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7 October 2009

Committee Secretary
Senate Standing Committee on Environment,
Communications and the Arts
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Sir/Madam

Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009

Free TV Australia represents all of Australia's commercial free to air (FTA) television broadcasters. Free TV welcomes the opportunity to comment on *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009* (the Bill).

Free TV confines its comments to those issues of relevance to television audiences and the television industry, and does not wish to comment on the broader telecommunications competition and consumer issues addressed in the Bill. However, Free TV notes its support for competition in the provision of telecommunications services and for fair and equitable third-party access to the National Broadband Network (NBN).

The critical issue for television audiences will be the carriage and availability of FTA television services on the NBN. FTA television services are highly valued by Australians, with 70% of Australians unable to afford or choosing not to subscribe to pay TV services. A range of important public policy outcomes are achieved through FTA television services, including Australian drama and children's programming and the free availability of coverage of major sporting events. It is important to note that the vast majority of new content services provided over the NBN will be subscription-based.

Delivery of television services on the NBN

Free TV understands there are a range of possible means by which television and television-like services could be carried on the NBN, enabling such services to be connected directly to viewers' TVs. Whilst details are yet to be publicly announced, Free TV understands from comments made by Mr Mike Quigley¹ that he anticipates the NBN could incorporate an RF layer (a dedicated download layer for the delivery of content).

We understand that dedicating part of the fibre capacity to an RF layer may raise access issues. We draw the Committee's attention to the comments of Mr Colin Goodwin, Ericsson Australia's broadband strategy manager, who noted the incorporation of an RF layer would require a level of administration that may result in this component being given over to a single operator:

¹ Comments made at the Communications Alliance meetings held on 17 September 2009 and 24 September 2009

*"[It] is okay if you are providing a single operator cable TV service like Verizon, but it does not support user choice, it needs an extra exchange equipment, and extra customer premises equipment, which increases the cost. It requires a novel way of cutting the optical fibre; it reduce[s] the reach of the fibre network and it limits the ability to upgrade to new types of fibre technology more use more frequencies, for example wavelength division passive optical networking. But most importantly it limits user choice."*²

Such an outcome has the clear potential to limit competition in the provision of television and television-like services over the NBN if it is not appropriately regulated. Free TV is also concerned the assignment of capacity for the delivery of television services to a single player (who, as a provider of competing services would have no incentive to negotiate openly with FTA broadcasters) could block FTA broadcasters from making their existing, highly-valued services available on the NBN. Such an outcome would clearly be inconsistent with the stated objectives of the Bill to deliver an open-access, wholesale-only network.

Access to the NBN for the delivery of television services should be consistent with the underlying Government objectives for an open, wholesale-only NBN providing pricing and access equivalence.

Free TV therefore advocates the introduction of a 'must-carry' scheme similar to that in place in the US, whereby local FTA services must be carried on a cable provider's system if the FTA broadcaster requests this ('must-carry'). Alternatively, the FTA services have the option to negotiate a fee or other compensation for their programming ('retransmission consent'). 'Must-carry' provisions have also been implemented in domestic law across Europe, including nations such as Australia, Belgium, Denmark, Finland, France and the United Kingdom (further detail is provided at [Appendix A](#)).

Free TV supported the urgent introduction of such a scheme in its 3 June 2009 submission to the Department of Broadband, Communications and the Digital Economy (DBCDE) regarding *The National Broadband Network: Regulatory Reform for 21st Century Broadband*. In that submission we outlined our concerns regarding the potential for a dominant IPTV provider using FTA signals under existing retransmission rules, in order to build its business.

It is clear that a must-carry regime should be implemented regardless of the technical means chosen for the delivery of television services on the NBN. This would protect viewers' access to highly-valued television services by ensuring that providers of broadcasting-like services on the NBN were required to carry FTA services if requested. It would also address the FTA industry's ongoing concerns in relation to the carriage of our services without our permission or compensation.

Amendments to Part XIC of the TPA

The availability of capacity will clearly be an important factor in enabling competition between competing services using or wishing to use the NBN. Issues of capacity will impact on the availability of FTA services on the network. This is an issue which should be addressed through the proposed amendments to Part XIC of the TPA, and in particular, the factors the ACCC must take into account when determining the terms of access.

