BROADCASTING LEGISLATION AMENDMENT BILL (NO. 2) 2001

Referral and conduct of the inquiry

1.1 On 23 May 2001, the Senate referred[1] the Broadcasting Legislation Amendment Bill (No. 2) 2001 (the bill) to the Environment, Communications, Information Technology and the Arts Legislation Committee for inquiry and report by 19 June 2001.

1.2 The Committee advertised the reference on the Internet and wrote to a number of interested organisations inviting submissions. The Committee received 6 submissions which are listed at Appendix 1, and held a public hearing in Canberra on Friday, 8 June 2001. A list of witnesses appears at Appendix 2.

1.3 The Committee thanks all those who assisted in its inquiry by making submissions, providing additional information and appearing at hearings.

The bill

1.4 The purpose of the bill is to amend the *Broadcasting Services Act 1992* in the following four areas:

- procedures for allocating additional digital television licences in two-station markets;
- automatic removal of events from the 'anti-siphoning list';
- High Definition Television (HDTV) transmission rules; and
- the exclusion of foreign-language news and current affairs programs (as distinct from foreign-language news bulletins) from the datacasting genre conditions.

1.5 The bill also amends the *Radiocommunications Act 1992* in relation to apparatus licences for datacasting.

1.6 The Government considers that the amendments made by the bill are relatively minor but important amendments[2] and the small number of submissions received by the Committee seems to support this point of view. Although the bill makes amendments in five areas, only two of these raised concern in submissions. The areas of concern were the amendments relating to the anti-siphoning provisions and the HDTV programming.

1.7 Support for, or opposition to, the provisions in the bill on these two issues was divided along industry lines. The pay TV sector, as represented by its peak body the Australian Subscription Television and Radio Association (ASTRA), was in favour of the bill's amendments relating to the anti-siphoning provisions, because the amendments are designed to assist pay TV operators to gain prompt access to certain broadcasting rights. The free-to-air sector, as represented by the Federation of Australian Commercial Television Stations (FACTS) and by the Australian Broadcasting Corporation (ABC), did not support these amendments as they stand in the bill.

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1 Selection of Bills Committee Report, No. 7 of 2001, dated 23 May 2001.

2 Broadcasting Legislation Amendment Bill (No. 2) 2001, Minister's second reading speech.

1.8 On the other hand, the amendments to allow exemptions from the simulcast requirements of certain HDTV programming and advertising or sponsorship matter by free-to-air broadcasters, were supported by FACTS (albeit with one reservation) but raised issues with the pay TV sector. In addition, the time limit placed on the exemption in relation to advertising or sponsorship matter provided considerable concerns to regional broadcasters who anticipated that it might delay their digital service start date as a consequence.

1.9 This report considers the bill's amendments in the order in which they appear in the bill.

Additional television licences in two-station markets

1.10 The *Broadcasting Services Act 1992* contains provisions for the allocation of additional commercial digital television broadcasting licences in two-station markets.

1.11 Two-station markets are those licence areas which contain only two commercial television broadcasting services. The Government's policy is to improve the arrangements for the provision of a third commercial television licence in currently underserved remote or regional areas. The Act provides for a new digital service to be established by one of the incumbent broadcasters or by a joint venture between the two incumbents in two-station markets, with lower rollout costs than would otherwise be the case.[3]

1.12 The Act currently provides that the incumbent commercial television broadcasters may, within a specified period:

- jointly seek the additional licence;
- apply alone if the other declines to seek the licence; or
- in the absence of an agreement between the broadcasters, bid for the licence at auction.

1.13 The current provisions require both broadcasters to indicate their intention in a joint notice to the Australian Broadcasting Authority (ABA). If either broadcaster refuses to respond however, the other is unable to proceed to apply for the licence. In effect, the requirement for a joint notice means that individual broadcasters are in a position to prevent the allocation of a licence for a third service in underserved areas by refusing to cooperate in providing a joint notice. One licensee may effectively veto the provision of a third service by the other licensee.[4]

Amendments to section 38B

1.14 Items 1 to 3 of the Broadcasting Legislation Amendment Bill (No. 2) 2001 repeal and substitute subsections 38B(1), (3), (4) and (7)-(9) of the Act to remove this effective veto power of individual licence holders. Under the new provisions, the requirement that a joint notice of intention be submitted to the ABA is removed and existing broadcasting licence

3 Broadcasting Services Amendment (Digital Television and Datacasting) Bill 2000, Minister's second reading speech, *Official Hansard*, 19 June 2000, p 15 116.

4 Broadcasting Legislation Amendment Bill (No. 2) 2001, Minister's second reading speech, *and* Explanatory memorandum, p 12.

holders in the two-station market may give the ABA either a joint notice or separate notices of their intention to apply for the new third licence.

1.15 The mechanism for the ABA to issue a third licence is that the written notice of intention from the existing licence-holders is given to the ABA within 90 days after a designated time specified in subsection 38B(26) of the Act and stating that the joint-venture company or an existing licensee will apply for the additional licence. This notice is to be followed by an application for the third licence within 12 months of the designated time. The bill amends subsections 38B(7) to (9) of the Act, which relate to the ABA's allocation of the additional licences to existing licensees in two-station markets, to reflect the situation where separate notices are given to the ABA.

1.16 The designated time will differ depending on whether the broadcasters are licensed to serve remote or non-remote licence areas. If the licence area is wholly outside of a remote licence area, the designated time is the commencement of section 38B which was 1 January 2001. Notices of intention should therefore have been given to the ABA before 31 March 2001 and applications for the additional licences must be lodged with the ABA before 1 January 2002 in these particular licence areas. On the other hand, licensees in remote licence areas need to give notice within 90 days of a designated time to be determined by the ABA. Eligible licensees in non-remote licence areas that overlap with remote licence areas are bound to the same designated time as that for the remote licence area.

