ASTRA

Australian Subscription Television and Radio Association

Submission to the Productivity Commission – Broadcasting Inquiry

May 1999

12 May 1999

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Deputy Chairman
Productivity Commission
Level 28
Telstra Tower
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Dear Professor Sharpe

Thank you for the opportunity to provide a submission to the Productivity Commission's Broadcasting Inquiry. Thank you also for taking the time to meet with ASTRA on 19 April 1999 for a preliminary discussion on the range of issues to be covered in the inquiry.

As you are aware the Australian Subscription Television and Radio Association (ASTRA) is the peak industry body for subscription television and narrowcast radio. Subscription broadcasting and open and subscription narrowcasting services were new categories of broadcasting services introduced with the Broadcasting Services Act, 1992 (the BSA).

ASTRA was formed in September 1997 with the amalgamation of the Federation of Australian Narrowcasting Subscription Services (FANSS) and the Confederation of Australian Subscription Television (CAST). A full list of ASTRA's membership is included at Appendix A.

This submission provides brief comment on broadcasting policy and on the current regulatory imposts facing subscription television and radio narrowcasting as a legacy of that policy. This includes specific comment on the anti-siphoning regime, Australian content, codes of practice, retransmission and the impending digital regime.

At this stage, ASTRA will be represented at the public hearings in May, by its Chairman, John Porter, CEO, AUSTAR with representatives from Cable & Wireless Optus, Foxtel and ASTRA's Radio and Programmers Groups.

If you require further information or clarification of any of the matters raised in ASTRA's submission please do not hesitate to contact me.

Yours sincerely

Debra Richards
Executive Director

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THE CONTEXT

REGULATORY POLICY

Even before the advent of television in this country, there was widespread concern about its possible impact, influence and potential for harm to both Australian culture and Australian children. These concerns related to diversity of views, the predicted preponderance of American programs, portrayal of violence and overt commercialism. It is fair to say that similar concerns related to radio before its introduction.

Hence Australian commercial terrestrial broadcasters who have been licensed to access and exploit the valuable, public broadcast spectrum do so at a cost in terms of regulation in the public interest. The quid pro quo for a continued protected market and as such exclusive use of that valuable public resource are certain obligations such as those relating to Australian content and children's television.

For example the history of regulation of children's television in Australia has essentially been a response to a lack of quality age-specific television programs for children and a concern to protect their interests. The policy has been that children are entitled to a viewing choice, which takes account of their needs from their point of view. Within commercial television it has been recognised that industry initiatives and market forces alone have not delivered the goods for children.

In finally introducing new broadcasting services with the regulatory regime of 1992, Parliament set down, for the first time, a set of objects and stated regulatory policy for broadcasting. These set the framework within which the legislation of the *Broadcasting Services Act 1992* (the BSA) is to be administered and implemented and within which subordinate regulation is to be determined by the Australian Broadcasting Authority (ABA).

In essence the broadcasting regime is one of regulation by exception with the objects to either promote, encourage, facilitate or ensure such important matters as diverse services throughout Australia, diversity in and effective Australian control of the more influential services, the development of an efficient, competitive and responsive broadcasting industry which among other things, reflects a sense of Australian identity, character and cultural diversity, includes high quality and innovative programming, with fair and accurate coverage of matters of public interest and local significance, and programming which respects community standards and is responsive to complaints and the protection of children.

Above all, the BSA should be implemented in a manner consistent with the regulatory policy that provides different levels of regulation for different types for services depending on their degree of influence.

Section 4 of the BSA states:

> *"(1) The Parliament intends that different levels of regulatory control be applied across the range of broadcasting services according to the degree of*

influence that different types of broadcasting services are able to exert in shaping community views in Australia."

(2) The Parliament also intends that broadcasting services in Australia be regulated in a manner that, in the opinion of the ABA:
(a) enables public interest considerations to be addressed in a way that does not impose unnecessary financial and administrative burdens on providers of broadcasting services; and
(b) will readily accommodate technological change; and
(c) encourages:
(i) the development of broadcasting technologies and their application; and
(ii) the provision of services made practicable by those technologies to the Australian community.

Further, the BSA, at section 5, sets out the role of the ABA to monitor the broadcast industry, produce regulatory arrangements that are stable and predictable and deal effectively with breaches of the rules, and in dealing with those breaches, to do so in a manner that, in the opinion of the ABA, is commensurate with the *"seriousness of the breach."*

Regulatory neutrality issues

In any call to consider applying the regulatory requirements applicable to commercial free to air services to pay TV services, it should be noted that the regulatory playing field is not level nor is it intended to be, for the very fact that the playing field is not level. All the leverage is well and truly in favour of the incumbent broadcasters.

Any such call conveniently ignores the regulatory policy of the Act, historical favouritism to the incumbent commercial broadcasters and the distinctive differences between for example free to air and pay TV. It also ignores the fact that commercial television operators will be the gatekeepers for access to the digital terrestrial spectrum.

As discussed above, commercial broadcasters have been given the use of a valuable, limited **public** resource to exploit, that is the broadcast spectrum, in return for a nominal licence fee (based on a fixed percentage of their revenue) and certain community service obligations such as provision of Australian content. Free to air television provides a single channel to a mass audience with no barrier to delivery.

By their own admission commercial television broadcasters continue to be very profitable. Australian Bureau of Statistics (ABS) figures, released November 1998, show commercial television profits of $737 million in the 1996/97 financial year compared to subscription television losses of $1.06 billion. The pay TV losses (for second year of operation) are not unexpected given the enormous start up costs in competing with a sector that continues in a protected market and has done so for over 40 years.

The commercial television sector continues to post significant profits annually. According to the ABA, the commercial television industry made a broadcasting profit in 1997-98 of $476.6 million, which represents a 6.9 per cent increase over the previous year's profit of $445.9 million.

ASTRA members have made an enormous investment in relation to licence fees and capital costs to establish subscription television, on-line and telephony businesses in metropolitan, regional and remote markets. The sector has also created an enormous number of jobs, investment, infrastructure and content.

The eventual introduction of pay TV in Australia followed a 30-year moratorium before pay TV was allowed to compete with the commercial free to air terrestrial services. Once allowed to play, the original operators were required to use digital satellite and restricted to only eight channels. There was an immediate requirement for new Australian drama expenditure and a ban on R rated material. Advertising was banned until 1 July 1997 and there remains a limit on that advertising revenue as a condition of licence. One of the major subscriber drivers, sport, has been nobbled by the anti-siphoning list. Now as well as a protected market (with the decision having been made of no fourth commercial network until the year 2006), the commercial networks control the gateway to digital terrestrial broadcasting.

To ASTRA's knowledge no other industry in Australia has been afforded, what will be by 2006 when the ban on more than three commercial television services in a market will be lifted, a protected market for half a century.

ASTRA

The Australian Subscription Television and Radio Association (ASTRA) is the peak industry body for subscription television and narrowcast radio. ASTRA was formed in September 1997 when industry associations representing subscription (multichannel) TV and radio platforms, narrowcasters and program providers came together to underpin and propel the new era in competition and consumer choice that these new services have brought to broadcasting, communications and entertainment in Australia.

Subscription broadcasting and open and subscription narrowcasting services were new categories of broadcasting services introduced by the BSA in 1992. These new services added to the mix of existing categories of service, being the national broadcasting services; commercial broadcasting services (commercial TV and radio); and community broadcasting services.

Our membership includes the major subscription television operators as well as more than twenty stand-alone channels that provide programming to these platforms. Other members include narrowcast television and radio operators such as racing TV and radio and ethnic language and information radio, and communications companies such as AAPT, Cable & Wireless Optus and Telstra.

