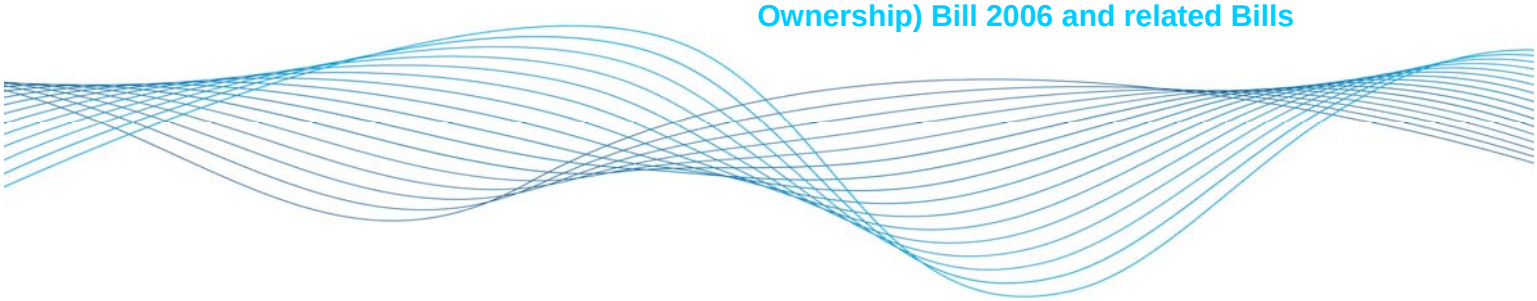

Inquiry into Broadcasting Services Amendment (Media Ownership) Bill 2006 and related Bills

Submission to Environment, Communications, Information Technology & the Arts Senate Committee
25 September 2006

Contact: Debra Richards
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AUSTRALIAN SUBSCRIPTION TELEVISION & RADIO ASSOCIATION

SUMMARY

- The Media Bills will have a significant and substantive impact on the subscription television sector and do little to redress the current imbalance which favours the incumbent free-to-air commercial networks.

- ASTRA's comments mainly relate to the Digital TV Bill.

- The key decisions favouring the commercial networks have been implemented while the 'use it or lose it' proposal to reform anti-siphoning and address part of the regulatory imbalance for the subscription television sector is still up in the air.

- ASTRA supports the proposed Use it or Lose it scheme but seeks legislative certainty for such a scheme.

- ASTRA's members have been, and continue to be, the drivers of digital television innovation in Australia and yet the Digital TV Bill continues to prop up the networks lack of action to promote digital terrestrial television with continued 'assistance' and no return to the public.

- A fair and stable regulatory framework is crucial to the consolidation of and future investment by the subscription television industry and is critical to deliver the flow-on effect of ASTRA's members' continuing investment in services to benefit all consumers throughout rural, regional and metropolitan Australia.

- ASTRA opposes any provisions to allow free-to-air multichannelling in the absence of fundamental reform of the anti-siphoning scheme.

- ASTRA is greatly concerned about specific provisions relating to limited sport on free-to-air multichannels which may allow the free-to-air broadcasters to circumvent the Government's intended policy. These provisions must be tightened to overcome what appears to be a technical oversight.

- Free-to-air terrestrial television networks should never be permitted to use the publicly owned spectrum gift to deliver subscription television services. This policy should be incorporated in the Digital TV Bill.

- True HDTV must be showcased and promoted by the commercial broadcasters on their primary digital channel. Further true HDTV of 720p or 1080i which is accepted worldwide should be mandated as the acceptable standard for HDTV in Australia.

- A number of provisions rely on the analogue switch-off date (end of simulcast period or digital switch-over). The Digital TV Bill should clearly specify such a date rather than leaving it to regulation.

- The amendments to the BSA must include the Government's announced policy on datacasting. For competitive neutrality, ASTRA supports the Government's policy of a prohibition on the datacasting spectrum being used for subscription television. This policy should be incorporated in the Digital TV Bill.

- ASTRA also supports Channel B being used for new services. This policy should be incorporated into the Digital TV Bill.

- The free-to-air networks should not be permitted to bid for the Channel B licence. This provision is a reversal of the Government's previous position and has no justification given the fact that free-to-air networks will have a substantial first mover advantage over potential competitors. They have the content, infrastructure, brand and established long term profits.

- Competitive parity requires that the free-to-air networks should have the same Australian content, children's content and captioning obligations in relation to their multi-channel as exists in relation to their primary channel.

