



COMMERCIAL.TELEVISION AUSTRALIA

**ACCC REPORT TO SENATOR ALSTON ON  
EMERGING MARKET STRUCTURES IN THE  
COMMUNICATIONS SECTOR**

**SUBMISSION BY  
COMMERCIAL TELEVISION AUSTRALIA**

**29 JULY 2003**

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## EXECUTIVE SUMMARY

- CTVA opposes the Commission's recommendation to bring forward the review of the moratorium on new commercial television licences and to allow new licences to be issued.
- These proposals have the potential to jeopardise the high quality of Australian free-to-air television services, which are available free of charge to all Australians.
- CTVA welcomes the statement from the Minister for Communications, Information Technology and the Arts that the Government is committed to maintaining the current moratorium.
- Similarly, CTVA opposes any liberalisation of the datacasting rules as this would allow de-facto broadcasters to enter the market.
- The anti-siphoning list was established to ensure that all Australians are able to see sporting events free of charge.
- Introduction of dual rights or removal of the rules will result in the migration of sporting events from free-to-air to pay television.
- The result will be that Australians will be forced to pay to watch sporting events that they have previously been able to watch for free.
- Consequently, CTVA opposes the ACCC's recommendations in relation to the anti-siphoning list.

## 1. SCOPE OF THIS SUBMISSION

Commercial Television Australia welcomes the opportunity to comment on the ACCC Report to Senator Alston, Minister for Communications, Information Technology and the Arts on Emerging Market Structures in the Communications Sector dated June 2003 (the "Report") on behalf of 48 metropolitan and regional free-to-air commercial broadcasters.

This submission will focus on three key issues considered in the Report:

- the moratorium on issuing new commercial television licences;
- the scope of the datacasting rules;
- antisiphoning.

Individual members of Commercial Television Australia may also make submissions on separate and additional matters.

## 2. INTRODUCTION

Australians have enjoyed diverse and high quality free-to-air television for many years. Indeed, it has been stated that Australian free-to-air television is the highest quality available anywhere in the world. These benefits are a direct result of the current regulatory regime.

The majority of Australians rely on free-to-air television for information and entertainment. Consequently, any review of the existing regulatory regime must carefully consider the impact on ordinary Australians of any proposed changes with a view to ensuring that they do not receive a lower standard of service than they have come to expect. It must consider both cultural and social outcomes as well as economic ones. CTVA is concerned that the Commission's recommendations place many of these expectations in jeopardy and they should therefore be rejected.

## 3. THE MORATORIUM ON NEW COMMERCIAL TELEVISION LICENCES

Commercial Television Australia is strongly opposed to the Commission's recommendation to bring forward the review of the moratorium on new commercial television licences and to allow new licences to be issued.

CTVA welcomes the Minister's statement that "the Government remains committed to maintaining the moratorium until December 2006 and will undertake a review at the appropriate time".

The moratorium on new commercial broadcasting licences is a central tenet of the existing regulatory regime. It is a critical factor in ensuring the ongoing delivery of quality programming by free-to-air broadcasters, and in particular Australian content.

In addition, the continuation of the moratorium recognises the high cost of transition to digital television by commercial free-to-air broadcasters.

When launching the digital television legislation in 1998, Senator Alston set out very clearly the policy reasons for the moratorium:

- *"Australia is well served by the current commercial television arrangements. The range of programming available to Australian audiences on free-to-air television is substantial and of high quality, with significant levels of Australian content.*
- *A fourth commercial channel would undermine the available advertising revenue base and thus the commercial viability of the existing three players particularly during the expensive conversion process to digital. Lifting the three licence restriction could result in negative consequences for the existing commercial television industry, without any significant offsetting benefits for the community.*
- *It is also questionable whether a fourth commercial broadcaster could provide sufficient quality Australian programming"*

This policy was endorsed by all political parties in 1998. There has been no change in the Australian media landscape since that time to suggest that change is necessary or would benefit the commercial free-to-air viewer.

