AUSTRALIAN SUBSCRIPTION TELEVISION & RADIO ASSOCIATION
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Regulatory Burdens Review
Productivity Commission
GPO Box 1428
Canberra City ACT 2001

Dear Sir/Madam

Annual Review of Regulatory Burdens on Business: Social & Economic Infrastructure Services – Draft Research Report RESPONSE

Thank you for the opportunity to provide comment on the Productivity Commission's (**Commission**) draft report on Regulatory Burdens on Business: Social and Economic Infrastructures (**Report**).

ASTRA commends the Commission on its Report. ASTRA believes the Commission has taken a rigorous approach in producing a report that puts the consumer front and centre of its analysis rather than vested interests. If there is any area that would benefit from this approach it is media policy, which for over fifty years has had as a centre piece protection of the terrestrial networks.

1. ASTRA OVERVIEW

ASTRA was formed in 1997 to take part in and progress the new era in competition and consumer choice that new services such as subscription broadcasting and narrowcasting were to bring to broadcasting, communications and entertainment in Australia.

ASTRA's membership includes the major subscription television (**STV**) platforms as well as the many channels that provide programming to these platforms. Other members include communications companies such as OPTUS and Telstra.

Further details on ASTRA can be found in ASTRA's initial response to the Commission's discussion paper, dated 20 March 2009. A complete list of ASTRA members can be found at www.astra.org.au/members.asp.

2. REGULATORY SETTINGS

ASTRA's specific comments on the Report need to be understood in the context of the overall protections the terrestrial broadcast networks are afforded. These are as follows:

- There is a prohibition on the entry of any additional terrestrial broadcaster on both Broadcast Services Band (BSB) spectrum and non-BSB spectrum;
- The Broadcasting Services Act 1992 (**BSA**) imposes significant restrictions on the uses of two unallocated blocks of broadcasting spectrum, known as Channel A and Channel B;
- The terrestrial broadcast networks enjoy the protections of the longest anti-siphoning list in the world. This is composed of more than 1300 events, 77% of which are not broadcast by the terrestrial networks; and
- The terrestrial broadcast networks were gifted a further 7MHz of spectrum on condition that they drive towards digital switch off by 2008.

3. ANTI-SIPHONING

ASTRA welcomes and agrees with the Commission's analysis of the extensive problems with the anti-siphoning list that it is:

- Overly burdensome;
- Anti-competitive;
- Has a negative impact on sporting bodies;
- Has limited effectiveness; and
- Is long compared to overseas jurisdictions.

ASTRA agrees that the immediate remedy to these problems is to reduce the length of the anti-siphoning list via a "Use it or Lose it" scheme in which the over 75% of events on the list that the terrestrial broadcast networks do not broadcast are removed from the list.

ASTRA submits that there are no losers from such an approach to sports rights:

- It will put more sport on television (a consumer benefit);
- It will allow terrestrial broadcast networks to keep what is currently shown (another consumer benefit);
- It will allow terrestrial and subscription TV to compete equally for rights not currently being shown on terrestrial TV and schedule it live on whichever channel they choose (an industry and sports body benefit);
- It will result in more, not less, competition for sports rights (a good public policy outcome with sports bodies and community benefits equally); and finally
- It will encourage Australians to rapidly adopt digital television (which is importantly a Government objective).

It is also worth noting since ASTRA's first submission, Deloitte (UK) has published its Annual Review of Football Finance for 2009, which in relation to the English Premier League, clearly demonstrates the benefits to the sports codes of a more competitive bidding market for their rights even in times of an economic downturn:

> *"Between 1991-92 and 2007-08, the collective revenues of the 20 Premier League clubs have grown at a compound annual rate of over 16% (compared with 5.4% for the UK economy as a whole). Deloitte says that, while the UK's growth has been 'robust', the growth of its football leagues during that time has been 'stratospheric'."*[1]

[1] Deloitte Annual Review of Football Finance, June 2009 - Forward

This growth since 1991-2 has been greatly assisted by a significant increase in competition for the broadcasting rights, with a number of parties bidding, including Sky, ITV, Setanta, NTL, Telewest, ESPN and private equity groups.[2]

An independent report was recently commissioned by BSkyB on 'The Impact of Broadcasting on Sports in the UK'. This report indicates that in addition to important revenues to support game development, *"broadcast coverage of sports provides important exposure for the game which impacts on the level of awareness and overall engagement with the sport"*.[3]

Opening up competition amongst broadcasters to bid for the rights to the Australian Hyundai A-League has had a similarly profound effect on the profitability, audience attendance, community engagement, media coverage and sponsorship of Football (Soccer) in Australia.