- **Annexure A** sets out specific legislative drafting comments on the Broadcasting Legislation Amendment (Digital TV) Bill 2006

- **Annexure B** includes specific legislative drafting comments on the Communications Legislation Amendment (Enforcement Powers) Bill 2006

- **Annexure C** sets out ASTRA's position on the Media Policy Reforms including the evidence for Use it or Lose it and free-to-air abuse of anti-siphoning; examples of Free-to air TV hoarding in 2006 and Q and A on proposed reform.

INTRODUCTION

ASTRA appreciates the opportunity to provide a submission to the Senate Environment, Communications, Information Technology & the Arts Committee's (**the Committee**) Inquiry into Broadcasting Services Amendment (Media Ownership) Bill 2006 and related Bills (**the Media Bills**).

ASTRA provides this submission on behalf of all its members including the subscription television platforms and the channels which are available on these platforms. ASTRA's membership totals 58 entities, including platforms and channels, representing 50 different media and communications businesses, 20 of which are Australian owned or based in Australia. A full list of ASTRA's members can be found at www.astra.org.au/members.asp.

The Media Bills as proposed will have a significant impact on the subscription television sector. In the main, ASTRA's comments relate to the Broadcasting Legislation Amendment (Digital Television) Bill 2006 (**the Digital TV Bill**).

BACKGROUND

As the Committee would be aware, ASTRA and its members have been an integral part of the Digital Terrestrial Television Broadcasting (**DTTB**) debate - essentially the path to digital conversion for terrestrial broadcasters and the impact on other broadcast and media sectors - since 1997. ASTRA has contributed to the policy and legislative frameworks of 1998 and 2000 (including relevant inquiries of the Committee), and to the most recent reviews conducted by the Australian Government in 2004 and 2005 into DTTB as well as the House of Representatives' Standing Committee on Communications, Information Technology and the Arts 2005 Inquiry into the Uptake of Digital Television.

In these forums ASTRA has identified the need for Government to take an holistic approach towards assessment of and amendment to the current regulatory regime – changes to which will have an extensive impact upon the subscription television sector.

At the same time ASTRA's members have been at the forefront of delivering digital services to Australian consumers (via satellite and cable) and continue to develop new and innovative services to take Australia into the digital age. This is in spite of the extraordinary competitive advantages given to the commercial television networks through the sports anti-siphoning regime and their exclusive use of publicly-owned spectrum to exploit and provide DTTB services.

The subscription television sector has now spent more than $9 billion in the development of Australian television. The sector was the first to deliver digital television (as mandated via digital satellite) to the Australian consumer and continues to lead the way in delivering choice and state of the art digital television services without a legislative mandate or the financial and regulatory benefits provided to its competitors.

The most recent large investments have been the provision of new digital services from March 2004 on both the AUSTAR and FOXTEL platforms with a total investment of over $1 billion. In addition, OPTUS launched (in mid 2003) the C1 satellite that is largely used to deliver these new digital subscription television services. OPTUS has since upgraded its

existing cable network allowing it to carry a digital service, launched in October 2005 and expects to deliver its D1 satellite before the end of 2006 and its D2 satellite at the end of 2007.

As you know the Australian subscription television sector has announced a switch-off date for its analogue services of March 2007. Having only launched new digital services from March 2004 on both AUSTAR and FOXTEL and OPTUS digital from October 2005, this is a very impressive timetable by any measure. As at September 2006, approximately 90% of Australian subscription TV households receive a digital service. This has been a major initiative requiring a substantial commitment from all parties, not only for the major technical conversion required but the extensive marketing and education campaigns which need to accompany such a conversion.

This conversion has been undertaken without the extraordinary benefits given to the incumbent and extremely profitable commercial broadcasters such as a continued protected oligopoly; gift of public spectrum; restrictions around potential datacasters; and direct financial assistance to regional broadcasters ($255million by way of licence fee rebates and direct grants).

The digital switchover date for terrestrial free to air television is still ‘up in the air’ and continues to allow the commercial networks to ‘sit on’ spectrum without any incentive to either promote digital terrestrial television nor provide any return to the Government or more importantly the Australian public.

After 50 years of a very privileged position in broadcasting, ASTRA maintains that the well established and extremely profitable commercial broadcast sector no longer requires its continued protection and privilege. It is time to cut the umbilical cord.