NARROWCASTING SERVICES

Narrowcasting a 'new' broadcasting category was introduced in October 1992. Envisaged as meeting the needs of specific audiences, it became the first new competitor for incumbent broadcasters operating under a class licence regime with the introduction of the BSA. Narrowcasting can be open (free to air) or subscription (made available on payment of subscription fees); it can be radio or television.

The category is described as a service whose reception is limited in some way either by being targeted to special interest groups; being intended for limited locations; being provided during a limited period or to cover a special event; by providing programs of limited appeal or for some other reason.

ASTRA's members include both radio and television narrowcasters. Examples of the type of narrowcasting services available throughout Australia include racing radio and television, tourist information radio, single language (non-English) radio and television services, television services in clubs and hotels, supermarket radio and TV, and radio and TV broadcast at specific locations.

Narrowcasting services do not require an individual broadcasting service licence under the BSA as a narrowcasting service can be provided under a class licence ie a standing authority to provide that service (the class licence regime of the BSA is under Schedule 2, Part 7). However a transmitter licence is required under the *Radiocommunications Act 1992*, (the Radcoms Act) administered by the Australian Communications Authority (ACA). Further, the ABA, under delegation from the ACA, administers the price-based allocation of transmitter licences for open narrowcasting services using the broadcasting services bands of the radiofrequency spectrum.

Narrowcasting services can be low powered; medium powered or high powered and have a limited licence period subject to uses determined for the spectrum and to the uncertainties of the ABA's planning of the broadcast spectrum.

The ABA also becomes involved when a service provider seeks certainty about their category of service and applies to the ABA for an opinion as to category of service under section 21 of the BSA. While the criteria for narrowcast services are set out under s.17 and s.18 of the BSA, the determination of what is or what is not narrowcasting is subject to the vagaries of the ABA.

The more likely involvement of the ABA arises when a successful radio narrowcaster is the subject of complaint by an incumbent commercial radio broadcaster.

From ASTRA's experience, radio narrowcasters find it increasingly frustrating that they are not recognised by some as 'legitimate' broadcasters meeting the needs and expectations of the community and niche audiences. Narrowcasting creates a competitive environment that improves and expands the overall service to the community. That competition can potentially be stifled by the regulator's conservative view of narrowcasting.

SUBSCRIPTION TELEVISION

Subscription (multi-channel) television broadcasting, commonly referred to as pay TV, extends audience choice in terms of the range and diversity of entertainment and information programming. Pay TV services may be delivered by a number of technologies including: multipoint microwave distribution systems (MDS); broadcast direct by satellite to the home (DS or DTH); and broadband cable communications systems (CTV or Cable).

A major distinctive feature of pay TV is the direct contractual relationship between the service provider and the subscriber. This voluntary relationship between the provider of a retail service and a subscriber to that service provides subscribers with freedom of choice along with the capability and responsibility to select the programs they wish to receive. In this sense, pay TV is in the nature of an invited guest, brought into the home in the full and prior knowledge of the guest's character.

The ABA recognised the unique characteristics of pay TV when it commented in its *Final Report on Australian Content for Pay TV* that, " Pay TV operates by offering as a package a range of 'niche' or specialised programming channels which subscribers must pay to receive. Within this context it enhances viewing options and complements free to air services.

Pay TV has a smaller target audience to commercial television which is provided free to air with no direct cost to the viewer ... Pay TV is further differentiated from free to air television in terms of the number of different channels, total hours broadcast, reduced advertising opportunities and the niche nature of much of its programming."

Multichannel services provided across Australia and available through satellite, cable and MDS include 9 movie channels (including world movies); 6 news channels (including 3 regional news services and a comprehensive Australian news service; 4 specific children's channels; 5 documentary/education channels; 9 entertainment/drama channels (including 2 arts channels); 6 sports channels; 4 music channels; 8 ethnic language channels (Greek, Arabic, Chinese, Cantonese, Lebanese, Japanese, and Italian programming); 3 local weather channels; 2 pay per view event channels; and one shopping network. Pay TV provides a diversity and depth of entertainment and information services.

Subscription multichannel television is providing Australian television audiences more viewing choice than ever before. Through its substantial capital investment in infrastructure and the establishment of a loyal and growing customer base, subscription television has made its mark on Australian broadcasting.

Australian programming is prominent with well over 620 of Australian programming, drama and non-drama broadcast over three pay TV platforms each week.

In the past two years the sports channels have broadcast at least 75 000 hours of local and international sports programming. Live sports coverage by pay TV sets a benchmark – in March 1999 Fox Sports One and Fox Sports Two channels combined broadcast some 348 hours of live sport representing a daily average of 11.24 hours.

Children's programming is a strong niche for subscription television. Industry members have a solid commitment to local programming producing 100 hours of new local programming every week.

Subscription (multichannel) television, the most prominent of the subscription services, was first launched (satellite/MDS) in January 1995 with cable services launched in September and October 1995.

By end 1995 there were 85,000 homes with 300,000 potential viewers by end 1996 - 400,000 homes with approximately one and half million people. By the start of 1998 about 750,000 homes were subscribing to pay TV. Over 920,000 homes are now subscribing to pay TV. With a typical pay TV home having an average of 3.4 residents (ACNielsen, August 1998), the industry has a viewing potential of more than 3 million Australians. After 3 and a half years the penetration rate in Australia for subscription television is about 14%. By world standards, this is a rapid take up rate. In the UK after 4 years, the penetration rate was 4% and in New Zealand it was 10%.

In less than four years, subscription television has made a substantial impact on the way we experience entertainment and information in the home in Australia. Subscription television is now available to all of metropolitan and regional Australia.

Australia's subscription television industry remains a long way short of the penetration rate in the world's most mature pay TV market in the US where up to 70 per cent of homes are connected to cable or satellite pay TV after 30 years. However it is impressive nonetheless in spite of the risks and costs involved with a rapidly changing regulatory environment which continues to put restrictions in the way of our industry.

a brief history…

- October 1992 — New broadcasting legislation introduced to allow new sectors of broadcast services – the first competition for incumbent TV and radio broadcasters in almost 40 years.
- January 1995 — Australis, branded as Galaxy, distributes Australia's first broadcast subscription television service to Adelaide, Brisbane, Melbourne and Sydney
- August 1995 — AUSTAR service commences
- September 1995 — OPTUS VISION service commences
- October 1995 — FOXTEL service commences
- May 1998 — Australis ceases to operate
- July 1998 — AUSTAR acquires East Coast Television following Australis' demise
- March 1999 — Foxtel launches satellite service

Summary

- Different levels of regulatory control applied across range of broadcast services according to degree of influence – in shaping community views.
- Public interest objectives need to be balanced against the impost of unnecessary financial and administrative burdens on broadcasters.

- Intention was for broadcast regulation to be technology neutral but first amendment to the BSA was for technical ‘reasons’.

- Pay TV banned until October 1992. The BSA provided for new services including radio and TV narrowcasting and subscription broadcasting – continued market protection for commercial TV.

- Pay TV began in January 1995 and limited to 10 channels (including 2 for ABC); mandated satellite – digital technology (intention to guarantee satellite window – reduced to 8 months).

Regulatory hurdles

- Ban on advertising until 1 July 1997 (further protection for incumbents who were concerned about possible erosion of their advertising revenue).

- After 1 July 1997 – condition to limit advertising.

- Ban on R rated material - the question of whether Pay TV can show R rated material – with appropriate disabling devices is yet to be resolved. The BSA has been amended (twice) to deal with this & other related classification issues. R is allowed on pay narrowcast television services (BSA amended to ban X).

- Immediate Australian content expenditure requirement (similar to commercial network expenditure for the same genre).

- Anti-siphoning legislation – bans pay TV from acquiring any rights to listed sporting events (extensive) other than from a free to air broadcaster (FTA) – so FTA is a sports rights broker – sport is a pay TV driver & effectively stifled.