As stated in ASTRA's previous submission, Soccer was previously included on the anti-siphoning list. The rights to the domestic league where purchased by one of the terrestrial broadcast commercial networks under the cover of the anti-siphoning list. The network only broadcast 1 game out of 32 and thereby contributed to the sport administrative body effectively going bankrupt. Since Soccer was taken off the list in 2004 the subscription television sector has bought the rights, invested heavily in the code and significantly contributed to its revitalization as a major sports code in Australia.

Since STV secured the broadcast rights to the Hyundai A-League in 2005:

- The Football Federation of Australia is over five times as profitable as when soccer was on the list;
- Community participation in Football (Soccer) has grown over 20% from when soccer was on the list to 2008;
- Crowds have grown 145% at Socceroo's matches and Hyundai A-League crowd attendance has grown over 11%% from 2005; and
- Media coverage has grown 600%, increasing the sponsorship value of Football.

ASTRA supports the Commission's assessment that the anti-siphoning regime imposes regulatory burdens and the conclusion that the list be substantially reduced.

4. REGULATION ACROSS BROADCASTING PLATFORMS

ASTRA's following comments relate to Section 4.8 Broadcasting Content, Regulation Across Broadcasting Platforms.

In this section, the Commission addresses some of the comments raised by Free TV in which Free TV argues that the regulatory settings are 'unfairly' balanced against the terrestrial broadcast networks compared to subscription television concerning matters such as licence fees, Australian content and local news content.

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[2] Sport Funding and Finance, Bob Stewart, 2007, pg 39

[3] The Impact of Broadcasting on Sports in the UK, A Independent Economic Study commissioned by British Sky Broadcasting Limited, July 20 2009, pg 2

ASTRA agrees with the Commission that these differences in regulation can be explained by the fact that the terrestrial networks have privileged access to public spectrum, the nature of the services terrestrial and subscription broadcasters each provide is different and Parliament intends there to be different regulation depending on the 'degree of influence'.

Further, ASTRA would like to refute some of the specific propositions put by the terrestrial networks in support of their position – and reflected to some extent in the Commission's draft report.

4 a) Terrestrial Network Licence Fees

Free TV argues:

> *"The greatest financial burden on commercial free to (air) broadcasters which does not apply to other media like subscription television is the annual licence fees they are required to pay. Commercial television licensees are required to pay annual licence fees of up to 9% gross earnings."*[4]

ASTRA's response:

1. **Licence fees paid by terrestrial networks represent a significant concession to the commercial terrestrial networks compared with other spectrum users**

   As the Commission said in its *Inquiry into Radiocommunications*:

   "*It is symptomatic of the special status that is given to broadcasting that charges (to reflect the opportunity cost) for broadcasting spectrum were not charged when the Spectrum Management Authority introduced fees based on spectrum denial for all other spectrum users".*[5]

   ASTRA submits that the only respect in which the commercial broadcasters licence fees are unfair is that the terrestrial networks benefit from a more favourable licence fee arrangement than other spectrum users.

2. **Regional licence holders are able to claim a rebate on their licence fees under the 'Regional Equalisation Plan' through a rebate scheme**

   In May 2000, the Howard Government's then Communications Minister Richard Alston announced $260 million in funding over 13 years under the 'Regional Equalisation Plan':

   "*This assistance represents 50 per cent of the estimated cost, determined through independent analysis, of digital conversation for regional broadcasters."*[6]

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[4] Submission for Free TV Australia Limited, Annual Review of Regulatory Burdens on Business: Social and Economic Infrastructure Services, Pg 6

[5] Radiocommunications, Inquiry Report, Productivity Commission, July 1 2002, pg 231

[6] Assistance for Digital Television in Regional Areas, http://www.richardalston.dcita.gov.au/Article/0,,0_4-2_4008-4_14980,00.html, accessed July 28 2009

3. **The national broadcasters, ABC and SBS, do not pay broadcast licence fees for their broadcasting spectrum**

   The BSA s31 makes provision for (1) broadcasting services bands to be reserved for national broadcasting services, and (2) instructs ACMA to not issue licences.

   The Television License Fees Act 1964 s5 makes fees payable by way of a tax with respect to the licence. As the ABC and SBS are not allowed to hold licences, they therefore incur no broadcast licence fees.

