Cable & Wireless Optus

Submission to the Productivity Commission's inquiry into

"Broadcasting"

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1. EXECUTIVE SUMMARY

1.1 The information age has opened great opportunities for Australia. If those opportunities are realised Australia stands to benefit greatly in terms of a wealthier more sophisticated and informed society well placed to meet the challenges of the next century. If the opportunities are not realised Australia will enter the next century at risk of falling behind much of the rest of the industrialised world.

1.2 Central to Australia being able to realise those opportunities is a legislative and regulatory environment which encourages and underpins a diverse, flexible and growing information economy. It is fundamental to any such legislative and regulatory environment that it:

- encourages a diversity and depth of participation in the information economy;
- fosters a competitive communications sector; and
- at the same time recognises the unique cultural and social influences that the information economy exerts and the need to preserve and further encourage plurality and diversity of opinion.

1.3 In this context Cable & Wireless Optus believes that the Productivity Commission's inquiry into Australia's broadcasting legislation is timely and represents an opportunity to review the legislative and regulatory framework and test whether it meets these objectives.

1.4 In particular, convergence and digitisation are sweeping away many of the distinctions which have underpinned the different legislative and regulatory models that have applied over the past 50 years to traditional broadcasting on the one hand and other communication sectors, including telecommunications on the other.

1.5 While many of the technological differences are being swept away, there remain unique and nationally important characteristics of media (as opposed to mere carriage) which require targeted legislative and regulatory protection.

1.6 Two fundamental challenges which confront the Government are:

- the need to adopt regulatory settings which provide encouragement to new entrants in the traditional broadcast media sectors with the consequential increase in diversity of opinion that will follow; and

- ensuring that the incumbent free-to-air broadcasters (**FTAs**) (who in many respects in terms of market power and legislative protection are in a similar position to that which Telstra was in prior to liberalisation of the telecommunications market) are not able to take advantage of their incumbent positions to entrench or obtain dominant positions in new and emerging markets, such as datacasting.

1.7 Cable & Wireless Optus' experience in pay television, a new industry sector, demonstrates how the incumbent power of the FTAs together with favourable legislative or regulatory settings can act as a break on the development of new sectors. For example, the so called anti-siphoning rules have, in Cable & Wireless Optus' submission, plainly operated to the significant advantage of the FTAs by allowing them to become and remain the gatekeeper of access to sporting rights. The consumer has been the ultimate loser by being denied access to the breadth and depth of sports programming that would have been available, had the anti-siphoning rules been implemented in accordance with their original objectives.

1.8 Cable & Wireless Optus is particularly concerned that the allocation of additional spectrum to the FTAs for the purposes of digital broadcasting should not result in the FTAs stifling further development of the pay television industry or the emergence of other sectors such as datacasting. To this end, Cable & Wireless Optus believes that the FTAs must be subject to:

- stringent and comprehensive prohibitions on using digital spectrum for multi-channelling (or any other form of broadcast that is in substance substitutable with pay television); and

- to a moratorium on their ability to provide datacasting services.

Furthermore, the definition of datacasting for the purposes of the FTAs should exclude point-to-point services which are effectively next generation broadcasting services such as video on demand, near video on demand, full frame rate audio/video services, cached (stored) video and audio services, internet and other online services.

1.9 Government has a responsibility to manage the efficient use of spectrum, including the additional spectrum allocated to the FTAs. The additional spectrum allocated to the FTAs must not be treated as an entrenched property right of the FTAs. Where technology developments result in spectrum channels no longer being required by the FTAs in certain geographic areas for the purpose of meeting their obligations relating to digital broadcasting, those spectrum channels ought to be made available for allocation in the normal manner, thereby freeing up spectrum for the introduction of new and innovative services.

1.10 Furthermore, spectrum that is not allocated by the Australian Broadcasting Authority (ABA) to the FTAs for digital broadcasting should not form a part of the broadcasting services bands, and should be returned to the control of the Australian Communications Authority (**ACA**) for allocation by it pursuant to a price based allocation mechanism. There is no reason, in Cable & Wireless Optus' view, for spectrum that is not directly linked to the digital activities of the FTAs to be regulated by the ABA. The uses to which the spectrum will be put for datacasting services is far more closely aligned with the use of spectrum for other carriage services, such as mobile telephony. Accordingly, to ensure consistency in regulatory administration of the allocation process it ought to be regulated by the ACA, which has been and continues to be responsible for the regulation of the allocation of spectrum for communications carriage purposes.

1.11 The so called anti-siphoning rules should be substantially liberalised to ensure open and effective competition. Cable & Wireless Optus recognises that there are some sporting events of national significance where it is entirely legitimate to impose a regulatory regime which ensures that a FTA has an opportunity to acquire the FTA television rights thereby maximising the possibility that all Australians who wish to view that event may do so. However, the events which fit within this category are far fewer than those currently subject to the anti-siphoning rules and ought to be limited to such things as the Melbourne Cup, the grand final of certain major football codes and test cricket matches. There is absolutely no reason, in Cable & Wireless Optus' submission, why a rugby sevens game between Fiji and Japan should be subject to rules the effect of which is to give a FTA the first right to acquire both the FTA and pay television rights to that event. Such a requirement serves no national interest whatsoever.

1.12 Further, and in any event, there is absolutely no reason at all for a pay television operator to be prevented from acquiring the pay television rights to any of these events provided that in doing so the pay television operator does not acquire the free television rights or otherwise acquire rights which would prevent a FTA from acquiring and exploiting the FTA rights. That is, pay television and FTA sporting rights should be allowed to coexist for a limited number of sporting events of national significance. Dual rights do not in any way impact detrimentally on the policy underlying the anti-siphoning rules, which is to ensure that all Australian citizens have access to events of national significance.