- ABA’s conservative view of narrowcasting – stifling growth of the sector.

- Incumbent broadcasters are the gatekeepers to the digital future – continued protection for commercial TV until 2006 (a 50 year protected oligopoly – no other industry has been afforded this luxury).

THE ISSUES FOR PAY TV

ANTI-SIPHONING REGIME

ASTRA maintains the current “anti-siphoning” rules are not operating as intended.

Put most simply, the “evil” addressed by the anti-siphoning rules is “siphoning”, ie. subscription television siphoning sporting events from free to air television. The rules are not intended to confer commercial advantage on the free to air broadcasters other than to a level which is unavoidable in meeting the policy objective of anti-siphoning.

Logically, for siphoning to be an issue and for anti-siphoning rules to be needed, the relevant event must actually be on free-to-air television (or it cannot be siphoned off), and it must be taken off free to air television through the actions of a subscription television operator, that is the subscription operator must acquire exclusive rights.

If the rules are really anti-siphoning rules (and not just a statutory competitive advantage for the free to air operators) the rules need to do no more than specify a list of key events actually shown on free to air television; and prevent subscription television operators buying free to air rights to those events.

It is plainly apparent that the current rules go much further than this in that:

- vast amounts of the material on the list are never shown on free to air television, never have been and never will be. Every match at Wimbledon is covered amounting to 90 hours of play per day. The three commercial networks together could not televise this. Similarly, every game of every round of the NRL and AFL competitions is covered. This would require two networks to devote their entire day time weekend schedules to coverage; and

- subscription television operators are not prohibited merely from acquiring the **free to air rights** (which could lead to "siphoning") but are prohibited from acquiring **any rights** to listed events other than from a free to air broadcaster.

This last provision effectively sets up the free to air operators as sports rights brokers with a statutory monopoly and no countervailing obligation to show any of the events in respect of which their statutory monopoly has been granted.

As an industry, we accept the reality of anti-siphoning rules but strongly believe they should be that and no more. To achieve that, change is necessary.

While ASTRA welcomes any attempt to redress these inadequacies, the proposed amendments under the BSA Amendment Bill 1998 (Schedule 1) do not address the fundamental issues. ASTRA encourages the Commission to take this opportunity to undertake a thorough review of the anti-siphoning rules for a more equitable and competitive solution for all broadcasters, viewers and sporting bodies.

Appendix B to this submission provides detail of ASTRA's concerns in relation to the anti-siphoning rules including the extent of the anti-siphoning list and the US experience. Appendix C includes the s.115 list of events including subsequent amendments.

Anti-hoarding amendment within the BSA Amendment Bill

As stated, this amendment does nothing to address the ongoing concerns of the pay TV sector with regard to the length of the anti-siphoning list of events; the resulting distortion in the value of rights and the continued difficulties imposed by free to airs in the process of delisting 'unused' events.

ASTRA understands this amendment is only intended to affect the commercial networks in relation to any hoarding of rights to televise very important events (as determined by the Minister) live, however ASTRA is concerned that this will add another step in an already uncertain and complex process.

Whilst the provision relates to free to air rights, the reality is that a commercial broadcaster is likely to also have control over the pay TV rights. There is no incentive for free to air operators to pass on those rights to subscription television broadcasters. To this end ASTRA continues to put the case for a regime which recognises separate pay and free to air rights.

ASTRA notes that the relevant events to be ‘offered’ are to be designated by notice by the Minister from time to time. It is unclear whether such events will go beyond the current anti-siphoning list.

There needs to be a provision within this proposed legislation that the current anti-siphoning list will not be expanded through this provision and that a reasonable ‘offer’ time be included to then allow a pay TV operator the opportunity and time (for contracting, marketing and publicising the event) to take up and broadcast the unused event.

Summary

- ASTRA believes the anti-siphoning rules are not operating as intended.
- The Minister’s anti-siphoning LIST has come to promise much more than it can deliver and pay TV is ‘living’ with that unreal expectation.
- The rules effectively set up the free to air networks as sports rights brokers with a statutory monopoly and no countervailing obligation to show any of the events to which they have been granted a statutory monopoly.
- The current anti-siphoning list is too long and should be reduced to more accurately reflect what is shown on free to air television.
- ASTRA accepts that major sporting events should remain available to free to air television. The financial strength and universal availability of the networks will ensure big events stay on free to air without an anti-siphoning list. This view is backed by experience in the US.
- The effect of the list is to hinder the development of pay TV and deny viewers more choice and more sport.
- ASTRA supports a reduced list which more accurately reflects what is shown on free to air television and a regime which recognises separate subscription and free to air rights.

CODES OF PRACTICE

The BSA sets out a self-regulatory regime for broadcasters where the onus to respond to complaints and matters of community concern rests with the broadcaster, in the first instance. It is if, and only if, a complaint is unresolved or community safeguards have proven inadequate, that the regulatory authority (the ABA) steps in.

Each broadcasting sector is tasked with developing their own codes of practice to cover matters of community concern as set out at section 123 of the BSA. These matters include, the classification of programs, accuracy and fairness in news and current affairs, advertising time, complaints handling, captioning, and for pay TV licensees, dealings with customers such as billing and fault repair.

Codes of practice must be relevant to the particular category of service, must take into account relevant ABA research, must be developed in consultation with the ABA and provide for public comment.

The ABA must register codes of practice for each sector, if it is satisfied the relevant codes provide appropriate community safeguards, are endorsed by the majority of service providers in those sectors and there has been adequate opportunity for public comment. National broadcasters, ABC and SBS TV and radio must also develop codes of practice and notify those codes to the ABA.

The ABA may determine program standards where, in the opinion of the ABA, codes of practice fail ie there is convincing evidence that a code is not operating to provide appropriate community safeguards, or where no code of practice has been developed. The ABA must seek public comment on any proposed standard. Codes and standards can be amended by agreement of both Houses of Parliament. Once determined, standards become a condition of licence for all relevant broadcasters (& narrowcasters).

ASTRA's codes of practice

As at April 1999, the ABA has registered ASTRA's subscription narrowcast radio code; open narrowcast radio code; subscription narrowcast television code; and the subscription broadcast television codes. The ABA is still to finalise registration of ASTRA's open narrowcast television code.

ASTRA's codes for narrowcasting radio cover general guidelines for programming, complaints handling and customer service, in the case of subscription services. In addition ASTRA's codes for narrowcast television also include classification and placement of programming.

In light of regulatory policy set out under the BSA, the codes for subscription television are designed to recognise the fundamental differences between the mass appeal and mass market target of free to air television and the niche nature of pay TV. They are especially sensitive to the expectations of the audience about program and advertising content of particular channels at particular times especially as the audience is paying for the service.

The codes are intended to provide clear and consistent information to enable consumers to make informed decisions about the nature of the programming they elect to receive.

Additionally, pay TV operators are committed to the protection of subscribers' interests in all aspects of their service provider-subscriber relationships. This includes issues relating to subscriber options, fault repair, subscriber privacy, credit management and billing, all of which are covered by the codes.

ASTRA will monitor the operation of its subscription television codes and review them one year from the date of effect. The review will be undertaken in full consultation with the public and representative organisations. If any substantive changes to the codes are necessary such amendments will be made in consultation with the ABA.

Those operators who provide both broadcasting and narrowcasting programming are subject to both the narrowcasting and subscription broadcasting sets of codes.

Multiple copies of ASTRA's Codes are included with this submission for the Commission's information.

AUSTRALIAN DRAMA EXPENDITURE CONDITION

The Explanatory Memorandum to the BSA relevantly states in relation to s.102 "Special condition relating to Australian content" that *"the licence condition will provide opportunities for the Australian **drama** production industry to provide new material for these services that people are willing to pay to watch"*.

