



FreeTV
Australia

44 Avenue Road
Mosman NSW
Australia 2088

T : 61 2 8968 7100
F : 61 2 9969 3520
W : freetvaust.com.au

Submission by Free TV Australia Limited

Submission to the Senate Environment,
Communications, Information Technology
and the Arts Committee

Inquiry into the Broadcasting Services
Amendment (Media Ownership) Bill 2006
and related bills

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Executive Summary

New Digital Services

- Free-to-air broadcasters and pay TV operators must be treated equally in applying the rules governing who is allowed to bid for the new channels.
- The rationale for restricting free-to-air broadcasters' ability to bid is that the government wishes to encourage new and diverse services, the same rationale applies to bidding by incumbent pay TV operators and therefore the same restriction should apply.
- A precise definition of narrowcasting must be developed prior to the licences being issued to prevent new services from mirroring traditional free-to-air services.
- No new licence should be issued without a review.
- The review should examine if there is a public interest in granting a new licence and consider the impact on existing free-to-air broadcasters.
- If a decision is taken to issue a new licence, the licensee should be subject to the same content regulation as existing commercial free-to-air broadcasters.
- The operating costs faced by a new operator may well be considerably lower than for existing broadcasters as they will not need to replicate existing infrastructure and depending on the identity of any new entrant they may also have access to extensive content libraries at low cost.

Antisiphoning

- Free TV supports the continuation of the antisiphoning list because it ensures that all Australians can watch the most popular sporting events in Australia for free, unlike in the UK and New Zealand where viewers have to pay.
- Free-to-air broadcasters use the sporting rights that they acquire. The remaining rights are available to pay TV. Pay TV already provides complementary coverage of most events on the antisiphoning list.
- Free TV supports a "use it or lose it" scheme, provided that it looks at the acquisition and usage of listed sports by both free-to-air broadcasters and pay TV. This is necessary so that the Government can identify when rights usage is already being maximised across both platforms, as is the case with the AFL and Australian Open tennis.
- The proposed guidelines must take into account the impact on viewers of delisting some or all of an event, and in particular whether or not delisting would maximise audience access.

Television Licence Fees

- For the purposes of calculating licence fees, the revenue on new channels should be considered separately from existing channels.
- These will be new services operating in an uncertain environment, subject to a great deal of competition. In this context a 9% of gross revenue levy would be a huge burden.
- Separate consideration of the revenue on new channels is consistent with the regulatory protection given to other emerging services such as pay TV.
- These services should be exempt from licence fees until they are viable at which time a license fee should be levied separately from the main channel.

Enforcement Powers

- Any extension of ACMA's powers must be consistent with the Broadcasting Services Act requirement that ACMA must use its powers in a manner that is "commensurate with the seriousness of the breach concerned".
- The legislation should only permit powers to be used in relation to serious breaches. This objective must be reflected in appropriate guidelines on the circumstances in which the new powers will be pursued by ACMA, the defence available and any mitigating circumstances.

Introduction

Free TV Australia Limited (**Free TV**) is the peak body representing all commercial free-to-air television licensees in Australia.

Free TV welcomes the opportunity to make a submission to the Senate Committee's Inquiry into the Broadcasting Services Amendment (Media Ownership) Bill 2006 and related bills.

Free TV limits its comments to the following aspects of the media reform bills before the Senate Committee:

Section 1: New Digital Services

Section 2: Antisiphoning

Section 3: Television Licence Fees

Section 4: Enforcement Powers

Section 1: New Digital Services

1.1 Use of datacasting spectrum

Free TV submits that rules governing who is allowed to bid for Channel A and Channel B should apply equally to both free-to-air broadcasters and pay TV operators.

The rationale for restricting free-to-air broadcasters' ability to bid is that the government wishes to encourage new and diverse services, the same rationale applies to bidding by incumbent pay TV operators and therefore the same restriction should apply.

Free TV is concerned about the proposal to permit the use of the spectrum for narrowcast services given that the current definition of narrowcasting is imprecise and unsatisfactorily distinguishes between commercial television and other new services.

The definition of narrowcast must be clarified in the Broadcasting Services Act prior to the allocation of any further narrowcast licences. The current narrowcasting definition has led to numerous instances of narrowcasters providing commercial broadcasting services.

The burden of proof for showing that a service is not a backdoor commercial free-to-air broadcast service should be on the prospective service provider. Prior approval by ACMA should be required before the licence is approved.

Any new services must not mirror traditional free-to-air television services.

