ACCC Report on Emerging Market Structures in the Communications Sector

July 2003

AUSTRALIAN SUBSCRIPTION TELEVISION AND RADIO ASSOCIATION

Introduction

The Australian Subscription Television and Radio Association (ASTRA) appreciates the opportunity to respond to the matters raised in the Australian Competition & Consumer Commission's (ACCC) report to the Minister for Communications, Information Technology & the Arts on Emerging Market Structures in the Communications Sector ('**the Report**').

ASTRA provides this submission on behalf of its members. ASTRA's members include the subscription television platforms and individual channels. A full list of ASTRA's members can be found at www.astra.org.au/members.asp.

The subscription television sector is a relatively new but increasingly important sector of the Australian media. It has introduced new voices, new players and new outlets for Australian and other content. It is all about offering a wide range of choices to consumers.

All participants in the subscription television sector have invested heavily and substantial losses have been incurred by many in order to bring new services and choice to the Australian market. Stability is essential for the sector's growth and success.

The recently approved content sharing arrangements for subscription television and the subsequent developments, with the launch of the new OPTUS satellite and digitisation of FOXTEL cable, providing more channels and new services, represent an opportunity for the sector to achieve stability and to grow, innovate and improve service to our customers.

Any fundamental changes to those arrangements, as suggested by the ACCC, threaten to put the industry back into a state of uncertainty and undermine our ability to invest in new content and technology.

Overall, the concern from ASTRA and its members is the fact that while ASTRA welcomes the recommendations with regard to anti-siphoning reform, some of the recommendations would create an unacceptable level of regulatory uncertainty in relation to the subscription television industry. As you would be well aware the subscription television sector has already been burdened with unnecessary regulation to address unfounded fears, perpetuated by our commercial network competitors, since before the advent of our services. We live with the 'legacy' of these unfounded fears, most particularly in the form of the 'anti-siphoning' regime to protect sports rights for commercial broadcasters.

ASTRA's submission is confined to the particular key recommendations which directly impact on the subscription television industry and its current regulatory framework. Comment on the specific matters and key recommendations relating to commercial arrangements of ASTRA's members will be left to those relevant members.

As such ASTRA's comments relate to the ACCC recommendations regarding anti-siphoning (sports rights), multichannelling and other digital terrestrial television matters; retransmission; the jurisdiction of the Telecommunications Industry Ombudsman (TIO) and general comments in relation to access to content.

In summary, ASTRA:

- Supports the ACCC recommendation for anti-siphoning reform;

- Rejects the ACCC recommendation to bring forward the ending of the moratorium on multichannelling by commercial television networks (given that the Government has already decided its approach to the linked issue of continuing protection of the commercial networks by rejecting the ACCC's recommendation of a review aimed at bringing forward the lifting of the moratorium limiting the number of commercial TV licences);

- Rejects the ACCC recommendation for regulation for access to subscription television content; and

- Rejects the ACCC recommendation for jurisdiction of the TIO over subscription television services which happen to be offered as part of a 'bundled' service.

Relevant 'Key recommendations' of the Report

Regulation of subscription and commercial broadcasting (Chapter 5)

Moratorium limiting number of commercial TV licences

Under the Broadcasting Services Act 1992 ('**BSA**'), the number of commercial television licences allocated using the broadcasting services bands is limited to three per licence area. In essence this means that the three commercial television networks, Seven, Nine & Ten and their affiliates are protected (as they have been since 1956) from further competition until 2007, when the moratorium ends on 31 December 2006.

There is no review as mentioned in the Report. The relevant provision [s.28 as amended by the Television Broadcasting Services (Digital Conversion) Act 1998] states that the Australian Broadcasting Authority ('**ABA**'*) "must not, after 25 June 1998, allocate any new commercial television licences in any licence area before 31 December 2006."*

The Government has already indicated that it will not 'bring forward' the end of the prohibition on a fourth commercial network, as recommended by the ACCC, and as such the protected position of the commercial networks will continue. In so doing the Government has locked in protection of commercial television for over 50 years up to 2007. No other industry has been afforded such protection and no other industry expects it.

The Government (Media release by the Communications Minister, Senator Alston, 20 June 2003 titled "ACCC Report on Pay TV competition) justified its rejection of the ACCC recommendation of an early review of the number of commercial network licences by arguing that the incumbents "needed breathing space from further competition while spending up to $1 billion on their requirement to convert to digital".

