

## KEY POINTS

- The existing retransmission regime in Australia works effectively in the interests of the consumer and the underlying rights holders in the programs broadcast by FTA services.
- The regime has no negative impact on the advertising revenue of commercial television broadcasters – audience numbers for FTA programs include FTA viewing in homes of STV subscribers.
- The primary public policy objective of ‘must-carry’ regimes in overseas jurisdictions is to ensure consumers are able to access FTA television services, and to ensure the viability of FTA commercial television broadcasters through being able to reach all consumers in their advertising market.
- In Australia, the public policy rationale of ensuring universal access to FTA television does not apply, as consumer access to reliable FTA television services in Australia is not contingent on subscribing to a STV service.
- In calling for the introduction of a ‘must carry/retransmission consent’ scheme in Australia, commercial FTA broadcasters are effectively seeking an additional revenue stream from STV customers for television services that are required to be both freely available and where those customers can already receive those services without payment.

## BACKGROUND

### Legislative basis for retransmission of FTA television services by STV in Australia

Current provisions under the *Broadcasting Services Act 1992* (BSA) and the *Copyright Act 1968* (Cth) allow a subscription television (STV) provider to retransmit free-to-air (FTA) television broadcasts, provided the retransmission is unadulterated and (in the case of commercial FTA transmissions) is only retransmitted within the broadcast licence area of the service.

An STV service retransmitting a FTA broadcast must pay equitable remuneration to the underlying rights holders in the content of the broadcast, but there is no requirement to compensate FTA broadcasters themselves for use of the broadcast signal.

### Retransmission consent/must carry schemes

Retransmission consent or ‘must carry’ regimes operate to varying degrees in a number of European jurisdictions and the United States. Australian commercial television broadcasters have, in recent years, argued for a similar regime to be adopted here. A significantly different broadcasting environment exists in Australia compared to the United States and Europe, and the particular public policy concerns that drove the introduction of ‘must carry’ regimes in these countries have never existed in Australia.

For many households in the United States and Europe, cable or other non-terrestrial broadcast transmission platforms are the primary or only means by which households can reliably receive terrestrial television services. The primary public policy objective of ‘must-carry’ regimes in these countries is to ensure consumers are able to access FTA television services, and to ensure the viability of FTA commercial television broadcasters through being able to reach all consumers in their advertising market.

### **‘Must-carry’ in the United States**

Cable television began in the United States in the late 1940s as community-based services for the retransmission of FTA television in areas that could not receive adequate reception of those services from household antennas. Subscription services were later added to the retransmitted FTA services delivered by cable. By 1992, when Congress enacted the first must-carry legislation in the United States, a significant majority of US homes received FTA television by means other than “over the air” broadcasts, a trend which has continued to this day.<sup>1</sup>

The public policy rationale for must-carry rules in the US remains much the same today as they were when those rules were first introduced:<sup>2</sup>

- to ensure all viewers can receive FTA television – there were concerns that, without ‘must carry’ provisions, cable networks may decide not to carry local television stations;
- to ensure the minority of viewers who still rely on terrestrial transmissions (including low-income and/or rural households) can continue to receive television services; and
- to ensure the viability of local FTA television stations, including local affiliates of the major US networks and those stations operating independently – of particular concern was that loss of advertising revenue for local television stations would threaten local content production.<sup>3</sup>

The link in the US between the underlying public policy rationale of protecting local content production and the operation of the retransmission regime has become increasingly tenuous. The major US networks now routinely demand ever increasing ‘programming fees’ from their affiliate stations, to be drawn from retransmission fees, while at the same time those local stations increasingly scale back local television production. The intention of the US ‘must carry’ regime was never for retransmission consent fees to be a revenue stream for national television networks. However the major US networks are increasingly viewing retransmission fees as no more than a lucrative supplementary revenue generator – one ultimately extracted from cable television subscribers.

### **‘Must carry’ in Europe**

Similarly in Europe, there is substantial reliance on non-terrestrial broadcast means to access FTA television. As a consequence, must-carry regimes of various forms have also been introduced in a number of European jurisdictions in response to the Must Carry

---

<sup>1</sup> In 2009, the OECD reported that 84% of the US population received television by cable or satellite means (OECD, Communications Outlook 2011). More recent media reports put STV penetration in the US at 90% (see “News bid to make TV really pay”, *Australian Financial Review*, 21 June 2012).

