisions such as the removal of the anti-siphoning scheme and any allocation of licences for additional commercial television services.

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

ASTRA's position is:

- Allow for additional commercial networks prior to any change to the prohibition on commercial television multi-channelling. This will prevent new entrants having only limited access to available content which would otherwise be hoarded by commercial networks for use for multi-channelling.
- Remove the anti-siphoning list while concurrently permitting the commercial television networks to multi-channel. This is to balance the increased competition faced by the subscription television sector through multi-channelling with the increased competition faced by the commercial television networks through open and fair competition for sporting event rights.
- Permit the simultaneous removal of the anti-siphoning list and changes to the prohibition upon multi-channelling at a time in the future (ASTRA recommends 2008) so as to not unfairly harm competition in the television entertainment market or investment in the subscription television sector. This recognises that the \$1 Billion investment in new digital television services by subscription television and continues Government policy to protect such investment.

ASTRA notes the recent commitment made to commercial radio broadcasters by the Government which included a five year freeze from new competitors in

recognition of the costs incurred in introducing digital services. It is clearly accepted Government policy to acknowledge and support the broadcasting sector as it incurs the significant expenditure necessary to provide digital services to the Australian public. ASTRA seeks comparable protections on investments made by subscription television broadcasters and channels that those that have been made to commercial television broadcasters and now most recently to commercial radio broadcasters.

- Not permit public spectrum gifted to commercial television operators to be used for the provision of subscription television services.

The Government should not assist the commercial networks to continue to use regulation to suppress the threat of competitive entry. Their position is one entirely formed from self preservation without any thought to benefits to consumers created by competition and real choice. 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 and charge for public spectrum.

ASTRA's position on the other hand is that 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 thus maximising benefits to Australian consumers.

Consequently, 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.**

This submission consolidates ASTRA's contribution to the 1st Digital Television Review and offers subscription television perspectives with regards to the 2nd 3rd and 4th Digital Television Reviews.

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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 three issues papers: *Provision of Commercial Television Broadcasting Services After 31 December 2006 (2nd Issues Paper)*; *Review of the Broadcasting Services Bands Spectrum: Identification and Structural Efficiency (3rd Issues Paper)*; and *Review of Underserved Regional Television Licence Areas (4th 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 these digital television reviews is the environment of digital communications, wired and wireless, terrestrial and non-terrestrial. Digital television will affect all Australians, both rural and urban and will have consequences for all industry participants competing to provide television entertainment.

2. Provision of Commercial Television Broadcasting Services After 31 December 2006

2.1 Background

The moratorium on the introduction of new commercial television services was a fundamental plank 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.

ASTRA notes a similar commitment that has recently been made to commercial radio broadcasters by the Government which included a five year freeze from new competitors in recognition of the costs incurred in introducing digital services.

It is clearly accepted Government policy to acknowledge and support the broadcasting sector by preserving the economic viability of profitable commercial free-to-air television and commercial radio services as they incur the significant expenditures necessary to provide digital services to the Australian public.

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.

It is on this basis that ASTRA has submitted in the first digital television review that the \$1Billion investment made by subscription television to digitise its services should receive a similar statutory protection through the timed introduction of multi-channelling by commercial networks along side the removal of the anti-siphoning list at a point when subscription television is no longer in its developmental stage.

This would provide for comparable protections on investments made by subscription television broadcasters and channels that those that have been made to commercial television broadcasters and now most recently to commercial radio broadcasters.

2.2 Changes to legislation to ensure that the Government has a decision making role in the allocation of commercial television broadcasting licences

Moratorium End Date (point 1.3)

The current end date of the moratorium (being 31 December 2006) should not alter. A moratorium was agreed so as to provide protection from competition for the commercial networks and done so as to encourage their agreement to a range of policies including investment in digital technology; the commencement of digital commercial television broadcasting and the eventual cessation of analogue broadcasting as well as increased levels of captioning on commercial television services.

Should the moratorium be extended then this would undermine the agreed policy trade offs that were made or suggest that the specific digital investments that have been made are somehow in need of further protection. It is however clear that further protection for digital investments is not needed (it has certainly not been argued) and an analysis of relative size of investment amounts in relation to regular operation expenditure would suggest that this is not necessary; and that arguments proffered as to the threat of reduced commercial television quality and reduced advertising expenditures (jeopardising social and cultural objectives) appear strained when set against the reality of the current product offerings, the relative profits made by the commercial television networks¹ or against the overseas experience of increased competition.² In 2001 for example, the average margin for Australian commercial television networks was 55% larger than the global average.³

Section 40 Licences (point 1.6)

With regard to the arrangements that should apply in relation to the allocation of licences outside the broadcasting services bands (section 40 licences), it is ASTRA's view that current arrangements serve the market well and are appropriate to continue.