Equally, subscription TV has collectively invested more than $8 billion, largely on digital systems, and Foxtel alone is further investing more than $600 million on its full digital conversion. This is vastly more capital than the commercial television networks have invested, or will invest, in digital systems.

The policy issues of new commercial network licences (whereby their continued prohibition protects the incumbent operators) and commercial network multichanneling are interdependent.

If the Government does not bring forward the end of the prohibition on new commercial television licences then all other provisions of the digital terrestrial television legislation should remain as is. This includes any question of the commercial networks being allowed to multichannel and any proposed changes to the datacasting regime. The digital terrestrial television legislation with all its provisions was approved by Parliament and should not be dismantled in any piecemeal fashion, as one fundamental facet of the digital terrestrial legislation substantially impacts on the other.

Digital terrestrial television - Multichannelling

The Parliament, in setting Australia's digital television policy, banned the issue of further commercial television network licences until at least 2007, and linked this to a ban on multichannelling by the incumbent commercial networks until a statutory review planned by 2005. This prohibition was reaffirmed in 2000 with limited multichannelling for ABC & SBS.

It is on this basis that the subscription television sector has continued its over $8 billion investment to establish new services. All our investment planning has accepted and relied on the integrity of Government policy. Lifting the ban on multichannelling at this time, would be a mid-stream change in digital policy commitments, which have underpinned and encouraged our continued investment amounting to billions of dollars by AUSTAR, FOXTEL & OPTUS, and the more than 50 independent channels.

Such a change would also compromise the business case for cable digitisation and seriously damage Australia's reputation in the global investment community by sending a message to Australian and international industry that it cannot rely on commitments given by the Government to encourage investment in technologies and services.

There are deeply destabilising and debilitating consequences that commercial network multichannelling would have for the capital markets and for investment confidence in legislated Government policy; and for competition and sustainable services in the subscription TV sector, which has never sought the development of anything other than a level playing field.

By contrast, the commercial television networks have been given hundreds of millions of dollars to assist their digitisation in regional Australia, while the metropolitan networks continue to be protected from competition from new entrants and given use of public spectrum at no charge to provide digital services.

It would be entirely against the public interest if the publicly-owned spectrum granted to the commercial broadcasters to provide free television services in High Definition TV (HDTV) should ultimately become channels for subscription services.

Any proposal for multichannelling by the incumbent commercial networks, without competing for the opportunity, effectively breaches the ban on any new commercial TV licences until 2007 and further entrenches the three existing commercial networks eliminating any opportunity for new entrants and new voices.

Some metropolitan commercial network television interests, and the regional commercial networks, have said publicly that they are strongly opposed to multichannelling because it would increase their operating costs and fragment their audiences without increasing their advertising revenue. It is logical, therefore, that if they are allowed to move into multichannelling, the networks will seek to pay for it by eventually shifting to a subscription TV model.

Given that the commercial networks were given use of public spectrum at no additional charge to provide so-called "free-to-air" television services to Australians, it would be a totally improper use of a public resource for the networks to ever be allowed to use that spectrum for subscription television services.

Such an outcome would also unfairly and severely undermine the massive investment by the subscription television sector which must pay for its "spectrum" on cable and satellite that is used to deliver subscription services.

In addition, the serious risks to the wider television system of allowing FTA broadcasters to multichannel were starkly highlighted in the UK with the recent collapse of ITV Digital, a terrestrial subscription multichannelling service operated by the equivalent of Australia's commercial networks.

In addition, the impact of multichannelling in regional Australia would be to place cost pressure on regional commercial networks that have already been reducing their investment in local news services. Multichannelling would also subvert a known, reliable and highly regarded subscription TV service provided by AUSTAR. The result would be confusion and uncertainty for regional and rural audiences.

ASTRA questions the policy imperative for such change, given the negative impact and uncertainty for the subscription television industry and indeed for the commercial television sector, as argued by two out of the three commercial networks, who have rejected such a proposal. Why should a commercial network be allowed to freely move into the subscription television business when they have not competed for or paid for the privilege to do so. This becomes even more concerning with sports rights reserved for the FTA broadcasters under the anti-siphoning regime.