GENERAL COMMENTS

Subscription television is still a relatively new but increasingly important competitor in the Australian television entertainment market. In the past 10 years it has introduced new voices, new players and new outlets for Australian and international content.

Subscription television is also the major investor in Australian broadcasting in the past decade – in cable and satellite infrastructure, broadcasting systems and programming investment, in new and award winning exclusive programming and acquired programming from a range of local, independent and overseas sources.

The competition from subscription television is a crucial aspect in encouraging the uptake of digital television. However, significant continued investment, competition and the evolution of new consumer services and employment cannot be robust if legislative advantage continues to be given to the dominant commercial television broadcasters. Investment will only continue with a stable and balanced regulatory environment. Unfortunately, the Government's Media Bills continue to tip the balance well and truly in favour of the incumbent free-to-air broadcasters.

Since the launch of DTTB in January 2001, the free-to-air terrestrial broadcasters have been afforded various legislative flexibilities to provide enhanced services and multiple channels. It is ASTRA's view that commercial networks in particular have done very little to make the most of these opportunities to encourage digital take-up. It is entirely inappropriate to provide further flexibilities to the subscription television industry's competitors without balancing this against the entire regulatory media framework.

High Definition Television (HDTV)

Overall it is extremely disappointing that the Government has not moved to have broadcasters make more of what they were given the spectrum for in the first place – the centrepiece of the DTTB legislative framework – the provision of HDTV. Not only is there no increase to the relatively low current quota, equivalent to 20 hours per week, nor any mandated adherence to the worldwide standard of true HDTV (ie 720p or 1080i) but now the Digital TV Bill provides that broadcasters can abandon HDTV from 2009 with still no meaningful return to the public for the exclusive use of the spectrum.

From the outset, ASTRA has argued there should be equal opportunity for others to access the spectrum for digital terrestrial broadcasting, on-line services and other emerging communications to promote diversity and provide substantial Government revenue.

However at the time, the commercial TV broadcasters successfully argued that they should each be given a 7 MHz channel, to broadcast digital terrestrial television. Their argument was predicated on the notion that the spectrum would be used for HDTV. Strategically this locked up large amounts of public spectrum and prevented any developed debate about the potential for other new and innovative services including additional commercial television licences.

However, the importance of HDTV as advocated by the commercial networks was accepted by Parliament and indeed the Committee. The legislation was passed in 1998 with subsequent amendments in 2000. As such, the basis for the grant of the valuable 7 MHz of spectrum to incumbent broadcasters is for the provision of HDTV services made via express

and implied commitments by the commercial television broadcasters to Government. These commitments are the centrepiece of the framework agreed to and passed by Parliament.

Indeed it was on the basis of the legislative HDTV mandate that many businesses and consumers made significant financial investments in rolling out both services to facilitate HDTV, as well as the associated infrastructure and training, in both regional and metropolitan Australia.

ASTRA considers the current HDTV quota of 1040 hours per year should not only be retained but increased over the simulcast period. It is also reasonable to expect that all content produced in HDTV should be broadcast in HDTV. Further true HDTV of 720p or 1080i which is accepted worldwide should be mandated as the acceptable standard for HDTV in Australia.

True HDTV must be showcased and promoted by the commercial broadcasters on their primary digital channel. As the overriding reason for the grant of additional 7 MHz of spectrum to each of the free-to-air broadcasters, HDTV should not be 'siphoned' off to a secondary channel via proposed multichannelling.

Multichannelling and Removal of Restrictions

ASTRA's views on multichannelling by the free-to-air broadcasters are well known and recognized in the current regulatory framework for DTTB. This includes a prohibition on multichannelling by the commercial broadcasters by virtue of the simulcasting requirements with exceptions for overruns into news programs and allowances for enhanced programming (to counteract impact on subscription television); and genre restrictions applying to the national broadcasters (to counteract impact on both commercial television and subscription television broadcasters). These restrictions also recognised the anti-competitive implications of the anti-siphoning regime.

ASTRA is opposed to permitting the free-to-air broadcasters to multichannel (whether by removing the genre restrictions on the national broadcasters or removing the multichannelling restrictions on the commercial free-to-air broadcasters) in the absence of abolition of the anti-siphoning scheme. At the very least there must be fundamental reform of the scheme which must be made certain and referenced in legislation. ASTRA cannot accept that the "backdoor" multichannelling provisions from 2007 and 2009 are sufficient to address the competitive imbalance that already exists between the free-to-air television sector and the subscription television sector.