1.2 Decision making process

The Government has concluded that there is no case for allocation of any new terrestrially-delivered commercial free-to-air television licence at least before the end of the simulcast period. This is because the existing number of commercial free-to-air television licences is critical to broadcasters' ability to deliver high quality broadcasting services to all Australians, which fulfil a range of public interest broadcasting objectives, for example local news services, Australian content, Australian drama and children's programming.

For the same reasons there is no case for allocation of any new commercial free-to-air television licence on any delivery platform. Any new services (delivered terrestrially or via another platform) would have the same effect on the existing broadcasting sector, the local production sector and viewers.

Free TV supports the Government's decision to amend the Broadcasting Services Act to ensure that a decision to introduce a new licence is taken at the highest level. The amendment recognises that this is an important matter of public policy which requires a careful weighing of any perceived benefits against its effects on the existing broadcasting sector, the local production industry and the resultant outcome for Australian viewers.

However, Free TV submits that such a significant decision should require the approval of both Houses of Parliament, rather than be left to the Minister for Communications.

At a minimum the decision to issue a new licence should be based on the results of a comprehensive review that should examine if there is a public interest in granting a new licence and consider the impact on existing free-to-air broadcasters.

Any such review should be conducted in the context of the economic and technological environment of the day and in light of international developments in broadcasting and related sectors.

A similar approach involving a review which examines the public interest in granting a new licence and the impact on the existing free-to-air broadcasters, should be taken by ACMA before any decision to issue a licence outside the broadcasting services bands.

No new licence should be issued, regardless of the delivery platform, unless the Government is convinced that the potential social and cultural costs of a new licence are outweighed by the benefits.

Any new service must be subject to and comply with the current Australian content requirements including but not limited to classification requirements, the prohibition on tobacco advertising, limitations on volume of advertising, requirements in relation to political and election advertising.

The operating costs faced by a new operator may be significantly lower than for existing broadcasters.

A new operator may already have access to delivery infrastructure as well as the ability to bundle service with an existing service currently delivered to the home.

If a new operator requires access to infrastructure, the range of options available suggests that this is unlikely to pose a significant barrier.

Depending on the identity of any new entrant they may also have access to extensive content libraries at low cost.

Section 2: Antisiphoning

Free TV welcomes the Government's continued support of the anti-siphoning rules. As stated in the Explanatory Memorandum to the Broadcasting Services (Subscription Television Broadcasting) Amendment Act 1992, section 115(2), "[the anti-siphoning list]

should ensure, on equity grounds that Australians will continue to have free access to important events. It will, however, allow subscription television broadcasters to negotiate subsequent rights to provide complementary or more detailed coverage of events”.

The list was reviewed extensively in March 2004 and a number of events were removed. There are now just ten sports - plus the Olympic and Commonwealth Games - on the antisiphoning list. The list reflects those sports consistently broadcast by free-to-air broadcasters that are genuinely events of national importance.

Free TV is confident that commercial free-to-air broadcasters use the listed sports that they acquire and that anything else is available to pay TV. Pay TV already provides complementary coverage of many events on the antisiphoning list, for example, AFL, NRL, the Australian Open and Wimbledon.

While some sporting bodies have claimed that they want to keep 'key games' on free-to-air television but also want to deal directly with pay TV, international experience proves that you cannot have it both ways.

The English Cricket Board said exactly the same thing to the English Government, and in the very next rights deal sold the exclusive, live rights to pay TV. This now means that the only way to watch this year's Ashes series in the UK is on BSkyB.

Statements that there are 1334 events on the list are misleading. 838 of those “events” comprise individual matches in the Australian Open and Wimbledon tennis tournaments and half of these “events” are not available to be filmed by anyone as the host broadcaster only provides coverage of a limited number of courts.

NRL and AFL make up a further 381 “events” and V8 motor cars a further 38, giving a total of 1257 of the 1334 "events".

Free TV supports “use it or lose it rules” provided that they are fair. In order for the use it or lose it test to accurately analyse whether delisting an event could increase coverage, it needs to take into account whether antisiphoning events are already available to pay TV, not just if they are being shown on free-to-air. Otherwise the results of the test will falsely show that events are not being adequately covered, when in fact pay TV already owns a significant portion of the rights and therefore delisting will not improve coverage.

Events that are already being covered should not be removed from the list, and the mechanism should not result in free coverage being replaced by paid coverage.