Sports rights – reform of the 'anti-siphoning' regime

Given ASTRA's well-documented concerns about the 'anti-siphoning' regime, the subscription TV industry fully supports and endorses the ACCC's key recommendation to reform the anti-competitive anti-siphoning regime. ASTRA maintains that the current anti-siphoning rules are not working as intended and after nine years of operation most stakeholders, including regulators are now calling for urgent reform.

ASTRA reaffirms its call for urgent reform so we can expand the amount of live national coverage of sports events and give a better deal to the consumer and sports viewing public.

The ACCC joins the Productivity Commission and the ABA in recommending reform of the scheme including the introduction of a dual rights regime.

Sports bodies and their representative sports management companies have called for reform and in some cases abolition of the scheme.

Advertisers, through the Australian Association of National Advertisers (AANA) have called for reform of the scheme.

Now it appears the only group opposed to reform is the free to air (‘**FTA**’) television industry, whose interests are protected under the current scheme in the form of a statutory competitive advantage. You must seriously question why the commercial networks continue to oppose reform and even seek to increase the number of listed events and to extend the list for another 10 years, despite their track record of not broadcasting ‘protected’ listed events and the fact that the list includes events which are no longer held.

Background

Put most simply, the ‘evil’ intended to be addressed by the introduction of the anti-siphoning rules was ‘siphoning’, that is subscription television siphoning off sporting events from traditional FTA television. However, the way the rules operate confer commercial advantage on the commercial broadcasters when acquiring sports rights that goes against meeting the policy objective of ensuring FTA coverage of important national events.

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

If the rules are really anti-siphoning rules then they need do no more than specify a list of key events actually shown on FTA television (that is, all the events shown as opposed to bits of some of the events) and then prevent subscription TV operators from buying FTA rights to those events. The current regime allows FTA broadcasters first access to both FTA rights and subscription rights to all events on the list. As such they are set up to acquire exclusive rights with subscription television cut out of the equation until the rights are acquired or refused by the commercial networks or ABC or SBS.

It is plainly evident that the current regime goes much further than preventing siphoning, in that:

- vast amounts of the material on the list are never shown on ordinary FTA television, never have been and never will be:
    - The scheme has enshrined a list of 40 types of sports events and more than 3,000 individual events each year. For example every match at Wimbledon is on the list, amounting to 90 hours of play per day. The three commercial networks together could not televise this;

- The list includes many sports events which historically have never received FTA television coverage. For example all cricket tests and one day internationals (ODI) played outside Australia;

- The list includes all events of many sporting competitions which historically had only received limited FTA television coverage. For example every match of every round of the both the National Rugby League (NRL) and Australian Football League (AFL) competitions is on the list;

- The list includes events which could not be justified as events of national importance or cultural significance. For example the Hong Kong Sevens and matches not involving Australian teams or participants of all major sports; and

- subscription TV operators are not permitted merely from acquiring the FTA rights (which could lead to siphoning) but are prohibited from acquiring ANY rights to listed events other than from a FTA broadcaster or, if the subscription TV operator can demonstrate to the Minister that the FTA broadcasters have had a reasonable opportunity to purchase the rights but have chosen not to do so, from the sporting body who owns the rights.

This last provision effectively sets up the FTA broadcasters as sports rights brokers with a statutory monopoly that allows them to manipulate the scheme to their commercial advantage but imposes no countervailing obligation on them to show any of the events in respect of which their statutory monopoly has been granted.

This does NOT benefit the Australian viewing public, the intended beneficiary of any effective anti-siphoning regime. The only beneficiary has been and continues to be the Australian FTA broadcasters, particularly the commercial television networks.

Need for change

The analysis of FTA television coverage of listed events speaks for itself. In 2002 more than 6,400 hours of sporting events were protected for FTA broadcast under the anti-siphoning scheme. Less than 17% of those hours of events were broadcast live on FTA television and more than 75% of those hours were not broadcast at all. These figures are key findings of the regular analysis undertaken by the subscription television industry and audited by Ernst & Young.

