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Broadcasting Legislation Amendment Bill (No. 2) 2001

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Broadcasting Legislation Amendment Bill (No. 2) 2001

Date Introduced: 5 April 2001

House: House of Representatives

Portfolio: Communications, Information Technology and the Arts

Commencement: Royal Assent

Purpose

This Bill will amend the *Broadcasting Services Act 1992* to:

- remove the capacity of existing commercial television licensees to block the allocation of an additional licence in two-station markets
- permit the automatic de-listing of events from the anti-siphoning list (a list of sporting events that pay TV licensees are prohibited from acquiring unless certain conditions have been met)
- modify the simulcast provisions relating to digital television transmissions, and
- make minor changes relating to datacasting.

Background[1]

As this Bill has no central theme the background to the various measures is included in the discussion of the main provisions.

Main Provisions

Commercial Television Licences

Commercial television licences are allocated by the Australian Broadcasting Authority (ABA) in accordance with the provisions of the *Broadcasting Services Act 1992* (the BSA). Each licence is allocated with respect to a specific licence area, with no more than three licences being awarded for any one area. No licensee may control more than one licence in a particular licence area. However, for licence areas in regional and remote markets that are too small to support more than one or two commercial television operators, the control rules are relaxed so that audiences may have the opportunity to receive a range of services similar to that available in metropolitan areas.

In licence areas with only one commercial television licence, that licensee may apply for an additional licence (section 38A). In areas with only two licences (neither of which was awarded under section 38A), the existing licensees must submit a joint written notice stating that:

- they will jointly apply for the additional licence
- they will separately apply for the additional licence, or
- only one of them will apply for the additional licence (section 38B).

This requirement for a joint written notice in all three circumstances has, in effect, given one of the licensees a veto power over the other in situations where only one of them wishes to apply for the additional licence. While there has been not yet been an instance where a licensee has attempted to exercise this veto power, the Government has decided that it would be prudent to deal with the anomaly.[2] **Items 1-3 of Schedule 1** insert **new subsections 38B(1)(3)(4)(7)(8) and (9)** of the BSA. These will have the effect of removing the requirement for a joint written notice for separate and sole applications for additional licences in those areas with only two commercial television licenses.

Licence areas with two licensees include Darwin, Mildura, Tasmania, Regional Western Australia, Remote Central and Eastern Australia and Mt Isa. There should now be no impediment to these areas receiving an additional commercial television service.

Item 4 of Schedule 1 of the Bill substitutes a **new section 73A**, which protects the controllers of additional licences granted under section 38B from being in breach of the control rules (ie. that no person shall control more than one licence in a licence area). This was considered necessary because the existing provisions of section 73A may not protect certain licensees in some circumstances. In particular, the current provisions were not drafted to cater for situations where a large licence area overlaps a number of smaller separate licence areas, the licences for which are controlled in common.

Anti-Siphoning Provisions

Current Provisions

The purpose of the anti-siphoning provisions is to attempt to ensure that major sporting events, which have traditionally been shown on free-to-air television, are not acquired for exclusive coverage by pay television. Under section 115(1) of the BSA, the Minister may gazette events which he believes should be available free to the general public.[3] Such events are de-listed 168 hours after they finish, unless the Minister declares otherwise (subsection 115(1B)). The Minister may also remove events from the list (subsection 115(2)). Ministerial notices and declarations under section 115 are disallowable instruments.

Section 115 imposes no obligations on free-to-air broadcasters to show listed events. The anti-siphoning list has effect because of paragraph 10(1)(e) of Schedule 2 of the Act. This makes it a condition of pay television licenses that licensees will not acquire the right to televise listed events unless:

- the ABC or the SBS have the right to televise the event, or
- commercial television licensees whose services reach more than fifty per cent of the Australian population have the right to televise the event.

The Act also contains extensive provisions to prevent commercial television operators from 'hoarding' the rights to sporting events (ie. obtaining the rights and not using them). These provisions, contained in Part 10A of the BSA, were introduced by the *Broadcasting Services Amendment Act (No.1) 1999*.

Productivity Commission's View

The Productivity Commission's Inquiry Report on Broadcasting (March 2000)[4] discussed the anti-siphoning provisions and related issues. It concluded that the provisions were anti-competitive and that the costs of the regime to sporting organisations, the broadcasting industry and the community, exceeded the benefits. However, it accepted that there would be migration of popular sporting events from free-to-air to pay television if the provisions were repealed and for this reason recommended that some regulation be maintained. It recommended that:

- neither free-to-air nor pay television broadcasters should be permitted to obtain exclusive rights to sporting events of major national significance
- stricter criteria for a new and much shorter list of events, and
- the transfer of the responsibility for the administration of the scheme from the Minister to the ABA, with streamlined procedures.

To date, the Government has not pursued any of these options.

ABA Investigation

On the 22 December 2000 the Minister directed the ABA to conduct an investigation of the anti-siphoning list, in particular:

- which events should be removed from the list
- which events should be added, and
- the date or dates on which protection should expire for events that the ABA considers should be retained in or added to the list.