² ExchangeDaily 17 September 2009

As presently drafted, the list of matters which the ACCC must take into account when making an access determination does not address anti-competitive conduct relating to over utilisation of available capacity for the purpose of excluding competitors.

This should be addressed through an amendment to the Bill to add a new subparagraph (h) to clause 152BCA(1) as follows:

"whether there should be limits placed on the capacity made available to each access seeker in order to ensure access by competing access seekers".

This would ensure that the ACCC is compelled to consider the possibility of anti-competitive conduct relating to usage of capacity on the NBN.

Other competition issues

Free TV supports the addition of content services to the list of goods or services that are supplied or acquired in a "telecommunications market" within the meaning of section 151AF of the TPA. It is not free from doubt that content services could be subject to competition notices under Part XIB and therefore we support the proposed amendment.

However, further regulatory intervention is required to prevent anti-competitive conduct in relation to the acquisition of exclusive rights to content, 'traffic shaping' and differential download speeds. In our 3 June 2009 submission to DBCDE, we noted our concern that providers of broadband or IPTV services with significant market power may be able to exclusively acquire the digital rights to premium content. This would not only have a negative impact on the market for content, but would also reduce competition and choice for consumers in other markets.

Free TV supports limits on access to rights for premium content for entities with market power in telecommunications connectivity to ensure that there is an appropriate level of competition.

Free TV also expressed its support for the principle of net neutrality and noted concerns that the application of differential pricing to favour certain kinds or providers of content (typically with the aim of favouring a carrier or ISP's own content or that of a commercial partner) could limit competition and inhibits investment, consumer choice and diversity of services. Media reports suggest this is already an issue in Australia, with concerns regarding the behaviour of carriers who are also content providers when negotiating pricing and access with other, 3rd-party content providers.³

Traffic 'shaping', whereby differential download speeds are applied for certain kinds of content stands to have the same impact. Practices such as these are inconsistent with the open and neutral design of the Internet. As noted in our earlier submission, net neutrality is an issue many overseas jurisdictions are engaging with as they consider the future of the Internet.

Free TV believes this needs urgent regulatory intervention and would welcome further consultation on these issues in the lead-up to the establishment of the NBN.

Regulatory framework for audio-visual content services

In its 3 June 2009 submission, Free TV urged the Government to consider the appropriate regulatory settings for television-like services delivered on the NBN as early as possible.

³ <http://www.theaustralian.news.com.au/business/story/0,28124,25565328-7582,00.html> Viewed 1 June 2009

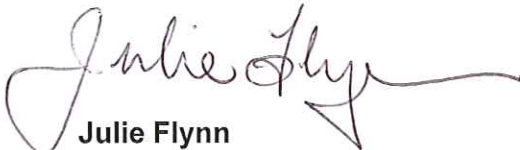
Commercial FTA services are subject to an extensive range of regulatory measures which, whilst achieving important public service outcomes, impose significant costs and limitations that do not apply to other platforms. There is a danger of a sharp regulatory imbalance between new, television-like services and services already provided on existing broadcasting platforms.

Whilst this is not addressed in the Bill, Free TV would like to draw these issues to the attention of the Committee. We note the Government has indicated it wishes to "wait until the [NBN] is more advanced before launching a full-scale review of convergence related issues."⁴ However, these are vitally important issues that must be fully explored *before* the commencement of rollout of IPTV or other television-like services.

These are matters of significant interest to those investing in the NBN and in services likely to be delivered over it and should therefore be considered as early as possible to ensure investment certainty.. Certainty regarding the regulatory framework will be important for both consumers and potential service providers alike.

Thank you once again for the opportunity to comment on the Bill.

Yours sincerely



Julie Flynn
CEO

⁴ Discussion Paper *The National Broadband Network: Regulatory Reform for 21st Century Broadband*

APPENDIX A – MUST CARRY PROVISIONS

A requirement that locally-licensed, free-to-air television must be carried by cable providers was first made law in the United States' *Cable Television Consumer Protection and Competition Act of 1992*. The US Supreme Court in, *Turner Broadcasting System, Inc, et al v Federal Communications Commission* summarised the circumstances that led to the need for the legislation:

cable operators had considerable and growing market power over local video programming markets in 1992; the industry's expanding horizontal and vertical integration would give cable operators increasing ability and incentive to drop, or reposition to less viewed channels, independent local broadcast stations, which competed with the operators for audiences and advertisers; significant numbers of local broadcasters had already been dropped ...⁵