The need for a level playing field (point 1.7)

It is important that any new entrant have a level playing field in which to compete against incumbents. Therefore it is important that they are able to broadcast using both analogue and digital technologies so that they have access to the entire Australian television audience as opposed to just those that have invested in digital technologies. There should be no greater impediments to new players or further favours offered to incumbents that would have the effect of nobbling a new entrant.

The subscription television sector's own experience of the entrenched competitive position of the commercial broadcasters through regulatory constraint such as prohibition of advertising until 1997, the anti-siphoning regime and mandated satellite delivery using the government's AUSSAT satellite have assisted in stalling the growth of many of ASTRA's member's businesses. ASTRA does not believe it appropriate that new entrants in any sector are hindered unfairly by regulation.

Spectrum Availability (point 1.8)

It is ASTRA's view that access to spectrum, being a scarce and valuable resource from which businesses have the ability to make considerable profit will always need to be juggled carefully by planning authorities. However one of the overriding aims of digital technologies is to encourage the more efficient use of spectrum allowing for more equitable opportunities for a broader range of organisations to participate in

¹ Commercial television in Australia is very profitable. In the most recent financial results released by the Australian Broadcasting Authority (ABA) in its 2003-03 Broadcasting Financial Results, 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.

² Dawn Airey, Managing Director Sky Networks UK and Robert Pepper, Chief, Policy Development, Federal Communications Commission (US) – addresses to the ABA Conference (June 2004).

³ ABN Amro, FTA Television Time to face the FACTS July 2002 p 13.

digital terrestrial broadcasting, on-line services and other emerging communications to promote diversity and as a consequence provide substantial government revenue.

As a consequence, the result of the development of digital technology should be that more spectrum becomes available for a greater number of purposes to a greater number of participants.

The availability of spectrum for the purposes of additional commercial television services has been already identified by the ABA.⁴

Alternative Approaches (point 1.9)

ASTRA argued in its 1997 submission for the need for a conversion path into digital for the current terrestrial broadcasters and therefore proposed a 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.

ASTRA remains of the view that much can be gained from this alternative approach to current arrangements.

As for whether or not subscription television channels could be included in alternative models, ASTRA vigorously opposes any use of public spectrum for the purpose of subscription television. Not only would this undermine the over \$9 Billion investments made by subscription television operators and channels but it would abandon a long held and key policy objective of using spectrum for new or innovative services rather than to allow new entrants to duplicate existing services. It is extremely poor public policy.

As previously flagged, 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.

2.3 Conditions under which new entrants operate

Equivalent Regulation (point 2.1)

If, at some point in the future, an additional commercial television licence is awarded for the broadcast of television using public spectrum, it will be important that a new entrant face the same regulatory obligations as incumbent licence holders. This includes regulation for the provision of Australian and children's content, local content (for regional broadcasters), similar restrictions as they exist against multi-channelling and program enhancements, similar high definition broadcast requirements and the same general licence conditions. There should be a continued prohibition against the use of public spectrum for the provision of subscription

⁴ Giles Tanner, General Manager ABA, presentation at the Network Insight Digital Television Reviews Conference, 8 June 2004

television services regardless of whether it is an incumbent or a new entrant broadcaster.

Any other approach would effectively release this new commercial broadcaster from the terms of the public policy bargain which has historically applied.

At the same time, and as articulated, there is no case to be made for the regulation being more onerous on a new entrant and having to face unnecessary hurdles often against the public interest in order to limit competition – as was the case when subscription television was first introduced.

ASTRA therefore advocates a ‘level playing field’ approach.

ASTRA further advocates a competitive price based allocation system for allocation with structured opportunities for new players to enter the market.

Other conditions for commercial licences (point 2.5)

As stated above, ASTRA vigorously opposes any use of public spectrum for the purpose of subscription television.

2.4 Conversion of datacasting licences after 1 January 2007

ASTRA strongly objects to the use of datacasting transmitter licences for anything other than that for which the licences were originally intended, that is:

- To provide the maximum opportunity for new and innovative services;
- To use datacasting as a means of driving digital penetration as an adjunct to the digital services being offered by commercial, national and subscription television broadcasters.

If government were to allow datacasting transmitter licensees to commence providing additional services such as commercial television services or subscription television services it would bring into question the commitment to the use of this spectrum for new and innovative services – as it was originally intended to be used. The potential would be open for commercial television licence holders to commence ‘back door’ multi-channelling and it would also mean that the datacasting licence allocation was and is in fact a defacto allocation for new commercial television or subscription television licences.