The scheme is anti-competitive. This is the view of both the ACCC and the Productivity Commission. In the Report, the ACCC states *"…by giving (terrestrial) broadcasters almost exclusive rights to the listed programming,* ***the anti-siphoning list has substantial anti-competitive effects and is more intrusive than necessary*** *to achieve the policy objective of ensuring key sporting events are available to viewers on (terrestrial) television."*

In its March 2000 Broadcasting Inquiry Report, the Productivity Commission concluded: *"The Commission finds that* ***the anti-siphoning rules are anti-competitive*** *and that the costs of the current scheme to sporting organizations, the broadcasting industry and the community as a whole, exceed the benefits."*

The anti-siphoning regime unfairly gives FTA networks greater bargaining power so that they can manipulate the scheme to their advantage when negotiating rights agreements with sports organisations. For example, the way the scheme currently operates allowed the Ten Network to block subscription television from acquiring live rights to the Formula One Motor racing events, even though the Ten Network was only prepared to commit to providing delayed coverage of most F1 races, with coverage usually commencing after the Sunday night movie. This is a clear example of how the scheme allows the FTA broadcasters to protect their own commercial interests rather than promote the interests of Australian sports fans.

The current scheme encourages the commercial networks to hoard rights to listed events. For example, of the 31 matches in the National Soccer League (NSL) finals series, with both FTA and subscription television rights held by the Seven Network, only one final was shown on FTA television this season. Similarly, in July 2003, the ABC only broadcast two of the eight matches involving Australia during the recent Netball World Championships.

When FTA television networks hold rights to live sport, the scheme does NOT compel them to broadcast these events live and in full. For example there was no coverage of the first session of the ASHES cricket tour in 1997 or 2001 on FTA television.

In the last five years Australia has played in 29 cricket test matches overseas (all covered by the anti-siphoning list). Not one of these matches has been covered in full on FTA television. Only five matches were covered in part and these were the five test matches played during the ASHES series of 2001. For the 2001 ASHES series, the Seven Network which held the broadcast rights, elected not to show the first session of each test, choosing instead to show its regular programming and other specials which included ‘The World’s Greatest Commercials’, ‘When Cameras Cross the Line’ and a repeat showing of the movie, ‘Mrs Doubtfire’.

What ASTRA finds remarkable is the claim by the commercial television networks that, in 2000, there were approximately 2,400 available hours of listed events, of which 1,800 hours were shown on FTA television. In other words, the commercial television networks claim that the amount of listed sport broadcast is 72%, with the majority shown live. To arrive at these inaccurate figures, the commercial television networks have conveniently left out of their analysis, among other things, most of the overseas cricket tours referred to above which they were not interested in showing.

The scheme also inhibits national coverage of listed events and greatly disadvantages regional viewers, especially those in Western Australia and South Australia where coverage is not continued or not broadcast because of time differences.

The overall policy reason for reform of the scheme is that the legislation is too broad and intrusive – too many events which FTA broadcasters do not or cannot show. Regulation should not be more intrusive than it needs to be to achieve a particular policy outcome. The Minister’s anti-siphoning list is archaic in that it includes events which are no longer held and events which have had to be consistently de-listed due to lack of FTA television interest. For example the previous two Australian cricket tours of the West Indies.

Benefits of Change

Given the evidence ASTRA believes that changing the regime will NOT mean that terrestrial FTA coverage of events will disappear. There is no denying the popularity of sports coverage. The ratings over the past three years show that at least half of the top 20 most popular programs on FTA television have been sporting events, so the networks will always broadcast sport.

Overseas experience clearly shows that lack of an anti-siphoning regime does not mean that major sports events are not shown on FTA television. There is no such scheme in the United States or New Zealand and major sports continue to be broadcast on FTA television. Similarly, in the United Kingdom, where the anti-siphoning scheme is much limited in scope to that of the Australian anti-siphoning scheme, major sports continue to be broadcast on FTA television. For example, the BBC continues to thrive on sport and holds the rights to many events not listed under the UK anti-siphoning scheme such as the MotoGP and Superbike World Championships and numerous football (soccer) competitions and English rugby league.

Importantly all sports bodies want and continue to seek FTA coverage of their sport. They want the widest possible coverage to increase their customer base and the high reach of FTA TV to attract and retain naming rights and sponsorship dollars. Sporting bodies will continue to seek maximum exposure for their sport which is best achieved by securing FTA and subscription TV coverage. This fact is well documented.