In June 2000 Senator Alston confirmed his commitment to the importance of maintaining Australia's free-to-air broadcasting section when he stated:

*“High quality free-to-air television also does not come by accident. It involves television networks, both commercial and national, being willing and financially able to make the necessary ongoing investment in the production of innovative (and often expensive) local content in a highly competitive environment.”*

Australia has one of the most comprehensive free-to-air broadcasting systems in the world. There is no other national television marketplace of comparable size and economic development which offers free-to-air services of such diversity, quality and local relevance. Australian free-to-air television reaches 98% of Australia's population, is in over 7 million homes and is the primary source of news, current affairs, entertainment and information for the majority of Australian households. Australia is a small market and generates only a limited amount of advertising revenue with little room for growth. Maintaining high levels of Australian content and local service across a geographically dispersed population is expensive and requires commercial free-to-air broadcasters to generate sufficient advertising revenue.

### **3.1 COMMITMENT TO QUALITY AUSTRALIAN AND OVERSEAS PROGRAMMING**

Commercial free-to-air delivers quality Australian programming and large amounts of Australian programming.

In the five years 1998-2002, commercial free-to-air broadcasters spent nearly \$3.2 billion on Australian content. Expenditure on Australian programs increased by over 25% in the period, up from \$564 million in 97/98 to \$706 million in 01/02.

Expenditure on Australian drama in 01/02 was \$128 million. Over the five year period spending on general Australian drama increased by 40% and expenditure on Australian children's drama by 20%.

Total program expenditure on Australian and Foreign programming exceeded \$1 billion per annum (01/02 \$1,007 million), an increase of 26% on the 97/98 level of \$799 million. Spending on Australian programs represents more than 70% of this total spend<sup>1</sup>.

During the period 1998–2002 commercial free-to-air broadcasters have introduced a range of quality new Australian drama programs including *Secret Life of Us* and *White Collar Blue* (Channel 10), *McLeod's Daughters* and *Stingers* (Channel 9) and *Always Greener* (Channel 7). Long standing series such as *Blue Heelers* and *All Saints* have continued to rate highly on Channel 7.

These programs have been critical and ratings successes. Not all new series survive, but the networks have increased their commitment to developing and maintaining quality Australian programming.

Free-to-air commercial broadcasters employ well over 5,000 people directly and are the main support for Australia's independent audio-visual production industry, underpinning 69% of the production industry's output (80% including commercials).

Australian free-to-air viewers also get free access to highly acclaimed international programming, including some programs which are only available on pay TV in other

<sup>1</sup> ABA "Broadcasting Financial Results 2001-2002"

countries. For example, the winners and all nominees for the US 2003 Golden Globe Awards for Best TV Series – Drama and Best Television Series – Musical or Comedy are already showing on Australian free-to-air television. All of the 2002 Emmy Award winning programs are already screened on Australian free-to-air television<sup>2</sup>.

The Report does not seriously consider whether Australian viewers will benefit in terms of quality of service from the ACCC's recommended changes to the existing regulatory structure. Importantly, the ACCC acknowledges that issuing more licences may not ultimately lead to any increase in the number of available services in the longer term<sup>3</sup>. It concedes such a move is likely to lead to increased costs to the industry. It offers no evidence to suggest that consumers will have a greater range or quality of service than they currently enjoy. Further, there is no evidence of demand by consumers for a change to the regime if this results in a watering down of the quality of programming.

The only real arguments offered in support of additional licences are market contestability and the fact that the ACCC "is unconvinced ... that the benefits of the restriction on the number of FTA licences outweighs the costs of this restriction" and that the Commission is therefore "sceptical of the need for the current moratorium."

Concerns that levels and quality of local programming would be adversely affected by introduction of additional FTA licences are dismissed as being overstated on the basis that European broadcasters transmit material in excess of their local content requirements and that Australian broadcasters have historically spent 70% of programming costs on Australian content. These comments ignore the very different dynamics in a small market such as Australia and the fact that historically high levels of expenditure have been possible only because of the current regulatory structure.

The ACCC's arguments are hardly a compelling justification for change, particularly where the potential social and cultural costs are so high. The ACCC appears to be prepared to sacrifice the quality of existing television services for unknown and unsubstantiated benefits. While this may be a victory for economics and market forces, the ultimate loser will be the Australian public.

### **3.2 FREE TO VIEW DIGITAL ROLLOUT**

Commercial free-to-air broadcasters have invested significantly in the transition to digital and will spend over \$1 billion in total on the transition to digital. This cost is being incurred in an uncertain international economic climate and at a time of significant new threats to advertising revenue in the form of pay TV, increased use of DVDs, computer games and internet usage as well as bundled service offerings.