The subscription television industry does not mirror the free to air television industry and in line with regulatory policy and the privileged position of commercial television does not mirror the regulatory requirements.

The reasons for the very different 'Australian content regulation' for the subscription television industry was clearly recognised at the time the BSA was introduced, and those differences remain. As stated in the ABA's Working Paper for its investigation into s 215(2) of the BSA, in discussing the differences between Australian content regulation for commercial television and pay TV:

> *"…The first and most fundamental difference is that the pay TV Australian content requirement relates to program expenditure rather than to the broadcast of programs. That is, it requires the spending of money instead of requiring that specific amounts of Australian programs be broadcast at certain times of the day…"*
>
> *"…The fourth difference is that the pay TV requirement does not cover the full range of Australian programs. It only creates an obligation concerning new Australian drama programs…*
>
> *"the achievement of this objective (set for the system) must be encouraged by regulation which is attuned to the differences between pay TV and other sectors of Australian broadcasting."*

The 'industrial' nature of the s.102 condition to contribute to the Australian film and television production sector, and the recognition that pay TV in Australia operates in a global market is also supported by the Second Reading Speech to the BSA which states:

> *"Our film and television production industry will also benefit from the new demand for programming. An Australian content requirement for drama channels on all (satellite)*

> *broadcasting services has been set …This will make a significant contribution to the development of the Australian production industry in providing jobs and developing creative Australian product, with potential for* ***export****.” (emphasis added)*

For this reason it is critical to keep in mind that the Australian Content Standard for commercial television (ACS) sets transmission standards across all genres and subquotas in vulnerable areas of drama and documentary, whereas section 102 is concerned with ensuring expenditure on drama. Most importantly, it is about ensuring that expenditure is made on new material that people are willing to pay to watch.

ASTRA members are committed to producing new Australian programming and recognise that Australian content has an important role to play in promoting and developing a sense of Australian identity character and cultural diversity. ASTRA members also aim to provide their subscribers with new, innovative and high quality programming and a variety of choices across the vast array of channels.

As recognised by the ABA in its report to the Minister, *“any regulation which might have the effect of decreasing the diversity and choice offered by pay TV to Australian audiences would be an undesirable public policy outcome since subscriber based services need to be responsive to subscriber demands and sensitive to their willingness to pay.” (page 28).*

With over 50 individual channels on offer across subscription television platforms, as compared to five on the commercial and national platforms, the industry offers *real* choice to Australians. Australian programming is prominent with well over 620 hours of Australian programming, drama and non-drama broadcast over three platforms each week.

<u>Summary</u>

- Unlike network television, pay TV is required to spend a certain amount of money on new Australian drama programs.

- Direct comparison of pay TV with commercial networks on the issue of Australian content is not valid – given regulatory policy and privileged position of the commercial networks.

- ASTRA has argued for a regime that reflects the reality of the pay TV industry, which takes account of the different channel genres, the inappropriateness of the condition which essentially becomes a tax for some channels and recognises the value of non drama Australian production.

- The current expenditure condition is ‘unenforceable’ and the sector has been operating under a voluntary scheme.

- ASTRA accepts the decision to enforce the current 10% Australian drama expenditure condition but the legislation must provide a flexible, coherent and administratively simple regime.

- Pay TV is committed to local content and realises it is essential to attract subscribers. But any extra mandated burden at this time will seriously hinder the ability of pay TV to grow as a business and major employer.

RETRANSMISSION

ASTRA's concerns relate to the *Broadcasting Services Amendment Bill 1998* (the BSA Amendment Bill) which deals with anti-hoarding (discussed under anti-siphoning regime) pay TV programs in regional areas (schedule 2) and retransmission (Schedule 3).

Subscription television programming in regional areas

The proposed amendments are complicated by an attempt to apply regional preference rules for not only retransmission of services but transmission of a particular type of programming designated by the Minister.

ASTRA was greatly concerned that certain services would be unintentionally caught by these provisions. As currently drafted, the restriction applies to a subscription television service where the majority of programming material (an inconsistent definition within the BSA) televised on that service during prime viewing hours (ie. 6.00pm - 10.30pm weekdays and 10.00am - 6.00pm on weekends) is the same as that televised on a metropolitan commercial television service.

This means that if, for example, a subscription television broadcaster replayed an NRL match or matches or part of the Olympics coverage immediately after the close of a free to air broadcast, then this service may be caught if that broadcast exceeded two hours fifteen minutes and was the same as the metropolitan broadcast. This restriction applies for up to one week.

ASTRA was greatly concerned at such anti-competitive regulation, for no apparent reason to address a concern of some regional broadcasters about something that may occur at some time in the future, and may have some detrimental effect on their advertising revenue.

One of the advantages of multichannel television is that it can give viewers greater choice in the times at which they watch programs, for example replays of key sporting events may be shown. As currently drafted, these provisions further entrench the disadvantage of those living in rural and remote areas, by limiting the scope of pay TV broadcasters to provide this program choice.

These provisions are now subject to redrafting which address the concerns of the regional commercial broadcasters and to allow pay TV to use their legitimate programming rights.

Retransmission

These provisions are intended to amend the retransmission provisions of the BSA to specifically address the retransmission of commercial and national television broadcasts by subscription television operators.

Retransmission of free to air signals by subscription television operators is permitted under the current law. For example FOXTEL and Optus Television retransmit (via cable) the national (ABC and SBS) and commercial television services simultaneously and unaltered under the current provisions of section 212 of the BSA relating to television broadcasting services within licence areas. These channels are free additions to the suite of subscription channels and provided as a service to subscribers.

The validity of the current law was tested in the courts when commercial television challenged the cable operators' right to retransmit under section 212. The 1996 decision of the Full Court of the Federal Court in *Amalgamated Television Services Pty Ltd and others v Foxtel Digital Cable Television Pty Ltd and another* confirmed that simultaneous and unaltered cable retransmission of terrestrial television services is permitted within licence/coverage areas under the BSA and the Copyright Act.

The proposed legislation makes 'illegal' what subscription television operators have been doing legally for the past three years as confirmed by the courts. As advocated by ASTRA, a change in the law will unfairly disadvantage existing customers.

There are over 600,000 cable subscription television subscribers. The retransmission of free to air services arises at no cost to either broadcasters or underlying rights holders; retransmission increases the reach of broadcasters and therefore potential advertising revenue; and more importantly greatly benefits consumers not only in the convenience with which they can switch from subscription channels to free to air and vice versa but also in the improved signal quality of free to air reception.

In lobbying for these changes to the current retransmission rules, commercial television broadcasters have argued that they have a property right in their broadcast signal, which they should have, control over with respect to retranmission except in 'genuine self-help' cases.

ASTRA maintains that commercial television broadcasters only have a limited right to broadcast by virtue of licences which have been granted under the BSA.

A subscription television operator, by retransmitting this signal, does not decrease the value of this right. Because the value of the signal is dependent on the number of people who can receive the signal, and because subscription television can only increase the number of people who receive a signal within the licence area, it is more logical that retransmission increases the value of the original broadcast rather than decreases the value.

In addition commercial television broadcasters are compensated through advertising, not by the recipient of the broadcast. If consumers paid for television signal reception directly, then the argument by commercial television that they are unfairly 'uncompensated' might have some validity. Cable retransmission improves the signal quality of reception and in turn increases the value of placed advertisements. There is no need for pay TV operators to compensate commercial television licensees as they are already compensated by advertisers.

The retransmission regime of the United Kingdom as it relates to copyright, reflects the ***no pay*** position advocated by Australian cable operators. That is, the copyright in a broadcast or any work included in the broadcast is not infringed by a cable retransmission that takes place in the licence area of the original broadcast. A summary of some relevant overseas retransmission regimes is included at Appendix E for the Commission's information.