1.13 Cable & Wireless Optus further submits that the policy objectives underlying the anti-siphoning rules can only be realised if FTAs are actually required to show the listed sporting events of national significance.

1.14 Whatever checks and limitations government may impose on spectrum utilisation and whatever levelling of the playing field government may undertake in relation to content

acquisition if the FTAs are, through digitisation, able to become the gatekeeper to the viewer through controlling the set top box and other customer premises equipment the FTAs dominance will not only be entrenched but substantially strengthened. It is critical that the FTAs not be allowed to be the gatekeeper to the home through controlling the set top box. Accordingly, it is critical that set top boxes be interoperable. That is to say set top boxes must have the capacity to operate not only in relation to digital FTA but also satellite and cable delivered pay television and ultimately datacasting services. It is not necessary that set top boxes contain the necessary equipment for each of those services when first acquired but rather that they are capable of being upgraded to access each of those services and that there is no impediment to the consumer making a choice to acquire one or more of those services and upgrade the box accordingly.

2. CONVERGENCE AND REGULATION

2.1 The current Australian regulatory regimes were not developed with market convergence in mind, and it is now proving increasingly impractical to regulate broadcasting separately from telecommunications:

- The markets are economically linked, with competition problems in the broadcasting sector spilling over into telecommunications; and vice versa.

- There are overlaps and duplications in regulatory jurisdictions. By way of example, the Australian Communications Authority has traditionally been responsible for the management of spectrum allocation in Australia. However, the Australian Broadcasting Authority is now responsible for the allocation of certain spectrum — being spectrum which happens to have been designated for digital television, but could just as easily have been utilised for mobile telephony. There is little chance of ensuring that such scarce public resources are allocated in the most efficient manner if management is arbitrarily divided between telecommunications and broadcasting authorities.

- Even from the consumer's perspective, the distinction is becoming meaningless. With the emergence of digital broadcasting, consumers will frequently be ambivalent as to whether electronic communications are sent via "carriage" or "broadcasting" services. Multiple services will be delivered over the same system; most systems will be able to deliver all services; and those operating many systems will not know what services are being carried over them at any particular time.

- The current restrictions on cross-media ownership produce arbitrary results in this convergent communications industry, since they are based on particular delivery mechanisms (ie: newspapers, commercial television and commercial radio), rather than on

the actual services delivered to end customers — resulting in a tilted playing field which inhibits fair competition and consistent regulation. The arbitrary nature of the rules is illustrated by the fact that there is nothing to prevent the incumbent telecommunications provider, Telstra Corporation Limited, from acquiring a commercial television licence, despite the fact that it already has control of the local loop for the purpose of delivering online services throughout Australia on a ubiquitous basis — a situation which could yield far greater competitive detriment than any merger or takeover prohibited by the cross-media rules.

The need for regulatory change

2.2 Cable & Wireless Optus is in no doubt that the regulation of telecommunications and broadcasting must change — current regulation is not sustainable, given its failure to recognise these fundamental shifts in electronic communications. Given the strong supply side convergence, Cable & Wireless Optus believes that there is a need to ensure coherent and consistent regulation across the converging sectors — and to remove the arbitrary distinctions and anomalies which are premised on out-of-date technological divisions.

2.3 Furthermore, the industry requires a regulatory regime which can address the legacy of Government-sponsored dominant incumbents the characterise both the broadcasting and telecommunications sectors.[1] — and which will continue to shape Australian electronic communications for some time to come. While the on-rush of technology makes convergence inevitable, convergence is not synonymous with consolidation and the control of new industries by a handful of giant conglomerates. It involves new media companies coming to TV screens. It involves established media turning to the Internet. Convergence means more choices.

Competition in the communications sector

2.4 Cable & Wireless Optus considers that the cross-media rules are the weak link in the development of a competitive communications market, and that they will result in investment distortions, without providing any assurance of the plurality and diversity which they were intended to deliver.

2.5 By comparison, the application of the existing competition provisions of the Trade Practices Act 1974 would provide a light-handed regulatory mechanism, encouraging competition to flourish and innovative services to be developed, while at the same time providing effective

[1] The incorporation of telecommunications-specific rules in Parts XIB and XIC of the Telecommunications Act 1997 recognises that competition law, with its emphasis on waiting until an abuse has occurred and focussing remedies on individual abuses, may be inappropriate to deal with the long-term and widespread advantages enjoyed by historically incumbent firms.

consumer protection and deterrence to anti-competitive practices. The existing competition provisions are inherently flexible and could be relied on to deliver competition across the entire communications sector, ensuring that FTAs are not able to take advantage of their incumbent positions to entrench or obtain dominant positions in new and emerging markets.

2.6 Such an approach provides the only viable means of addressing concerns relating to access issues. At present, major anomalies exist due to the fact that cable networks are subject to the access rules contained in the Trade Practices Act 1974, while there are no rules governing access to bottlenecks in the "broadcasting" sector — including the fully ubiquitous FTA networks. Unless issues pertaining to access are determined on a consistent basis across the entire communications sector, investment incentives will be distorted and inefficiencies will result.

2.7 The existing competition provisions can be utilised to tackle potential abuses of market power at all stages in the delivery of services to consumers, ensuring that interoperability is achieved without endowing particular firms with the ability to lever their bottleneck market power in one part of the system across the whole of it.