As has been stated, ASTRA does not support the use of datacasting transmitter licences for subscription television services for the same reasons that it opposes the ability for incumbent or new entrant commercial television licence holders (as well as any national broadcasters) from providing subscription television services on public spectrum. Not only would this undermine the commitments made to and investments made by the subscription television sector; it is quite simply poor public policy to allow a valuable public resource established for one outcome to be squandered for a completely unrelated purpose.

Clearly, any form of subscription service on the public spectrum loaned to the datacasting licence holders is unacceptable and would be a complete subversion of the purpose for which the public asset was originally provided.

3. Review of the Broadcasting Services Bands Spectrum: Identification and Structural Efficiency

The Broadcasting Services Bands Spectrum is a valuable resource. The efficient allocation and use of the spectrum is a crucial consideration when determining whether current plans have met necessary requirements or are able to meet future needs.

ASTRA has had long held concerns that commercial television broadcasters may consume spectrum unnecessarily either due to poor policy decisions or due to over ascribing the amount of spectrum needed to provide the same level of cover and reception quality in digital modes as was achievable in analogue mode.

Any decision as to spectrum allocation requires considerable consultation with all industry participants (and indeed potential participants) in the digital environment and should therefore be subject to the needs of the wider industry, rather than being determined by the commercial television broadcasting licensees which has often traditionally been the case.

Between 1997 and 2000 ASTRA provided detailed comment and advocacy regarding more efficient spectrum allocation planning. The proposed approach by ASTRA is superior to that which currently exists. ASTRA's submissions at the time were largely ignored by Government and the current allocation and planning prevails. ASTRA consequently has doubts that further comment would encourage any change to the current approach.

4. Review of Underserved Regional Television Licence Areas

It has been ASTRA's consistent view that it is inappropriate to consider Regional Television Licence areas as necessarily being 'underserved'. It is instead appropriate to consider the licence areas in the context of all services available including subscription television and then to draw a conclusion.

Subscription television services are available now to nearly all Australians regardless of their geographical location. With the launch of the OPTUS C1 satellite mid 2003, AUSTAR in particular was able to commence providing satellite services to regions which had been previously unprovided for. In so doing, subscription television provides a broader range of entertainment and information than that which can potentially be provided by another free-to-air service.

In this regard, subscription television is contributing to a key object of the BSA by promoting the availability to audiences throughout Australia, and in particular those people in regional Australia, of a diverse range of television services – far superior in both choice and diversity to commercial broadcasters.

With regard to specific issues raised in the 4th Issues Paper:

- ASTRA considers it appropriate that any HDTV requirement that exists on metropolitan commercial broadcasters also exist on commercial broadcasters in all other parts of Australia. This consistency is important not only in ensuring that regional Australian's do not receive any inferior commercial television service but that there is consistent policy application. This is significant also in acknowledging the financial assistance provided to commercial broadcasters in regional Australia by Government in view of these requirements acknowledging their (in)ability to make similar investments as metropolitan licences.
- ASTRA can see no justification for exempting operator's in two-service markets from simulcast requirements. This would effectively provide opportunities for 'back door' multichannelling. ASTRA has submitted that while multichannelling is not opposed per se, it should be permitted to coincide with other reforms such as the removal of the anti-siphoning list and after the introduction of additional commercial networks.
- ASTRA notes the suggestion that an out-of-area service could be made available on a pay TV service in the solus market. While ASTRA members are not adverse to discussing such an option, there are clearly many issues – regulatory, technical and commercial - that must first be addressed. In particular, it is questionable whether the broadcast of a very localised service would be an effective use of satellite capacity and this issue would need to be considered by the retransmitted FTA service provider as, similar to recent retransmission arrangements, the acquisition of spectrum capacity would be the responsibility of those providers. This option would also be subject to suitable commercial terms being reached between the subscription television operator and the retransmitted FTA service provider.

5. Conclusions: The Long Term Integrated Approach towards the Development of Digital Television

ASTRA restates that 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.

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.

The reality of broadcast policy is the interdependency of both historic and present policy trade-offs. ASTRA is supportive of unwinding these trade-offs to progress the development of digital terrestrial television 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.”*⁵

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.

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.

⁵ BSA 1992 section 3(b)

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.

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 or datacasting 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 and now commercial radio 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 and following the introduction of additional commercial television licences. 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 television and commercial radio broadcasters for their own digital investments.