

## Submission to the Digital Television Regulation Consultation Paper

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I make this submission on my own behalf, as an interested person and with no obligation to any vested commercial interest. My interest in and understanding of the subject matter rests largely on my role as a policy adviser from 2008 – 2013 to the Minister for Broadband, Communications and the Digital Economy in the former Labor Government, Senator Stephen Conroy. I have discussed my views with various people in the broadcasting industry while preparing this submission, and have made the federal opposition aware of my concerns particularly about item 1.2, but have not had a conversation with Senator Conroy or any other MP or senator about my submission. The views expressed below are entirely my own.

I note that this consultation paper makes explicit the fact that anti-siphoning and captioning obligations, and Australian content obligations for commercial free-to-air broadcasters are not within its purview, and that the Government has indicated it will separately consider the anti-siphoning, Australian content and captioning obligations.

I would urge the Government and those charged with drafting any legislative or regulatory changes that result from this consultation paper to be mindful of the potential impact of those changes on the obligations referenced above. In particular, changes to the definitions of services that may go ahead must be monitored to ensure that they still align with the definitions of services that are included in legislation that gives effect to captioning requirements, Australian content requirements and the anti-siphoning scheme. There are tangential implications for all three areas in some of the proposals below.

I have provided responses and comments to each proposed position below.

### 1.1. The number of commercial broadcasting services provided

**Preliminary Government position: No new regulation limiting the number of services provided by broadcasters will be introduced**

The Government will not seek to regulate the number of services provided by commercial or national broadcasters in addition to their primary channel. It considers that there are sufficient commercial incentives in the market to mitigate the likelihood of broadcasters significantly reducing the number of services they provide.

#### **No objection to this position.**

However, it should be noted that future commercial pressures on broadcasters resulting from increased competition from on-demand content providers may well result in a reduction of the number of traditional broadcasting services provided by commercial licensees. As discussed below in 2.1, traditional broadcast channels may be replaced by narrowcast services as more targeted content delivery becomes more commercially viable in the face of changing consumer behaviour.

## 1.2. The availability of commercial television services across Australia

**Preliminary Government position: Remove the provisions in the BSA that specify if a terrestrial regional commercial broadcaster provides *fewer* services in its licence area than is provided on VAST, the ACMA can declare the area to be ‘service deficient’**

Consistent with its deregulation agenda, the Government will remove the regulation of the number of services provided across regional and remote licence areas. The provisions intended to allow viewers in regional licence areas access to the VAST service where the ACMA declare the area to be ‘service deficient’ will be removed.

### **Strongly object to this position.**

The consultation paper notes the policies and regulatory measures that were introduced during digital switchover to ensure that viewers in regional and remote areas of Australia were able to access the same number of television channels, and broadly comparable content, to viewers in metropolitan areas. These are the Additional Services Assistance Program (ASAP) that provided \$24million of government funding directly to regional commercial broadcasters in previous solus markets to upgrade their transmission infrastructure, and the establishment of the Viewer Access Satellite Television (VAST) service for viewers who are unable to receive adequate terrestrial television reception. It further notes that the government has funded the VAST service until 2020.

Contrary to the implications in the paper, the provisions in the BSA that allow the ACMA to declare an area service deficient if the terrestrial regional commercial broadcaster provides *fewer* services in the license area than is provided on VAST (the “service deficiency provision”) are not an addendum to the VAST and ASAP programs, or a separate measure with a different intention, but rather integral policy within this suite of measures that were put in place to equalise television services across Australia. To use the vernacular, ASAP was a “carrot”; the “service deficient” declaration measure was a “stick”.

The paper suggests that the policy measures combined with “...a range of drivers influencing commercial decisions...” are sufficient safeguards to ensure that the parity of service offerings in regional commercial license areas will continue absent the service deficiency provision. **This suggestion is wrong.** The ability of a viewer to apply for VAST under a service deficiency declaration is an essential safeguard.