   As stated by the Commission in its Radiocommunications report, exemptions exist on account of 'public interest' (a similar argument is used to describe special conditions enjoyed by terrestrial commercial broadcasters):

   "The licence fee exemptions granted to national and community free-to-air broadcasters using spectrum in the broadcasting services bands are ostensibly justified as being in the public interest."[7]

4. **Subscription television <u>does</u> pay for bandwidth and licence fees**

   Free TV's implication that subscription television does not cover the cost of bandwidth or spectrum costs is misleading and incorrect.

   The terrestrial networks use BSB spectrum and transmission towers to provide television signals from their broadcast centres to their viewers. The terrestrial networks broadcasting licence provides them access to spectrum for which they pay a fee.

   In contrast, subscription television uses cables and satellites to provide signals to customers. FOXTEL pays Telstra a fee for the use of Telstra's Hybrid Fibre Coax cable network (and the relevant spectrum used within this cable).

   FOXTEL and AUSTAR pay OPTUS a substantial fee for the use of its satellites. OPTUS in turn then uses these fees to pay for its spectrum licences (which were obtained at market rate not under special agreement) and to operate the satellite network.

5. **Government bears the risk with terrestrial broadcast licence fees whereas subscription television bears the risk of its bandwidth/spectrum costs**

   ASTRA submits that a significant difference in the licence fee arrangements between the terrestrial networks and subscription television is that with the terrestrial networks the Government carries a significant amount of risk of the costs of spectrum while the STV sector bears the risks of bandwidth and spectrum costs.

   The terrestrial networks' licence fees provides the networks with two mechanisms for defraying risk to the Government; firstly their fees vary with the amount of revenue they generate in any financial year, and secondly, the proportion of revenue that they pay is adjusted – according to a sliding revenue scale – depending on their total revenue.

[7] Radiocommunications, Inquiry Report, Productivity Commission, July 1 2002, pg 232

The Commission previously noted that such approaches to charging for spectrum are inefficient:

"Charging on the basis of opportunity cost (the value of the best alternative forgone) will promote the efficient use of spectrum. In a well functioning market this will be the market price. Where markets are not functioning well and administrative pricing is required, charging should attempt to emulate opportunity cost."[8]

In contrast the subscription television sector pays its satellite suppliers (OPTUS) a fixed fee for access to transponders. This fee clearly includes covering the satellite provider's capital costs, operational costs, spectrum licence fees and the opportunity cost of providing the capacity to the subscription television sector rather than other potential customers.

ASTRA recommends the Commission's assessment of Free TV regulatory burdens relating to Section 4.8 of the Report, Broadcasting Content, takes into account:

- **Licence fees paid by terrestrial networks are based on revenue, rather than opportunity cost, and represent a significant concession to the commercial terrestrial networks compared with other spectrum users;**

- **Regional commercial broadcasters receive an additional concession through a rebate on license fees under the 'Regional Equalisation Plan";**

- **National Broadcasters, ABC and SBS, are exempt from paying broadcast licence fees for broadcasting spectrum for matters of 'public interest';**

- **Subscription television platforms pay a substantial market priced fee to OPTUS to deliver their satellite television services. These fees are then in turn used by OPTUS to operate, maintain and license these services;**

- **Subscription television pays a fixed, market priced fee, meaning they carry the risk of contracting these services. Whereas the Government carries the risk of terrestrial networks licensing spectrum, where fees are based on a portion of network revenue, calculated on a sliding scale.**

4 b) Australian Content Obligations

Free TV argues:

".. attention should be paid to moving toward an even handed regulation across all (new media) platforms.[9]

"In addition to heavy annual licence fees, the commercial free to air broadcasters are required to provide minimum hours of Australian and children's content. The Australian Content Standard 2005 requires all commercial free to air television licenses to broadcast

[8] IBID, pg XLII
[9] Submission by Free TV Australia Limited, Annual Review of Regulatory Burdens on Business: Social and Economic Infrastructure Services, Pg 3

an annual minimum transmission quota of 55% Australian programming between 6am and midnight."[10]

ASTRA's response:

1. **The terrestrial network obligations in relation to local content are a *quid pro quo* for other protections**

   As the Commission said in its Broadcasting Report of March 2000:

   "*The main arguments put forward (by [then] FACTS) to justify the restriction on entry into free to air commercial television broadcasting is that it is a trade off for the obligations placed on the licensee such as the requirement to meet Australian content and children's programming quotas."*[11]

   The subscription television industry does not have any legislated restrictions on new entrants; subscription television licences can be purchased over the counter at the Australian Communications and Media Authority (**ACMA**). The only barrier to entry is an appetite for risk and the availability of real risk capital.