1.17 The ABA has determined eight commercial television licence areas to be remote licence areas for the purposes of conversion to digital broadcasting. All of the two-station regional markets (Tasmania, Darwin and Mildura) had overlaps with a remote licence area (Remote Central and Eastern Australia) but the ABA varied the television licence area plans for Remote Central and Eastern Australia to remove the overlap between the Remote Central and Eastern Australia television licence areas and the Tasmanian commercial television licence areas. As a consequence, the only market that was affected by the 31 March 2001 deadline was the Tasmanian market. The ABA is yet to determine the designated time for other licence areas.

1.18 Mr Giles Tanner, General Manager, ABA, explained to the Committee that although no licensee has sought to exercise the effective veto referred to above, the amendments in the bill were technical amendments to correct this unintended effect in the Act:

> I do not believe there was any intention, and it is quite plain on the face of the bill, that one licensee be able to do the other out of the entitlement to apply by simply remaining passive …[5]

1.19 It is necessary to correct the Act before the deadline for the majority of two-service markets is set by the ABA.

Amendments to section 73A

1.20 Section 73A of the Act, provides an exemption from the normal control provisions which limit a broadcaster to owning only one licence in a licence area. Where the broadcaster has been allocated a licence under section 38B to provide a third digital service in

5 *Proof Committee Hansard*, Canberra, 8 June 2001, p 11.

the same licence area, the existing and additional licences are treated as one licence for the purpose of the ownership limits. However, in a limited number of cases involving overlapping licence areas, section 73A does not provide an exemption from the control provisions for all licensees.

1.21 The bill repeals and substitutes section 73A (item 4) so that it will operate in a way more appropriate to markets with overlapping licence areas and the varying corporate structures used by broadcasters.

Reaction in submissions

1.22 In general, submissions did not address the amendments in the bill which relate to two-service markets. The Australian Subscription Television and Radio Association (ASTRA) is the peak industry body for subscription television and narrowcast radio. It referred the Committee to its submissions to the digital review of underserved regional licence areas which was conducted before 1 January 2000.[6] In these submissions, ASTRA did not oppose the licensing of additional services where they can be provided on a commercially sensible basis, but it considered that the introduction of subscription multichannel television has already greatly enhanced the viewing opportunities for people in rural and remote Australia. In addition, ASTRA was opposed to multichannelling as a mechanism to introduce new commercial services in regional and remote areas.

1.23 ASTRA had no further comment in relation to the relevant amendments proposed in the bill.[7]

Anti-siphoning provisions

1.24 When pay TV commenced in Australia there was concern that major television sports events would migrate or be siphoned from the free-to-air networks to pay TV. Siphoning refers to the obtaining of the exclusive broadcasting rights (ie both free-to-air and pay TV rights) by a pay TV licensee, so that those events cannot be received on free-to-air television and would only be available to subscribers of the pay TV services. The current 'anti-siphoning list' contains sports events within 11 categories and has effect until 31 December 2004. The exception to this is the 2006 tournament of the FIFA World Cup. [8]

1.25 The anti-siphoning regime is a mechanism by which the Minister can formally list events that should be available on free-to-air television for viewing by the general public. The anti-siphoning list is not a list of sporting events reserved solely for free-to-air television. It does not compel free-to-air broadcasters to acquire the rights to listed events nor to broadcast the listed events to which they hold rights. The list does not guarantee them exclusive rights to such events, however, it does give them priority over pay TV licensees for the acquisition of rights to listed events.

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6 Australian Subscription Television and Radio Association (ASTRA), Submissions to Review of Underserved Regional Licence Areas, Department of Communications, Information Technology and the Arts, dated 8 April 1999 and 6 August 1999.

7 Australian Subscription Television and Radio Association (ASTRA), Submission 3, p 1.

8 Australian Broadcasting Authority News release, NR 7/2001, 15 February 2001.

1.26 It is a condition of a subscription television licence (Broadcasting Services Act, Schedule 2, paragraph 10(1)(e)) that the licensee will not acquire the right to televise, on a subscription television broadcasting service, an event on the anti-siphoning list unless:

- a national broadcaster has the right to televise the event on its broadcasting service; or
- the television broadcasting services of commercial television broadcasting licensees who have the right to televise the event cover a total of more than 50 per cent of the Australian population.

1.27 Under section 115 of the Broadcasting Services Act, the Minister may specify in a notice published in the *Gazette*, events which should be televised free to the general public. The Minister may amend notices to specify additional events and also to remove events from the notice. Unless the Minister declares otherwise, events are automatically removed from the notice 168 hours (7 days) after the end of the event. This ensures that pay TV operators may provide secondary coverage of listed events without restriction.

1.28 The Productivity Commission, in its March 2000 report on Broadcasting, concluded that the anti-siphoning rules are anti-competitive and that the costs of the current scheme to sporting organisations, the broadcasting industry and the community as a whole, exceed their benefits.[9] The pay TV industry has persistently criticised the anti-siphoning regime as being inequitable, anti-competitive and favouring free-to-air broadcasters at the expense of pay TV providers. However, there are currently 6 million homes that are reached by free-to-air television compared with 1.2 million subscribers to Australia's major pay TV services and the Government's policy objective of making available certain major sporting events free to the general public would not be served by removing the anti-siphoning provisions at this time.[10]

1.29 According to the Minister, however, there is scope for amendment to the existing anti-siphoning regime to assist pay TV operators to gain prompt access to broadcasting rights, where free-to-air broadcasters have had a reasonable opportunity to acquire rights.[11] These amendments, contained in the bill, are also designed to streamline procedures to improve timeliness and certainty in the administration of the regime.

1.30 According to the explanatory memorandum to the bill, whilst there is no consistent pattern to the time in advance of an event that rights are offered for sale, or to the time in which negotiations for broadcasting rights are completed, a substantial majority of rights are negotiated several months before the event date. Free-to-air broadcasters prefer to schedule programming some months in advance in order to attract advertisers on whose advertising revenues they are primarily reliant. Pay TV operators however are less reliant on advance sale of advertising slots in programs and have more flexibility in programming events as they operate on multichannel platforms.