### **The proposal to remove this regulatory measure directly disadvantages the viewer.**

Without the incentive, which the consultation paper recognises, of losing a viewer to the VAST service, regional commercial broadcasters are likely to *reduce* services in their license area. Given the commercial pressures on regional broadcasters, as acknowledged by the consultation paper and demonstrated by the need for the ASAP program, any “flexibility” provided by removing the service deficiency provision will more than likely result in the loss of services; the suggestion that broadcasters may use this new-found flexibility to add services is misleading – a service deficiency declaration can only be made by the ACMA if *fewer* services are provided. **There is therefore nothing preventing broadcasters acting now to provide more services, or different services of the same number.**

Moreover, there is **nothing in current regulation preventing a regional commercial broadcaster from reducing the number of channels it provides in a license area now** – broadcasters already have this “flexibility”. If they do so, then affected viewers can apply to the ACMA for a service deficiency declaration, which authorizes the viewer to access VAST **at the viewer’s own expense**. However, there is no other penalty applied to a broadcaster who chooses to provide a lesser number of channels.

It should be noted that is no small expense to establish VAST in a private household, and the process of applying to the ACMA is suitably robust; therefore, such an action would not be taken lightly by a viewer and it is reasonable to expect that the number of households lost to the terrestrial broadcaster would not be high in the event of the removal of one multichannel.

However, the potential loss of viewers to the terrestrial broadcast is sufficient to provide an incentive to the broadcaster to provide an equal number of channels as is available in capital cities. If it were not, there would be no appetite amongst broadcasters for removing the service deficiency provision.

**The VAST service is taxpayer funded and should be available as a full service option to any viewer who desires to access it in the event of service deficiency without impediment from the commercial broadcaster.**

The consultation paper relies on the principle that regulation should be removed in favour of market forces wherever possible. **The proposed removal of the service deficiency provision actually runs counter to this principle – it is inherently anti-competitive.**

The consultation paper notes that “[A] factor encouraging broadcasters to make more services more widely available in their license areas is their contribution to advertising revenue”. It is the potential loss of viewers to VAST, which removes a household from the local market for advertising revenue, which encourages licensees to provide the same number of channels via terrestrial broadcast. By removing the option for a viewer to access VAST if the viewer is unhappy with the loss of one or more channels from their local terrestrial broadcast, the government would actually be removing the only competition to the commercial terrestrial broadcast in that license area. There would then be no market forces in play to influence the commercial decision of the licensee.

It should be noted that the removal of the service deficiency provision, in that it will result in the loss of some commercial channels in certain markets, will also have an impact on the provision of SBS services in those markets – it will be difficult to justify the continuation, or launch, of terrestrial services for SBS in markets that do not have the full suite of commercial channels. This will likely lead to people needing VAST for the ABC and SBS (VAST is unrestricted for access to the national broadcasters) but not being authorised to view commercial channels on VAST, thereby necessitating the household needing both satellite and terrestrial reception systems.

**The preliminary government position to remove the service deficiency provision is detrimental to viewers, who as taxpayers fund the VAST service. Its only benefit is to commercial regional broadcasters in allowing them to reduce services without the potential loss of a viewer household that can be counted in its advertising market. It should not go ahead.**

### 1.3. The role of the ‘primary’ channel

**Preliminary Government position: The requirement for the primary channel to be provided in standard definition will be removed**

The Government intends to remove the requirement for the primary channel to be provided in standard definition. Given the widespread availability of HD receivers, there is no longer any reason to restrict the format of the primary channel.

**No objection to this position.**

However, the Government should note that, while the Newspoll survey conducted at the end of digital switchover found that 96 per cent of all households had access to HD channels on its main television, it is likely that a significant number of secondary television sets still in operation are not HD capable.

It is therefore unlikely that broadcasters will quickly switch their “main” channels to HD in the short term. Should they do so, it should be incumbent upon them to ensure viewers are aware of the change in advance and able to prepare for it.

**Moreover, while the consultation paper notes that it is not exploring the appropriateness of the Australian content, captioning and anti-siphoning obligations, legislation to remove the requirement for the primary channel to be provided in standard definition must be carefully drafted to ensure no unintended adverse outcomes that may undermine those obligations.**

### 1.4. High definition services

**Preliminary Government position: No reintroduction of a quota requiring a specified amount of HD content**

The Government will not reintroduce a quota requiring a specified amount of HD content. This will provide broadcasters with greater flexibility to choose the format of services they provide.