"Public interest" factors

2.8 While a consistent approach to competition policy is required across the communications sector, this does not mean that the special characteristics of the media and broadcasting industries should be ignored. As identified in the objectives of the Broadcasting Services Act,[2] the broadcasting and media sectors are distinguished by a number of public policy, rather than economic, considerations — reflecting the ability of the broadcasting and media sectors to shape and influence public opinion. The objectives reflect:

- a desire to ensure plurality and diversity of ownership in the commercial provision of content;
- a desire to secure commercially (and politically) neutral reporting;
- a desire to develop and reflect a sense of Australian identity, character and cultural; and
- concern over the content of programs.

2.9 Cable & Wireless Optus believes that society will want more in this area than an unconstrained competitive market may be able to deliver. There will still be a need for a

[2] *Broadcasting Services Act* 1992, s 3.

limited set of "special" rules to reflect the particular economic, social and cultural characteristics of the communications sector:

(i) rules to ensure delivery of social and consumer policy goals:

- It is generally accepted that the public policy objectives pertaining to plurality and diversity of views, and protection of national cultures, are objectives that cannot be left solely to the forces of competition. An economically efficient communications market may be insufficiently diverse and pluralistic to ensure that citizens can fully participate in public life and exercise their political rights in a well informed way. Concentration of ownership and control in the communications sector may be economically efficient but may unacceptably lead to some interest groups, either political or commercial, using media influence to wield political power. Moreover, general competition law may not be able to ensure plurality as it tends to focus on single markets while the communications sector often produce unique products for which there is no satisfactory substitute.

- The emergence of digital broadcasting will expand the sources of content and the outlets for content, and is therefore likely to enhance plurality and diversity in the communications sector. However, there is no certainty that it will (at least for some time) deliver the social and consumer goals outlined above.

- Cable & Wireless Optus believes that these social and consumer policy goals must inevitably be determined in conjunction with issues pertaining to competition — and that such public interest considerations ought to be included in the criteria to considered in reaching any decision pertaining to media / broadcasting alongside the competition and efficiency objectives. The application of a broader test of this nature is not without precedent in the Trade Practices Act — it could be applied by the ACCC in a similar manner to the "public benefit" test or the test relating to "long term interests of end users", tests which the ACCC is already required to take into consideration from time to time when making decisions relating to competition.

(ii) rules on content:

- Issues relating to cultural policy objectives, content quality and standards, and consumer protection issues, must be addressed in accordance with the more diverse demand-side considerations.

- In order to ensure that Australians enjoy world-class communications with a distinct Australian presence that serves the public interest, it is imperative to retain the objective of ensuring that the content provided fosters Australian creative talent and reflects Australian society — in all its complexity. Cultural measures are important because culture, broadly speaking, is an important part of our national identity. Our content rules allow Australians to define their own cultural identity. It would be wrong to think that this is just an Australian preoccupation. All around the globe, nations are scrutinising the changes in the communications industry, especially globalisation — and are concerned about issues of cultural sovereignty and the presence of indigenous products.

- Cable & Wireless Optus considers that the role of content/cultural regulator can be managed independently from issues pertaining to competition and the other factors pertaining to social and consumer policy goals. This role ought more appropriately to be retained by the Australian Broadcasting Authority — whose primary responsibility would be to ensure that customers obtain access to the type of content they need and are not exposed to content they do not want (including ensuring that children are adequately protected from harmful material).

The significance of a consistent regulatory framework for ongoing investment

2.10 Failure to establish a new and consistent regulatory framework across the communications sector is likely to have very serious consequences. A positive climate for investment is incompatible with regulatory uncertainty which, in turn, follows inevitably from a plurality of regulators each requiring different and possibly conflicting objectives to be met. Lack of investment now will result in Australia falling behind other countries in the provision of information services and, because of the importance of electronic communications as inputs to economic activity in general, in other sectors of the economy.

3. MANAGEMENT OF SPECTRUM

3.1 Radio spectrum is a finite resource of economic significance, with its optimal use depending on effective planning and management to exploit the technology available. Spectrum allocation problems to date show that policy and regulatory issues must now be thought through in a "converged" way — a consistent policy and regulatory framework is required if access to the electronic communications market is to be both transparent, fair and equitable on the one hand and economically efficient on the other. Convergence, whether between fixed and mobile services or between broadcasting and

telecommunications, will fundamentally alter the way in which radio spectrum is used to deliver these services.

3.2 Government will have a key role in ensuring flexibility in the current balance between telecommunications, broadcasting and public/commercial usage. Convergence has not eliminated the need for management of the spectrum — indeed, new services and technologies have heightened the need for regulators to ensure adequate spectrum for both new and existing technologies, so that both can flourish.

Consistent regulation

3.3 Cable & Wireless Optus believes that the management of spectrum must managed by a single regulatory authority — there is little chance of this scarce public resource being managed efficiently if management is arbitrarily divided between the telecommunications and broadcasting authorities. Cable & Wireless Optus submits that spectrum which is not allocated by the ABA to the FTAs for digital broadcasting should *not* form a part of the broadcasting services bands, and should instead be returned to the control of the Australian Communications Authority (**ACA**) for allocation by it pursuant to a price based allocation mechanism.

3.4 There is no reason, in Cable & Wireless Optus' view, for spectrum that is not directly linked to the digital activities of the FTAs to be regulated by the Australian Broadcasting Authority. The uses to which the spectrum will be put for datacasting services is far more closely aligned with the use of spectrum for other carriage services, such as mobile telephony. Accordingly, to ensure consistency in regulatory administration of the allocation process it ought to be regulated by the ACA, which has been and continues to be responsible for the regulation of the allocation of spectrum for communications carriage purposes.