<sup>2</sup> See R. Frieden, “Analog and Digital Must-Carry Obligations of Cable and Satellite Television Operators in the United States” Working Paper Series, University of Pennsylvania, April 2005; J.H. Snider, “Multicast Must-Carry for Broadcasters” Spectrum Series Issues Brief 13, New America Foundation Spectrum Policy Program, Dec 2003.

<sup>3</sup> See Screenrights submission to the Convergence Review, 28 October 2011, p.4.

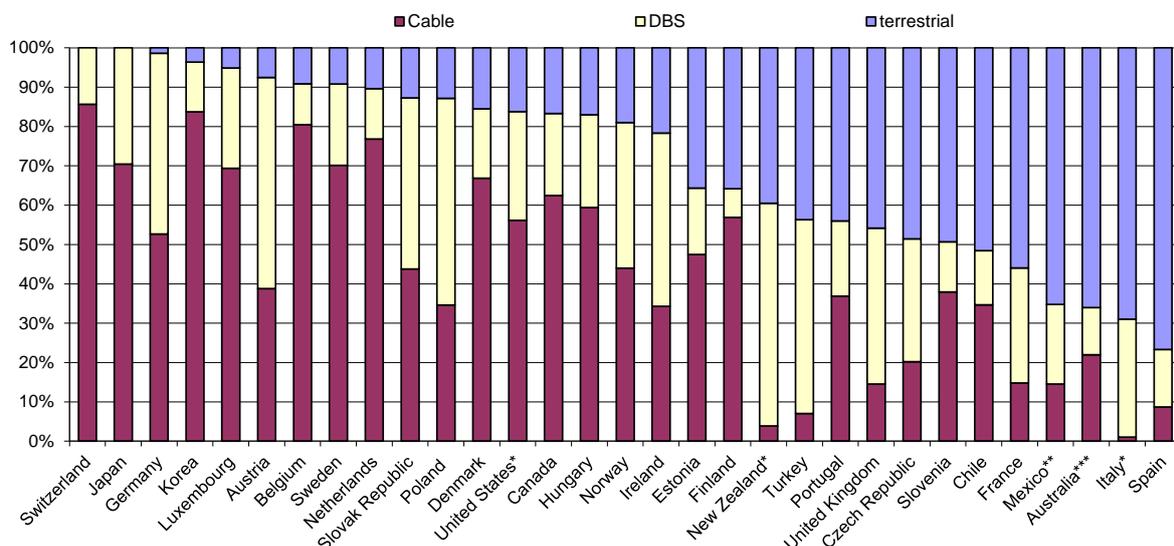
provisions of the European Commission Universal Services Directive (the Directive). Article 31 of the Directive (the provision relating to “must carry” obligations) states:

Member States may impose reasonable "must carry" obligations, for the transmission of specified radio and television broadcast channels and services, on undertakings under their jurisdiction providing electronic communications networks used for the distribution of radio or television broadcasts to the public *where a significant number of end-users of such networks use them as their principal means to receive radio and television broadcasts*. Such obligations shall only be imposed *where they are necessary to meet clearly defined general interest objectives and shall be proportionate and transparent*. The obligations shall be subject to periodical review. (emphasis added).<sup>4</sup>

The Directive clearly states that Member States may only impose these obligations on networks where end-users use them as the principal means to receive television, and that such obligations should be imposed only where they are necessary to meet “a clearly defined general interest objective”. The primary purpose of the provision is to ensure that end-users have access to FTA television broadcasts.

### Relevance to Australia

In Australia, the public policy rationale of ensuring universal access to FTA television does not apply. Consumer access to reliable FTA television services in Australia is not contingent on subscribing to a STV platform, unlike many parts of Europe and the United States. Indeed, in regional areas, STV has never retransmitted FTA commercial television services. As the following chart demonstrates, in contrast to most countries in the OECD, Australians mainly receive FTA television services via terrestrial transmission.



Source: OECD Communications Outlook 2011.

Notes : (\*) Data for 2008 instead of 2009; (\*\*) Data for 2005 instead of 2009; (\*\*\*) Australia was not included in the original OECD chart. Data for Australia estimated by ASTRA based on STV penetration for cable and satellite services, and households reliant on DTH satellite for FTA television services.

