

ABC COMMENTS ON THE ACCC REPORT ON EMERGING MARKET STRUCTURES IN THE COMMUNICATIONS SECTOR

Introduction

The Australian Broadcasting Corporation (ABC) welcomes this opportunity to comment on the recent report by the Australian Competition and Consumer Commission (ACCC) to the Minister for Communications, Information Technology and the Arts on emerging market structures in the communications sector.

The ABC understands the report as extending and complementing the decisions made by the ACCC in approving content sharing agreements (CSAs) between FOXTEL and Optus and between FOXTEL and Telstra in November 2002. Those agreements were approved subject to an extensive set of undertakings provided by FOXTEL, Optus, Telstra and Austar under s87B of the *Trade Practices Act 1974*. Taken together, the CSAs and undertakings effectively constitute the basis of a new content and access regime for the subscription television sector.

The ABC believes that this regime has provided a beneficial boost to the pay television industry. As the undertakings include the digitisation of the FOXTEL network, the regime is likely to accelerate the transition towards digital television in Australia, with benefits for viewers and listeners across the country.

However, in reaching its decisions on the CSAs, the ACCC was confined to considering matters directly related to those agreements. Consequently, the content and access regime it has created is limited in scope. In particular, the regime deals inadequately with the relationship between the free-to-air (FTA) and the subscription television industries.

By contrast, in this report to the Minister on emerging market structures, the ACCC considers issues beyond the direct scope of the CSAs and presents proposals to broaden the regime.

In commenting on the report, the ABC is concerned to address two issues materially affecting the Corporation in its role as a national broadcaster. These are the introduction of “must carry” provisions for national broadcasting services on subscription television platforms, and prominent placement of national broadcasters’ programs in subscription television networks’ electronic program guides (EPGs). The ABC raised these issues in its submissions to the ACCC on the CSAs. The ACCC addresses them in Chapter 7 of the report.

The ABC also supports the ACCC’s recommendation that the undertakings accompanying the CSAs be legislated.

“Must carry” provisions for national broadcasting services

As a national public broadcaster, the ABC’s services should be easily and conveniently available to all Australians across the country, no matter where they live or how they access the signal. This is important not just because the ABC’s services are publicly funded, but also because of the ABC’s unique ability to offer innovative and diverse programming, two of the key objectives of the *Broadcasting Services Act 1992* (“BSA”).

To this end, the ABC has sought to ensure the retransmission of its services on all subscription television platforms. The ABC’s programming is currently retransmitted on the Optus and Austar services, and on the FOXTEL cable service. ABC services are not currently retransmitted on the FOXTEL satellite service.

However, all of these retransmission arrangements are time-limited agreements and do not cover all potential ABC services. None provides a guarantee that the ABC’s services will always be available to all Australians on all platforms. That outcome can be ensured through legislation requiring the retransmission of ABC services.

Compulsory retransmission of ABC services should be achieved through the addition of a “must carry” provision in the BSA for all ABC services including the main channel, radio, interactive and enhanced services, wide screen, surround sound and any future additional channels or services. Retransmission should not require payment to the pay TV operators as the ABC is not able to operate on the same commercial business model as the commercial FTA broadcasters. Although the ABC has in place arrangements with Optus and FOXTEL which cover cable retransmission, these arrangements do not give adequate protection to the national broadcaster and its audiences and are no substitute for a legislative framework.

The ABC believes that “must carry” provisions should be in place for all platforms, including satellite. However, the ABC recognises the current capacity constraints of existing satellite platforms and simply notes that, if practical, the same principle should apply to all platforms.

The ABC notes that the ACCC considers the question of FTA retransmission in Chapter 7 of its report, and that the report does not recommend the introduction of “must carry” requirements for free-to-air broadcasts at this stage. However, the ABC submits that while the reasoning that led the ACCC to this conclusion might be applicable to commercial FTA broadcasters, it misunderstands the role of public broadcasting services. As such, the “wait and see” recommendation contained in the report should not be an impediment to introducing a “must carry” provision in relation to the national broadcasters.