Efficient use of spectrum

3.5 Cable & Wireless Optus is concerned to ensure the efficient use of spectrum in the transition to digital broadcasting. Without accepting the validity of the Government's decision to allocate spectrum to the FTAs on a "quid pro quo" basis, Cable & Wireless Optus considers that FTAs must be required to use the allocated spectrum in the most efficient manner possible in meeting their digital broadcasting requirements.

3.6 Furthermore, the allocation of spectrum to the FTAs must not be viewed as an entrenched right. Digital broadcasting is a new, more effective way of transmitting television services and allows much more information than before to be transmitted — and with technological

developments, the channels of spectrum channels allocated to FTAs may subsequently prove to exceed that required to meet their digital broadcasting requirements (as discussed in section 4). The allocation of the 7 MHz of spectrum to FTAs should therefore be monitored on a geographic basis — the objective being to ensure that as many channels of spectrum as possible are freed up from time to time for the introduction of new and innovative services, further stimulating competition and choice in the converging multimedia.

3.7 To this end, Cable & Wireless Optus considers that the relevant regulatory authority (presumably the Australian Communications Authority) should impose requirements on the FTAs to employ commonly available, standardised, open technologies and deployment methods which minimise their requirements for spectrum channels for the purposes of digital transmission:

- One of the benefits of the European Digital Video Broadcast (DVB) system adopted by Australia is its ability to be deployed in a Single Frequency Network (SFN) configuration for Digital Terrestrial Television Broadcasting (DTTB).[3]

- A SFN minimises the channel allocation demand on spectrum by allowing repeater stations to re-broadcast on the same frequency as the primary transmission station in areas where reception from the primary transmission station is degraded. The DVB system allows for this by transmitting signals using an RF modulation scheme known as COFDM (Coded Orthogonal Frequency Division Modulation).

- COFDM allows a DVB compliant receiver (TV or set top box) to pick up the signals from the primary transmission station and one or more other repeater stations on the same frequency channel, and effectively allow them to build together to form a stronger signal, rather than interfering with each other — which would occur with traditional analog television transmission.

- According to various information published by DVB, SFNs have been successfully trialed in Sweden, Germany and Ireland, are being planned for Italy and Spain, and are generating interest in Brazil, Japan, Hong Kong, Singapore and other countries.

3.8 Cable & Wireless Optus submits that the relevant regulatory authority ought to monitor the results of such trials, and to impose obligations on FTAs to utilise such technology as and when it becomes viable. Furthermore, if the utilisation of such technology results in

[3] By comparison, the American system chosen for digital television, known as ATSC (Advanced Television Systems Committee), uses a modulation scheme known as 8-VSB which is different to COFDM, and which does not lend itself to SFN modes of operation

spectrum channels in certain geographic regions being no longer required by the FTAs for the purpose of fulfilling their obligations relating to the transmission of digital broadcasting, those spectrum channels ought to be returned to the control of the ACA for allocation pursuant to a price based allocation mechanism.

3.9 Cable & Wireless Optus is also concerned to ensure that the migration from analogue to digital TV broadcasting results in the current analogue TV spectrum being freed up to the greatest extent possible, even allowing for the introduction of new broadcast services. Such spectrum could then be used to introduce new innovative services, further stimulating competition and choice in the converging, multimedia world. To this end, clear rules need to be established for the handing back of analogue spectrum, and its subsequent management by the Australian Communications Authority.

4. CONSTRAINTS ON THE POWER OF THE FTA INCUMBENTS

4.1 Frequency spectrum is a key but finite resource even in the digital age. The cost and amount of spectrum available will have an important impact on the development of existing and new delivery channels where a broadcaster offering multimedia or online services uses spectrum obtained free or at low cost, and competes with operators from the telecommunications sector who have paid a price reflecting the commercial value of the resource allocated.

4.2 Cable & Wireless Optus is therefore concerned that the allocation of the 7 MHz of spectrum to the FTAs for the purposes of digital broadcasting should not result in the FTAs stifling further development of the pay television industry or the emergence of other sectors such as datacasting. Cable & Wireless Optus believes that any determination as to the scope of enhanced programming and datacasting at this stage will have a major impact on the development of infrastructure in the broadcasting sector and, ultimately, on competition and consumer choice in broadcasting in Australia.

4.3 It is critical that the regulatory model:

(a) creates conditions that foster competition by encouraging the entry of new and diverse market participants;

(b) does not create the potential for market distortions by creating a series of carriage service providers of Internet type services, which are already appropriately regulated under the telecommunications regime;

(c) does not allow datacasting to become a *de facto* form of broadcasting that can be exploited by the free to air broadcasters (FTAs) to further entrench their dominant position in the electronic communications market; and regime; and

(d) incorporates stringent and comprehensive prohibitions on using digital spectrum for multi-channelling (or any other form of broadcast that is in substance substitutable with pay television).

4.4 Cable & Wireless Optus believes that the best protection against this happening is as follows:

(i) "datacasting" by the FTAs should not be permitted to include services that are "defacto" broadcasting services, such as video on demand, near video on demand, full frame rate audio/video services, cached (stored) video and audio services, and does not include Internet or online services; or

(ii) if the Government does not adopt this approach then, to maximise the prospects for the emergence of new players and to generally enhance competition, the FTAs should be excluded from datacasting for the simulcast period; or

(iii) if the Government is not minded to follow either of these approaches then, at a minimum, special restrictions (over and above those contained in the general competition rules) should be imposed on the FTAs so that they cannot leverage their dominant position in the broadcasting market to become dominant players in datacasting, thereby discouraging new entrants and stifling competition.