The proposed retransmission regime includes both a ***consent*** provision which requires subscription television operators to negotiate and reach agreement with all free to air broadcasters if they want to retransmit the signal and a limited ***must carry*** provision in overlap areas (where metropolitan and regional licence areas overlap, for example the Gold Coast) which imposes a mandatory obligation upon pay TV operators to retransmit the regional commercial television signal if it is retransmitting a metropolitan commercial television signal. However this can only be done with the consent of the regional commercial television licensee.

Summary

- ASTRA's preference is for **no** change to the current legislation.

- Consumer interest should be the primary concern and this interest is clearly being served by the current regime which allows subscription television operators to retransmit free-to-air signals without restriction.

- The proposed legislation makes 'illegal' what subscription television operators have been doing legally for the past three years.

- Retransmission occurs at no cost to either broadcasters or underlying rights holders.

- Retransmission increases the reach of free to air broadcasters and potential advertising revenue.

- Retransmission greatly benefits consumers not only in the convenience with which they can switch from subscription channels to free to air but also in the improved signal quality of free to air reception.

- Viewers should be able to receive their 'free' TV any way they choose. Those who choose to receive their free to air signal via an antenna do so without restriction and without permission of the free to air television stations. Cable is simply another means of delivering free to air television to the home.

- **Regional protection** - the only overlap area, which currently has retransmitted commercial and national services, ie the Gold Coast (retransmission on FOXTEL cable), includes both the metropolitan and regional retransmitted signals.

- The combined **must pay** (outcome of **consent**) and **must carry** provisions for overlap areas leaves the pay TV broadcaster in a situation where it will have to pay to retransmit a broadcast which it is compelled to carry. No other country in the world has such a draconian impost.

- The proposed legislation does not take into account any considerations of the technical capacity and capacity needs for the different delivery modes of subscription multichannel television (whether cable, satellite or MDS).

A transition period

- Need for **transition period** as the Government's proposed legislation makes illegal what is currently legal.

- ASTRA maintains that the transition period or 'period of grace' should be a **minimum** of 6 months to ensure retransmission negotiations are not pressured by the impending unlawfulness of the retransmission.

An arbitration mechanism

- if no arbitration mechanism is included in the proposed legislation then all the negotiating leverage will be with the free to air broadcasters. ASTRA supports the Copyright Tribunal as the appropriate body.

PIRACY

The Australian pay TV industry has been making submissions to the Federal government for legislative amendment to make theft of pay TV signals an offence since 1995, when the industry commenced commercial operations. While these submissions have been favourably received, pay TV industry uncertainty, governmental changes and policy changes have not seen any legislative protection enacted to date.

Signal theft, otherwise known as piracy, is the unauthorised receipt of a subscription television service. Unauthorised means that the person receiving the service has not paid the pay TV service provider a fee for receipt of the service but is able to watch the service for free.

Pay TV service signals are encrypted to ensure that people pay for the service, so that a customer needs a set-top box or decoder provider by the pay TV service provider in order to decode the encrypted signal and receive the service. The encryption methods are complex algorithms that alter the signal, which are decoded by appropriate software in the decoder box, if that box is found to be "authorised" when the signal is sent. In order to receive a service without paying the pay TV provider it is necessary to have equipment that duplicates the functions of the pay TV provider's set-top box.

Piracy of pay TV services exists in Australia in a number of ways:

1. use of stolen decoder boxes/smart cards
2. manufacture of a decoder box/smart card
3. importation of a decoder box/smart card.

Evidence suggests that each of the above methods is currently being used in Australia for the authorised receipt of pay TV services.

This pirating of services means a loss of revenue to pay TV distributors and in turn to pay TV channel providers and copyright owners. Generally pay TV distributors pay the channel providers on the basis of subscriber numbers. If people are able to receive a service without subscribing to the distributor then there is a direct loss of revenue that flows down the supply chain.

There is not currently sufficient legislative protection against signal piracy in Australia. Express legislative provisions need to be enacted to make signal theft an offence, as is the case in other countries such as the USA, the UK and New Zealand.

For the subscription television industry, time is of the essence to enact legislative remedies as the larger the problem becomes the harder it will be to contain.

Summary

- This is not about legislation to reduce competition; this is about the need to address an illegal activity.

- ASTRA has sought legislative amendments to both the Copyright Act and the Broadcasting Services Act to specifically combat signal theft.

- The concern for ASTRA is becoming increasingly urgent, given the continued rise in “pirate” activity by individual operators in both regional and metropolitan centres.

- Without these provisions, we are allowing an illegal activity/market to develop.

- The current exposure draft of the Copyright Amendment Bill does not include an adequate amendment.

DIGITAL IMPLEMENTATION (RADIO & TV)

The digital debate

Digital terrestrial television broadcasting (DTTB), is one of the most significant communications’ developments of the last 50 years. It will affect all Australians, both rural and urban and will have far-reaching consequences for many industry sectors, including free to air television, TV and film production, subscription television, narrowcasting services, the on-line industry, advertising and electrical manufacturing among others.

While the digital debate in this country focussed principally on digital terrestrial television, ASTRA maintains that the policy context for these issues is the much wider universe of digital communications, both wired and wireless, terrestrial and non-terrestrial. Thus, any significant policy decision in the digital sphere will have important implications for other areas of digital communications, and interested parties from each of these areas should be consulted in the making of any policy decisions by either government or regulators.

Pay TV operators are pioneers in digital TV in Australia, given digital technology was mandated for satellite services within the ‘technology neutral’ BSA, and have much to contribute.

ASTRA entered the digital debate with a submission to Government in December 1997 in response to the Australian Broadcasting Authority (ABA) Specialist Group Report and recommendation to the then Minister for Communications, the Information Economy and the Arts, Senator Alston, on the introduction of digital terrestrial television broadcasting (DTTB). That submission sought to provide an alternate view for Australia’s transition to digital terrestrial television broadcasting.

In response to the ABA’s Specialist Group Report, ASTRA’s concerns related to:

- the give away of spectrum which is a valuable, finite public resource;
- the opportunity it gives to the incumbent terrestrial broadcasters to use that spectrum for **new** services - multi-channel television, other non-broadcasting services and subscription services (broadcasting or non-broadcasting);
- the assumption that broadcasters would need the full 7MHz of spectrum to provide HDTV - as has happened in the US, the networks will attempt to abandon HDTV for multi-channelling, on-line and data delivery;
- assumptions about what the Australian consumer wants and is prepared to pay to participate in Australia’s digital future; and
- conversion costs for broadcasters.

ASTRA acknowledged the need for a guaranteed path into digital for the current terrestrial broadcasters and therefore proposed the multiplex model which would leave available channels that could carry a number of programming, communication and data streams available for auction. This model would substantially reduce the costs of conversion especially for regional commercial stations and the national broadcasters.

From the outset, ASTRA believed there should be equal opportunity for others to access the spectrum for digital terrestrial broadcasting, on-line services and other communications to promote diversity and provide substantial government revenue.

FACTS (on behalf of the commercial free-to-air broadcasters) has successfully argued that the free to air broadcasters should each be given a 7Mhz channel, to broadcast DTTB.

They have also gained a further eight years of protection (ban on 3 commercial TV services in a market to be lifted in 2006); and have guaranteed access and exclusive right to exploit 7MHz each of digital and analogue spectrum for the next nine years (as a minimum and at least another 13 years in regional areas).

FACTS argument has been predicated on the notion that the spectrum will be used for high definition television (HDTV). Given overseas experience, ASTRA found this to be a highly dubious proposition.