Fundamental to the ACCC’s reasoning is that retransmission of FTA services on subscription television networks is an option that is best determined by the operations of the market. For example, it is clear from statements such as:

[i]n a more competitive market, pay TV operators may have greater incentive to facilitate the supply of digital FTA and interactive services in an effort to seek competitive advantage¹

that the ACCC accepts the possibility of one or more pay TV networks not retransmitting FTA services at all. If, as seems likely during the early stages of the transition to digital television, many Australians obtain digital television services through pay TV set-top boxes rather than through digital terrestrial receivers, this will create a situation where channels that are not retransmitted become effectively invisible, or else only available in a visibly poorer analog form.

While this may be an acceptable outcome in a commercial context, it is antithetical to the principle that all Australians should be able to access the ABC's services regardless of the means by which they access the signal. When considering national broadcasting services, the presumption must be that their services will be available on all platforms.

A "must carry" provision of the kind proposed above would serve that purpose.

Electronic program guide placement

Another key area of concern for the ABC is the location of the ABC channels on the electronic program guide (EPG). Experience from the UK has shown that prominent positioning and early mover advantage are absolutely crucial for public broadcasters; the BBC and ITV have suffered as a result of disadvantageous positioning on the satellite platform. It will also be important for the industry to agree on channel genres and program genres so that content is classified consistently across all platforms.

The ABC is currently satisfied with the positioning of its channels and services on the Optus and Austar pay television electronic program guides (EPGs). The ABC would like to continue to be provided with fair and reasonable positioning on any pay TV or any common FTA/pay platform EPG. This would mean the ABC main television channel would be retained at the number 2 position in the program guide, and any genre channels would have logical channel numbering and equality within a genre block. It is important that all Australians have easy and convenient access to the publicly-funded national broadcaster services.

Chapter 7 of the report addresses the question of EPGs. It notes the possibility of pay TV providers using favourable EPG placement to advantage affiliated channels over non-affiliated channels.² The report indicates that the ACCC insisted upon the inclusion of provisions in FOXTEL's digital access agreement requiring FOXTEL to negotiate with access

¹ Australian Competition and Consumer Commission. *Report to Senator Alston, Minister for Communications, Information Technology and the Arts, on Emerging Market Structures in the Communications Sector*. June 2003, p.143.

² *Ibid*, p.139.

seekers for EPG services and ensuring that disagreements over the provision of EPG services be subject to the access agreement's dispute resolution clauses.³

From the ABC's perspective, this provides little comfort, as an "access seeker" within the terms of the FOXTEL's digital access agreement is the provider of a subscription broadcasting or narrowcasting service as defined in the BSA.⁴ It is not clear from FOXTEL's undertakings if retransmission of FTA services is included in the proposed digital access regime. The ABC would seek to have requirements relating to channel position, EPG services and disputes extended to ensure adequate protection for retransmitted services.

Legislation of the framework contained in the s87B undertakings

As noted above, the CSAs and undertakings approved by the ACCC in November 2002 effectively constitute the basis of a new content and access regime for the pay television industry. However, this regime will remain in place only for the duration of the CSAs—until 31 December 2010, or whenever the agreements are terminated, if that is earlier. The content and access regime that has been created will be of uncertain, but limited duration.

In this light, the ABC agrees with the ACCC's recommendation⁵ that the s87B undertakings be legislated to guarantee a diverse and competitive market in the long term.

³ *Ibid*, p.142.

⁴ For example, Recitals B and C of the "FOXTEL Section 87B Undertaking Schedule 2: FOXTEL Digital Access Agreement" indicate that an access seeker is a provider of "Subscription Television Services and Related Services" seeking carriage of their services on the FOXTEL digital network (p.5). A "Subscription Television Service" is defined in Schedule 8 of the Digital Access Agreement as a service that delivers television programs which is either a subscription broadcasting service or a subscription narrowcasting service, as defined in the BSA (p.81).

⁵ ACCC. *op cit*, p.99.