4.5 Cable & Wireless Optus believes that a datacasting service should allow the delivery of data in the form of text, speech and images. However the scope of datacasting service should be limited to ensure there is no evasion by the FTAs of the restrictions on additional commercial broadcasting services, multi-channelling and subscription television imposed on them. Datacasting should also exclude services which are or may easily become defacto broadcasting services such as full frame rate audio/video services, cached (stored) video/ audio services and video on demand or near video on demand services.

4.6 These services will inevitably deliver programs that are so similar to broadcasting services that they would allow the datacaster to operate effectively as a broadcaster. The only difference is that they would be offering programs at a time more convenient to the consumer and without the regulatory constraints to which traditional broadcasters are subject. Plainly it was not the intention of Parliament when enacting the Digital Act and allocating spectrum to the FTAs at no charge that datacasting should be allowed to become

an alternative way of delivering services which are, from a consumer perspective, substantially substitutable for traditional broadcasting services.

4.7 In addition, if these types of video services were to be within the scope of datacasting this would also have an extremely negative impact on the pay television industry. This industry has had to invest enormous amounts in licence fees, infrastructure and other start up costs over the past decade and is currently in a critical phase in terms of market development. Further, the investment by Cable & Wireless Optus, Telstra and others in pay television infrastructure, in particular broadband networks, was made in a regulatory environment which drew a clear distinction between broadcasting and carriage and did not allow for the use of spectrum within the broadcasting services bands for the delivery of services that are in effect broadcasting services but are not regulated as such.

4.8 For pay television operators to be exposed to competition from datacasters which offer essentially comparable services such as video on demand services, but are not subject to the same regulatory constraints, is totally inequitable and may substantially impede the growth of the pay television industry.

4.9 If, notwithstanding Cable & Wireless Optus' concerns, datacasters are permitted to offer services which are comparable to pay television, Cable & Wireless Optus believes that the principle of competitive neutrality becomes paramount. Accordingly, at a minimum, the delivery of services by datacasters should be regulated in the same way as pay television operators are regulated. This would involve imposing the same local content obligations on datacasters, as well as the 'anti-siphoning' rules.

4.10 However, Cable & Wireless Optus strongly believes that even if those regulatory provisions were applied to datacasters generally, this would not overcome the significant competitive advantages which FTA datacasters enjoy in comparison to new entrants. FTAs already have substantial economies of scale in relation to local content.

4.11 Further, the anti-siphoning provisions would be of little effect in regard to FTAs, given that they already operate to confer on FTAs advantages in the acquisition of sports rights. The FTAs, which already hold many significant sporting rights, would simply be in an even better position to exploit those sporting rights not only on their FTA services but also as part of their datacasting services.

FTA restrictions during the simulcast period

4.12 FTA broadcasters clearly stand the most to gain from a broad definition of datacasting. FTA broadcasters are one of the strongest sectors of the communications industry and have

enjoyed a market which has been protected from competition by additional FTAs for decades. They enjoy existing access to all of Australia's six million households. Whilst they are required to incur not insignificant capital investment as part of the conversion to digital these are costs which they are more than able to fund from their existing businesses. As FTAs will not be required to pay for the 7 MHz of additional spectrum being made available to them and compete in the same way as any aspirant datacasters, FTAs are in an even better position to easily fund digital conversion and offer datacasting services.

4.13 Without the changes suggested below, FTA networks will be able to leverage from their position of strength in the broadcasting market, arising from a long history of protection from competition. Such leveraging is likely to take the form of integration of their television programming with their datacasting services, exploiting existing viewer loyalty, profile and capacity to advertise their datacasting service in competition with any new players. New entrants are likely to need several years and large advertising budgets to be able compete with the profile and exposure of a datacasting service offered by a FTA network.

4.14 Further, FTAs have existing content arrangements and connections which put them in a position to dominate the acquisition of content for datacasting. Each of the commercial FTAs have long standing and key relationships with major suppliers of content such as the Hollywood studios, and sporting bodies. At least in the case of the Nine and Seven Networks, they have an interest in pay television, and in the case of the Nine Network, on-line services, all of which give them substantial advantages over new entrants in the market in terms of securing the appropriate content for datacasting.

4.15 There is little doubt that if the FTAs are unrestricted in their use of datacasting they will continue their horizontal and vertical integration strategies to dominate the provision of datacasting services and thereby further strengthen their leading position in the communications sector.

4.16 Some FTA broadcasters are also likely to receive direct support from the government under the Regional Equalisation Plan, exacerbating this competitive imbalance.

4.17 The adverse competitive consequences of allowing FTAs unrestricted access to datacasting cannot be overstated. The communications sector is already highly concentrated. The Government has made a decision not to issue any further commercial broadcasting licenses in the near future, and pay television is in its infancy.

4.18 In these circumstances, to give the FTAs unfettered datacasting rights will only further entrench their position by allowing them to substantially raise the barriers to entry for new

players. The FTAs' existing economies of scale, access to key content, audience reach and advertising connections will all be used in a way that allows them to dominate datacasting in the same way as they dominate the broadcasting sector. If this is unchecked FTAs will be able to continue in their domination of electronic delivery of communications services. Concentration of electronic delivery of communications services will hamper competition and will result in consumer choice being limited and the prices consumers pay for electronic communications being higher than they should be.

4.19 To allow this to happen would be a grave disservice to the Australian public and would be completely at odds with the policy of fostering diversity in the communications sector.