Again in its Broadcasting Inquiry Report (March 2000), the Productivity Commission noted that *"commercial judgment by sports bodies and their interests in maintaining a mass audience and interest in their sports are likely to prevent migration of the major (sports) events."*

Additional evidence that reform will not lead sporting events disappearing from FTA television is the fact that an open market has successfully operated with the few sports events which are not included on the Minister's list. For example Australian Swimming is broadcast by both subscription television and FTA television and has developed into a successful high profile Australian sport demonstrating the benefits of an open sports rights market.

The Commonwealth and Olympic Games also not listed events have benefited in an open sports rights market. Coverage of both these events has been consistent on FTA television over the period that the list has been in operation. A further example is the Tour de France Cycling event which has enjoyed substantial coverage on FTA and subscription television even though it is not a listed event. This again demonstrates the benefits of an open sports rights market.

ASTRA understands that one reason for the commercial networks' opposition to reform is that if they do not have a guarantee of exclusivity for sports events (which they are guaranteed under the current regime) then they will not acquire or broadcast those events. This is in stark contradiction to their recent actions where they have continued to acquire rights to listed events in the full knowledge that subscription television held live rights to those events. For example in 2002 the Seven Network acquired the rights to the French Tennis Open and the Nine Network acquired rights to the Cricket World Cup knowing subscription television held rights to these events. In 2003, the Seven Network acquired rights to the Rugby World Cup in full knowledge that subscription television would also hold rights to the event.

In light of the overwhelming evidence and recommendations for reform, ASTRA believes the list should not be renewed beyond 2005. However ASTRA and its members accept the reality of effective anti-siphoning rules and advocates reducing the number listed events to only those that meet specific key criteria and should be reviewed and reduced as soon as possible. To this end the list should only include major events of national significance which are generally held in Australia; which involve a national Australian representative team; and which are consistently broadcast live and in full by FTA television and there must actually be a real or perceived threat that the event will be acquired exclusively by subscription television.

Moreover the anti-siphoning scheme should be amended to include a dual rights regime to address any concern about siphoning of sport. Such reform would ensure a fairer regime where FTA broadcasters can acquire the FTA rights and subscription television can acquire subscription television rights to events of national importance and cultural significance. Dual rights will ensure that FTA and subscription television only acquire their rights to major sports events, stopping either party from acquiring and hoarding the other party's broadcast rights, and most importantly, dual rights will promote national coverage of events. That is, if a FTA broadcaster does not show an event live then it can be shown nationally on a live basis on subscription television.

Such reform will see more sports broadcast on Australian television; greater live national coverage of sporting events so viewers do not miss out in different states as they do now; and existing level of FTA television sports coverage will continue.

Reform will deliver a better result for Australian viewers with a greater breadth and depth of sport available and flow on advantages and benefits for Australian sporting bodies. Reform will require the FTA broadcasters to compete for rights as they currently do for all other programming with greater pressure on them from the public and sports bodies to show those events live.

There will be increased competition for the viewing audience; more competition in the sports rights market; greater investment in Australian sports; increased complete national coverage of sporting events; more sport broadcast live on Australian television; and a better deal for all Australian viewers.

Access to Content (Chapter 6)

ASTRA, as the subscription television industry representative body, is not in a position to comment on specific commercial relationships and business models pertaining to the supply of programming and subscription television channels in the Australian market. These are matters properly addressed by the individual business enterprises.

However, ASTRA does make the following general observations in relation to the ACCC's views about access to subscription television programming content.

ASTRA rejects the ACCC's recommendation that there should be industry-specific regulation of access to content. Such a move would be unnecessary and detrimental to the still developing subscription television industry which is already burdened with high and inappropriate levels of regulation such as sports anti-siphoning rules, and faces uncertainty about the future competitive framework for the wider television broadcasting sector including terrestrial broadcasting.

More than $8 billion has been invested to date in subscription television infrastructure and content, yet all the main operators – AUSTAR, FOXTEL and OPTUS – continue to report losses. The Australian industry, while having great potential based on international experience, remains at a fragile stage in its development. Subscription television take-up in Australia is 22%. This compares with 40% in New Zealand, 50% in the United Kingdom and 85% in the United States.

There are already abundant and effective legislative mechanisms for ensuring competitive programming supply arrangements – including through the Trade Practices Act ('**TPA**').

The TPA under Part IV prohibits the misuse of market power (under Section 46) as well as contracts, arrangements or understandings that restrict dealings or affect competition (under Section 45). Exclusive dealing conduct is dealt with under Section 47 of the TPA.