**No objection to this position.**

However, the Government should note a small but vocal section of the community that blames government for the low level of HD services available on free-to-air television in Australia relative to comparable international markets.

While this consultation paper does not explore issues related to anti-siphoning, I would take this opportunity to note that the mooted consideration of reviewing the anti-siphoning scheme should give attention to the issue of HD services. For example, if free-to-air broadcasters are to retain the benefit of first rights to major sporting events, then a sporting body could reasonably expect that HD coverage of its content would be part of the offer. If the Government removes the requirement for a specified amount of HD content on free-to-air broadcasting services, it weakens the justification for government intervention in the sports broadcast rights market. That is, the provision of HD services as part of a sports rights deal becomes a matter solely

of commercial negotiation if government no longer requires HD content on FTA services. Sports bodies and subscription broadcasters could argue that the right of FTA broadcasters to bid first on protected events should be conditional on the provision of HD services.

## 2.1. Datacasting and narrowcasting services

### **Preliminary Government position: Remove the datacasting regime in relation to television and remove the current restriction on providing narrowcasting services on digital multiplexes**

The Government intends to remove datacasting provisions related to television in Schedule 6 to the BSA and corresponding provisions in the Radcomms Act. It is anticipated that arrangements will need to be put in place to allow the established datacasting services provided by commercial broadcasters to continue where necessary.

The Government also intends to remove the current restriction on commercial and national broadcasters providing narrowcasting services on their digital multiplexes. This will provide broadcasters with greater flexibility as to the types of services they provide. The Government will monitor the industry's response to this increased flexibility with a view to ensuring that services offered by broadcasters continue to meet the objectives of broadcasting legislation.

### **No objection to the first position.**

In relation to the second position (the removal of the restriction on commercial and national broadcasters providing narrowcasting services on their digital multiplexes) this will require, as noted, careful monitoring.

It is conceivable that, over time, broadcasters could exploit this change to shift all their services to narrowcasts, thereby avoiding all regulations around Australian content and captioning. Given the changing nature of content consumption by viewers, this development could occur quite quickly. The major competitors to traditional broadcasters now are on-demand services over the Internet, such as Netflix. Such services are essentially "narrowcasts" in that they provide content that can be consumed on demand according to the viewer's specific interests and tastes. In order to compete with such services, broadcasters may opt to provide a number of highly targeted narrowcast channels with tailored advertising for specific audiences.

Such a development would seem to make sense commercially, but will have a significant adverse impact on the cultural aspects of broadcasting (as do the on-demand online services with which such narrowcast services would compete). Australian content rules are in place not only to support the Australian production sector, which could conceivably adapt to an all-narrowcast / on-demand market, but to support our cultural identity and social cohesion. The loss of content that draws disparate audiences together for shared experiences – the loss of the national conversation in the virtual town square, and the opportunity for us to share our stories – has dire implications for our sense of cultural identity and our cohesion as a nation. These are difficult things to regulate, but nevertheless careful attention must be paid to changes in regulation that remove measures that supported such objectives in the past.

Similarly, attention must be paid to the potential loss of captioning on services that may in future replace broadcast services. The legislation governing captioning must be regularly reviewed to ensure its terminology keeps pace with changes in the provision of content.

## 2.2. Third party content

**Preliminary Government position: Maintain the current arrangements for third-party content while considering alternative frameworks**

The Government will maintain the current arrangements for third-party content in the near term. However, the Government is interested in other options for the provision of third-party content by commercial broadcasters and their implications for licensing, regulation and spectrum use.

### **No objection to this position.**

It is important that any change in arrangements for third-party content be carefully considered.

## 2.3. Subscription services

**Preliminary Government position: No change to the restriction on broadcasters providing subscription services**

The Government intends to retain the current restriction on commercial and national broadcasters providing subscription television services on their digital television multiplex. Broadcasters are provided with spectrum on the expectation that their services are available to the public free of charge. Allowing broadcasters to provide subscription services would represent a significant cultural and policy shift.