1.31 The Government considers that these different characteristics of the way free-to-air and pay TV broadcasters operate, will enable an automatic de-listing of events six weeks prior to their commencement, and will maximise the time that free-to-air broadcasters have to

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9 Productivity Commission, Broadcasting, Report No. 11, 3 March 2000, p 444.

10 Broadcasting Legislation Amendment Bill (No. 2) 2001, Minister's second reading speech.

11 Broadcasting Legislation Amendment Bill (No. 2) 2001, Minister's second reading speech.

negotiate rights, while providing an adequate time prior to the event for subscription services to acquire and promote the event.

1.32 If free-to-air broadcasters oppose the de-listing of an event, and can successfully demonstrate to the Minister that they have not had a reasonable opportunity to acquire the free-to-air broadcasting rights before that date, the Minister may override the automatic de-listing by publishing a declaration that the event continues to be listed.

1.33 Since the commencement of the anti-siphoning provisions in 1994 the Minister has issued 11 de-listing notices at the request of pay TV operators. Ten of these de-listings have occurred since 1998, most dealing with international test and one-day cricket series. In each case, the pay TV operator who has applied for a de-listing has obtained broadcasting rights for the event in question. According to the explanatory memorandum, with this experience as a guide, it can be expected that the automatic de-listing process could be of real benefit to pay TV operators several times a year.[12]

1.34 Automatic de-listing would simplify the de-listing process and reduce the costs of administering the regime for Government. Under automatic de-listing provisions, the ABA and the Minister would not be required to effect a de-listing. Instead the Minister would only issue a notice retaining an event on the anti-siphoning list where a free-to-air broadcaster can demonstrate that it has not been granted an opportunity to obtain the rights.

1.35 The bill, therefore, inserts new subsections 115(1AA) and (1AB) (item 5) into the Broadcasting Services Act which provide that listed events are automatically removed from the anti-siphoning list 1008 hours (six weeks) before their commencement. If the Minister is satisfied that at least one commercial television broadcasting licensee or national broadcaster has not had a reasonable opportunity to acquire the right to televise the event concerned, he/she may publish a declaration in the *Gazette* prior to the six week period, that the event continues to be specified in the notice.

1.36 The effect of the automatic six week de-listing of events is to shift the onus from the pay TV industry applying to the Minister to de-list events, to the free-to-air broadcasters who may now be required to demonstrate that they had not been offered broadcasting rights on a reasonable commercial basis in order for the de-listing to be overridden.

Reaction in submissions and by witnesses

1.37 In general, the pay TV industry supported the provisions in the bill which relate to anti-siphoning:[13]

> ASTRA supports the Government's proposed amendments to section 115. … these amendments address an element of the Productivity Commission's Inquiry on Broadcasting recommended changes to the anti-siphoning regime, being the streamlining of the decision making process. …

12 Broadcasting Legislation Amendment Bill (No. 2) 2001, Explanatory memorandum, p 8.

13 Australian Subscription Television and Radio Association (ASTRA), Submission 3, p 2; FOXTEL, Submission 1; Fox Sports, Submission 4.

> ASTRA supports any proposal that recognises the anti-competitive nature of the anti-siphoning regime and any attempt to redress the current imbalance while still maintaining the overall objective to ensure major sporting events remain freely available to Australian television viewers.[14]

1.38 ASTRA contended that current anti-siphoning provisions establish free-to-air broadcasters with substantial control over rights. Pay TV can only attempt to get any rights which are available if free-to-air broadcasters acquire rights to an event. If free-to-air broadcasters do not take up the rights, and pay TV rights to the event are available, then pay TV broadcasters must make a case to the Minister to start the de-listing process.

1.39 According to ASTRA, the current de-listing process is a cumbersome one:

> … pay TV must make a case to the Minister that the FTA broadcasters have had a reasonable opportunity to acquire the rights to the event. The Minister in turn seeks advice and a report from the ABA; the ABA then seeks information from all parties to determine the facts and then reports back with a recommendation to the Minister. If the case is made and accepted by the Minister then the specific event is de-listed by Gazette notice and pay TV licensees are then free to acquire and use the event.[15]

1.40 The free-to-air broadcasting sector, as represented by FACTS and the ABC, had misgivings about the amendments to the anti-siphoning regime in the bill:

> Currently the onus is on pay television operators to apply to the Minister to have events de-listed when free-to-air broadcasters, having had a real opportunity to acquire rights, have not done so in a reasonable time.[16]

1.41 In its submission, FACTS was concerned that the effect of the changes to the de-listing process goes beyond the Government's intention of the amendment, and the changes have the potential to subvert the original intent of the anti-siphoning regime.[17]

1.42 FACTS was concerned that once the obligation to seek the de-listing of an event is moved away from the pay TV operator, there will be a shift in the negotiating power towards the rights holder who is often affiliated with a pay TV operator. As a consequence, a risk arises whereby automatic de-listing provisions will be used by rights holders to deliberately delay negotiations after the automatic de-listing date. Under the Act's current provisions, if a rights holder is not successful in placing rights with one free-to-air broadcaster, they must attempt to place them with another. This mechanism benefits the public by ensuring that the rights holder makes all possible attempts to place the event on free-to-air television before the event can be de-listed.[18]

1.43 The amendments in the bill will ensure that the event automatically de-lists unless a free-to-air broadcaster notifies the Minister that it has not had the opportunity to acquire the

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14 Australian Subscription Television and Radio Association (ASTRA), Submission 3, p 2.