Anti-siphoning Review and Use it or Lose it

ASTRA has continued to monitor the broadcast coverage by free-to-air broadcasters of events listed on the Minister's anti-siphoning list. ASTRA's research, conducted in conjunction with Premier Media Group, already provides extensive evidence which warrants further scrutiny of the list, particularly in relation to events such as competitions and tournaments which comprise multiple matches.

Annexure C to this submission sets out ASTRA's position on the media policy reforms including the evidence for urgent anti-siphoning reform to deliver more live sport on television for Australian viewers.

Results of ASTRA's research, independently audited by Ernst & Young, shows the long term abuse by free-to-air networks with on average (for years 2000 to 2005) only 16% of the hours captured on the anti-siphoning list broadcast live, just 23% broadcast live, delayed or as highlights which leaves 77% of the captured hours not shown at all.

While the scheme was ostensibly set up to guarantee continued free-to-air coverage of events of national importance and cultural significance, the evidence of the lack of broadcast coverage of listed events by the free-to-air broadcasters proves it has only ever guaranteed an unfair competitive advantage, exploited primarily by the commercial free-to-air networks to the detriment of the growth and potential future development of subscription television in Australia; of sporting codes and their various representative sports bodies and of the Australian viewing public.

ASTRA supports the introduction of a use it or lose it scheme, however to provide certainty and some semblance of balance within the proposed reforms, such a scheme must be made certain and transparent in legislation.

ASTRA questions why the provisions of the Bill require the anti-siphoning review (to consider the ongoing rationale for the anti-siphoning scheme after 2010) to be conducted by 31 December 2009 when the further multichannel advantages for free-to-air broadcasters apply from as early as 1 January 2007 and then 1 January 2009. ASTRA seeks amendments to bring any review in line with provisions that benefit free-to-air broadcasters.

ASTRA considers that the provisions for the review, whether conducted now or in 2009 as proposed, must be undertaken with the presumption that the scheme is well passed its use by date.

New digital services on datacasting spectrum

ASTRA welcomes the Government's decision that the datacasting spectrum should be used for new and innovative services, specifying such services as DVB-H mobile television. ASTRA has always maintained that DTTB provides the opportunity for new voices and new and innovative services, rather than setting up the incumbent commercial broadcasters as the exclusive gatekeepers of the digital spectrum.

The amendments to the Digital TV Bill must include the Government's announced policy on datacasting. For competitive neutrality, ASTRA supports the Government's policy of a prohibition on the datacasting spectrum being used for subscription television. This policy should be incorporated in the Digital TV Bill.

The free-to-air networks should not be permitted to bid for the Channel B licence. This provision is a reversal of the Government's previous position and has no justification given the fact that free-to-air networks will have a substantial first mover advantage over potential competitors with their content, infrastructure, brand and established long term profits.

ASTRA also supports Channel B being used for new services. This policy should be incorporated into the Digital TV Bill.

Broadcasting Legislation Amendment (Digital Television) Bill

ASTRA has a number of concerns relating to the Digital TV Bill, not the least being the guaranteed provisions favouring the free-to-air networks with a complete absence of provisions to implement 'use it or lose it' or to redress the regulatory imbalance for the subscription television sector.

Provisions to 'protect' the commercial networks include the Minister's veto power over allocation of new commercial licences ('not in the public interest'), the ability to provide an HDTV multichannel from 1 January 2007 and a SDTV channel from 1 January 2009 with **NO** market based payment (no return to Government for exclusive use of the spectrum); **NO** return to the public with public interest obligations, and as such **NO** Australian content obligations, **NO** children's television obligations, **NO** closed captioning and **NO** standards; and continued protection with **NO** allocation of a 4th commercial network.

ASTRA notes the prohibition on no 'listed' sport; however ASTRA has highlighted its concern with this provision which may allow free-to-air broadcasters to circumvent the Government's policy intention.

These provisions are extraordinary given the highly profitable networks which already have the content, the infrastructure, the brand and the viewers and is in stark contrast to the complete lack of 'transitional assistance' afforded subscription television on its introduction which was burdened with a limitation on number of channels, mandated technology, NO advertising (or advertising revenue) for first five years, immediate Australian content, restrictions on content and the most restrictive sports rights regime in the world.