The fundamental policy objectives behind 'must-carry' obligations were also stated by the United States Supreme Court decision:

1. to preserve the benefits of free, over the air local broadcast television;
2. to promote the widespread dissemination of information from a multiplicity of sources; and
3. to promote fair competition in the television programming market.⁶

The European Commission, drawing on the conclusions from their Convergence Green Paper (http://ec.europa.eu/avpolicy/docs/library/legal/com/greenp_97_623_en.pdf) implemented 'must carry' provisions in Article 31 of the Universal Service Directive. Article 31 recognised the ability of Member States to impose or maintain reasonable must-carry rules on network providers under their jurisdiction (see http://ec.europa.eu/information_society/policy/ecomm/doc/current/broadcasting/working_doc_must_carry.pdf).

'Must carry' provisions have been implemented in domestic law across Europe, including nations such as Austria, Belgium, Denmark, Finland, France, Germany, the Republic of Ireland, the Netherlands, Portugal, Spain, Sweden and the United Kingdom. For a full report on the 'must carry' legislation, please see *An Inventory of EU 'must-carry' regulations: A report to the European Commission, Information Society Directorate*, February 2001 at <http://www.pedz.uni-mannheim.de/daten/edz-bo/gdi/01/OVUM-mustcarry.pdf>.

The details of these countries' domestic legislation is summarised in the table below:

Country	Year of Implementation	Legislation/ Decree	Beneficiaries of the Must Carry Provisions
Austria	1997	The Cable and Satellite Broadcasting Act BGBl.I Nr. 42/1997, Article 11	the public service broadcasting company.
Belgium, Flemish Community	1995	Co-ordinated Decrees on Radio and Television, Article 112	specified radio and television programs of the Flemish and French public broadcaster, as well as authorised private and regional broadcasters.
Belgium, French Community	1987 (last modified 1999)	The Media Decree, Article 22	French public broadcasters, authorised local and private broadcasters, television programs relating to international organisations, and other broadcasters as agreed to from time to time.
Belgium, Regional of the Capital	1995	The Federal Law of 30 March 1995, Articles 13, 16 and 19	television and radio public service broadcasters of the Flemish and French communities, as well as other

⁵ Ibid at pp. 13 – 25.

⁶ *et al.* (95 – 992), 520 U.S. 180 (1997) at pp. 6 – 11 (hereinafter, *Turner*).

Brussels			broadcasters as agreed to from time to time.
Denmark	2000	Danish Broadcasting Act nr 551/2000, Article 4	public service broadcasters, including regional programs
Finland	1998	Act on Television and Radio Operations, Article 42	public Finnish broadcasting companies
France	1986, amended 2000	French Law of 30 September 1986 on Freedom of Communication, Article 34	services broadcast via hertzian means, and possibly also communal authorities and not-for-profit associations
Germany	2001	Inter-State Agreement on Broadcasting Services, sections 51 and 52	public broadcasters and broadcasters who are otherwise appropriately licensed; other broadcasters as determined by location.
Republic of Ireland	1974, amended 1988	Radio and Television Act 1988, section 17; Wireless Telegraphy (Wired Broadcast Relay Licence) Regulations 1974, section 3 and Wireless Telegraphy (Television Programme Retransmission) Regulations, 1989, section 3.	national public service broadcasting company and television programs of the independent television station.
The Netherlands	1987	The Media Act 1987/249, Article 82	the three television channels of the Dutch public service broadcasting companies, two local public service broadcasting companies, and television programs transmitted by the two channels of the Flemish public service broadcasting company.
Portugal	1997	Decree No. 241/91, Article 12	the two television channels of the public service broadcaster, Article 12
Spain	1996	Cable Telecommunications Act, Article 11 and	the two channels of the public service broadcasting service; the television programs transmitted by the three channels of private broadcasting companies; and the local television channels.
Sweden	1996	Radio and Television Act, Chapter 8, Section 1	two television channels of public service broadcasting company and one television channel of the private broadcaster

United Kingdom	1990	Broadcasting Act 1990, Schedule 12, Part III, paragraph 4 and section 78A	The following channels: BBC1, BBC2, ITV, Channel 4 and the Public Teletext Service.
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'Must-carry' rules have also been implemented in India.