15 Australian Subscription Television and Radio Association (ASTRA), Submission 3, p 3.

16 Australian Broadcasting Corporation (ABC), Submission 5.

17 Federation of Australian Commercial Television Stations (FACTS), Submission 2, p 1.

18 Federation of Australian Commercial Television Stations (FACTS), Submission 2, p 2.

rights to the event. If the rights holder delays negotiations up to the six week deadline, the free-to-air broadcaster may notify the Minister that negotiations are ongoing but there is no requirement for the Minister to halt the de-listing process. This can only be done if the Minister takes positive action which will place a considerable political and administrative burden upon the Minister within a very short time frame.[19]

1.44 This concern that there is no provision for de-listing to be halted if free-to-air broadcasters believe that they have not had a genuine opportunity to acquire rights, was echoed in the ABC's submission.[20] In response, Ms Susan Page, Chief General Manager, Broadcasting and Intellectual Property Division, Department of Communications, Information Technology and the Arts, informed the Committee that the Minister is able to halt the de-listing process at any point if he becomes aware of concerns that the free-to-air operators have indicated that they have not had an adequate opportunity to obtain the rights.[21] In relation to the fact that the bill contains no provision for the Minister to take account of advice that negotiations are on-going at the six week point, Ms Page responded:

> He is not required to take account of the advice, but I am pretty certain that he would take account of the advice. The underlying principle of the legislation is to maximise the coverage of major sporting events on free-to-air television. If he became aware of an instance where that was not going to happen, any minister would wish to intervene.[22]

1.45 FACTS anticipates that the Minister will be confronted with notifications from free-to-air broadcasters that they have not had an opportunity to acquire the rights to certain events. The Minister will be under pressure from the free-to-air broadcaster to determine the matter prior to the six week point and the pay TV operator will have an incentive to drag the decision over the six week mark.

1.46 A related concern in FACTS' submission was that the original intent of the anti-siphoning regime was to ensure that free-to-air broadcasters had a reasonable opportunity to acquire the broadcast rights on reasonable commercial terms. The proposed amendments do not require 'reasonable commercial terms', but only 'a reasonable opportunity to acquire' the rights.[23] FACTS considered that this omission could also allow rights holders to protract negotiations on an unreasonable basis and in effect, rights holders could withhold rights from free-to-air television. It recommended that the existing wording in the Act be retained.

1.47 Ms Page, however, did not believe that this would be an issue:

> We believe that the words as currently drafted could encompass the notion of reasonable commercial terms if broadcasters wish to raise that as an issue.[24]

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19 Federation of Australian Commercial Television Stations (FACTS), Submission 2, p 2.

20 Australian Broadcasting Corporation (ABC), Submission 5.

21 *Proof Committee Hansard*, Canberra, 8 June 2001, p 11.

22 *Proof Committee Hansard*, Canberra, 8 June 2001, p 13.

23 Federation of Australian Commercial Television Stations (FACTS), Submission 2, p 4.

24 *Proof Committee Hansard*, Canberra, 8 June 2001, p 13.

1.48 In its submission, ASTRA countered the arguments of FACTS by informing the Committee that there is no incentive for a rights holder to avoid, or deliberately delay, negotiations with a free-to-air network because this would work against the rights holder's commercial imperatives which are to have early certainty of free-to-air coverage and related revenue:[25]

> If a rights broker or sports body holds the rights, they will want to know as far in advance as possible what TV coverage will be available so as to maximise sponsorship opportunities and to make logistical production arrangements. Equally, FTA networks will want to conclude broadcast arrangements well in advance of the start date of an event in order to plan for, produce and secure advertising and/or promotional opportunities as well as to make appropriate production arrangements.[26]

1.49 At the public hearing FACTS raised the desire for exclusivity of rights for pay television as being an issue of concern:

> We find ourselves in the position in many cases of having to deal with a company like News Ltd to acquire free television rights. Our concern with the proposals that are in the legislation is that there is no imperative on News Ltd to, in fact, deal with all the networks because the imperative is, at the end of the day, to ensure exclusivity for the pay television platform.[27]

1.50 In addition, FACTS had a particular concern with overseas events:

> In terms of the overseas rights holders of events such as cricket on the subcontinent, or cricket wherever, and in relation to ASTRA's comments that they are concerned about getting exposure on free television in Australia, I think that is a lesser concern to them than getting the maximum dollar they can, particularly when these organisations are also paying US dollars for those rights. So we do believe that there are a number of events that are currently the subject of extensive coverage on free-to-air television which, with the introduction of these events, would be bought by these large conglomerates and there would not be an incentive for them to have to deal with free television outside the scope of the framework that has been put in place, or it has been suggested be put in place.[28]

1.51 FACTS was also concerned that an event may be automatically de-listed without free-to-air broadcasters being aware that the rights to the event are available.[29] In its submission however, ASTRA contended that there is no evidence that any events on the list have occurred without the free-to-air networks knowing that the rights are available and the amendments in the bill will not alter this fact:

> Acquiring program rights is the business of commercial television. Added to this is the fact that sports rights holders want to create a market for their rights and will therefore contact all possible buyers to maximise demand. If one FTA network

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25 Australian Subscription Television and Radio Association (ASTRA), Submission 3, p 4.

26 Australian Subscription Television and Radio Association (ASTRA), Submission 3, p 4.

27 *Proof Committee Hansard*, Canberra, 8 June 2001, p 7.

28 *Proof Committee Hansard*, Canberra, 8 June 2001, p 7.