Annexure A to this submission provides detailed legislative drafting comments on the Digital TV Bill and seeks, inter alia:

- Specific legislative reference to Use it or Lose it;
- Recognition of the Digital Action Plan to expedite digital conversion;
- Drafting to remedy a technical oversight that multichannel exceptions in relation to listed sports do not apply to automatically de-listed events;
- Drafting to clarify 'part' of an event in a 'news and current affairs program'
- Definition for "digital television switch-over date", given implications for a number of provisions within the Bill; and
- Competitive parity for Australian content, children's and closed captioning obligations.

ASTRA supports specific drafting comments by Premier Media Group in relation to the definition of anti-siphoning event; exceptions for news and current affairs and a Use it or Lose it scheme.

Communications Legislation Amendment (Enforcement Powers) Bill

ASTRA considers the current powers provided to ACMA to enforce broadcasting regulation strike an appropriate balance and do not need enhancing. ASTRA's members have demonstrated a conscientious and disciplined approach to the regulation of their services with the subscription television sector being subject to very few investigations in its ten year history.

ASTRA notes that the impetus for the reforms comes from ACMA's concerns that its enforcement powers were inadequate to deal with the outcomes of the Australian Broadcasting Authority's Commercial Radio enquiry in 2000 and ACMA's response to a breach of the Commercial Television Code of Practice by the Ten Network in relation to the Big Brother program.

It would be unfortunate if the need for the proposed reforms, which impact across all of the broadcasting community, has been generated by only a portion of this community (sectors other than subscription television) due to either these broadcasters' behaviour or their comparatively greater influence within the Australian community.

ASTRA notes that the Broadcasting Services Act 1992 (the BSA) was seen as moving towards a more market-based, less interventionist approach to broadcasting regulation. The Explanatory Memorandum to the BSA states (in relation to section 5 and the role of the ABA):

> It promotes the ABA's role as an oversighting body akin to the TPC rather than as an interventionist agency hampered by rigid, detailed statutory procedures, and formalities and legalism as has been the experience with the ABT. It is intended that the ABA monitor the broadcasting industry's performance against clear, established rules, intervene only when it has real cause for concern, and has effective redressive powers to act to correct breaches.

Section 4 of the BSA sets out the regulatory policy to be pursued in the administration of the BSA. The key elements are:

- Different levels of regulatory control are to be applied across services according to the degree of influence they 'are able to exert in shaping community views' in Australia, (s 4(1)); and

- Regulation should be flexible and should aim for an appropriate balance between catering for public interest considerations and imposing unnecessary financial and administrative burdens on broadcasting service providers, s 4(2).

Set against this background, it is disappointing that the Government has decided to impose the same level of enforcement on the subscription television sector as the commercial television sector. However, ASTRA notes that the Government has determined to amend ACMA's enforcement powers as part of the new media framework and accordingly provides detailed legislative drafting comments at Annexure B.

Television Licence Fee Amendment Bill

Given the fact that the commercial networks have not paid any market price for public spectrum, and in light of their continued protected oligopoly; the extraordinary advantages provided for their digital conversion, and no meaningful return to the public, ASTRA supports as a minimum, the inclusion of the revenue from multichannels in the free-to-air licence fees.

Broadcasting Services Amendment (Media Ownership) Bill

ASTRA supports the removal of the current media-specific foreign ownership rules in the *Broadcasting Services Act 1992* and the current newspaper-specific foreign ownership restrictions in the *Foreign Investment Policy* under *Foreign Acquisitions and Takeovers Act 1975*.

ASTRA has no comment at this stage on the specific proposals relating to the cross-media rules.

ASTRA would welcome the opportunity to discuss its views further and would be pleased to provide any further comment or clarification on the matters raised in its submission.

25 September 2006

Annexure A

Legislative Drafting Comments on Broadcasting Legislation Amendment (Digital Television) Bill 2006

Section/Paragraph	***Comment***
1. Page 11 of Explanatory Memorandum: Options: Anti-siphoning list events on multichannels: A3 Progressive change	• Does not include a reference to the "use it or lose it" scheme referred to on page 29 of the Explanatory Memorandum. ASTRA notes that there is no reference to the "use it or lose it" scheme in any of the Bills. ASTRA believes the scheme should be recognised in legislation to provide certainty.
2. Page 31 of Explanatory Memorandum:	• The Explanatory Memorandum states that the Government will release a Digital Action Plan to expedite full digital conversion. However, this is not recognised in the legislation.
3. General Comment in relation to anti-siphoning	• Clarification is required to ensure an 'anti-siphoning event' includes each event specified on a notice notwithstanding the fact that the event may be removed by reason of the operation of the subsection 115 (1AA) and/or subsection 115 (1B). ASTRA supports the submission of Premier Media Group in this regard. • To remedy this oversight ASTRA proposes that it be clarified that the multi-channelling exceptions in relation to sports on the anti-siphoning list notice do not apply to events that are automatically de-listed.