The following criteria should be included in the “use it or lose it” rules:

- *What rights were acquired by the free-to-air broadcaster and how much of these were shown*
- *Were sporting rights available for acquisition by pay TV?*
- *Was there complementary coverage of the event? If so what was it?*
- *What would be the impact of delisting some or all of an event, and in particular would it maximise audience access?*

Free TV also calls on the Government to close the loophole in the anti-siphoning rules to ensure that pay TV channels cannot acquire rights to listed sports before free-to-air broadcasters have been given a reasonable opportunity to acquire the rights or the event has been de-listed

The recent 2005 Ashes series highlight the problem when the rights holder sold the pay TV rights to a channel provider, Foxsports, before negotiating a rights deal with a free-to-air broadcaster. This severely compromised the ability of the free-to-air broadcaster to negotiate a viable rights package.

Free TV Australia wrote to the Government alerting them to the problem two years prior to the event being shown. It was only at the last minute that SBS acquired the free-to-air rights and Australian viewers were able to watch one of the most competitive Ashes series in recent memory.

In evidence to this committee early last year, the Pay TV industry group ASTRA and the owner of Fox Sports, Premier Media Group detailed a number of other occasions where they have used the loophole to acquire rights in breach of the spirit and intent of the antisiphoning rules.

Whilst Free TV accepts that the anti-siphoning list will be reviewed prior to its expiry, Free TV does not agree with suggestions that rapid changes in the Australian media market will undermine the rationale for the list. There will always be a proportion of Australian viewers who cannot afford or choose not to pay for television and they should not be deprived or access to sporting events they currently see for free.

Free TV supports the Government's intention to ensure commercial operators outside the BSB do not acquire rights to an event on the list prior to a commercial or national broadcaster.

Section 3: Television Licence Fees

Free TV opposes the amendment to the Television Licences Amendment Bill which would bundle multi channels with existing channels for the purposes of calculating licence fees.

These will be new services operating in an uncertain environment, subject to a great deal of competition. In this context a 9% of gross revenue levy would be a huge burden.

New channels (whether multi channels or otherwise) should be quarantined from licence fees until they are viable businesses. This is the same treatment as commonly applies to all new services (for example pay TV is still exempt from licence fees).

Under the proposed treatment of the new digital channels, Channel B will be exempt from licence fees and Channel A will be subject to a licence fee based on revenue. Any licence fee applied to a free-to-air multi-channel should likewise be based on the revenue earned by that channel – not charged at the top sliding scale as would apply if the licence fee was bundled with the main channel.

For the purposes of calculating licence fees then, it is our firm view that the revenue on new channels should be considered separately from existing channels.

Section 4: Enforcement Powers

4.1 Civil Penalties, Enforceable Undertakings and Infringement Notices

Free TV is of the view that the extension of ACMA's powers to impose civil penalties and infringement notices should be limited to breaches of commercial television broadcasting licence conditions only in serious cases where the conduct of the broadcaster is wilful, reckless or in flagrant disregard of the licence condition. This reflects commercial

broadcasters' very good record of compliance with licence conditions and a positive compliance approach to licence conditions.

For these same reasons, the extension of ACMA's powers through enforceable undertakings should also be contained within parameters consistent with the seriousness of the breach.

To define ACMA's powers in this way is consistent with the objectives of the BSA in relation to the role of ACMA. Free TV supports the preparation of clear guidelines for the purpose of determining the circumstances in which these new powers will be pursued by ACMA, the defences that should be available to broadcasters and mitigating circumstances that may be taken into account.

Such guidelines should reference section 5(2) of the BSA which provides that ACMA must use its powers in a manner that is "commensurate with the seriousness of the breach concerned". In the case of infringement notices the guidelines should reflect the recommendations of the ALRC.

Decisions in relation to the use of infringement notices should take account of whether the broadcaster has taken all reasonable steps to rectify the breach. Before an infringement notice is issued a broadcaster must be given a written warning and the opportunity to give reasons for the alleged breach.

4.2 Injunctions

Free TV supports the extension of ACMA's powers to include injunctive relief where a person has failed to comply with a remedial direction (formerly a notice issued under s137 of the BSA).

Broadcasting without a licence is a fundamental and serious matter that warrants immediate and preventative legal action.

Free TV submits that licensees whose licence areas are affected by infringing services conducted without a licence or not in accordance with the terms of their licence should have standing to pursue an infringing entity for an injunction in the Federal Court should ACMA determine that it does not wish to pursue a prosecution for whatever reason.