29 Federation of Australian Commercial Television Stations (FACTS), Submission 2, p 2.

> expresses no interest, a rights holder will as a matter of course approach all other possible FTA buyers who are highly visible in the Australian market.[30]

1.52 FACTS, in its submission, was concerned at the lack of certainty under the amended regime, however ASTRA argued that the new procedures are certain, simple and transparent and will reduce the administrative burdens and costs imposed on all parties by the current de-listing process:

> The Government's proposal provides certainty for sports bodies, broadcasters and viewers. It is transparent, reduces administrative burden for all parties and provides a safety net for the Minister to intervene. It is a sensible balance of responsibilities and obligations and does not detract from the objective of the anti-siphoning regime.[31]

1.53 The major criticism of the amendments in the bill from the free-to-air broadcasting sector is that the onus of proof is switched from the pay TV operators to free-to-air operators:

> The proposed amendments effectively reverse the current practice and place the onus of proof on free-to-air broadcasters to apply to the Minister to have events remain on the list if they believe rights have not genuinely been made available.[32]

1.54 FACTS considered that '[t]his is also a change from an objective to a subjective assessment of the situation'.[33] At the public hearing, ASTRA responded as follows:

> The FACTS concern is that there will be a shift in responsibility in that they would then have to do some work to convince the minister, if it came to an automatic de-listing, that they were not given a reasonable opportunity, or that they did not know that the events were available. They would have to make their case to the minister. Under the current regime they have the control in terms of saying yea or nay to rights before we can have them, and they get all the benefits out of the antisiphoning regime, in terms of control of those rights; and we have to do all the work to get anything de-listed so that we can use it, so that at least our pay TV subscribers can see it. We see the government's amendment shifting that slightly: we would do less work, but they would still have control and still get all the benefits. We do not see it as a major shift.[34]

1.55 Notwithstanding the concerns of the free-to-air television sector, the Committee is mindful that there have only been approximately 11 events removed from the anti-siphoning list since 1994 and understands that these de-listings have been uncontroversial. In the light of this limited use of the de-listing provisions, it does not seem likely that the worst of the free-to-air broadcasters' fears will be realised. The Committee suggests that the ABA monitor the effects of the new provisions to ensure that the intent of the anti-siphoning regime is being maintained.

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30 Australian Subscription Television and Radio Association (ASTRA), Submission 3, p 4.

31 Australian Subscription Television and Radio Association (ASTRA), Submission 3, p 3.

32 Australian Broadcasting Corporation (ABC), Submission 5.

33 Federation of Australian Commercial Television Stations (FACTS), Submission 2, p 2.

34 *Proof Committee Hansard*, Canberra, 8 June 2001, p 3.

1.56 While the pay TV operators supported the amendments in the bill, they proposed a longer automatic de-listing period of 10 weeks, rather than the proposed six weeks in the bill.[35] ASTRA contends that this would be reasonable because the free-to-air networks acquire rights to major sporting events as far as possible in advance:

> Given that the routine practice of the FTA TV networks is to acquire rights to events they are interested in a year or more from the commencement of those events, ASTRA considers that the period allowing for automatic de-listing could be reasonably extended to at least 10 weeks.[36]

1.57 ASTRA's submission gave examples of where free-to-air rights were acquired for major sporting events several years in advance of the events taking place:[37]

> Sporting rights holders are primarily concerned with maximising television exposure and broadcasting revenues for their events so they also attempt to conclude FTA rights sales as far in advance as possible.[38]

1.58 Ms Page informed the Committee that the six weeks automatic de-listing in the bill was a matter for judgment:

> Certainly there is no intention in the bill to discourage any process that might lead to the coverage of listed sports on free-to-air television. The six week period has been chosen simply to maximise all opportunities for free-to-air coverage of certain events.[39]

1.59 Officers from the Department of Communications, Information Technology and the Arts, explained to the Committee that the Department, in developing the bill, had consulted with members of both FACTS and ASTRA. It had weighed up the various concerns and concluded that six weeks gave the maximum opportunity for free-to-air coverage of an event, whilst being the minimum amount of time required by the pay TV industry to promote an event. The rest of the time is for negotiation.[40]

1.60 Because of its concerns about the amendments in the bill, FACTS, in its submission, suggested an alternative regime which would address the desire of the pay TV operators for a 10 week period to acquire, schedule and publicise de-listed events. In addition, this alternative regime, supported also by the ABC in its submission,[41] would allay its own concerns with the changes in the bill.[42]

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35 Australian Subscription Television and Radio Association (ASTRA), Submission 3, p 4; FOXTEL, Submission 1; Fox Sports, Submission 4.

36 Australian Subscription Television and Radio Association (ASTRA), Submission 3, p 4.

37 Australian Subscription Television and Radio Association (ASTRA), Submission 3, p 4.

38 Australian Subscription Television and Radio Association (ASTRA), Submission 3, p 4.

39 *Proof Committee Hansard*, Canberra, 8 June 2001, p 11.

40 *Proof Committee Hansard*, Canberra, 8 June 2001, p 14.

41 Australian Broadcasting Corporation, Submission 5.

42 Federation of Australian Commercial Television Stations (FACTS), Submission 2, p 3.

FACTS' alternative regime

1.61 FACTS' proposed mechanism would be that a pay TV broadcaster may give two weeks' notice, at any time during a three month period prior to an event, that it wishes to have an event de-listed. The event would be automatically de-listed if the Minister received no objection to the notice by the end of the two week period. If an objection was made to the notice, the de-listing would be halted. The pay TV operator could then request the Minister to make a determination that free-to-air broadcasters have had a reasonable opportunity to obtain the rights on reasonable commercial terms. If the Minister was satisfied that there had been a reasonable opportunity for this, the de-listing would proceed.

1.62 Under the FACTS alternate regime, the current de-listing processes would remain in place to allow a further application from a pay TV operator if a free-to-air broadcaster did not acquire the event after that time. FACTS contended that a pay TV broadcaster would likely provide the original notice as early as possible, and the Minister would therefore have sufficient time to undertake any relevant investigation well before the event. However, based on past experience where free-to-air broadcasters have not hindered de-listing applications, it is unlikely that the Minister would be involved at all.[43]

1.63 In its submission, FACTS enumerated for the Committee the following advantages with its alternative regime:[44]

- it removes the administrative burden where the issue is not contested;
- it alleviates pressure on the Minister six weeks prior to the event where the matter is contested;
- it creates more certainty in the process;
- it does not create a mechanism whereby the rules can be avoided;
- it creates a mechanism that ensures free-to-air broadcasters are aware of any event that is to be de-listed; and
- it provides more time for pay TV to acquire, schedule and publicise de-listed events.