STV in Australia has been built through billions of dollars invested in infrastructure and production to provide exclusive programming and innovative services that consumers want, without a cent of Government funding and without the significant statutory protections and

<sup>4</sup> Directive 2002/22/EC of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), Art 31.

privileges afforded to commercial broadcasters. Consumers do not pay for STV services in Australia to watch FTA television – they pay for program diversity and choice. The majority of viewing in STV homes is STV programming.<sup>5</sup>

The viability of commercial FTA television in Australia is ensured through a legislative framework that provides significant protections and privileges to commercial broadcasters including protection from competition from additional FTA services, guaranteed access to valuable broadcast spectrum (a scarce public resource) and preferential access to premium sports content. Successive Australian Governments have invested many hundreds of millions of dollars since 2001 to ensure universal access to digital FTA television by terrestrial means, or by satellite where terrestrial reception is not feasible, including:

- licence fee rebates and direct grants for commercial television broadcasters in regional and remote areas for costs associated with the conversion from analog to digital transmission;
- grants to commercial broadcasters in smaller regional and remote licence areas to ensure that they can provide the full suite of commercial digital television services;
- the Household Assistance Scheme which supplied and installed free digital television HD set top boxes (and free antenna and cabling upgrades if required) to people on the maximum rate Age Pension, Disability Support Pension, Carer Payment, Veterans' Service Pension or Veterans' Income Support Supplement;
- the Viewer Access Satellite Television (VAST) service which provides the full suite of commercial and national FTA digital television channels to viewers with inadequate terrestrial reception; and
- the Satellite Subsidy Scheme which provides subsidised installation of satellite reception equipment for reception of the VAST service in households in terrestrial digital transmission black-spots.

### **Retransmission of free-to-air services by subscription television has no negative impact on advertising revenue for commercial free-to-air television services**

Commercial FTA broadcasters argue that a retransmission right should be introduced for these broadcasters to “exploit the value of their services”. ASTRA submits the existing regulatory framework for the retransmission of FTA television under the BSA and the Copyright Act works well for both consumers and all industry stakeholders.

Commercial broadcasting services are services that provide programs that are “made available free to the general public” and that “are usually funded by advertising revenue”.<sup>6</sup> The retransmission of FTA services by STV platforms has no negative impact on the advertising revenue of commercial television broadcasters. Audience numbers for FTA programs, upon which commercial FTA broadcaster advertising revenues are based, include FTA viewing in homes of STV subscribers.

The BSA provides that a service provided by a commercial television broadcasting licensee is only permitted to be retransmitted within the licence area of the licensee.<sup>7</sup> Commercial television services retransmitted on STV platforms consist of the same programs with the same advertisements as those services transmitted terrestrially within the relevant licence

---

<sup>5</sup> Year to date STV share of viewing in STV Homes for 2012 is 56.4%, 2am-2am, with the remainder shared between the five FTA networks, including multi-channels (Source: Source: OzTAM NatSTV as of Week 44 2012).

<sup>6</sup> *Broadcasting Services Act 1992*, s 14.

<sup>7</sup> Subject to the payment of equitable remuneration to the underlying rights holders: BSA, s 212.

area – meaning that advertisers reach relevant audiences. Commercial broadcasters are effectively seeking an additional revenue stream from STV customers for television services that are required to be both freely available and usually funded by advertising, and where those customers can already receive those services without payment.

Further, the FTA broadcasters are themselves significant owners of underlying rights in the content they broadcast and currently receive a substantial proportion of the remuneration payments made under Part VC of the Copyright Act.<sup>8</sup>

By contrast, a must carry scheme would place additional and unnecessary regulatory burdens on STV broadcasters. In particular, the retransmission of regional broadcasting services in a satellite environment would be commercially prohibitive due to the number of local licence area-based regional broadcasting services.

### **Existing retransmission regime works well for the benefit of consumers**

The retransmission of FTA services on STV gives subscribers the convenience of not needing to move from one platform to another. Consumers who view FTA services via their STV provider can access these services terrestrially (or via satellite) if they choose to do so.

The retransmission of FTA broadcasts on STV has, up to this point, been successfully achieved under the existing regulatory regime for retransmission through commercial negotiation between STV platform providers and commercial and national television broadcasters. There is no public policy justification for regulatory intervention in a process which works effectively in the interests of the consumer and the underlying rights holders in the programs broadcast by FTA services.

---

<sup>8</sup> Screenrights response to the Convergence Review Emerging Issues Paper, 12 August 2011, p.5. Screenrights collected \$5.96 million under the Part VC remuneration scheme in 2011-12 (*Screenrights Annual Report 2011-12*, p.7).