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Resources Directorate
Resources and Network Branch
Ministry of Economic Development
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Attn: Ian Hutchings, by email

Dear Ian

DISCUSSION DOCUMENT: DIGITAL TELEVISION

Thank you for the opportunity to comment on the discussion paper. Our points are set out below.

A: Background

SPADA is the foremost screen production industry organisation representing film and television producers and directors in New Zealand. We have nearly 300 company and individual members. Our mission statement is to be *the leading advocate for a robust screen production industry which strives to enhance the diversity of screen culture in New Zealand.*

This submission has been approved by SPADA's Executive, a board annually elected by its members, after consultation with our members.

Our primary interest in this matter is to ensure that a lively and healthy broadcast market exists where New Zealand programmes play a key role, both in being an attractive proposition for programmers and a highly visible part of our cultural landscape. All small countries actively pursue policies which protect and enhance their own screen production. In New Zealand this is especially necessary because large quantities of overseas programmes are sold here at minimal, marginal cost and there are no compensatory regulatory mechanisms (unlike most other countries, including those to whom we export).

As stated in the report, the Government has signalled that it wishes more emphasis to be given to the promotion of New Zealand's national identity through broadcasting (para.33). This cannot be achieved through ownership of TVNZ alone. However it is also critical that the Government clearly distinguishes and separates its roles as owner and regulator.

We also note with concern that the lack of regulation in other related areas is a threat, notably the lack of constraints on foreign ownership of media companies and on cross-media ownership. None of this is helpful for the protection and fostering of local programmes in a highly competitive global market dominated by multinational companies.

B: Responses to the questions posed in the discussion paper

In what circumstances, if any, is Government intervention in the choice of technology used to implement digital television justified?

1.1 Does the Government have a role to play in promoting or preventing one or more of the identified technologies used to transmit or receive digital television?

The discussion paper refers to four potential technology choices: satellite, cable, DTT (digital terrestrial UHF) and the terrestrial Digital Data Network.

If the industry has a unified view on technology choices for television, then the Government's role should be that of an enabler.

If there are competing views, there is no immediate case for the Government to intervene in technology choice per se. In general, technology investments, which are expensive and risky, are best left for the market to determine. However there is a case for some intervention to achieve a sensible and cost-effective transition that avoids unnecessary costs being passed on to the consumer. See our comments on 1.2 below.

The Government's only 'prevention' role in the use of any technology should be confined to setting a regulatory framework that governs the use of that spectrum.

The Government has a different and equally important role in promoting common standards as adopted by Standards New Zealand.

1.2 If so, what objectives should the Government be seeking to achieve and what interventions should it consider to achieve those objectives?

The issue is not one of ‘promotion and prevention’ of technologies as specified in the question above. The issue is how to create a sound regulatory environment which encourages investment and competition, yet discourages significant anti-competitive behaviour which disadvantages consumers.

Thus the objectives for the digital television environment are critical. We believe that they can be simply encapsulated as follows:

Objectives for digital television in New Zealand:

- To ensure that New Zealand’s conversion to digital is seamless and cost-effective for both broadcasters and consumers.
- That viewers can access digital free to air television whether or not they subscribe to a pay television channel provider.

To achieve these objectives, at least three government interventions will be necessary. Such interventions may be imposed, and should certainly be if an operator refuses to cooperate, but will be best achieved by facilitating agreement across broadcasters.

Government interventions to achieve digital television

- Seamless transition: achieved through the Government taking a coordination role which encourages broadcasters and platform providers to agree and cooperate on the path forward.
- Unconditional access to digital free-to-air television: achieved through open access (so viewers only need to buy a box but do not have to be Sky subscribers to receive a free-to-air signal). The cooperation referred to above could include: migrating middleware over time to DVB-MHP (as a number of European countries have done); that all operators operate common scrambling compliant CA and headends within, say, 3 years, to enable the possibility of simulcrypt; and that all operators simulcrypt and offer their content to other boxes once the three year implementation of common scrambling is complete. It is highly unlikely that the transition will be orderly - and cost-effective - without Government playing a leadership role in encouraging cooperation and common standards.
- Television equipment complies with standards developed by Standards New Zealand

In addition:

- Should the satellite platform emerge as a monopoly provider (not necessarily a problem per se), there will need to be some regulatory intervention so that the benefits of being a monopoly are tempered with brakes put upon potential anti-competitive behaviour which will ultimately disadvantage consumers.