1.64 Ms Page, when asked to provide a view on the FACTS alternative regime, responded as follows:

> The intention of the arrangements, as currently drafted, is that, where possible, the process would be automatic. As a general comment, any regulatory regime which requires one commercial body to signal to another commercial body what its intentions are will always be problematic. Secondly, the government considers that we are talking about the exception and not the rule, and that these arrangements do not arise very often. The minister would only be asked to exercise his discretion in a small number of cases. He currently has the ability to ask the ABA for advice in those circumstances, and that would continue. Thirdly, the government considers that it is unlikely that a rights owner would not seek, in every instance, to maximise

43 Federation of Australian Commercial Television Stations (FACTS), Submission 2, p 3.

44 Federation of Australian Commercial Television Stations (FACTS), Submission 2, p 4.

> both the audience and the revenue that the rights owner could receive by seeking maximum circulation or maximum broadcast of the product.[45]

1.65 Ms Debra Richards, Executive Director, ASTRA, told the Committee that given a choice between the FACTS alternative model and the existing regime, ASTRA would prefer the current regime because at present it can go to the Minister and make a case to get an event de-listed three or six months out.[46] In addition, ASTRA would favour the amendments in the bill even with the six week period rather than its preferred 10 week period, to the FACTS alternative.

1.66 The Committee considers that the Department has consulted with relevant parties and achieved an outcome which is adequate for all concerns.

ABA Investigation

1.67 The Selection of Bills Committee, in its Report referring the bill to this Committee, suggested that the Committee should consider the relationship of the proposed changes in the bill to the current ABA investigation.[47]

1.68 On 22 December 2000, the Minister for Communications, Information Technology and the Arts directed the ABA to conduct an investigation into the anti-siphoning list and to report to the Minister by 30 June 2001.[48]

1.69 The Committee received no submissions on this matter. When Senator Bourne asked the Department whether the bill should have been delayed till after the results of the investigation were available, Ms Page explained that:

> The review is making a recommendation to the minister in relation to what should be on the list. The minister would have to consider the recommendations put to him by the ABA in the first instance. Certainly, whatever regime is put in place by the legislation will work in tandem with the list, as it does at the moment, but the list had to be reviewed at [some] point in time, and the government thought it was prudent to do it now, given the advance purchase of major sporting rights.[49]

High definition television programming

1.70 There have been ongoing concerns since the release of the Government's policy on the conversion to digital television that high definition television (HDTV) will not be a sufficient driver to encourage the take-up of the new technology by the Australian community (see for example, the Committee's report on the Broadcasting Services Amendment (Digital Television and Datacasting) Bill 2000, June 2000). The amendments

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45 *Proof Committee Hansard*, Canberra, 8 June 2001, p 13.

46 *Proof Committee Hansard*, Canberra, 8 June 2001, p 3.

47 Selection of Bills Committee, Report No. 7 of 2001, dated 23 May 2001, Appendix 1.

48 *Broadcasting Services Act 1992*, Australian Broadcasting Authority (Investigation) Direction (No. 2 of 2000), dated 22 December 2000.

49 *Proof Committee Hansard*, Canberra, 8 June 2001, p 13.

relating to the HDTV transmission rules in the bill are designed to assist with the promotion of HDTV to the public.

1.71 According to the Minister's second reading speech the amendments will:

> … increase the flexibility of the digital television framework with respect to HDTV without undermining the integrity of the simulcast and HDTV quota rules.

1.72 Under the Broadcasting Services Act all mainland capital city television broadcasters are required to transmit full-time digital services in standard definition television (SDTV) mode in addition to their analog transmission as from 1 January 2001. From the end of 2002 they will also be required to transmit at least 20 hours per week of HDTV.

1.73 Whilst the Australian Broadcasting Authority (ABA) may make determinations to provide an exemption from the simulcast requirement for the analog and SDTV versions of specified programming,[50] these exemption provisions do not extend to the HDTV service. There is currently a requirement in the Act that the HDTV version of the broadcasting service be transmitted simultaneously as the analog and SDTV programs, and that it be the same as those programs.

1.74 In addition, all advertising or sponsorship matter on a HDTV service must be the same as that on the analog and SDTV services.

1.75 The bill, through the addition of clause 37EA in Schedule 4 of the Act, will enable the ABA to grant an exemption authorising commercial television broadcasters in non-remote areas to 'time-shift' HDTV programs - that is, to show the HDTV version of a program at a different time to when the SDTV/analog versions are shown. The exemption could be provided for up to one year with the ability to apply for renewal. The aim of this amendment is to enable good quality HDTV to be demonstrated during the day. Retailers can use this material to show consumers the benefits of HDTV receivers at point of purchase.

1.76 To ensure that this amendment does not encourage broadcasters to create HDTV material not available in SDTV format, broadcasters will be required to show these HDTV programs in SDTV within seven days, before or after, the HDTV version is shown.

1.77 In addition, new clause 37EA of Schedule 4, allows the ABA to determine that specified advertising or sponsorship matter on the HDTV version of a commercial television broadcasting service may be different from the advertising or sponsorship matter on the SDTV version of the service. This determination may apply for a maximum of two years from the commencement of the relevant simulcast period. This two year period will provide time for broadcasters to make the necessary investment and put in place the necessary equipment to provide the same range of HDTV local advertising as they provide in SDTV.

1.78 Corresponding provisions are applied (where relevant) to the national broadcasters in non-remote areas through new clause 37FA.

1.79 Clauses 37G and 37H in the Act provide for HDTV quotas for commercial broadcasters and national broadcasters in remote areas. They are the equivalent of clauses

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50 Broadcasting Services Act, Schedule 4, subclauses 6(9) and 6(10); and 19(9) and 19(10).