4.20 If the Government does not take appropriate steps to level the playing field for new datacasters there is a serious risk that the market for datacasting services will be foreclosed. This in turn will have a critical adverse impact on dynamic efficiency in the market. At a time when competition policy is focused on breaking down incumbency advantages and allowing new competitors to compete on an even footing, it makes little sense to give incumbent broadcasters even further benefits which can be used to lessen competition.

4.21 Accordingly, it is absolutely critical that the legislation be amended so that FTAs are not permitted to offer datacasting services, at least for the simulcast period. By excluding the FTAs from datacasting for the simulcast period the Government would allow sufficient time for new entrants to establish themselves in the market and to secure content sufficient to withstand the no doubt fierce competition which they will face from the FTAs once the FTAs are able to provide datacasting services.

4.22 Restricting FTA broadcasters in this way would encourage new players to bid for spectrum at auction and invest in the enormous infrastructure costs required to start up a new and independent datacasting service. It would also give effect to the Government's policy of using digital technologies to increase diversity of choice and opinion in the Australian information and entertainment industry by promoting sustainable competition.

4.23 If the Government does not adopt this approach, at a minimum, FTAs should be subject to the following special limitations, at least during the simulcast period:

(i) They should be prohibited from offering full frame rate video services, audio services, video on demand, near video on demand or cached services for the reasons outlined above.

(ii) They should be prohibited from offering e-commerce, two way interactive communications or subscriptions to subsidise their datacasting service, at least for

the simulcast period. Without this restriction the FTA broadcasters will be at a significant advantage by offering e-commerce facilities linked to their high rating free to air programs in a manner with which new entrants could not compete.

(iii) They should not be permitted to offer carriage services such as Internet or online services. Without this restriction FTA broadcasters would be able to turn themselves into carriage service providers, unfairly relying on their incumbent advantages.

(iv) They should be required to pay at least the same amount as new entrants pay at auction for the right to offer datacasting services. The 'charge' referred to in the current legislation, which is to be determined with 'reference" to "competitive neutrality principles" is far too imprecise to ensure that a similar amount is to be paid by both FTA broadcasters and new datacasters. Further, in assessing what is a similar amount to that paid by non-FTA entrants, regard must be had to the risks faced in an open auction process, the fact that spectrum must be acquired "in bulk" with the consequent business risks (in contrast to FTA broadcasters who "pay as they go"), and any government support available to FTA broadcasters from the Regional Equalisation Plan. Charges should be determined in a manner which ensures that FTA broadcasters do not have an unfair competitive advantage over other datacasters who have to purchase spectrum on the open market.

4.24 The reviews currently being conducted pursuant to section 59 have the potential to impact not only on broadcasting services but also on other telecommunications and multimedia services, many of which are still in the initial stages of development. Given the current lack of regulatory certainty in relation to datacasting in particular, the review process needs to be mindful of the need to promote ongoing investment in the facilities required to offer such new services in the future.

HDTV obligations

4.25 The purpose behind the Government's decision to "lend" each of the FTAs a 7 MHz channel of valuable spectrum free of charge was to ensure that they could provide prescribed amounts of High Definition Television (HDTV) from the commencement date of digital television in Australia. However, concerns have been expressed as to the risk that FTAs will attempt to abandon HDTV and will instead use the 7 MHz channel for new services non-broadcasting services and for subscription services (broadcasting or non-broadcasting), eg: multi-channelling, on-line and data delivery.

4.26 In order to ensure that this does not occur, there should be minimum standards established to define HDTV and prescribed amounts of HDTV programming which must be broadcast by the free to air broadcasters (FTAs) over each 24 hour period.

- The minimum standards defining HDTV should be made with reference to minimum resolutions, rather than a specific bit rate, and should be specified in legislation. These minimum standards should be based on the principle that HDTV should be a significant, rather than a marginal, improvement on standard definition television.

- All transmissions should be made available in HDTV format from the commencement date for digital television. This will be possible because programs that have not been produced in HDTV format can be up-converted to HDTV via a simple conversion process. However, FTAs should also be required to transmit a minimum proportion of programming that has been produced in HDTV format.

- It is also important that FTAs are required to broadcast a prescribed amount of programming which has been produced in HDTV as part of their daily programming schedule. This will ensure a minimum number of hours of programming of extremely high picture and sound clarity and stimulate consumer demand for HDTV receivers and decoders.

- At the commencement of digital television in Australia at least two hours of programs produced in HDTV format should be broadcast by the FTAs during prime time per day. This should be progressively increased over time. There should also be a requirement to deliver programs produced in HDTV at non-prime time periods of the day. This should commence at least two hours per day and should also be increased progressively over time.

4.27 It is important that the HDTV standards are sufficiently high to enable retailers to demonstrate to consumers the significant benefits of digital over analogue. To do this the minimum resolution and the aspect ratio must be significantly different from current standard definition analogue television. In this regard it should be noted that standard definition analogue television in Australia, using the current PAL format, is significantly better than standard definition using National Television Standards Committee (NTSC) recommendations in the USA, particularly in relation to picture "sharpness" which has been one of the major features differentiating digital and analogue television in the USA.

4.28 The most effective mechanism for enforcing the minimum standards for HDTV is to include the requirements as part of the FTAs licence conditions. In the case of the National

FTAs this may require amendments to be made to the respective Acts of the ABC and the SBS.

4.29 Minimum standards for HDTV should also be expressly included in legislation. This would be consistent with the *Television Broadcasting Service (Digital Conversion) Act 1998* which imposes penalties for non-compliance with any prescribed HDTV standards.