FACTS now concedes that even if HDTV is used, broadcasts would only occur in that format for a limited period on any day. One reason for this is the apparent “lack of HDTV content”.

In the United States the broadcasters adopted a tactic similar to that of FACTS. They argued for HDTV, but once they were allocated the spectrum, moved away from HDTV and announced plans to explore multi-channelling.

However, the importance of HDTV as advocated by the networks has been accepted by Parliament. The legislation has been passed. The driver for the take-up of digital services will be high definition television. The basis for the grant of the spectrum to incumbent broadcasters is for the provision of HDTV services – to walk away from HDTV negates the framework agreed to and passed by Parliament.

It should be noted that the commercial broadcasters have made a commercial decision ‘to get into digital’ and their initial investment will create a substantial commercial return. ASTRA believes the incumbent commercial television broadcasters, who have always enjoyed a healthy profit, will be able to absorb a substantial part of their digital conversion costs, in particular their annual operational costs.

For example, with aggregation (or equalisation) the overall pool of advertising revenue increased. Given trends in the analogue regime the advertising dollar will likely move from other mediums to television.

In addition, digital will provide new and innovative opportunities to advertise through the medium of television via datacasting and enhanced programming. For example, during a sports broadcast, additional information on player statistics could be ‘brought to you by ...’ or additional revenue streams could be provided by access to gaming through ‘incidental and directly linked’ programming related to, for example, the broadcast of horse racing.

While ASTRA has expressed disappointment at the Federal Government’s decision to give spectrum for free to the commercial television networks for digital broadcasting. ASTRA is pleased that the Government has recognised the importance of our sector by prohibiting the commercial networks (and the national broadcasters) from using the spectrum for subscription television or multi-channel services. Of course this is subject to review in 2005.

ASTRA’s views on HDTV, datacasting, enhanced programming and multichannelling are included in submissions to the digital reviews required before January 2000 being conducted by the Department of Communications, Information Technology & the Arts.

A summary of the digital decision for both television and radio, and the principles for digital conversion as advocated by ASTRA are included at Appendix D for the Commission’s information.

Summary

- ASTRA entered the digital debate to provide an alternative view about how best to implement digital television in this country. As a starting point we maintained that this was not just about television.

- The final decision recognised the infancy of pay TV and set up certain prohibitions in terms of what the free to air broadcasters can do with their very valuable, public gift of spectrum.

- ASTRA is concerned that decisions with regard to the prohibition on multichannelling and subscription services by free to air broadcasters be maintained.

- ASTRA is a member of both the Digital Television and Digital Radio Steering & Planning Committees and their associated working groups.

- ASTRA's concern in this implementation phase is to ensure that technical standards are inclusive and take into account the needs of the whole of the broadcasting industry (including satellite, wireless and cable operators) and not confined to the narrow concerns of terrestrial broadcasters.

APPENDIX A

The Australian Subscription Television and Radio Association (ASTRA) is the peak industry body for subscription television and narrowcast radio. Subscription broadcasting and open and subscription narrowcasting services were new categories of broadcasting services introduced with the Broadcasting Services Act, 1992. (the BSA).

These new services added to the mix of existing categories of service, being the national broadcasting services (ABC and SBS); commercial broadcasting services (commercial TV and radio); and community broadcasting services (previously public broadcasting).

ASTRA was formed in September 1997 with the amalgamation of the Federation of Australian Narrowcasting Subscription Services (FANSS) and the Confederation of Australian Subscription Television (CAST).

ASTRA's members include:

- the main Pay TV operators – Austar; C&W Optus Television and Foxtel

- channel providers – The Value Network (Australia); Pan TV; Artist Services Cable Management; Odyssey Channel; XYZ Entertainment Pty Ltd; Movie Vision Pty Ltd; Discovery Channel; TV 1; Nickelodeon; Learning Network Pty Ltd; UK TV Pty Ltd; MTV; Sky News Australia; The Premium Movie Partnership; Premier Sports Australia (Fox Sports); Disney Channel; and Satellite Music Australia

- narrowcast television services – Sky Channel Pty Ltd; Television Oceania; CFM Technology; Information Television; Westlink - Dept of State Services; and Arnbridge

- narrowcast radio services – 2KY Racing Radio; Really Really Big Productions; Western Visitor Radio; Eazy 88 Cooloola Coast Radio; Radio Austral; Free FM; I&G Pty Ltd; Radio Newcastle; Radio Uno; Tourist Radio Devonport (TCT FM); Fresh Media Woolgoolga; 2CR; and Asia Space, and

- communications companies – AAPT; C&W Optus Communications; Telstra; PanAmSat; Australian Satellite and Cablevision Services; CSIRO Radiophysics Division; News Ltd; Totalisator Agency Board of NSW; Peter Pratt; Orbit Electronic Media; and Comsyst (Australia) Pty Limited.

APPENDIX B

ANTI-SIPHONING

“Siphoning” refers to the migration of sporting events from free-to-air (FTA) TV to pay TV. Anti-siphoning legislation, as set out in Section 115 of the Broadcasting Services Act, regulates this by:

- A list of events which in the Communications Minister’s opinion should be kept on FTA television, and

- A condition in all pay TV licences that prevents licensees from acquiring the right to broadcast such an event until a FTA broadcaster has already acquired the right to do so.

The intention of the legislation was to keep listed events available to viewers on FTA television, with subscription television providing complementary sports coverage. It was based on the assumption that the events on the list would be broadcast on FTA television. The legislation, however, is vulnerable to manipulation by the FTAs and has failed to achieve this. ASTRA maintains only about 40% of events on the list are actually shown on FTA, with about a third shown live.

FTA broadcasters, via the anti-siphoning list, have been given the rights to cover most major sporting events and are not using them. FTA broadcasters can acquire exclusive rights to listed events - thereby preventing pay TV access to them - and still not show them.

The unavoidable result of the current legislation is less sport on television than would be the case if pay TV could compete fairly with FTA for TV rights.

THE ANTI-SIPHONING LEGISLATION DOES NOT WORK:

- FTA broadcasters have been made the television broadcast rights gatekeepers of what is available on television and therefore what viewers can and cannot see.

- For pay TV to have any access to any coverage of any event on the list, a FTA licensee reaching over 50% of the Australian population must already hold rights to the event. This requirement not only disadvantages pay TV - it works against regional broadcasters and the SBS, which do not have the required 50% reach, and underpins the gatekeeper position of the major commercial networks.

- A FTA broadcaster, for example, can purchase the right to only the finals or highlights of an event. But if “every event” of that sport is listed, the FTA has not technically acquired the “right to broadcast the event”. This means that pay TV is still prevented from getting access to other rounds of that competition.

- Where no FTA licensee has acquired the right to broadcast a listed event, the only way a pay TV operator can buy the rights is to have it removed from the list. This is a cumbersome and lengthy process, involving an application to the Minister, which is likely to be unresolved by the time the event is actually played.

- Also, if no FTA has acquired rights to a listed event, pay TV can not even acquire rights to show delayed telecasts after the event has occurred.

- There is nothing in place to ensure that, once a FTA broadcaster has acquired the broadcast rights to an event, it will actually show it. The proposed amendments to the BSA do nothing to ensure broadcast of the event.

- Where a FTA broadcaster acquires exclusive rights - thereby preventing any access by pay TV to the event - and does not show it, this is called “hoarding”.

- Hoarding can occur because there are many more sporting events on the list than could ever be broadcast by FTA television. The list covers every game of tennis played at Wimbledon, and every game of every round of the NRL (and previously every round of the ARL and Super League) and the AFL.

- A very public example of hoarding was the 1997 England-Australia Ashes cricket tour. Channel Nine had exclusive rights to broadcast the event, but was not prepared to disrupt its regular programming to show the first sessions live. At short notice, and under pressure from the public and politicians, the network offered it to the ABC and SBS, but they also were not prepared to upset the viewers of their regular non-sports programming. The result was that the first sessions were lost live to FTA viewers.