### **No objection to this position.**

The considerable benefits afforded to free-to-air broadcasters, including provision of spectrum well below market value, certainty of spectrum allocation, and regulatory benefits such as the anti-siphoning provisions, mean that their services should be provided to viewers free of direct charges.

## 2.4. Online services

**Preliminary Government position: Further work should be undertaken in 2015 on the commercial and regulatory implications of free-to-air television services being delivered using online platforms, in the context of the Government's deregulation agenda**

The Government considers that developments in the online delivery of free-to-air television services may offer opportunities to the broadcasting industry to provide new and diverse services to their viewers. The Government is interested in getting feedback on the potential use of alternative technologies which do not use BSB spectrum for the delivery of television services and the impact this could have both on the regulatory framework and on broadcasters' business models in the future.

### **No objection to this position.**

A comprehensive examination of developments in the online delivery of FTA television services is warranted.

## 3.1. More efficient broadcasting technologies

### **Preliminary Government position: Broadcasters should commence the transition process to transmit their services in MPEG-4**

The Government will consult with and encourage television broadcasters to commence their transition to using MPEG-4 technologies. Subject to the extent of the roll-out of such services, the Government may consider setting a deadline by which broadcasters are required to transmit MPEG-4 only services following consultation with industry. The Government also encourages the broadcasting and manufacturing industries to explore adopting additional spectrum efficient technologies in the future.

### **Reservations about this position.**

While it is true that MPEG-4 provides benefits in terms of more efficient use of spectrum and the potential to deliver more services, the proposal that broadcasters "commence their transition" to broadcasting in MPEG-4 format is fraught with potential problems both for industry and consumers.

While the consultation paper asserts that "[I]ndustry has ... estimated that, as at late 2013, more than 80 per cent of the main digital television sets in Australian homes were capable of receiving MPEG-4", no source is provided for this statistic and I have been unable to verify it from any independent industry source.

Most likely, the consumer electronics industry, which has a vested interest in a rapid switch to MPEG-4 broadcasts, as it provides an incentive for viewers to buy new television sets, provided this figure to the Department.

Regardless of the true level of penetration of MPEG-4 capable television sets in Australia, a switch to MPEG-4 is essentially another switchover – that is, it is a format change of comparable scale to the switch to digital television that took place as a government program between 2010 and 2013. This was a significant undertaking, requiring massive resources, and the cooperation of broadcasters, equipment vendors, federal, state and local government agencies and consumers.

Any move to MPEG-4 in the short term would require similar resources to be deployed in order to ensure that households were fully prepared and able to make the switch. To simply propose that "broadcasters commence the transition" and suggest that Government may impose a deadline for the switch **without consideration of the program required to support such a switch** is naïve. If a switch to MPEG-4 is pursued without a coordinated program driven by government

could lead to the loss of television services for a significant proportion of viewers. This would lead to considerable backlash for the government of the day.

### 3.2. Digital television multiplex licensing arrangements

#### Preliminary Government position: Digital television multiplex licensing will be introduced

The Government will commence discussions with the national broadcasters to develop a spectrum sharing arrangement for the terrestrial delivery of their television services. The Government will also commence consultation and planning for introducing alternative digital multiplex licensing arrangements, including the potential to share digital television multiplexes for commercial broadcasters.

#### Object to this position.

While future efficiencies in the use of broadcasting multiplexes may be possible (for example, after a managed transition to MPEG-4), any requirement that the national broadcasters commence work to develop a spectrum sharing arrangement for current terrestrial broadcast services is impractical. **It would require the ABC and SBS to cut the number of services they currently offer to viewers.** Doubtless the ABC and SBS will express their views on this proposal, but I believe it would be impossible for all current national broadcast channels to be provided via a shared multiplex.

Similarly, it will be difficult for commercial broadcasters to share multiplexes, at least in metropolitan markets. The Government should examine the fraught experience of commercial radio broadcasters in sharing multiplexes, particularly in relation to their accommodation of community broadcasting services and the limited capacity of multiplexes to support commercial and national digital radio broadcasts of sufficient quality, to inform its thinking in this area.