Schedule 1	
4. Item 18: Section 41H(3)(c) SDTV multi-channelled national television broadcasting service – restrictions on televising anti-siphoning events during the simulcast period 5. See also Schedule 2 Item 86 section 41C(3)(c), 41D(3)(c) and various references in Schedule 3 amendments.	• This paragraph provides for an exception to the restriction on televising anti-siphoning events on the SDTV multi-channel by national television broadcasters. The exception is for televising part of the event in a news or current affairs program broadcast on the SDTV multi-channel. • The same exception is included in numerous places throughout the Bill in relation to commercial television broadcasters and the televising of anti-siphoning events. • ASTRA is concerned that the reference to "part" of an event is unlimited. ASTRA notes the EM states that it is intended that this exception allows for the televising of parts of an anti-siphoning event within a sport segment. However, the exception will not cover, for example a sports highlights program which televised significant excerpts from previously un-televised anti-siphoning events, broken only by short commentary segments. Given this is very open to manipulation, ASTRA would prefer to see this intention acknowledged further in the section.
Schedule 2	
6. Item 4: sub-section 6(1): "earliest digital television switch-over date" and 7. Item 8: section 35A: reviews about the allocation of new commercial television broadcasting licences	• This review is to occur before the earliest digital television switchover date. ASTRA notes that the definition of earliest digital television switch over date means the earliest date on which a simulcast period (within the meaning of schedule 4) ends. As currently drafted, the legislation does not provide for an amended simulcast period, which means the review may be required to occur by 1 January 2008. • ASTRA is generally concerned about the failure to amend the simulcast

	period in this Bill. ASTRA notes that it is anticipated that this amendment will be made through regulations made under subparagraph 6(3)(c)(ii) of Schedule 4 (see page 62 of EM). However if this amendment is not made, the simulcast period will cease on 31 December 2008 for metropolitan areas. This has implications for a number of sections within this Bill.
8. Item 17: New subsections 122(7)(8)(9) and (10): program standards for children's programs and Australian content.	• The effect of these amendments is that during the simulcast periods, standards made by ACMA relating to Australian content and children's television do not apply to the television broadcasting service unless it is the core service. The EM says that the intention is that the standards will be required to be serviced by the programming provider on the simulcast or main channel, thereby ensuring the free availability of this content to the widest possible audience during the simulcast period. The EM also states that this will also provide time for multichannels to be developed and become established before they are subject to the full suite of regulatory obligations. • Subsection 122(9) also provides that the Australian content and children's television program standards do not apply to a licence issued under section 36 (BSB services) or subsection 40(1) (non BSB services) post 1 January 2007 during the first 5 years of operation. Again this concession is supposed to be designed to ensure that new services are able to emerge and establish operations in the market before the full spread of regulatory obligations is imposed. • ASTRA believes these exemptions are extremely unfair particularly in view of the fact that there were no similar exemptions provided to the emerging subscription television industry at its launch.

9. Item 29 paragraph 7.1 (ma) of schedule 2. Conditions of commercial television broadcasting licences – obligation to provide an HDTV multichannel during simulcast period	• ASTRA notes that this condition applies during the simulcast period. However, the definition of "simulcast period" has not been amended in the Bill to recognise the continuance of the period until at least 2010. If the amendment is not made by regulation as contemplated by the EM, then the obligation to provide an HDTV multi-channel would only apply until the end of 2008 which is inconsistent with the policy intention.
10. Item 66. Section 35AA. National broadcasters must provide HDTV multi-channelled national television broadcasting services during simulcast period etc:	• See Comment in relation to Item 29.
11. Item 69: New section 37DA-HDTV quotas and standards	• Note that HDTV digital mode is defined by reference to the program or service being broadcast or transmitted in digital mode in high definition format. There is no reference to a technical standard.
12. Item 70: subclause 37E(2) HDTV quotas	• Paragraph 37E(2)(b) provides an end date for the HDTV quota period. However, this is defined by reference to the end of the simulcast period. This has not yet been amended and could potentially only have a life of 2 years. • The obligation to comply with the HDTV quota for new commercial television broadcasting licences issued after 1 January 2007 will not commence until 2 years from the initial start date and ends at the end of the simulcast period. Query what licences this applies to as the section 40 licences are excluded and any new section 36 licences are not intended to be allocated until after the end of the simulcast period.
13. Item 85: subclauses 38(4) and (5) also subclause 38(6) Captioning	• Broadcasters do not need to provide captioning on the SDTV or HDTV multi-channel service during the simulcast period unless the program