If Part IV of the TPA is adequate to deal with competition in other industries (as confirmed by the Dawson Report), it must be equally adequate to deal with competition issues in subscription television – which is a highly discretionary consumer service and is in no sense a utility like telephony, water or electricity. If the ACCC suggests that the TPA is not sufficient to deal with the subscription television content issues it is concerned about, ASTRA considers that those issues the ACCC wants to address with new legislation are in fact not anti-competitive.

In addition, the section 87B undertakings provided by AUSTAR, FOXTEL and OPTUS to the ACCC in relation to the FOXTEL-OPTUS Content Supply Agreement (CSA) accepted by the ACCC in November 2002 provide additional, comprehensive, court-enforceable and industry-specific guarantees about access to content.

Further, as an outcome of the section 87B undertakings, commercial contracts have, and will be, entered into by companies with AUSTAR, FOXTEL and OPTUS. These contracts are in turn privately enforceable at law.

With these comprehensive undertakings which apply until 2010 and backed by the substantial powers of the TPA, as well as the private enforceability of any subsequent program-supply contracts, there is no necessity for further regulatory intervention.

To introduce further complicated layers of regulation upon the subscription television sector, and its many participants in network provision and programming and channel supply, at this time of significant change, investment and ongoing adjustment to the new landscape following the FOXTEL-OPTUS CSA and the section 87B undertakings would harm the sector by reducing its ability to be innovative, flexible and responsive to evolving market conditions and consumer demands.

By 2005, the Federal Government is required to have conducted a range of reviews into the digital television broadcasting system, including the prohibition on multichannelling. The Government has already rejected the recommendation by the ACCC that the moratorium on issuing new commercial licences be brought forward from end 2006. These issues are interdependent and will have a far-reaching impact on the competitive framework of the entire television broadcasting sector, including commercial broadcasting and subscription broadcasting.

To create new subscription television specific content regulation now, without knowing what the future market competition structure will look like, would uniquely and severely penalise subscription television and can only deter future investment.

Exclusive programming

The ACCC justifies its recommendation for further legislation to deal with exclusive programming arrangements in subscription television by arguing that it has been difficult in the past for new network providers to obtain access to premium subscription television content, such as sports and movie channels, due to exclusivity arrangements.

However, as an outcome of the FOXTEL-OPTUS CSA and the section 87B undertakings, access by infrastructure operators to all the premium sports and movie channels has been achieved, either by direct licence from the channel supplier or as part of the AUSTAR or FOXTEL packages.

For example, AUSTAR, FOXTEL, OPTUS, TransACT in Canberra and Neighborhood Cable in regional Victoria are now supplying each of their customer bases with all the premium sports and movie channels, backed by the security of the protections of the TPA, the court-enforceable section 87B undertakings, and privately-enforceable legal contracts.

A level of exclusive content is an essential feature of any sector of the media, whether it is in television, radio or print.

All media organisations seek out and promote “exclusive” news, or exclusive entertainment content, in order to differentiate themselves from their competitors and to attract viewers, readers or listeners.

To single out the subscription television sector to apply unique legislation to regulate exclusivity would be absurd, massively biased against the development of subscription television and value-destructive for investment in the sector.

If exclusivity in subscription television was to be prohibited, the corollary is that the same rules should be applied to other media including broadcast television (commercial, ABC, SBS), radio and print.

It would destroy the business model of the commercial television system if the Nine Network was forced by regulation to provide its most popular programming to the Seven Network and vice versa. The same would occur if the Fairfax newspaper group was forced by regulation to supply its exclusive stories and columns of its most prominent journalists to the News Limited newspapers.

In subscription television, the industry was founded with a race for exclusivity in the early years as the main platform operators, Australis and OPTUS, sought to differentiate their services by maximising programming exclusivity in order to build brand awareness and consumer preferences.

For example, when subscription television services commenced in 1995, OPTUS had exclusive access to premium movie content from Time Warner, Disney, and MGM. Australis had exclusive access to premium movie content from Colombia, Paramount, Twentieth Century Fox and Universal. FOXTEL then sub-licenced this programming from Australis.

However, as evidenced most recently by the FOXTEL-OPTUS CSA which was driven by recognition of the small scale and financial unsustainability of the existing structure of the Australian subscription television sector, the level of exclusive content in the sector has been reducing steadily and at times dramatically, since the industry's commencement in 1995.