Should suitable spectrum for terrestrial use be allocated in due course, and if so, on what basis?

Spectrum for Satellite Television

2.1 Is the existing administrative licensing regime which applies to spectrum for satellite transmissions appropriate? If so:

- 1. Should any resource charge be considered to give greater equity vis-a-vis terrestrial broadcasters?*
- 2. How should the Ministry determine whether to provide terrestrial licences or to preserve and license the spectrum for satellite services?*

2.2 If administrative licensing is not appropriate, what is a preferable alternative?

Spectrum for Digital Terrestrial Television

2.3 What spectrum should the Government make available for terrestrial digital television services?

2.4 Should the Government allocate spectrum in the form of management rights, spectrum licences, or a combination of both?

2.5 Are the allocation options put forward in 1998 still valid?

2.6 What allocation of 12 GHz spectrum should be made?

We do not intend to comment in depth on the technical issues as this is a matter for the engineering experts. However we believe that the issues can be discussed in a more comprehensive way.

Spectrum use and management needs to be considered in a context of whether or not it is deemed likely that a competitor of equal weight to Sky will emerge. We do not believe such competition is a given, unless the economics of broadcasting and/or the size of population change significantly. The recent collapse of NTL and ON Digital in the United Kingdom shows the difficulties of this business in a market of 60 million people.

Thus we are concerned that an entire broadcasting system of a small country has the potential to be in the hands of one single unregulated foreign-controlled company.

The critical point is that free-to-air broadcasters must have long-term access to their audiences and not through the gateway of a competitor. What if Sky suggests it might decline to provide its satellite platform services, or enhancements, unless TVNZ declines to bid for particular desirable programme rights?

Competition must be about content, not the lifeblood of a television operation: its spectrum. If any of the channels were profitable, in terms of an adequate ROI, there might be an argument for auction. But they are not.

Thus we believe the auction system needs to be reviewed as it has the potential to lead to illogical outcomes. What if TVNZ or TV3 is not successful in securing its spectrum? What if Sky purchases one of the free to air channels' spectrum? If a bidding war eventuates, the money spent on this activity ultimately means that fewer local programmes will be commissioned. The only winner is the Crown coffers which might then be required to support a depleted TVNZ, for example, at a much higher level than desirable or necessary.

We think a much more strategic approach needs to be adopted. To ensure that there is healthy competition between the channels - which is good for audiences and good for the industry - perhaps the channels should not waste money on a fruitless spectrum bidding process but in return be required to deliver a cultural outcome: more local programmes. Hoarding of spectrum also needs to be discouraged.

We note that most submissions on the 1998 discussion paper supported the Crown retaining management rights, yet the Ministry still preferred to auction them. We are unclear why the Ministry believes that auctioning management rights is the best method. If this approach is preferred because it has the potential to raise the greatest revenue, we suggest that this is a dated position which needs to be reviewed in light of the cultural and citizenship issues now seen as a key policy driver by the Government.

The current economics of the television business in New Zealand also cannot be ignored.

The idea that auctions support the concept of spectrum being awarded to 'highest value uses' only recognises monetary value or the price paid at auction. It does not take into account social, citizenship or cultural issues (such as asking whether a broadcaster having to pay a higher price than necessary to secure its spectrum, and consequently reducing its programme making and acquisition budgets, is the best outcome for viewers and the broadcasting industry).

Spectrum for Simulcasting

2.7 Should any special provision be made for existing broadcasters to manage the transition to digital television?

The cost of digital transition does not automatically correspond to increased revenue. Without subsidy, free to air broadcasters will compete only to the extent where the competition is commercially viable or somehow positively affects their market position. There is an assumption throughout the discussion paper that vigorous competition will occur. This is not necessarily so. TVNZ was precluded by its shareholders from embarking on digital platform competition and CanWest does not have a history of substantial or risky investment in infrastructure. Sky has recorded ongoing losses in the pursuit of competition (but it has most potential to become profitable as it has successfully staked out a monopoly). Competition provided by potential new sources such as foreign-based internet or satellite television is unquantifiable at present.