The ABA is to report to the Minister by 30 June 2001.[5] In February 2001 the ABA produced an Issues Paper on the subject and sought submissions from interested parties. The authority is also undertaking consultations with commercial and pay television operators, the national broadcasters and sports bodies.

De-listing of Events

The Bill deals with only one aspect of the anti-siphoning provisions: the removal of events from the list. The current provisions specify that events will be automatically removed 168 hours after they finish. The Minister may also remove events from the list at any time, subject to parliamentary disallowance. Circumstances where the Minister might consider removal include:

- where free-to-air broadcasters have had the opportunity to acquire the rights, but have not done so, or
- where free-to-air broadcasters have the rights, but have televised an unreasonably small proportion of the event.[6]

In both of these cases, removal of the event would presumably result in a greater availability of the event on television, which is the ultimate objective of the anti-siphoning provisions. However, it should be noted that the Minister is not required to justify removal of an event from the list.

The proposed amendments (**Item 5 of Schedule 1**) provide for automatic removal 1008 hours (six weeks) before the start of the event, unless the Minister declares otherwise. Such a declaration can *only* be made if the Minister is satisfied that at least one free-to-air broadcaster has not had a reasonable opportunity to acquire the television rights to the event.

The justification for this change is that the current procedures are cumbersome and lengthy, and that pay TV operators find it difficult to properly schedule and promote events as a result.[7] There is also no incentive for free-to-air broadcasters to support de-listing, even if they have no intention of broadcasting an event. The new provisions should

encourage free-to-air operators to promptly secure the rights to events that they wish to broadcast, while denying them the opportunity to stall the acquisition of events by pay TV.

Views of Interested Parties

The proposed change has been welcomed by pay TV operators. However, the industry's peak body, the Australian Subscription Television and Radio Association (ASTRA), has suggested that the de-listing period be increased from six weeks to ten weeks, arguing that it is the routine practice of free-to-air networks to acquire rights a year or more in advance.[8]

The Federation of Australian Commercial Television Stations (FACTS)[9] has opposed the changes, arguing that:

- they will increase the negotiating power of the holders of sports rights
- they will switch the 'onus of proof' from pay TV operators to the free-to-air broadcasters ie. the latter will have to demonstrate that the rights have not been made available to them, and
- they do not require the Minister to de-list events even if a broadcaster notifies the Minister that it has not had a genuine opportunity to acquire the rights.

FACTS has proposed an alternative regime: at any time during a three month period before an event, pay TV operators may give the Minister notice that they wish to have the event de-listed. If free-to-air broadcasters make an objection, then the de-listing is halted. The Minister can then make a determination that the free-to-air broadcasters have had a reasonable opportunity to obtain the rights on 'reasonable commercial terms'. The Bill does not use the latter term, but refers only to a 'reasonable opportunity to acquire the right'.

Comment

Given that the Productivity Commission determined that the anti-siphoning rules conferred an economic benefit on the free-to-air broadcasters at the expense of sports rights holders and pay TV operators, then it would appear not unreasonable to transfer the 'onus of proof' to the broadcasters and increase the negotiating power of sports rights holders. The purpose of the rules was not to improve and entrench the commercial position of the free-to-air networks, but to protect the viewing public. Providing the original intent of the rules is maintained, then any reduction in their anti-competitive effect should be welcomed.

FACTS insistence on 'reasonable commercial terms' would appear to be unnecessary. It is unlikely that the Minister would be satisfied that free-to–air television stations have had a 'reasonable opportunity to acquire the right to televise an event' if the commercial terms of the acquisition were themselves unreasonable.

Digital Transmission Changes

Under the digital broadcasting regime (Schedule 4 of the BSA), commercial and national television broadcasters are required to simulcast in high definition (HDTV) and standard definition (SDTV) digital mode in non-remote areas. The Bill relaxes this requirement by permitting the ABA to make determinations which would have the effect of excluding certain programs and advertisements from the simulcast requirements. The determinations will be disallowable instruments.

Item 8 of Schedule 1 inserts a **new clause 37EA** in Schedule 4 of the BSA allowing such determinations in respect of commercial television licensees. **Item 9 of Schedule 1** inserts a **new clause 37FA** allowing similar determinations with regard to the national broadcasters (the ABC and SBS).

The relaxation of the simulcast requirements for programs is limited to one year after the commencement of the determination. The purpose of the amendment is to allow broadcasters to 'time-shift' programs so that they can showcase the benefits of HDTV. For example, they will be able to show HDTV programs in the daytime when the shops are open, providing the same program is shown in SDTV within the period of 168 hours before or after the HDTV transmission. For this reason, these provisions were referred to as the 'Harvey Norman' amendments during the proceedings of the Senate Committee. Commercial and national broadcasters will be able to repeat such HDTV transmissions, but only the first transmission will count towards the requirement for 20 hours of HDTV programs each week.

The relaxation of the simulcast requirements for advertisements is limited to two years after the introduction of digital transmission. The justification for this change is that it will enable commercial broadcasters to put in place the necessary equipment to provide the same range of HDTV advertising as they provide in SDTV.