Market forces have driven these changes and consumers have benefited. Industry-specific regulatory intervention was not, and is not, necessary.

There is no case for regulatory intervention to hasten or straightjacket the industry into realignments, especially given the fragile financial nature of the still-developing subscription television sector.

Sport

As discussed above, commercial and national broadcasters have exclusive first opportunity (that is first right of refusal) to acquire rights to 40 sports events covering approximately 6,500 hours per year of sports (6,490 hours in 2002, 6,700 hours in 2001 and 6,600 hours in 2000) courtesy of Australia's sports anti-siphoning regime.

As such, the commercial broadcasters, and at times the ABC and SBS, are the ultimate controllers of the amount and type of sport that is and is not shown on television in Australia.

Subscription television sports channels and providers require at least some exclusivity to differentiate themselves from each other, and from the FTA broadcasters.

However, the FOXTEL and OPTUS CSA and related section 87B undertakings by AUSTAR, FOXTEL, and OPTUS have resulted in all the premium sports channels - FOX Sports (through the AUSTAR or FOXTEL service), FOX Footy Channel and ESPN – being made available.

FOXTEL and OPTUS CSA

ASTRA additionally notes that FOXTEL and OPTUS publicly announced in November 2002 (from a Foxtel Media Release 13/11/02) that:

> *"Non-exclusive channels: FOXTEL will not acquire any subscription television channels that are currently shared channels with OPTUS (provided that OPTUS has a reciprocal undertaking) on an exclusive basis.*
>
> Outcome: This undertaking ensures that neither FOXTEL nor Optus can acquire exclusive subscription television rights to Antenna, BBC World, Cartoon

Network, CNBC, CNN, Disney, ESPN International, National Geographic, RAI, Sky News, Sky Racing, TCM, TVSN and World Movies. This will enable independent operators to acquire those channels directly rather than through FOXTEL or OPTUS.

FOXTEL will also not acquire the Movie Network channels on an exclusive basis nor the PMP Movie Channels on an exclusive basis at the expiry of FOXTEL's current agreement with PMP, unless this is a requirement of the movie channel supplier, or another party has bid for those rights exclusively.

Outcome: This will ensure as far as possible that in addition to the Shared Channels, the 3 Movie Network channels (Movie One, Movie Extra, Movie Greats) are now available non-exclusively for independent operators to acquire and the 3 PMP Movie channels (Showtime, Showtime 2, Encore) are available non-exclusively at the expiry of FOXTEL's current agreement.

Non-affiliated channels: FOXTEL will ensure that 30% of the subscription television channels in FOXTEL's basic service will be completely non-affiliated with FOXTEL or its shareholders.

Outcome: This ensures a minimum proportion of FOXTEL's basic service is available to independent channel providers and is double the only similar arrangement which is operative in the United States.

Non-exclusive 3G/ Internet/ High Speed Broadband rights: FOXTEL will not acquire such rights in partnership with any of its shareholders (nor bid on the condition that such rights be licensed to its shareholders), nor will it license any 3G, Internet or high speed broadband rights to any of its shareholders on an exclusive basis. If FOXTEL supplies those rights non-exclusively, it will supply them to all third parties on terms, which do not discriminate unfairly between third parties. FOXTEL has also undertaken not to acquire, in certain circumstances, subscription television rights acquired by its shareholders as part of a bundle of 3G, Internet or highspeed broadband rights.

Outcome: This removes any concern that might arise from FOXTEL's ability to acquire 3G/Internet/High Speed Broadband rights.

AFL Channel: For so long as FOXTEL has exclusive rights to AFL match coverage or produces an AFL-dedicated channel, it will sub-license that coverage or channel to subscription television providers on terms which do not discriminate unfairly. FOXTEL will also only sub-license AFL coverage or an AFL-dedicated channel from its shareholders if either FOXTEL or the shareholder agrees to sub-license that coverage or channel to subscription television providers.

Outcome: This undertaking, in conjunction with the inclusion of ESPN International and Sky Racing as Shared Channels (and thereby subject to FOXTEL's undertaking not to acquire them exclusively) ensures that quality sports programming will be available to subscription television providers."

Conclusion

Exclusivity is a naturally declining feature of subscription television. However, the commercial flexibility to acquire and offer programming content exclusively is essential for all media, including subscription television channels and subscription television service providers.