- Vast amounts of TV sports coverage available via the list is not shown and never will be. Initial investigation by ASTRA members indicates that FTA networks are covering less than 33% of events captured by the list live, and are only covering approximately 40% of the total events at all.

- For example, about 650 hours of Wimbledon tennis - the total amount played at each annual tournament - is covered by the list. Channel Nine, which shows the event, aired just 76.5 hours of Wimbledon in 1997, or about 12% of available coverage.

- Also, many events on the list are simply not viable for commercial television because of their narrow appeal and are better suited to pay TV which is about multichannel, niche programming.

- In addition, FTA broadcasters can, and often do, have the rights to two or more events which are held concurrently.

- About 14 per cent of Australian homes - over 920,000 households containing more than two million viewers - subscribe to pay TV. These homes are serviced by up to six pay TV channels dedicated to sport - all being denied access to a large quantity of sport that is not being shown elsewhere.

- The listing of an event obviously restricts the ability of rights holders to negotiate a sale of these rights. This is because the rights holders first have to finalise a deal with a FTA broadcaster. This impedes the ability of sporting associations to benefit from competition and gain the best deal - both in terms of coverage and profit.

THE FTA ARGUMENT DOES NOT STACK UP:

- For siphoning to be an issue, the event must actually be on FTA and then taken off it through pay TV gaining exclusive rights.

- In 1994, the purpose of s.115 of the BSA was to enable the Communications Minister to protect the rights of access to major sports events on FTA after changes to the broadcasting environment through the introduction of pay TV. The first phase of this change has now occurred and a review is clearly needed.

- The argument that giving pay TV a fairer opportunity to buy rights to sporting events would undermine FTA advertising revenue is an attempt to avoid competition and a blatant plea by the dominant players in TV - the FTAs - to be protected in a market economy.

- Commercial TV broadcasters are powerful, highly profitable and very astute - they will not allow pay TV to substantially erode their most attractive programming and greatest revenue earner: sports.

- Sporting bodies want maximum exposure for their sports and sponsors. It is not logical that they would deny access to FTA television in the event that they could also deal directly with pay TV operators.

- There is no evidence to suggest that migration from FTA to pay TV would occur if a more competitive market in TV rights to sports were created.

- There is, in fact, evidence to suggest that a change in the legislation would improve sports coverage overall.

- Viewers can watch television for free or pay a fee - it is their choice. FTA broadcasters have the advantage over pay TV because they are free and pay TV has to make itself an attractive alternative.

- An investigation and report by the US Federal Communications Commission - the US equivalent of the Australian Broadcasting Authority - into whether or not there had been any migration of sports programming from FTA broadcast to cable pay TV found that there had not been a migration to pay TV at the expense of the FTA broadcasters.

- In fact in some cases - such as with ice hockey in the US - FTA coverage of sport had increased, or been initiated, as the result of pay TV taking up coverage. This is because pay TV coverage created a bigger public profile for the sport that in turn encouraged interest from FTA TV.

- The US system - which has no anti-siphoning legislation - gives the responsibility of the negotiation of rights to sporting associations and broadcast providers, and demonstrates the ability of sporting associations to negotiate the best deal for their organisation and their viewers, with the result of more sport on television. Benefits also flow through to the sporting organisations to the players and junior sport development.

CHANGES THAT ARE NEEDED:

- ASTRA wants more choice for viewers and more sport on television.

- The anti-siphoning list should be removed - or at least be shortened - and dual/split rights introduced. The current list of events is both too broad in its coverage and too extensive within particular sports. It should at the very least be reduced to reflect what the FTAs actually put to air.

DUAL/SPLIT RIGHTS:

- The Government's objectives would be more effectively achieved by a model that gives guaranteed access of listed events to a FTA licensee, but also allows both FTA and pay TV licensees to secure the rights to any sporting event.

- Splitting the acquisition of rights would balance the access of FTA and pay TV licensees to events. Pay TV broadcasters would not be able to gain FTA broadcasting rights and vice versa. Pay TV operators would not be able to prevent FTA networks acquiring rights and showing events and FTA networks similarly could not restrict pay TV broadcasters.

- Sporting organisations, and sports players, would be able to deal directly with all parties interested in acquiring their products and thereby obtain the optimum returns and benefits that only an open marketplace can deliver.

TELEVISION SPORTS RIGHTS - THE US EXPERIENCE

The US Federal Communications Commission in 1994 prepared a report for Congress which investigated the workings of the American market in television sports rights.

The aim of the investigation was to ascertain if there had been a migration of TV sports coverage from free-to-air (FTA) TV to cable pay TV.

In essence, the FCC found there had been no migration of sports coverage from FTA to pay TV.

The findings of the FCC have important implications for the Australian market for television sports rights.

In the US, there is a low regulation regime. Unlike the high regulation regime in Australia, there is no US anti-siphoning list that protects the access of FTA broadcasters to television sports rights.

The rationale behind the Australian anti-siphoning list is that without it, pay TV operators could use their financial and market power to acquire sports rights exclusively and take them away from FTA, leaving the bulk of TV viewers - who only have access to FTA TV - without their favourite sports.

This rationale is badly flawed, as the US experience demonstrates, and merely serves to protect the interests of the major commercial FTA broadcasters, rather than enhance the TV viewing opportunities for sports fans.

In the US, pay TV via cable and satellite is purchased by about 70% per cent of the 95 million homes in the US. The US pay TV industry has been well-established over many decades, and is a highly profitable and able competitor against the FTA broadcasters.

In other words, despite the deep financial resources of the US pay TV operators, their wide availability, high penetration of TV households, and an open marketplace in TV rights to sports - FTA coverage of sports remains high and unaffected by competition from pay TV.

By contrast, pay TV operators in Australia have only been established for about three years, continue to book heavy financial losses, and are in about 13 per cent of Australian households. Pay TV has enormous potential to add value to Australian sport and increase overall TV coverage of sport, but the industry’s ability to grow is being constrained by the onerous anti-siphoning rules.

The Australian FTA broadcasters have been established for decades, make hefty profits and are seen in almost 100 per cent of households.

Yet in Australia, there is a comprehensive anti-siphoning list of sporting events that past Government policy has decided should be the exclusive preserve of the FTA broadcasters.

The US experience demonstrates that anti-siphoning legislation is unnecessary to ensure FTA coverage of sport.

APPENDIX C

the anti-siphoning list

APPENDIX D

Summary of Digital Decision – subject to introduction of legislation

key points

- DTTB to commence by 1 January 2001 and 2004 in regional areas
- 8 yr simulcast period to be reviewed in 2005 (once consumer demand for digital TV better known)
- at end of simulcast period - return of equivalent loan spectrum
- if no start up or non compliance with conditions then return of spectrum
- HDTV start up date to be determined
- HDTV minimum levels and staged increase to be determined
- fees regime for FTAs to use their 'unused' loaned spectrum for datacasting to be determined
- Australian Communications Authority (ACA) to determine fees
- allocation of available leftover spectrum to new players at same time as DTTB
- decision on what ABC/SBS allowed to do eg non-commercial multichannelling and sub-lease of their loaned residual digital capacity
- rules for access to transmission facilities (NB sale of NTA) to be determined
- flexibility for regional broadcasters re start-up date & transmission access & licence fee rebates
- 'stringent' Oz content rules to apply to digital services
- new requirements for closed captioning ie for all prime time programming and all news and current affairs outside prime time
- new datacast players to ensure free access of a SDTV community TV service as a condition of license
- funding (if any) for ABC/SBS and community TV digital conversion still to be considered
- FTAs to submit to and comply with implementation plans approved by the ABA (unclear who develops these plans)

Decisions needed prior to 1 January 2001

Department of Communications and the Arts (DOCA) to report to Minister on:

- regulations re allowable 'enhanced' programming and television datacasting services (ie what is enhanced programming and datacasting);
- possible legislative amendments to respond to convergence between broadcasting and non-broadcasting services;
- whether ABC/SBS will be allowed to multi-channel;
- rules for retransmission of FTA digital services on Pay TV

DOCA to convene a Digital Television Planning and Steering Committee with ACA, ABA and all relevant industry sectors to:

- advise on transmission standards and compatibility requirements (including conditional access); access to transmission facilities; and implications for consumers
- commence detailed technical planning; and
- identify broadcasting spectrum not required for FTA digital conversion.