Since the introduction of digital terrestrial services in January 2001, Australia's five free-to-air networks have undertaken the massive task of rolling out digital services across Australia while maintaining the high quality analogue services built up over the last fifty years. This has been achieved through planning and co-ordination between the networks, the ABC and SBS, the Australian Broadcasting Authority and the Department of Communications, Information Technology and the Arts.

The Australian digital television rollout is the fastest free to view rollout anywhere in the world and has been achieved with a minimum of disruption to existing services.

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<sup>2</sup> Golden Globe Awards List from the [www.hfpa.org](http://www.hfpa.org). Emmy Awards Lists from [www.emmys.org](http://www.emmys.org).

<sup>3</sup> ACCC Report, page 89.

By the end of 2003, 75% of Australian homes will have access to all of their current analogue television channels in digital. This includes all metropolitan city centres and thirteen major regional areas around Australia. At the same time another 10 to 15% of Australian television homes will have access to at least one broadcaster's digital television signals which will be added to over time. Ultimately, free to view digital television will achieve the same coverage as the current analogue service.

Consumer take up of digital television receivers is also tracking well. There are currently over 80,000 digital receivers in Australian homes with an expectation that this will grow to over 120,000 by the end of 2003. This compares favourably with the take up rates of other consumer equipment, including DVD's<sup>4</sup>. Prices for digital receivers are also falling, with equipment now available from \$299.

Free-to-air broadcasters have also invested significantly in upgrading their television production facilities to new digital technology to enable production in widescreen and high definition. Broadcasters are required to broadcast at least 1040 hours of high definition content per annum.

The current regulatory structure for commercial broadcasting licences delivers clear benefits to Australian free-to-air viewers in terms of local content and quality international programming. Any erosion of finite advertising revenue by the emergence of a 6th television network will have a direct and immediate negative impact on the programming delivered to the Australian free-to-air audience. It will also jeopardise the ongoing expenditure necessary by the free-to-air broadcasters for the conversion to digital television.

#### **4. DATACASTING**

CTVA opposes the ACCC's recommendation that there is a strong case for removal or relaxation of the current datacasting rules.

The Report notes *"the issues of datacasting and the restriction on the number of FTA licences are related because removing restrictions on datacasting provisions would allow a datacasting licence to closely replicate the service provided by existing FTA broadcasters"*. Commercial Television Australia supports this view and adds that the existing datacasting regime is the only effective system suggested to date which ensures the integrity of the moratorium on additional commercial licences.

Consequently, the issues raised in section 1 above apply equally in the context of the ACCC's consideration of datacasting rules.

The ACCC argues that the datacasting regime has not achieved the social objective of encouraging the development of a range of new services that are different to traditional broadcasting services. However, it is widely acknowledged that the kind of new services expected when the concept of datacasting was first envisaged were unrealistic because they were not commercially feasible.

The only commercially viable use for the datacasting spectrum that has been identified to date is broadcasting. The current datacasting rules were the result of lengthy consideration and are the only service parameters that have been generally agreed to separate broadcasting from other uses of the spectrum.

As a result, any relaxation of the datacasting rules will by definition allow broadcasting in some form or other. Therefore, this proposal can only be considered if it is agreed that

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<sup>4</sup> See Graphs A – D in Appendix A.

additional commercial broadcasting licences are in the public interest. As discussed in section 3 above, CTVA does not believe this to be the case.

Commercial Television Australia made a Submission in Response to the Department of Communications, Information Technology and the Arts Issues Paper on 25 January 2002 (Review of the Operation of Schedule 6 of the Broadcasting Services Act 1992 (Datacasting Services)). In that submission CTVA argued that:

- Under the moratorium new services are permitted if they provided new and innovative services which did not resemble existing television services.
- Interrelated with the Government's commitment to maintain the moratorium on new commercial television licenses is a requirement that datacasting licensees not be able to provide services which are essentially broadcasting services. As stated by Minister Alston in his speech given in June 2000, *"it is axiomatic that the definition of datacasting must set boundaries which ensure that there is no back-door or de-facto broadcasting under the guise of datacasting – otherwise the clear intent of the parliament would be circumvented"*.<sup>5</sup>
- The existing datacasting rules are the only service parameters proposed to date which successfully distinguish datacasting from traditional broadcasting services, thereby accommodating the moratorium on new commercial television licences that is supported by all political parties and which is discussed in this submission in section 3 above.
- There should be no automatic right of conversion attaching to any datacasting licences post 2006. The ability of the market to sustain new entrants should be assessed at the relevant time. The reasons for Parliament's decision in 1998 that there should be no automatic right of conversion attaching the datacasting licences continue to apply.
- The difficulties experienced overseas in the take up of digital television are expected in Australia and will have flow-on effects for the proposed business case for datacasting services. Datacasting services do not exist independently in overseas markets. While high penetration of free-to-air digital may allow the commercial justification for stand-alone datacasting services to be revisited, such opportunities will be dependent on first achieving a successful transition to digital television for all Australians.