Given the outcomes of the FOXTEL-OPTUS CSA, the related section 87B undertakings given by AUSTAR, FOXTEL and OPTUS and accepted by the ACCC, the private enforceability of any subsequent program-supply contracts, and the existing substantial powers of the TPA, no case has been made for further regulatory intervention in relation to access to subscription television programming.

Other Access issues (Chapter 7)

Retransmission of FTA digital services

ASTRA maintains that any retransmission of FTA digital signals (commercial networks, ABC and SBS) should be determined by the market and appropriate commercial arrangements. This should NOT be a matter for regulatory intervention.

Dual terrestrial/satellite digital tuner (STU)

ASTRA views on the call for a ‘common’ set top box are well documented. ASTRA reaffirms its view that such a proposal is costly, inappropriate and will put Australia at odds with international practice.

As such ASTRA supports the ACCC view rejecting any Government legislative or regulatory intervention to require subscription television to incorporate a terrestrial broadcast tuner in our digital STUs.

Bundling Issues (Chapter 8)

Extending the Jurisdiction of the TIO

ASTRA is opposed to the recommendation for the TIO to be given jurisdiction to investigate complaints about subscription TV where subscription television services are provided as part of a bundled telecommunications offering.

Bundling is becoming increasingly common across the telecommunications market. Over time there are likely to be an increasing number of products and services being bundled together with telecommunications services, including movie passes, videos, software, gas and electricity. Indeed, TransACT already offers gas and electricity as part of a bundle of services offered to consumers.

Clearly, there is no sound policy basis for extending the jurisdiction of the TIO over a wide range of products and services merely because they are or might be offered as part of a package with other telecommunications services.

With specific reference to subscription television services, the BSA has already established a regulatory regime for subscription TV products and services. This regime includes the development of codes of practice which specifically deal with customer complaints.

For example, Section 123(k) of the BSA provides that subscription broadcasting licensees should develop codes dealing with customers of the licensees, including methods of billing, fault repair, privacy and credit management. Section 123(h) provides for the creation of codes in relation to handling customer complaints.

The ASTRA Subscription Television Broadcasting Codes of Practice (the Codes) which are registered with the ABA under section 123(4) of the BSA address these issues for subscription TV services. Clause 4.2 and 4.4 of Code 4 addresses fault repair, credit management and billing respectively and Code 5 addresses subscriber complaint handling. If a customer is not satisfied with the Licensee's response to a complaint, the complainant may be referred to the relevant regulator, the ABA.

Some subscribers, for example OPTUS Subscription TV subscribers, receive separate bills for their subscription TV, telephony and Internet services. These bills clearly advise customers of the phone number to call for billing and customer service inquiries. From our experience customers who escalate complaints have no difficulty in dealing with separate complaints handling regimes for telecommunications services on the one hand and subscription TV services on the other.

If the ACCC recommendation is adopted and the TIO is given jurisdiction in relation to subscription TV services, this will confuse subscribers and will unnecessarily complicate the complaints handling system which has been set up for the benefit and ease for consumers.

For example, complaints from customers who received subscription TV services only would be dealt with under the ASTRA code and, if they are not satisfied, may take their complaint to the ABA. In contrast, complaints from customers who received a bundled package including subscription TV would be dealt with under a separate regime involving the TIO.

If the TIO's jurisdiction was to be expanded to deal with only the billing aspects of a bundled subscription TV and telephony service, then a customer who has a range of issues may have to deal with two different regulatory regimes. For example, a customer complaining about installation charges on their bills for the subscription TV service may need to take their billing complaint to the TIO, but their complaint about the entertainment guide or other content issues would need to be dealt with under the ASTRA Code and may be referred to the ABA.

Rather than meet the Commission's objective of making the complaints regime simpler, in our view were the TIO's jurisdiction to be extended it would cause additional consumer confusion and frustration.

ASTRA recognises that a consumer must have a clear path for making inquiries and complaints about the services they receive both independently and as part of a bundle from a telecommunications supplier. However, based on many years of experience, ASTRA believes that the current regime works effectively in relation to bundled packages. Accordingly, we urge the Minister not to support this recommendation.

ASTRA would be pleased to provide any further information or clarification of matters raised in its submission.

28 July 2003