ACA (Chair) and ABA to report to Minister on structure and conditions for allocation of 'leftover' (television datacasting) spectrum.

And in 2005

DOCA to review DTTB and report to Minister on whether:

- all spectrum available for allocation has been identified and 'efficiently structured' (?);
- new commercial FTAs allowed after 31 December 2008;
- FTAs allowed to provide multi-channel and/or pay TV services (having regard to developments in pay TV)
- a simulcast period other than 8 yrs is needed.

Digital Radio

(interesting key points in this decision is that what is proposed re multiplexing for digital radio is the model for digital television proposed by ASTRA)

- DOCA (Chair), ACA, ABA and industry representatives to form the Digital Radio Planning and Steering Committee to report on technical planning issues and legislative amendments
- assumed to commence in line with digital TV - 1 January 1998
- number and timing of new entrants to be determined as part of planning process
- Eureka 147 system to be used - generally on L band but with consideration of VHF spectrum in regional areas
- existing broadcasters to share a multiplex facility - 5 CD quality radio services
- however unclear where ‘narrowcast’ radio fits in this scenario as decision specifically refers to ‘commercial, community and national radio broadcasters’.

Principles for digital terrestrial television as advocated by ASTRA March 1998

Here are four approaches to address the issue of the digital communications future, including policy reasons and suggested solutions.

One

Do not rush any decision on the digital communications future

- there are too many unknowns to make any commitments on the allocation of the digital spectrum
- this is the most significant communications decision since the introduction of television
- this will require a major rethink on the definition of ‘service’ impacting on the rules and conditions under the broadcasting, radiocommunications and telecommunications acts

Solution
Conduct a full inquiry to consider ALL the policy, legal, technical and economic issues and possible uses of the digital spectrum

Two

The digital spectrum is a highly valued, finite, public resource

- all new commercial television licences are auctioned in addition to payment of annual licence fees based on revenue.- allows equal access to all players and substantial government revenue
- the digital terrestrial spectrum is a low cost wireless connection via the existing TV antenna to the home capable of more than just TV - its the communications future - its data, radio, newspapers, home banking, and a range of on-line services.
- the commercial networks want to maintain control of the VHF television spectrum and the allocation of adjacent channels effectively locks out any new entrant into what is already a protected market

Solution
Allocate the spectrum by way of auction

Three

Allow a digital transition for all five terrestrial broadcasters

- only a fifth of the 7Mhz bandwidth is required to provide a digital standard definition television signal
- the cost for digital conversion is prohibitive for both national broadcasters and regional television operators
- for regional broadcasters the cheaper option of direct satellite feed from the metropolitan stations will reduce local content and local advertising dollar
- the multiplex model proposed by ASTRA will reduce costs by a third and open up more digital spectrum for access by other service providers

Solution
Allow migration of the five terrestrial television broadcasters to provide a digital version of their current analogue service ONLY - this will require less digital spectrum, less cost for conversion.

Four

If the 7Mhz of spectrum is given away then it must be conditional and those conditions must be clear before any policy decision is made

- about half of the 7Mhz bandwidth is needed to provide Enhanced Definition Television (EDTV), which is of similar quality to HDTV
- FACTS have argued that they need 7MHz to provide HDTV
- if 7Mhz is given to them then they must provide HDTV only with no allowance for ‘enhanced services’
- if they do not use the spectrum for HDTV within a period of 5 years then the spectrum must be returned for allocation

Solution
They must use it or lose it.

APPENDIX E

RETRANSMISSION REGIMES - OVERSEAS EXPERIENCE

In considering overseas retransmission regimes, ASTRA provides the following information on retransmission of free-to-air terrestrial services in the United States, the United Kingdom and Canada. While overseas experience provides some relevance, it should be noted that the Australian market is very different both in its make up of free-to-air services (in particular, the relative strengths of the commercial and public systems) and dominance of the commercial networks.

For example, in the United States the cable pay TV sector has been well established over a number of decades, with 70% of homes connected. It is highly profitable and an able competitor against the commercial networks. This compares to the Australian market where subscription television has three years experience, continue to book heavy financial losses and is in about 13 per cent of Australian households.

United States

Broadcasting

The *Communications Act* recently amended the previous retransmission **must carry** rules and now provides that every three years, commercial free-to-air broadcasters can elect between status as a ***must carry*** broadcaster (where the cable operator must carry the free-to-air broadcaster and receives no payment; **or** retransmission ***consent*** (under which the terms of retranmission are negotiated with the cable operator).

Must carry stations may choose their channel position and must be carried on the tier of programming offered to all subscribers. Cable operators are not allowed to change the free-to-air broadcast signal subject to certain exemptions.

If free-to-air broadcasters are not eligible or do not assert their *must carry* rights, then the cable operator must obtain consent from the free-to-air broadcaster to carry its signal.

Copyright

The US *Copyright Act* provides cable operators with a compulsory licence to retransmit the underlying programming in free-to-air broadcast signals. This regime includes a statutory schedule of royalties to be paid for retransmission. The Copyright Royalty tribunal was established to distribute royalties to owners of copyright in the *programming* that makes up the transmitted free-to-air signal.

United Kingdom

Broadcasting

Cable operators are obliged to carry free-to-air signals in their area (and some DBS satellite broadcasts). Cable systems that *only* retransmit free-to-air broadcasts are exempt from the licensing requirements under the *Broadcasting Act* and telecommunications legislation.

Copyright

If the retransmitted broadcast is simultaneous and intended for reception in a cable operator's area, no copyright licences are required from the free-to-air broadcaster or the owner of any underlying rights in that broadcast: section 73 of the *Copyright, Designs and Patents Act* 1988.

Canada

Broadcasting

Cable operators **must carry** free-to-air broadcast signals in accordance with a priority list in the Canadian Cable TV regulations*. The Canadian Radio-television and Telecommunications Commission (CRTC) regulations prevent a cable operator from altering or curtailing free-to-air signals. *(* NB. The regulations are not current).*

Copyright

Underlying rights holders have the sole right to communicate their work to the public by telecommunication (the so-called retransmission right). A compulsory licence regime exempts from copyright infringement, retransmissions of local signals and distant signals. Cable operators who retransmit free-to-air signals are required to pay retransmission fees to the owners of copyright in the programming that makes up that broadcast if the retransmission is outside the local area of the free-to-air broadcaster.

The Copyright Board sets the fees to be paid by cable operators and determines how the fees should be divided between the collecting societies who act for the owners of copyright in the programming. The cable operator must pay the prescribed royalty fee to obtain authority to **vary** the free-to-air signal.

A broadcaster has a copyright in the communication signals that it broadcasts, including the sole right to authorise another broadcaster to retransmit it to the public simultaneously with its broadcast. This right appears to be limited to 'over-the-air' transmissions because communication signal is defined as radio waves transmitted through space without any artificial guide, for reception by the public. Therefore cable retransmission would not infringe a broadcaster's copyright in a communications signal.