The proposal by the free to air broadcasters, that they be provided with free spectrum in return for building a DTT network, needs to be carefully evaluated. If the prospect of a DTT network is sound, it would of course provide valuable competition.

We quite understand that, as the discussion paper points out, "*it is not generally Government policy to subsidise the introduction of new technology*" (para.108). However this is an ideological position: most technology introductions do not immediately affect almost every household in the country. We are also concerned at the discussion paper's assertion: "*It is debatable whether a section of the industry should receive a preferential spectrum allocation simply because it elected to use advertising revenues, rather than subscription revenues, to receive a return on investment*" (para.109).

Such a statement seems to challenge the whole rationale for free to air television. If there is an intention to preside over the death of free to air television, we suggest that the implications are discussed in a much wider forum.

It is clear that the transition to digital needs to be managed. It is too important to be solely left to the market and the broadcaster players must be encouraged to develop strategies cooperatively so that the objective of cost-effectiveness can be kept in sight. We believe the proposal by the Television Broadcasters' Council to establish a Digital Television Group should be carefully considered.

2.8 If so, should any such provision incorporate a requirement to implement particular transmissions in, and for, specified timeframes?

One solution might be that, in return for low or no-cost spectrum, broadcasters are required to agree to a transitional timetable and certain open access technical agreements (see our comments on interventions at point 1.2 above).

If free to air broadcasters do receive low or no-cost spectrum, there should also be a requirement on them to deliver minimum levels of local content.

Competition Issues

2.10 Is anti-competitive behaviour likely in respect of digital television services?

Of course. The investment and risk required in developing a digital television service means that operators will guard their territory carefully. There are some natural barriers to competition because of the cost of entry to the marketplace and because the range of players in a small country will always be limited. But those companies which do operate services will nevertheless be fiercely protective.

This is why a managed Government / industry partnership must be achieved.

2.11 Are there any particular characteristics of spectrum suitable for digital television, or of broadcasting markets, which justify acquisition limits for spectrum over and above the Commerce Act safeguards?

2.12 If so, what are these factors and what form and level of limits are appropriate?

We support limits on acquisitions so that spectrum hoarding - which is a perfectly feasible threat - can be avoided. Such hoarding would doubtless be by a bigger player more concerned with retaining existing market share than offering new services. To mitigate some of the disadvantages of this approach, the need for limits should be reviewed every three years. An initial limit might be 10% of the spectrum.

Should analogue services be 'switched off' at a certain date and, if so, what policies should apply?

3.1 Should a policy of mandatory termination be established, and if so, at what time should the Government consider establishing the actual termination date, and what criteria should be used in determining the date? Or

3.2 Should the termination issue should be left for industry to manage in light of their costs and viewer take up? Or

3.3 Should the termination issue be left open, to be reviewed at a future date, and if so when should such a review be undertaken? Does ensuring public choice and access to a full range of digital television content and services warrant specific Government policy interventions, e.g. mandated standards for open access and set top boxes?

The ‘switch off’ will be a highly political decision and we predict that any future Government will find the decision unpalatable while any demand for analogue services exists. The last vestiges of demand are likely to be by elderly, rural and/or impoverished constituents, namely those who can have an effective political voice and whose participation in society is already limited.

The cost of continuing analogue services, meantime, will continue to rise for broadcasters as they grapple with obsolescent equipment and decreasing analogue audience levels which will become increasingly uneconomic. We understand that obsolescence of analogue broadcast equipment is an issue for BCL now. There will be strenuous calls for Government subsidy when the analogue services seriously begin to lose money and any subsidy, as always, will be at the expense of content.

Thus the hard decisions must be made early. The current environment is uncertain on a number of fronts and the level of uncertainty overall has probably never been at this level of intensity before. This is one area where a decision can clearly be made.