The Government responded to the review in December 2002 stating that there would be no change to the datacasting rules as "no other option for defining the content which datacasters can provide was likely to result in greater opportunities to develop a viable business case without, in effect, breaching the moratorium on provision of new television broadcasting services before 31 December 2006".<sup>6</sup>

## 5. ANTISIPHONING RULES

CTVA is concerned that the ACCC's recommendations in relation to anti-siphoning will have the inevitable result that ordinary Australians will be required to pay to watch sporting events they have always been able to access for free.

Anti-siphoning laws were enacted to maximise the broadcasting of premium sporting events on free-to-air television. The anti-siphoning list has achieved its stated aim of enabling the

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<sup>5</sup> Speech by Senator Alston to "New Broadcasting and Datacasting Symposium" 14 June 2000

<sup>6</sup> Report on Review of the Operation of Schedule 6 of the *Broadcasting Services Act 1992 – Datacasting Services*, page 7.

majority of Australian viewers to continue to see major sporting events on television without having to pay monthly subscription fees.

After eight years of pay television in Australia, only about one in five viewers are willing or able to pay monthly subscription fees for television. 78% of Australians still choose not to subscribe to pay TV. Low income earners are least likely to pay for television and any migration of sport to pay TV will hit these people the hardest. It is clear that the majority of viewers rely heavily on free-to-air television and will continue to do so.

Australians are renowned as the world's biggest sports fans and sport continues to play an integral role in Australian society. The public interest underpinning the anti-siphoning rules remains as strong as ever, to ensure that all Australians continue to have access to major sport for free.

The intended operation of the scheme was set out clearly in the Explanatory Memorandum to the anti-siphoning provision: "This process should ensure, on equity grounds, that Australians will continue to have free access to important events. It will, however, also allow subscription television broadcasters to negotiate subsequent rights to complementary, or more detailed, coverage of events".<sup>7</sup>

In practice the operation of the scheme has successfully achieved this outcome. Australians have continued to have access to major sport on free-to-air television, and complementary coverage is available to those who choose to pay.

Pay TV has not been disadvantaged due to the scheme operating as it was always intended to, by allowing scope for pay TV to provide complementary and more detailed coverage for its subscribers. Contrary to pay-TV's arguments, the rules allowing complementary (but not simultaneous) coverage are not preventing them from showing a diversity of listed sport. For example, Fox Footy Channel boasts of carrying every single NRL and AFL game. Moreover, the anti-siphoning rules have not prevented Fox Sports from becoming the one pay TV channel making significant profits for its shareholders.

The overwhelming majority of events on the list are broadcast on free-to-air television, with most shown live. Pay TV has attempted to claim that only 25% of listed events are actually shown by free-to-air broadcasters<sup>8</sup>, a claim which is grossly inaccurate. The pay TV figure is based on an assumption that there are nearly 7,000 hours on the list, which is grossly inflated. This figure could only be arrived at by separately counting every game of every round of tennis in a multi-round event, or every hole of every golfer in every round of a tournament, even where this coverage is not made available by the host broadcaster.

CTVA's analysis of sporting coverage in 2000 (the same year used by Pay TV) demonstrated that there is approximately 2,400 total available hours of sport on the list, of which 1800 hours was shown on free-to-air television – in other words the amount of available sport broadcast is 72%, with the majority shown live.

Free-to-air's coverage of listed events has not varied significantly in the past three years. The ABA Report to the Minister in June 2001 found that there were very few listed events that are not consistently broadcast on free-to-air television.

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<sup>7</sup> Explanatory Memorandum to the *Broadcasting Services Bill* 1992, clause 115.

<sup>8</sup> Fox Sports submission to the ABA inquiry into the antisiphoning list.

## 5.1 DUAL RIGHTS

In our submission, a move to dual rights in Australia as suggested by the ACCC would seriously undermine the integrity of the anti-siphoning system and result in viewers having access to less sports coverage for free.