4.30 From the relevant commencement dates for digital television *all transmissions* should be broadcast in HDTV format. This will be possible because programs that have not been produced in HDTV format, including programming shot in 35 mm or Super Sixteen mm film, can be up-converted to HDTV via a simple conversion process.

- Clearly in the early start up phase of digital television in Australia there will be limited range of programs domestic and foreign programs produced in HDTV available. However, this should steadily increase over time.

- Moreover, there are a number of options available to the Government to encourage the production of HDTV programs in Australia. For example, the Government might require all or a significant amount of domestic programming to be produced in HDTV format. Similarly, programming which is under the effective control and production of the FTA broadcasters, including most domestic sporting programs, studio produced news programs, local productions and children's programming could also be required to be produced in HDTV format.

- There is no doubt that there are costs involved in producing or purchasing programs formatted in HDTV. However, one of the reasons that the Government made the decision to 'loan' spectrum to the FTAs at no cost was to offset the investment that the FTAs will be required to make in offering HDTV digital services. In other words, ensuring that the Australian public are provided with a proportion of HDTV sourced programming by the FTAs from 1 January 2001 is a key feature of the Government's digital regime.

4.31 The importance of encouraging the production of programs in HDTV format has been noted in early market research by Connie Book in the USA (Broadcasting & Cable Magazine, 7 December 1998). This research suggests that consumers will not purchase HDTV equipment solely based on programming that is up-converted from SDTV to 1080I. Therefore prescribing a sufficient amount of HDTV programming will be critical to the success of digital television in Australia.

4.32 There is no compelling reason to introduce different HDTV targets for regional broadcasters. The digital regime already provides a later start up date for regional broadcasters, and the Regional Equalisation Plan is designed to provide support for this category of broadcaster to ensure that they are not disadvantaged. However, FTAs should not be required to deliver HDTV to remote areas at this time. This is because of the substantial costs involved to the FTAs who service these areas via satellite and the investments that have already been made by consumers in set top boxes which at this time can only receive Standard Definition Television (SDTV) and not HDTV.

Anti-siphoning

4.33 The so called anti-siphoning rules should be substantially liberalised to ensure open and effective competition. Cable & Wireless Optus recognises that there are some sporting events of national significance where the public interest may be served by ensuring that a FTA has an opportunity to acquire the FTA television rights, thereby maximising the possibility that all Australians who wish to view that event may do so. However, the events which fit within this category are far fewer than those currently subject to the anti-siphoning rules. Anti-siphoning rules ought to be limited to such events as the Melbourne Cup, the grand final of certain major football codes and test cricket matches. There is absolutely no reason, in Cable & Wireless Optus' submission, why a rugby sevens game between Fiji and Japan should be subject to rules the effect of which is to give a FTA the first right to acquire both the FTA and pay television rights to that event. Such a requirement serves no national interest whatsoever.

4.34 Further, and in any event, there is absolutely no reason at all for a pay television operator to be prevented from acquiring the pay television rights to any of these events, provided that in doing so the pay television operator does not acquire the free television rights or otherwise acquire rights which would prevent a FTA from acquiring and exploiting the FTA rights.

4.35 Cable & Wireless Optus does not believe that there are any grounds for prohibiting any live event from being simulcast on both the FTA networks and the pay television networks. Dual rights do not in any way impact detrimentally on the policy underlying the anti-siphoning rules, which is to ensure that all Australian citizens have access to events of national significance. As such, the anti-siphoning rules are currently acting in such a manner as to unnecessarily impede competition well beyond the level required to achieve the underlying objectives. The objectives of the anti-siphoning rules could be achieved in a manner less distorting on competition, and as such should be reformed.

4.36 In addition, there is clear evidence that the FTAs have acquired a range of rights which, either because of the FTAs scheduling limitations or otherwise, they have failed to exploit

by broadcast. Had pay television operators been free to acquire those rights there is little doubt, given their different scheduling imperatives, that those rights would have been more fully exploited. Cable & Wireless Optus submits that the policy underlying the anti-siphoning rules can only be realised if each of the events subject to the anti-siphoning rules are required to be shown by the FTAs.

4.37 In the event that the Government does not proceed with the reforms recommended by Cable & Wireless Optus, then any partial liberalisation of the anti-siphoning rules must be accompanied by a corresponding strengthening of provisions which prevent FTAs from hoarding sports rights, that is acquiring rights and then failing to exploit them by broadcast.

4.38 Cable & Wireless Optus strongly endorses the submission made by the Australian Subscription Television and Radio Association to the Productivity Commission Broadcasting Inquiry in respect of anti-siphoning. The anti-siphoning rules were not intended to confer commercial advantage on the FTAs except to the extent required to prevent subscription television operators from buying free to air rights to certain key events — being events that are actually shown by the FTAs. However, the fact that subscription television operators are prevented from acquiring any rights to listed events — regardless of whether the FTAs actually show any of the events — results in the conferment of a statutory monopoly on FTAs as sports rights brokers.

Negative impact of current anti-siphoning rules

4.39 The anti-siphoning rules have given rise to the following negative impacts:

- the level and quality of sporting coverage has been substantially impeded;
- the extent and effectiveness of competition in the broadcasting industry has been artificially constrained; and
- sporting associations and their players have been denied the right to freely negotiate a fair and reasonable market return.

4.40 Constraints on the acquisition of sporting rights results in less money going towards a range of sporting activities than would be the case in a free market. The anti-siphoning provisions have the effect of decreasing the payment for sporting content below that which would be paid in an open market, so that the factors of production (ie the players and sporting organisations) are paid below their marginal product, leading to an inefficient allocation of resources away from their best use.