The Crown must, in consultation with broadcasters:

- a) set a switch off date now with a lead time of at least eight years. This helps both broadcasters and consumers. Broadcasters can plan within a timeframe that provides increased certainty. Consumers are given a long lead time to prepare for new equipment purchases. Politicians can keep a watching brief on developments and avoid having to make a hasty future decision.
- b) manage a process to determine the optimum nationwide delivery system. A public policy framework which encourages the development of open access agreements is critical, as well as the adoption of non-proprietary technical standards. See below.

Does ensuring public choice and access to a full range of digital television content and services warrant specific Government policy interventions, eg. mandated standards for open access and set top boxes?

4.1 If so, what aspects should such requirements cover (potentially terrestrial, satellite, and cable transmissions, free to air, pay tv, conditional access and middleware)?

4.2 Should industry develop agreed performance requirements and standards for set top boxes, for example through Standards New Zealand?

4.3 Should product labelling and consumer information be implemented in regard to digital television receiving equipment?

The Government’s decision not to approve TVNZ’s digital platform effectively means that New Zealand may be in the hands of a single, foreign-owned platform provider for the foreseeable future. Sky has undertaken considerable risk and expense in developing a New Zealand operation. Having said that, the chances of strong competition against its services have now been minimised.

The potential of DTT seems to be the only realistic alternative and at this stage it is unclear who would provide the capital funds necessary - and why. The current proposal by the free-to-air broadcasters, to build a DTT network in return for free spectrum, is unlikely to create a DTT network as an equal Sky competitor. It is also unclear if the DTT network idea would proceed if the Government rejected the call for free spectrum.

It is not in New Zealanders' best interests to allow an effective monopoly without some regulatory safeguards.¹

Open access is critical and must be legislated. Content is the key point of competition. It is untenable to permit a content provider also to control the gateway to another company's viewers. Viewers must be able to access free to air content services irrespective of which company provided the set-top box to the home. New Zealand is too small a country to think that the market provides adequate competitive safeguards in this area.

As we point out in our comments on para.1.2 above, for successful open access, cooperation is needed on:

- migrating middleware over time to DVB-MHP (as a number of European countries have done);
- ensuring that all operators operate common scrambling compliant CA and headends within, say, 3 years, to enable the possibility of simulcrypt; and
- ensuring that all operators will simulcrypt and offer their content to other boxes once the three year implementation of common scrambling is complete.

If such cooperation cannot be secured, these steps could be achieved by regulation.

In answer to the final two questions;

Set top box standards must be consistent, with approved standards coordinated through Standards New Zealand.

Product labelling and consumer information is also critical. This is a specialised area and most consumers are unlikely to be able to keep abreast of technical developments. Information on functionality and convergence capability will be vital.

Geographical Coverage

5.1 Should the Government take steps to ensure that rural and provincial areas are guaranteed access to certain digital services in the future? If so, what services are necessary and what steps should be considered?

A digital satellite footprint covers the country. As the discussion paper points out, this is only really an issue if a DTT service emerges as competition to a satellite-delivered digital platform. We can see a reason for public policy favouring a DTT service if the service was specifically created or supported to provide competition to satellite

¹ Even since the MED paper was released, two fundamental market shifts have already happened. Prime has entered into a partnership with Packer-owned Channel 9 and the Telstra Saturn network is being subsumed into the Murdoch-owned Sky operation. The Telstra Saturn cable network was the only remaining form of digital competition against Sky.

delivery. DTT also provides the further benefit of regional advertising opportunities, a critical revenue source for broadcasters and a useful regional service which cannot be provided by satellite means.

But it would be unwise to provide subsidy to support a nationwide DTT rollout. We understand rollout to around 70% of the country is viable without subsidy. This will be an unpalatable political decision but in the interest of providing for best use of scarce financial resources, the Government should not take steps to ensure guaranteed access to DTT provided that the satellite option continues to exist.

In the event of no DTT rollout, however, the regulatory environment for the monopoly operator should recognise that the operator has obligations in return for the privilege of its monopoly status.

5.2 Should the Government take steps to facilitate arrangements for the broadcast of all free to air services on the satellite platform? What approach should be taken for other non-commercial broadcast services and services which are only economic on a terrestrial platform?