37E and 37F for non-remote areas except that the power to make standards requiring HDTV quotas for remote areas is discretionary and not mandatory.

1.80 Items 10 and 11 of the bill amend clauses 37G and 37H respectively so that if regulations are made determining HDTV quotas for commercial broadcasters and national broadcasters in remote areas, the regulations would enable the ABA to make determinations which impose conditions and exceptions which operated in a similar way to new clauses 37EA and 37FA.

Reaction in submissions and by witnesses

Exemption relating to specified televised programs

1.81 FACTS informed the Committee that as HDTV is a new technology in the Australian marketplace, it is important that retailers have the capacity to demonstrate the benefits of HDTV to consumers:

> The US experience has shown that a lack of HDTV material during retail hours to showcase HDTV has caused a level of frustration amongst retailers and consumers who cannot see HDTV demonstrated when they are in retail outlets.[51]

1.82 FACTS welcomed the intent of the provisions which would enable the broadcasting of HDTV material which was exempt from the simulcast provisions, but had concerns in relation to the broadcasting of a demonstration loop tape (see below).

1.83 ASTRA's submission raised the issue that although the term 'time-shifting' is used in the explanatory memorandum and the second reading speech to the bill, the term itself is not defined in the bill. The Committee notes that the term 'time-shifting' is not used in the bill so does not require definition. However, the concept is described in the bill in new subclauses 37EA(6) and 37FA(6) (items 8 and 9 respectively).

1.84 ASTRA was concerned that the amendments in the bill, should not be used to subvert the current legislation that prevents commercial free-to-air broadcasters from multichannelling. ASTRA thought that the amendments in the bill may impact on pay TV because they provide an avenue for the free-to-air broadcasters to undertake a form of multichannelling which is the province of the pay TV broadcasters. According to ASTRA:

> Being able to time shift effectively amounts to multichannelling. Subject to the ABA determination, the amendments allow the FTA networks to broadcast different programs in HDTV mode at different times on a different channel, without restriction. While the program must then be broadcast in SDTV mode, there are no restrictions on the kinds of programming that may be transmitted in HDTV, except that which the ABA imposes.[52]

1.85 At the public hearing however, ASTRA informed the Committee that it now understood the amendments related to the broadcast of a demonstration loop tape, and to this

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51 Federation of Australian Commercial Television Stations (FACTS), Submission 2, p 5.

52 Australian Subscription Television and Radio Association (ASTRA), Submission 3, pp 5 and 6.

it had no objections. ASTRA stressed however, that this needed to be specified far more clearly in the explanatory memorandum to the bill:

> The purpose of the HDTV amendment needs to be very clear in the Explanatory Memorandum to [the bill]. The Memorandum must give clear guidance as to the types of exemptions that can be determined by the Australian Broadcasting Authority (ie. loop tapes only).[53]

1.86 The programs that qualify for HDTV 'time shifted' transmission are those which fall within an ABA determination. According to ASTRA's submission, the ABA has a wide discretion with respect to making determinations and the legislation does not indicate the sorts of programming that these determinations might encompass. The ABA may make further determinations under the time shifting provision with respect to programs and advertising.

1.87 ASTRA's concerns stemmed from what it considered had been wide-ranging ABA determinations made in relation to exemptions from the SDTV/analog simulcast requirements:

> Given that the ABA has already allowed exemptions to what we see as multichannelling under the exemption they are allowed to give for standard definition—I think they did an exemption in February this year for the cricket finals—then that sort of program, which is long-term programming and may be repeated, would cause concern for us because it is the sort of thing that we do now as pay TV operators. We might show live the sport that comes in overnight and then repeat it the following day.[54]

1.88 Whilst ASTRA would prefer a provision or avenue to allow comment on the making of further determinations with respect to this kind of programming, the Committee notes that these determinations are disallowable instruments and can be disallowed by either House of Parliament if the ABA were to issue a determination which was at odds with the Act.

Demonstration loop tape

1.89 One of the measures to promote the benefits of digital television to Australian viewers, and to assist the early take-up of HDTV in Australia, is the creation by broadcasters of a 30 to 60 minute tape of extracts of high definition material for promotional purposes. The tape would be broadcast on a loop basis to enable retailers to tune to the broadcast to demonstrate the benefits of high definition to their customers:

> [s]uch a tape would typically show extracts from programs and possibly material filmed particularly for the tape to demonstrate the superior technical capabilities of HDTV. The tape would not contain whole programs and, given the initial availability of material, would be unlikely to contain material recently broadcast on the analog and SDTV service.[55]

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53 Australian Subscription Television and Radio Association (ASTRA), Submission 3a, p 3.

54 *Proof Committee Hansard*, Canberra, 8 June 2001, p 2.

55 Federation of Australian Commercial Television Stations (FACTS), Submission 2, p 5.

1.90 As mentioned above, ASTRA was not opposed to this exemption to the HDTV simulcast requirement:

> To the extent that FACTS wants the opportunity to demonstrate HDTV in retail outlets via a "loop tape" of no more than 30-60 minutes, ASTRA has no objection as long as this exemption is clearly defined and restricted.[56]

1.91 According to FACTS, the requirement that broadcasters show these exempt HDTV programs in SDTV within 168 hours (seven days) before or after the HDTV version is shown is problematic as regards a demonstration loop tape. The current drafting of new clause 37EA(6) would preclude the broadcast of such a promotional tape:

> A promotional tape would simply be unsuitable for mainstream audiences and would not find a place in primary SD/analog program schedules.[57]

1.92 At the public hearing however, the Department made it clear that the intention of the legislation was to ensure that HDTV programming would also be available in SDTV/analog mode. When Senator Bourne asked the Department whether there would be objections to a loop tape being broadcast, Ms Page replied:

> I cannot comment on particular proposals. All I can do is indicate the government's intention behind the bill as currently drafted. The government expressed concern that it did not wish to have the creation of material, however circumscribed, which would be shown only on HD. The government did not want to open the prospect for multichannelling and the government wanted material which could be compared through the joint transmission on HD and SD.[58]

1.93 The legislation is not drafted to specifically allow the broadcast of a demonstration tape:

> **Senator MARK BISHOP**—How do you see it working in practice with the tape in the retail stores?
>
> **Ms Page**—At the moment it is not a tape. The way the legislation is drafted, it must be a program. The program would be shown on HD television, presumably during retail hours, and at some stage a week either side of that transmission the broadcaster would then show the same program on standard definition television.[59]

1.94 As a consequence, 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.

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56 Australian Subscription Television and Radio Association (ASTRA), Submission 3a, p 3.