The Report is mistaken in its view that dual rights may result in more sport being broadcast. In practice a dual rights regime would lead to migration of 'listed' sports to exclusive broadcast on pay TV.

Exclusivity of sports coverage is the objective of both the free-to-air and pay television platforms.

Exclusive broadcast of sport is the objective of a pay TV operator to drive viewers to subscribe to Pay TV. Pay TV's ostensible support for dual rights is a Trojan horse to achieve this objective. Experience elsewhere shows that under a system of dual rights, sport migrates to pay TV.

Exclusive broadcast of an event by a free-to-air broadcaster is essential to attract the maximum possible numbers of viewers (and hence revenue) to ensure the broadcast of the event is economically viable. This is particularly critical in a small market such as Australia.

Advertisers associated with sporting coverage want exclusivity. If advertisers are not able to acquire exclusive association with an event they will reduce the amounts they are willing to pay. Ambush marketing was a key concern of Sydney Olympic sponsors, with SOCOG and sponsors devoting millions of dollars to prevent ambush marketing.

Fragmentation of the audience by simultaneous coverage on pay TV would severely jeopardise the viability of free-to-air sports broadcasts in a small market the size of Australia. The loss of exclusivity would cause erosion of the value of sports rights to free-to-air broadcasters, due to the reduced value to sponsors and advertisers. This would be exacerbated by the pay-TV channels' ability to promote advertising-free coverage, at least initially to draw viewers away from the simultaneous free-to-air coverage, as a subscription-driver.

Premium sport such as that listed on the anti-siphoning list is expensive programming for free-to-air broadcasters. The margins on sports broadcasts for free-to-air broadcasters are not large due to the high production costs and rights fees, and Australia's relatively small advertising market from which to recoup these expenses. The loss of up to one-quarter of the free-to-air viewing audience (on current subscription levels) to a simultaneous, largely commercial-free pay TV coverage would have a devastating effect on revenue for many free-to-air sporting telecasts, and threaten their ongoing viability.

Due to the fact that the production costs of broadcasting a sporting event are fixed and are such a high proportion of the total cost of an event, the loss of advertising revenue will not be offset by a reduction in sporting rights fees (if any) paid by the free-to-air network.

Elsewhere dual rights has encouraged pay TV to bid up the price of rights in an effort to obtain de facto exclusivity by making free-to-air coverage of the event uneconomic. An inflated pay TV rights fee will position rights holders so that they do not need to sell free-to-air rights at all.

Pay TV operators have shown throughout the world that they are prepared to bid up sports rights fees to an unsustainable level as a loss leader to acquire subscribers. In the UK and Germany, this practice jeopardised the structure of the broadcasting industry and sporting

bodies, resulting in the insolvency of ITV Digital and Kirch, demonstrating the importance of sport as a subscription driver at virtually any cost.

As free-to-air broadcasters rely solely on advertising to underwrite the costs of covering sporting events, they will inevitably siphon to pay TV which can underwrite events with three major sources of revenue – predominantly (lucrative) monthly subscriptions, and increasingly pay-per-view, in addition to advertising/sponsorship. (Once exclusivity has been achieved, the pay TV operator is then able to extract higher subscriptions from sports fans, as demonstrated by BSkyB which has steadily increased monthly fees over recent years for the privilege to watch the national sport, the English Premier League.)

The net effect of these inter-related factors is that the commercial rationale for free-to-air broadcasters to carry sports ahead of other programming genres diminishes, leading to the displacement of sport on free-to-air by programming that provides a return to the broadcaster.

A 'dual rights' regime would therefore inevitably lead to affected sporting events migrating to pay TV, and enable pay TV to achieve de facto exclusivity to major sport – their ultimate objective in order to drive subscriptions. This outcome would be unacceptable to the Australian public.

The anti-siphoning rules are working effectively. They continue to serve their intended purpose – ensuring viewers are not forced to pay to watch the sport they have traditionally seen for free, without depriving pay TV subscribers from receiving complementary, more detailed coverage should they choose to pay to do so.

## **6. CONCLUSION**

CTVA believes that the ACCC's recommendations in relation to new commercial television licences, changes to the datacasting rules and the anti-siphoning rules will have serious adverse consequences for the quality of Australian free-to-air television.