Free to air services will - and have - migrated for commercial reasons over time. The Government's interest should simply be to ensure that the digital platform operator is not abusing its monopoly status. This is one of the reasons why the platform should be separate from its channels so that, for example, Sky could not combine programme rights bidding issues with commercial platform matters.

No free to air channel should be supported by public funding to be present on the satellite platform. The NZ On Air funding made available to TVNZ and TV3 for remote coverage has long been unnecessary and should cease as soon as possible so that the funding can properly be applied to programme funding.

Non-commercial television channels are created by Government policy. It may well be, should those channels continue to provide services desired as public policy, that a digital platform with the benefit of being a monopoly provider has a 'must carry' provision for these channels (should those channels seek this).

5.3 Are rural and provincial areas likely to face greater costs than urban areas in the transition from analogue to digital?

5.4 Are there any considerations that suggest that the transition to digital television services in rural and provincial areas should follow a different timeframe to that for the rest of the country?

Rural and provincial audiences are no better or worse off than urban audiences, in that they too will need to purchase a set-top box and dish at some stage. Should a form of terrestrially-based digital competition emerge in the cities, there is no immediate reason why public subsidy or regulation should be considered to provide that service to remote areas, provided the satellite option is there.

What are the implications of digital television for public broadcasting services and local and special interest content?

6.1 Does the Government have a role in ensuring that all New Zealanders have access to digitally broadcast public interest programming? How can/should this be achieved?

These are a confusing series of questions and not well-defined. What is meant by ‘public interest programming’? The discussion paper simply refers to NZ On Air-funded programmes.

NZ On Air funds two main types of programmes:

- (a) programmes for niche audiences in terms of s36(c) of the Broadcasting Act
- (b) other New Zealand programmes mostly intended for mainstream audiences which require a subsidy related to the cost of production.

Other types of public interest programmes include programmes funded through Te Mangai Paho, and niche programmes from other countries (for which there are currently very few broadcast outlets in this country and for which satellite channels may well provide the answer).

Public access issues are not always related to technology. The discussion paper refers to NZ On Air’s policy of restricting funding to programmes for free to air broadcasters via coverage requirements. Those coverage requirements originated as one measure of potential audience size (to help determine whether the programme investment is worthwhile).

With satellite coverage, the measure may simply need to change so that successful funding applications are supported by channels which can show a certain level of audience share. The Government needs have no role here as it is a policy issue for the funding agency.

If ‘public interest programming’ means TVNZ free to air channels, the Government may well have a role in ensuring its channels remain free to air and have full access to all households – a universal broadcast signal available to the maximum number of viewers as befits a public broadcaster.

If ‘public interest programming’ means local content, the Government does not have a role in this area but should leave the decision making to its funding agency.

6.2 What issues are seen in the broadcasting of public interest programming in a digital environment?

For this question, we will assume ‘public interest programming’ means local content.

New Zealand-made programmes for niche (special interest) audiences will have an uncertain future in a digital environment. The advent of TVNZ’s Charter may assist to some extent provided public funding is available.

New Zealand-made programmes for mainstream audiences will also face considerable challenges. The existing challenges compared with imported programmes will remain (cost of production versus the marginal cost of foreign acquisition; launching completely new programmes versus launching foreign programmes already tested in their domestic market; promotion and audience awareness in a crowded marketplace, etc).

The risks for broadcasters exponentially increase with a declining market share.

If a quota system is not introduced, the risk of the small amount of New Zealand programmes made being swamped by cheaply acquired foreign programmes is higher than it has ever been before.

It is critical that New Zealand takes some bold moves - as most other countries already have - to ensure there is an adequate corner of our screens reserved for our own stories.

6.3 Should special account be taken of the availability of channels which currently carry public interest broadcasting, i.e. TV One, TV 2, TV3 and non-commercial regional stations?

This cannot be adequately answered until the questions are better defined. The overriding issue of importance is that all kinds of New Zealand programmes are able to be accessed by as many New Zealanders as possible. The multi-channel world means that New Zealand programmes will fight for attention more than ever before.

It would seem, however, that if TVNZ is to retain its position as the dominant national broadcaster, and this is understood as a critical issue for cultural policy reasons, then it cannot be put in any form of 'hostage' position to a platform provider.