57 Federation of Australian Commercial Television Stations (FACTS), Submission 2, p 6.

58 *Proof Committee Hansard*, Canberra, 8 June 2001, p 12.

59 *Proof Committee Hansard*, Canberra, 8 June 2001, p 11.

Exemption relating to advertising or sponsorship matter

1.95 In its submission, FACTS welcomed the amendments which give an exemption from the HDTV simulcast provisions for advertising or sponsorship matter. It informed the Committee that currently, broadcasters are not in a position to transmit in each licence area high definition programming that separates out different commercials for different licence areas:

> Expensive presentation equipment duplicating the existing analog/SD equipment is required in each station's local studios to insert local advertisements into a HDTV service. This will involve the re-design and construction of studio space, and the availability and installation of equipment from overseas.[60]

1.96 According to FACTS, these amendments will enable broadcasters to make available to Australian consumers, native HDTV programming in advance of the legislative quota requirement of at least 20 hours per week which takes effect from 2003. The availability of native HDTV programs will provide a major driver for the take-up of HDTV television receivers and set top boxes.[61]

1.97 However, Regional Broadcasters Australia Pty Ltd (RBA), which represents regional commercial television broadcasters, whilst supporting the exemption for the simulcast of advertising or sponsorship matter, was not so sanguine about the fact that the period specified in an ABA determination which authorises the exemption, must not be more than two years from the commencement of the simulcast period for the licence area concerned (new subclause 37EA(5)):

> This period is far too short for regional markets, because of the huge cost and complexity of television distribution systems in those markets. There are no obvious policy reasons for imposing any time limit on the ABA's determination power. If Parliament believes that it should be limited, then regional broadcasters submit that the limit should be at least five years.[62]

1.98 Regional television stations are not required to commence digital transmission until 1 January 2004 and their HDTV transmission quota requirement comes into effect two years after SDTV transmission begins. According to RBA, however, many stations plan to begin digital services as early as calendar 2001.[63]

1.99 Whilst the amendment in the bill is intended to provide time for broadcasters to make the necessary investment and put in place the necessary equipment to provide the same range of HDTV local advertising as they provide in SDTV, RBA submitted that the proposed two year limit may persuade some stations to delay starting digital services till closer to 2004 in order to postpone the unanticipated expenditure on the HDTV service as long as possible.

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60 Federation of Australian Commercial Television Stations (FACTS), Submission 2, pp 4 and 5.

61 Federation of Australian Commercial Television Stations (FACTS), Submission 2, p 5.

62 Regional Broadcasters Australia Pty Ltd, Submission 6, p 1.

63 Regional Broadcasters Australia Pty Ltd, Submission 6, p 2.

1.100 RBA recommended that subclause 37EA(5) should ideally be omitted from the bill. If this is not acceptable, then the words '2 years' should be replaced with '5 years'. A supplementary submission from FACTS supported this recommendation.[64]

Exclusion from datacasting genre conditions

1.101 Schedule 6 in the Broadcasting Services Act sets up a system for regulating the provision of datacasting services. It establishes the licensing system and contains detailed specifications for datacasting services to ensure that they will not become de facto television or radio broadcasts. The main restrictions on datacasting content are restrictions on the provision of certain genres of television programs and restrictions on the provision of audio content.

1.102 The bill amends Schedule 6 of the Act (items 13 to 17 and 19) so that foreign-language news and current affairs programs, and not simply foreign-language news bulletins (which may include discussion commentary or analysis) are excluded from the datacasting genre conditions. The amendment specifies that foreign-language news and current affairs programs are not category B television programs. A 'foreign-language news or current affairs program' is a news or current affairs program which is wholly in a language other than English. However, minor and infrequent use of English, and English language subtitles or captioning, are ignored.

1.103 Submissions did not address this aspect of the bill.

Issuing of apparatus licence

1.104 Section 100 of the *Radiocommunications Act 1992* allows the Australian Communications Authority (ACA) to issue apparatus licences. However, subsection 100(s) prohibits the ACA from issuing an apparatus licence authorising operation of a transmitter within a part of the spectrum designated under subsection 31(1) of the Act (ie within the broadcasting services bands spectrum) unless the issuing of the licence is in accordance with:

- a decision of the ABA under subsection 34(1) of the Broadcasting Services Act; or
- an agreement between the ACA and the ABA made under subsection 31(2) of the Radiocommunications Act.

1.105 The ABA is able to make spectrum available for transmitting datacasting services under subsection 34(3) of the Broadcasting Services Act. Accordingly, item 20 of the bill amends paragraph 100(2)(a) of the *Radiocommunications Act 1992* to allow the Australian Communications Authority to issue an apparatus licence (including a datacasting transmitter licence) in accordance with a decision of the ABA under subsection 34(3) of the Broadcasting Services Act.

1.106 Submissions did not address this aspect of the bill.

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64 Federation of Australian Commercial Television Stations (FACTS), Submission 2a.

Recommendation

The Committee recommends that the bill be passed without amendment.

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Senator Alan Eggleston

Chair