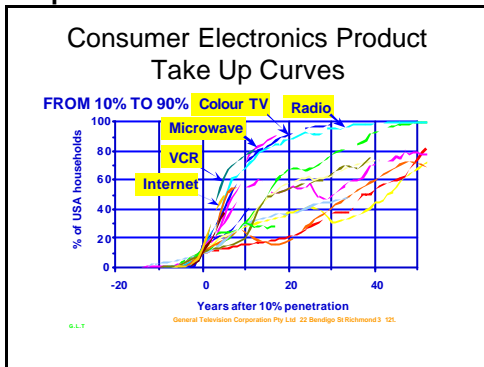
In many instances, the ACCC seeks to argue that unless it can be clearly demonstrated that anti-competitive concerns are outweighed by the public benefit then the weight should be given to unknown and undemonstrated benefits to be delivered by market forces. In many instances, the current regulatory structures are clearly intended to deliver social and cultural benefits that would not be delivered by market forces. It would seem that in these circumstances the correct approach should be that until it can be clearly demonstrated that competitive forces will deliver greater public benefit to ordinary Australians than the current regulatory system, then the current rules, at least in these three areas that are so fundamental to the quality of Australian television, should continue to apply.

Australians are extremely well served by the current range of services on Australian free-to-air television. This quality of service should not be jeopardised through untested economic experiments.

Finally, it should be noted that CTVA has chosen to focus on these three issues only and there are many issues of detail in the Report that have not been specifically addressed in this submission. The fact that CTVA has not specifically responded to any particular matter in the Report should not be taken as agreement on that point.

# APPENDIX A

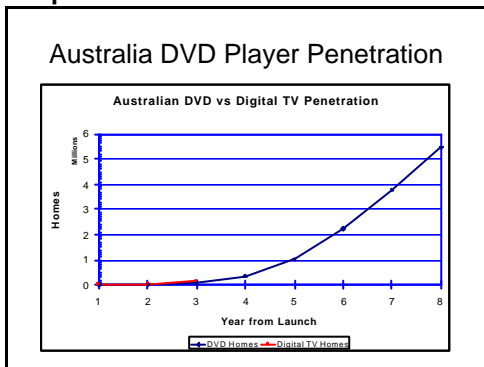
Graph A



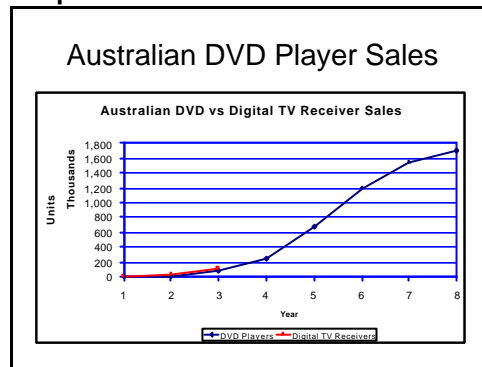
Source: General Television Corporation Pty Ltd, 22 Bendigo St, Richmond, VIC 3121

Graph A compares the expected take up of digital television and the actual take up of other consumer electronic devices. As the graph shows, the take up rate of new technologies follow a similar path. The current take up of digital television at 1% after 2 years is in line with this trend.

Graph B



Graph C



Sources:

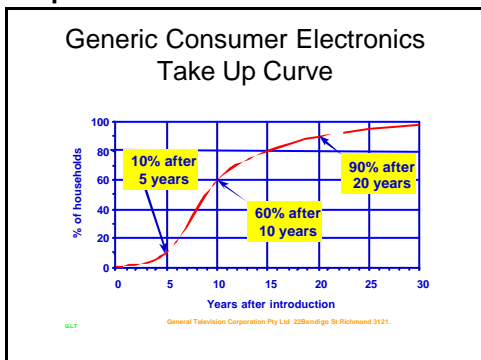
Graphic: Commercial Television Australia, 44 Avenue Road, Mosman, NSW 2088.

DVD Player Penetration and Sales figures: GfK Informark.

Digital Receiver penetration and sales: Digital Broadcasting Australia.

Graphs B and C show a direct comparison between the take up of DVD Players in Australia and the take up of digital television. Three years after the initial launch, take up of digital television compares more favourably to the take up of DVD Players.

Graph D



Source: General Television Corporation Pty Ltd, 22 Bendigo St, Richmond, VIC 3121

Graph D shows a generic take up curve that new consumer electronic devices tend to follow. The take up of free-to-air digital is likely to follow a similar curve.