It would also seem that if non-commercial regional stations are to continue to be supported by public policy, a must-carry regime may need to be implemented.

6.4 In what ways will audience fragmentation positively or negatively impact on public interest programming?

Audience fragmentation provides a challenge for all types of programming, not just public interest programming. All programmes will be competing even more aggressively for audience attention, and production budgets - and quantity of local production - will be adversely impacted if broadcaster revenue falls. There will be little positive impact from a local content perspective unless Sky becomes a significant contributor to local broadcasting in many genres.

This is not the case anywhere else in the world. The only country where pay television operators voluntarily invest in programme production to any extent is America, a country with a 280 million population base.

This is the reason that we advocate including Sky in a quota regime.

6.5 How will the audience fragmentation likely in a digital environment affect broadcasters financially?

Traditional advertising revenue will fall. Free to air broadcasters will need additional revenue streams to maintain existing services. Investment in local content will be seriously threatened. Smaller operators will fold or merge.

Solutions to these conundrums are far from clear, both in New Zealand and internationally. The outlook cannot be entirely positive for a small country and is not at all positive from a cultural perspective.

6.6 How will the introduction of digital television broadcasting impact on non-commercial broadcasters?

They will need to deal with the obsolescence issue. A ‘must carry’ provision may be required assuming the concept of these types of channels are still supported by the Government.

6.7 How will the introduction of a digital television broadcasting environment affect the future Maori television service?

The Maori Television Service will need a digital platform. It would have, in any case, because of the terrestrial transmission problems in remote areas where the Service will be required. Again referring to the problem of scarce financial resources, it seems unproductive for the Maori channel to spend funds competing for spectrum when it is an instrument of public policy. The channel’s funding must be directed toward content.

6.8 Are there issues unique to the introduction of digital broadcasting which will be affected by either expanding section 88 of the Copyright Act to include satellite broadcasters, or conversely, repealing section 88 to remove the ability of cable broadcasters to re-broadcast free to air programmes on their cable network?

Section 88 should be repealed. This provision denies rights-holders the ability to negotiate payment for use of their work. In our October 2001 submission to the MED on the Digital Copyright issues paper, we said:

The basis for the special provision for cable programme services enacted in 1994 had two objectives:

- a) to encourage greater competition and investment in the cable network and service industry by allowing cable service providers to bundle free-to-air television with telecommunication services;
- b) to improve the quality of television reception in areas where signal quality was inadequate.

It is submitted that this rationale no longer has the strength of argument that it did in 1994. Television service providers should now rely on commercial arrangements to carry each other’s signals, to meet their commercial needs and the needs of the viewing public.

Producers of films should not be required to effectively subsidise cable service providers and sections of the viewing public by being constrained from seeking additional licence fees for additional transmission rights. In an environment that seeks to increase and encourage the production of local content, legislation should protect the interests of those producing such local content by permitting them to secure additional licence fees for additional uses.

If broadcasters are not free to licence the re-transmission of their free-to-air broadcasts, then producers are also not in a position to negotiate a secondary use fee, which they would otherwise be entitled to but for the effect of section 88 of the Act.

SPADA submits that section 88 should be abolished altogether. On no account should it be extended to allow the transmission of free-to-air broadcasts by other means such as satellite, pay television and/or webcasting in addition to inclusion in a cable programme.

SPADA also submits that the broadcaster/webcaster should have the exclusive right to authorise or prohibit retransmission of free-to-air broadcasts through contractual or licensing means.

Our view has not changed.

C: Conclusion

There are a complicated series of issues and decisions to be made in order that the transition to digital television is as simple and cost-effective as possible. The uncertainties - financial, technical and audience related – all combine to provide a substantial and unparalleled threat to the availability of local content to New Zealand audiences.

Clearly, given these complexities, a healthy Government / broadcasting industry partnership is vital. A fresh approach to the possibility of sensible, light-handed regulation is also desirable so that in amongst all the vested interests, the positions of the viewer and consumer and citizen in a small, proud country are not forgotten.

Yours sincerely

Jane Wrightson
Chief Executive
[sent unsigned by email]