ASTRA has claimed that the changes will enable the free-to-air broadcasters to undertake a form of multi-channelling, because they will be able to broadcast different programs in HDTV mode on different channels at different times. The digital conversion scheme for commercial broadcasters prohibits multi-channelling, as it would provide unfair competition to pay TV licensees. However, it would seem that there are sufficient safeguards to ensure that the original policy objectives of the legislation are not compromised: the ABA determinations providing exemptions to the simulcast requirements must specify programs, licensees and time periods. These determinations are also subject to parliamentary disallowance.

FACTS expressed concern that the amendments did not provide it with an exemption to broadcast a 'demonstration loop tape'. This tape would contain extracts of high definition program material for promotional purposes and would run for 30 to 60 minutes. FACTS argues that the tape would not be suitable for broadcast at a later time in standard definition or analogue because it would only contain parts of programs.

ASTRA stated that it had no objection to an amendment allowing the broadcast of such a tape so long as the exemption was clearly defined and restricted.

The Department of Communications, Information Technology and the Arts however stated that the Government did not want material to be broadcast that could only be shown in HDTV and that the Government wanted material which could be compared through the joint transmission on HDTV and SDTV.[10]

The Senate Committee noted that as the Bill stands:

> '..free-to-air broadcasters will be unable to show their demonstration loop tapes in HDTV if they decide that the tapes are unsuitable for SDTV/analog transmission because of the provisions in the bill requiring SDTV/analog broadcasting within seven days, before or after the HDTV broadcast.'[11]

The Labor and Democrat minority reports however advocated an amendment to the Bill to allow the free to air networks to seek an exemption from the ABA to broadcast a 30-60 demonstration tape without having to simulcast in SDTV and analogue.

Datacasting

Datacasting services are not presently available to the public. The Government abandoned the planned auction of datacasting transmission licences in May 2001[12] following the withdrawal of a number of potential bidders such as Telstra, Fairfax and News Limited. Some commentators have blamed the lack of interest in the licences on the restrictive nature of datacasting regime.[13]

The regulatory framework for datacasting is contained in Schedule 6 of the BSA. The legislation imposes genre conditions on datacasters to ensure that they will not become de-facto television broadcasters. These conditions restrict the ability of datacasters to transmit certain types of programs including drama, current affairs and sports programs.

One type of program that a datacaster would be able to transmit under the existing legislation is a 'foreign-language news bulletin'. The Bill only makes a very minor amendment to Schedule 6 by replacing references to 'foreign-language news bulletin' with references to 'foreign-language news or current affairs program' (**items 13,14, 15 and 17**). The practical effect of these amendments will be minimal however as foreign-language news bulletins are already defined to include discussion, commentary or analysis in relation to the items included in such a bulletin.

Endnotes

1 On 23 May 2001 the Senate referred the Bill to the Environment, Communications, Information Technology and the Arts Legislation Committee for inquiry and report by 19 June 2001. See http://www.aph.gov.au/senate/committee/ecita_ctte/Advert/ecita_BL2.htm for more details. Submissions were received from the Federation of Australian Commercial Television Stations (FACTS), the Australian Subscription Radio and Television Association (ASTRA), Foxtel, Fox Sports and the ABC. They can be obtained from the following address: http://www.aph.gov.au/senate/committee/ecita_ctte/Blab2/Blab2Sublist.htm.

2 Mr Tanner (General Manager, ABA), *Evidence*, 8 June 2001, p. 10.

3 The original anti-siphoning list was the Broadcasting Services (Events) Notice No.1 of 1994.

4 This report can be obtained from http://www.pc.gov.au/inquiry/broadcst/finalreport/index.html. The discussion on the anti-siphoning provisions in contained on pages 429–445.

5 Information on this investigation can be obtained from the following ABA Internet site: http://www.aba.gov.au/what/program/anti_si_issues.htm

6 These examples are contained in notes to subsection 115(2) of the BSA.

7 The Hon Mal Brough, House of Representatives, *Debates*, Second Reading Speech, 5 April 2001, p. 26538

8 ASTRA submission to the Environment, Communications, Information Technology and the Arts Legislation Committee (see 1 above).

9 FACTS submission to the Environment, Communications, Information Technology and the Arts Legislation Committee (see 1 above).

10 Ms Page (Chief General Manager, DCITA), *Evidence*, 8 June 2001, p. 12.

11 Senate Environment, Communications, Information echnology and the Arts Legislation Committee, *Broadcasting Legislation Amendment Bill (No.2) 2001*, June 2001, p.17. The Committee's report can be obtained from: http://www.aph.gov.au/senate/committee/ecita_ctte/Blab2/contents.htm

12 Minister for Communications, Information Technology and the Arts, 'Datacasting licence auction cancelled', *Media Release*, 9 May 2001.

13 See Darren Gray and Sophie Douez, 'Government urged to lift digital TV restrictions', *The Age*, 11 May 2001.