

# Meeting the Digital Challenge

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*Submission to the Department of  
Communications, Information Technology and the Arts,  
Meeting the Digital Challenge, Discussion Paper*

CMCL – Centre for Media and Communications Law  
Faculty of Law  
University of Melbourne

April 2006



## About the CMCL

The Centre for Media and Communications Law is a centre for the research, discussion and teaching of all aspects of media and communications law and policy, located in the Faculty of Law at the University of Melbourne. The CMCL undertakes multi-year research projects, holds public seminars in Melbourne and Sydney about legal and regulatory developments, supports research visits from Australian and international academics, lawyers and policy makers, and supervises undergraduate and graduate teaching and research in media and communications law. For more information on the CMCL, please consult [www.law.unimelb.edu.au/cmcl](http://www.law.unimelb.edu.au/cmcl).

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## Overview

In March 2006 the Department of Communications, Information Technology and the Arts released a discussion paper on media reform options outlining the government's proposed reforms. While dealing with broader media reforms, the discussion paper also considers a number of options aimed at encouraging viewer uptake of digital television. In this submission, we comment on three of the reform options intended to promote digital uptake, relating to:

- national broadcasters;
- commercial multichannelling; and
- sports rights/anti-siphoning.

In general, the CMCL supports the proposed reforms in these three areas, but emphasises that they may well have only minor effects. One of the main drivers of digital television internationally has been the provision of extra channels and increased services. This has been highlighted in many submissions made to various reviews conducted as part of the digital television review process required under the *Broadcasting Services Act 1992*. Encouraging more digital-only content remains central to driving digital uptake, and greater reforms in the directions outlined for each of these areas in the discussion paper should be considered (along with the necessary resourcing for national broadcasters).

With regard to extra channels and services, several points about the UK situation are worth noting, which we do below before turning to the three areas of possible reform. We hope that the next stage of the media reform process will involve more detailed proposals which are likely to allow further comment on these issues and wider matters about digital television in Australia.

### **Channels, services and uptake: UK experience**

In Australia to date, digital television offers few features above existing analogue channels to encourage switchover. As noted in the discussion paper, by mid-2005 digital reception equipment had only been adopted by approximately 15.5 per cent of

Australian households. A further 12.8 per cent receive digital television via subscription services like Austar and Foxtel Digital.<sup>1</sup> The poor uptake of digital television in Australia was recognised in a parliamentary inquiry conducted by the Senate Select Committee on Communications, IT and the Arts, which concluded that multichannelling was ‘critical to driving DTV’ and recommended that free-to-air broadcasters be able to offer new channels from 2008.<sup>2</sup>

Within discussions about the uptake of digital television, reference is often made to the UK’s comparatively successful experience in promoting digital television. In the UK, the provision of multichannel television appears to have been crucial to digital uptake. The multichannel digital service Freeview offers approximately 30 free-to-air channels and is used in 25.7 per cent of television households.<sup>3</sup> In addition, subscription to digital satellite or cable services in the UK is roughly 42 per cent,<sup>4</sup> bringing the UK digital transition near to 70 per cent.<sup>5</sup> In addition, Ofcom has recently reported that the last quarter of 2005 represented the greatest growth rate for digital uptake since digital services were introduced in 2001.

In considering multichannelling, a difference between Australia and the UK deserves emphasis; namely, the comparative strength of subscription TV. Under the UK approach to sports’ rights and anti-siphoning BSkyB was able to establish itself as a dominant player in the UK television landscape, before the move to of terrestrial free-to-air television to digital, by acquiring exclusive rights to football and other sporting events. The introduction of digital free-to-air television and the decision to allow multichannelling can be seen as a response to BSkyB’s market dominance and a policy aimed at making UK television more competitive and diverse. It appears that allowing multichannelling was also intended to support the continued existence of the UK’s public service broadcasting tradition. Thus, within the broader context of competition and public broadcasting, the BBC and other incumbent free-to-air

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<sup>1</sup> Australian Communications and Media Authority, *Driving Media in Australian Homes* (2005) 20.

<sup>2</sup> House of Representatives Standing Committee on Communications, Information Technology and the Arts, *Digital Television: Who’s Buying It?* (February 2006) xx.

<sup>3</sup> Ofcom, *The Communications Market: Digital Progress Report* (Q4, 2005) 6.

<sup>4</sup> Ofcom, *Communications Market 2005* (2005) 183.

<sup>5</sup> Ofcom, above n 3, 2.

networks were permitted to take advantage of the technical capacity of digital television.

Several factors should also be noted about the UK's Freeview service. First, Freeview – which was created following the commercial failure of a subscription terrestrial service (ONdigital and, later, ITV Digital) – appears to be a loss making project even in a market three times the size of Australia. Second, the BBC has assumed a major role in supporting Freeview, both in terms of funding and content. This role, however, has depended to a significant extent on the BBC's resources which are markedly greater than those of Australia's national broadcasters. Third, BSkyB also has a significant share in Freeview and, in contrast to the UK government's policy aims when introducing digital television, BSkyB appears to have strengthened its market dominance by using Freeview to attract subscribers to its own premium content subscription service.