   For example, it has taken 11 years and investment of over $A1.7Bn for FOXTEL to reach its first breakeven year in 2005/2006. However, SelecTV's recent entry demonstrates others have the appetite and risk capital to enter the market.

2. **The nature of the services provided by subscription television and the terrestrial networks are quite different**

   The terrestrial networks provide their service over public spectrum, it is available to 99% of the population and so has certain "public good characteristics", as the Commission has acknowledged.

   In contrast, subscribers pay for an STV service, it is not provided over public spectrum, viewers can express their preferences directly to the STV service providers, and so, as the Commission has said:

   "*The public good nature of free to air television does not apply to subscription television so there is less justification for content regulation in the public interest."* [12]

3. **Subscription television already broadcasts far more local content than the terrestrial networks**

   Australian consumers want Australian programming and because the success of subscription television is determined by consumers (as subscribers) as opposed to advertisers, that is what subscription television delivers.

   The hours of local content broadcast on subscription television platforms far surpasses that

[10] IBID, Pg 6

[11] Broadcasting, Inquiry Report, Productivity Commission, Report No 11, 3 March 2000 (**Broadcasting Report**), pg 318

[12] Broadcasting, Inquiry Report, Productivity Commission, Report No 11, 3 March 2000, pg 383

broadcast on terrestrial networks across all genres including sport, music, children's television, documentary, drama and news.

In addition to on-air activities, the subscription television industry supports the creative evolution of digital broadcasting through sponsorships and scholarships for emerging and accomplished Australian creative talent.

4. **The costs of Australian drama incurred by the terrestrial networks needs to be 'put in context'**

   As the Commission suggests in its Broadcasting Report:

   "The cost of Australian drama, documentaries and children's programming, and thus the revenue base that arguably needs protecting, also needs to be put into perspective. Expenditure on Australian made programs is a relatively small part of the total costs of running a television station."[13]

   Media Analyst Peter Cox said in an interview with Media Watch that the networks should still have ample money to make Australian drama:

   "The Australian television industry is a $4 billion dollar revenue industry a year. It makes $1 billion dollars EBIT, that's profit before interest and tax, $1 billion dollars. Do you know how much they spend on Australian drama? In 2007 they spent $92 million."[14]

ASTRA recommends the Commission's assessment of Free TV regulatory burdens relating to Section 4.8, Broadcasting Content, takes into account:

- **Australian content regulations for commercial broadcast television exist as a *quid pro quo* for other protections and concessions and in response to the 'public good characteristics' belonging to the terrestrial broadcast networks;**

- **The cost of Australian drama incurred by the terrestrial broadcast networks needs to be 'put in context' of overall running costs associated with a television station.**

4 c) Local News and Information Obligations

Free TV argues that:

> *"Regional commercial television licensees in the eastern states are subject to licence conditions requiring minimum levels of 'material of local significance' (local news and information). …These quotas do not apply to subscription television."*[15]

ASTRA's response:

1. **Local news and information quotas were imposed as a response to community concern with the loss of 'local information' broadcast by regional commercial TV licensees**

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[13] Broadcasting, Inquiry Report, Productivity Commission, Report No 11, 3 March 2000, pg 319
[14] Peter Cox, Media Analyst, http://www.abc.net.au/mediawatch/transcripts/s2395650.htm, accessed July 28 2009
[15] Submission by Free TV Australia Limited, Annual Review of Regulatory Burdens on Business: Social and Economic Infrastructure Services, 26 March 2009, pg 7

It should be noted that the licence conditions imposed by the regulator are in response to market failure. An objective of the BSA at paragraph 3 (1)(g) is to encourage commercial broadcasters to provide "appropriate cover of matters of local significance" where local is defined as contributing "to the provision of an adequate and comprehensive range of broadcast services in (the) licence area".