4.41 This inevitably has the impact of reducing Australia's sporting competitiveness, with potential consequences for the Sydney 2000 Olympics, the Rugby World Cup, the Cricket World Cup, etc. Given the very significant resources the Australian Government devotes to fostering sporting success, through institutions such as the Australian Institute of Sport (AIS), it seems incongruous that it would allow the anti-siphoning provisions to be misused in such a manner as to impede the success of Australian sporting bodies and athletes. The artificial constraints embodied in the anti-siphoning provisions therefore have the effect of subverting the positive public externalities, or intangible benefits, that all Australians enjoy whenever an Australian sportsperson succeeds on the international stage.

United States experience

4.42 There are no anti-siphoning provisions in the United States. The FCC was unsuccessful in its efforts to defend "anti-siphoning" rules, with the United States Court of Appeals finding that there was no reasonable public interest justification for imposing siphoning conditions on cable carriage of sports programming.[4] However, a subsequent review by the FCC indicates that sporting events have not significantly migrated from free-to-air to cable delivery platforms in the last 20 years. Instead, all sports are subject to complex arrangements involving detailed carve-outs and varying shades of exclusivity. For example, ESPN's US$435 million deal with Major League Baseball gives it broad exclusivity on Wednesdays, limited regional exclusivity on Sundays, and no exclusivity on opening day and holidays. Even the free-to-air networks do not consider anti-siphoning rules necessary, and the FCC has decided not to pursue them.[5]

4.43 The FCC's findings need to be viewed in the context of the United States pay television industry, which has been well established over many decades, and is a highly profitable and able competitor against the FTA broadcasters. In the United States, the penetration rate for pay television via cable and satellite is approximately 74 per cent, with there being a total of 75 million subscribers.[6] However, despite the deep financial resources of the United States pay television operators, their wide availability, high penetration of TV households, and an open marketplace in TV rights to sports, the FCC found that FTA coverage of sports remains high and unaffected by competition from pay television.

United Kingdom experience

4.44 The United Kingdom has anti-siphoning provisions with a "prohibited list" similar to Australia's. However, the scope of those anti-siphoning provisions are narrowing, with the

4 Home Box Office v FCC (1997) 567 F 2d 9; 434 US 829.
5 FCC Inquiry into Sports Programming Migration, 9 June 1994, FCC 94-248.
6 OECD Communications Outlook 1999, pp. 127-128.

organisers of Wimbledon having successfully convinced the Government that only the finals should be subject to the anti-siphoning rules. It is ironic that the same Wimbledon games that are open to pay television operators in the United Kingdom are not available in Australia — the Australian list includes every game of tennis played at Wimbledon

4.45 The adverse impact of the anti-siphoning provisions has been highlighted by sporting bodies in the United Kingdom, with the England and Wales Cricket Board petitioning the government to have England's home test matches removed. The Board estimates that if pay TV channels were permitted to bid for exclusive live broadcast rights to the games, its annual revenues could triple.

4.46 The anti-siphoning rules impact dramatically on the competitiveness of Cable & Wireless Optus' pay television operations. Live sport is a major driver of pay television worldwide, meaning that the anti-siphoning provisions have the effect of limiting the level of service Cable & Wireless Optus can offer to its subscribers. The damage relates not only to Cable & Wireless Optus' inability to simulcast those limited events of national significance which ought reasonably to be available on both FTA and pay television. The damage is felt more keenly by subscribers in respect of those areas of sport where Cable & Wireless Optus would logically provide a complimentary service to the FTAs, ie: by showing live coverage in circumstances where the FTA scheduling precludes live coverage.

Risks for the emerging communications market

4.47 As the FTAs move into digital communications, it is imperative that these distortionary rules be amended. Recognising that the anti-siphoning rules severely entrench the incumbent power of the FTAs, there is absolutely no justification for retaining such major anomalies at a time when the incumbent power of the FTAs provides a major impediment to the ongoing competitiveness of the communications sector.

5. INTEROPERABILITY

5.1 Digital networks will be able to deliver a multitude of different services. Whether or not consumers will actually be able to receive these services, once connected to a network or networks, will depend on whether there is end to end interoperability. The objective should be to facilitate convergence wherever possible, ensuring compatibility and interoperability between systems but providing flexibility in how those systems are deployed.

5.2 Digital set top devices are likely to be the gateway between digital bitstreams and new applications that may reside in the intelligent appliances of the future. These devices will not only control television service, but are also likely to be the customer's gateway to the

Internet and the world of electronic commerce. Interoperability for set top devices is of such significance that regulatory intervention will be required by the ACCC in the event that industry groups could reach of consensus on the relevant standards, or if a dominant operator is abusing its position.

5.3 Standards Australia Committee CT2/A is currently conducting a standard setting process for set top decoders and Cable & Wireless Optus is contributing to this process. It is anticipated that these standards will specify multiple inputs for digital television devices, allowing televisions to be connected to:

- an aerial to receive free to air broadcasts;
- a cable system to receive subscription services; and
- a satellite dish and low noise converter to receive subscription and free to air television.

6. CONCLUSION

6.1 The digital age requires the Government and regulatory authorities to rethink and hopefully recast the divergent and separate systems and frameworks that have previously been used for each form of information transmission. Since all such information now travels by the same electronic form, the onus is on regulators to justify any differences in the laws pertaining to different media and conduit by which such information is conveyed.

6.2 The ACCC will be an important body in safeguarding the openness and fairness of markets, both to review mergers and to identify areas where market power exists. The application of a consistent body of competition rules and other regulatory regimes across the communications sector would provided much-needed certainty, and enhance investment incentives.