Lessons from the UK experience, therefore, are not just about multichannelling. The value of multichannelling, emphasised by the Senate Select Committee report, needs to be seen in a wider context: the UK lessons are also about how past policy decisions affect the decisions that are open now. The challenge in Australia is to promote media evolution, while acknowledging the investments supported by past policy, at a time when the largest changes probably lie outside the spectrum – and when some viewers could switch right past digital television to other platforms and delivery mechanisms.

### **Reform Options most relevant to Digital Uptake**

With regard to digital uptake, some opportunities are presented in the reform package to provide additional, attractive features that should appeal to potential digital viewers. However, the CMCL suggests that the reform package is unlikely to significantly increase uptake. Further steps should be considered: national broadcasters will require appropriate financial resources for multichannelling to be most effective; the possibilities commercial multichannelling should be monitored closely as other platforms develop; and reforms to the anti-siphoning scheme should bring it close to the UK model in terms of the number and scale of events listed.

### ***National broadcasters***

One of the reform options considered in the discussion paper is the removal of the genre restrictions currently imposed on the national broadcasters' multichannel services. Under existing rules, the ABC and the SBS can broadcast an extra digital service if the content stays within certain genres. For example, educational or children's programs are permitted, but local news and drama are not. Without these restrictions, the public broadcasters could provide wider, more appealing content on their extra digital-only channel.

The CMCL supports this proposal. The removal of genre restrictions for ABC and SBS will make digital more attractive to customers and can be expected to promote uptake. (Given the UK experience and the market positions and current economic resources of Australian national broadcasters, further uptake is likely to be only moderate rather than overwhelming.)

As the discussion paper notes, the change would also be consistent with the public service role of the ABC and the SBS by enabling them to take advantage of archived materials and to experiment with digital program production and new digital services. In relation to archived material, it appears that difficulties and expense in managing rights for royalties and residuals due to performing artists may substantially limit the amount of archival material that can be broadcast. We suggest this matter deserves further research. It also illustrates the broader and crucial issue that the national broadcasters' funding base must be strong enough make extra digital services viable.

### ***Commercial multichannelling***

The discussion paper proposes various reforms to multichannelling by commercial free-to-air networks. The current restrictions on commercial multichannelling might be removed at the end of the simulcast period; that is, when the analogue broadcast signal is switched off. However, if there are any significant changes in the industry which would warrant such a move – for example, growth in the pay TV sector – the government would be prepared to consider the relaxation of the multichannel restrictions prior to switch off. The CMCL supports the monitoring of changes in the broadcasting sector – especially the development of alternative platforms, such as

internet and mobile services – with regard to whether the multichannelling restrictions for commercial broadcasters be removed prior to analogue switch off.

The discussion paper also note that it is possible the government could remove the requirement for the HDTV versions of free-to-air channels' signals to be simulcasts of their SDTV services. The CMCL supports removing the requirement that the HDTV channel be a simulcast of the regular service, in so far as the current reforms aim to increase the uptake of digital television. Although it is far from clear that much programming would be economically viable for HDTV-only broadcast, the change could enhance the range of digital services available and promote digital switchover. Even more than with the proposed changes for national broadcasters, this change can only be expected to be a minor promotion of the digital platform.

### ***Anti-siphoning***

Another proposal raised is reform to the anti-siphoning list. The government proposes that a 'use it or lose it' scheme be introduced for events on the anti-siphoning list, with events being removed if they are not 'used' by free-to-air broadcasters. The CMCL notes the anti-competitive nature of the anti-siphoning regime and the negative impact that it appears to have had on Australia's adoption of subscription TV.<sup>6</sup> The current regime, as assessed by Warren Lee and Brendan Moylan, 'allows free-to-air broadcasters to act as de facto arbiters of what can and cannot be seen, not only on free-to-air but also on pay-TV'.<sup>7</sup> While the CMCL supports reform to the anti-siphoning regime, much depends on the details of the plan. Doubt exists as to the extent to which a 'lose it or use it' scheme will result in material reform. For example, its operation will depend to a significant degree on what is considered to be adequate 'usage' and how that is to be determined.

When compared with the UK, the current Australian approach to sports' broadcasting appears very restrictive. The *Broadcasting Act 1990* (UK) originally allowed satellite and cable companies to obtain exclusive rights to certain events of national interest ('listed events') on the same basis as terrestrial broadcasters, as long as they were not

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<sup>6</sup> See Productivity Commission, *Broadcasting Inquiry Report* (Report No 11, 2000) 429-438.

<sup>7</sup> Warren Lee and Brendan Moylan, 'Hosepipes and Footballs: How Sports Coverage went down the Gurgler' (1997) 2 *Media and Arts Law Review* 93, 105.

provided on a pay-per-view basis. This was change in 1996, when public concern and a vote in the House of Lords forced the UK government to provide extra protection of listed events. Now, the regime is divided into two lists: Group A and Group B. Group A events can be exclusively licensed only where they will be available to at least 95 per cent of the population on a free-to-air basis. Group B events can be exclusively licensed only where adequate provision has been made for secondary coverage. Despite the strengthening of the listed events regime in the UK it remains more liberal than Australia's anti-siphoning rules. For example, there are a total of 19 events listed in the UK, compared to over 1,000 individual events in Australia.

A revised scheme should aim to protect public access to select key events while allowing subscription services to further their own market adoption. With regard to the wider policy about uptake, enhancing digital subscription services through a revised sports regime could offer support for greater uptake of digital television in general, through increasing public awareness and interest in digital reception equipment.

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