Following community concern over the closure of a number of news bureaus in local areas, an investigation undertaken by the then ABA in 2002 and 2004 over the provision of local news in regional areas resulted in a condition being imposed on relevant commercial broadcasting licensees where *"a minimum amount of programs about matters of local significance to 'defined' submarkets within each of their licence areas."*[16]

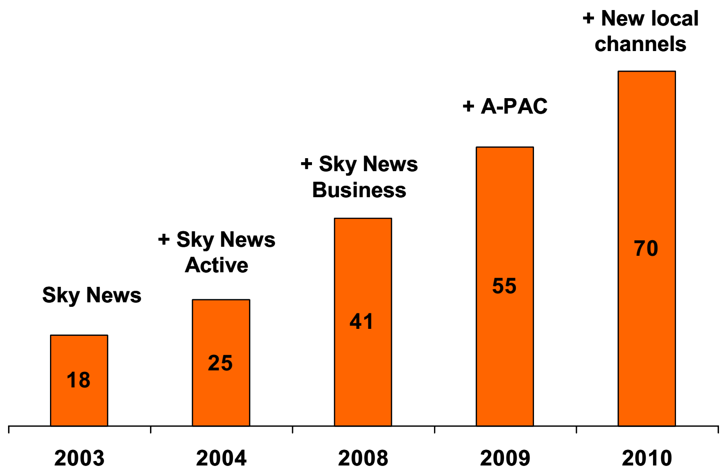
Also local content quotas, as discussed above, need to be put in context of the protections afforded terrestrial commercial television. Further regional commercial broadcasters receive a rebate on licence fees under the Regional Equalisation Plan, as referred to above.

2. Subscription television provides a significant and growing quantity of 'local daily' news without any regulatory obligations, to meet consumer needs.

AUSTAR and FOXTEL's broadcast footprint together covers the whole of Australia.

Australia's News Channel (ANC) currently provides 55 hours of Australian content daily. The launch of APAC in February 2009 was a significant milestone for ANC and with live 24 hour internet streaming, Australians have a greater window into the workings of Government. Later this year ANC will further expand its daily 'local' news coverage with bureaus opening in Perth, Adelaide and Brisbane, adding to its existing bureaus in Canberra, Sydney and Melbourne.

Figure 1: Increase in Local Content on Australia's News Channel: 2003 – 2010 (daily hours broadcast)



[16] Adequacy of local news and information programs on commercial television broadcasting services in regional and rural Australia, Australian Broadcasting Authority, June 2004, page 2

ASTRA recommends the Commission's assessment of Free TV regulatory burdens relating to Section 4.8 of the Report, Broadcasting Content, takes into account:

- **Regional commercial broadcasting quotas for local news coverage arose out of community concern over a number of bureau closures in regional areas.**

- **Subscription television provides a significant and growing quantity of 'local daily' news without any regulatory obligations, to meet consumer needs.**

4 d) Codes / Restrictions on Advertising

ASTRA has detailed requirements about programming and advertising that are the same or similar to terrestrial commercial broadcasters. These have been outlined extensively in ASTRA's original submission.

In addition, subscription television is regulated more expansively than terrestrial television with regard to trade practices regulation given the direct relationship STV has with consumers. ASTRA's codes of practice include regulation of billing, fault repair, privacy and credit management.

One aspect of the draft report is worth clarifying: the third bullet point that appears on page 137 of the report gives the impression that the only advertising restrictions relate to children's television and that there is a current (5 year) ban on advertising. This may be confused with an initial ban on all advertising on subscription television that ran for 5 years from 1992 to 1997. The fact is subscription television has very similar advertising regulation as commercial television broadcasters and adopts the AANA Codes. Children's channels are additionally required to publish their own code that addresses advertising directed at children.

ASTRA recommends relevant amendments to Section 4.8 of the Report to clarify current restrictions and regulation on advertising on subscription television.

5. CAPTIONING

ASTRA notes the discussion on Captioning outlined under Section 4.8 of the Report as it relates to concerns raised by Free TV Australia in relation to obligations under the BSA (imposed with the gift of the extra 7MHz of spectrum to terrestrial networks for digital conversion) and the Disability Discrimination Act (**DDA**), administered by the Human Rights and Equal Opportunity Commission (**HREOC**).

As a point of clarification, ASTRA's members' provision of closed captioning is governed solely by agreements reached under the DDA, as negotiated with stakeholders and approved by HREOC. This arrangement has successfully delivered the current roll-out plan of closed captioning across 40+ STV channels.

6. CONCLUSION

Thank you for the opportunity to respond. ASTRA again commends the Commission on its rigorous analysis and recommendations.

Please contact Matthew Deaner (02 9776 2688) or myself should further information about any aspect of ASTRA's response is required.

Yours sincerely

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