	has been transmitted on the core/simulcast service. In addition the commercial television broadcasting licensees operating under subsection 40(1) licences do not need to provide captioning during the first 12 months of their service. ASTRA submits that this is extremely unfair particularly in view of the lack of regulatory parity provided to the emerging subscription television industry.
14. Item 88: new clause 60C – review of content and captioning rules applicable to multi-channelled commercial television broadcasting services.	• See our comments above in relation to the failure to amend the simulcast date as this is relevant to the date by which the review must be completed which could be 2007 if the date is not varied.
Schedule 3	
15. Item 3: section 41B(1)(2) and Services authorised by commercial television broadcasting licences during so much of the simulcast	• Paragraph (a) refers to the simulcast period for the licence area. See comments above in relation to amending the definition of simulcast period. If the amendment is not made, this section may have no work to do as it permits an SDTV multi-channel post 1 January 2009 until the end of the simulcast period which maybe 31 December 2008.
16. Section 41C: Services authorised by commercial television broadcasting licences after the end of the simulcast period:	• As outlined above, ASTRA is very concerned that the simulcast period definition has not been amended in the Bill. The effect of this is most evident in relation to new section 41C. If the amendment is not made, then section 41C permits the commercial television broadcasters to provide unlimited multichannels from 1 January 2009. This is clearly inconsistent with the policy intention.
17. Item 13: new clause 38(4)A of schedule 4:	• See comments above in relation to definition of simulcast period.
18. Item 14: section 41B(1) and 41D(1)	• Query references to subsection 41B(2). There appears to be two sections 41B

	inserted by the amendments.
19. Item 15: Section 41G(1)(2) – Primary commercial television broadcasting service.	• The obligation on ACMA to determine a primary commercial television broadcasting service is not compulsory i.e. "may". ASTRA believes this determination should be mandatory.

Annexure B

Legislative Drafting Comments on Communications Legislation Amendment (Enforcement Powers) Bill 2006

Section/Paragraph	Comment
1. Item 134 – Sections 141 and 142:	• ASTRA notes that the remedial directions provisions have been modelled on the remedial directions provisions in clause 53 of schedule 6 of the Broadcasting Services Act and the Telecommunications Act. ASTRA notes that section 53 of schedule 6 provides that a person is not required to comply with the notice under subclause (1) until the end of the period specified in the notice and that that period must be reasonable. This wording has not been included in section 141. • In addition clause 53 (4) of schedule 6 provides that the person is guilty of an offence if the person <u>intentionally</u> engages in the conduct. The word intentionally has been omitted from section 142 (1)(c).
2. Item 48 - Section 205W acceptance of undertakings:	• Subsection 205W(4): this subsection provides that ACMA may by written notice given to a person cancel an enforceable undertaking. ASTRA notes that there is no requirement on ACMA to outline the reasons for the cancellation which ASTRA submits is unfair.
3. Item 48 - Section 205Z matters to be included in an infringement notice.	• ASTRA has the following concerns in relation to the infringement notice provisions: i. the issue of an infringement notice should recognise that it constitutes no more than an allegation of breach and payment does not constitute an admission for any purpose; ii. no public announcement should be made about the issue of an infringement notice to, or the

	payment or non-payment of the amount by an identifiable person; iii. any public reporting of any infringement notices must be on an aggregate or anonymous basis. The recipient of the infringement notice should have the right to request a written copy of any information considered relevant by ACMA in making the decision to issue the infringement notice; iv. the recipient of the infringement notice should have the right to seek to have the infringement notice withdrawn by presenting material demonstrating that the factual basis on which the notice was issued was erroneous.

Annexure C

ASTRA'S POSITION ON MEDIA POLICY REFORMS

BACKGROUND

There are seven subscription television providers in Australia with more than 6.5 million viewers.

25% of Australian homes enjoy subscription television, and on average they watch most of their television (more than 55%) through subscription television services.

The channels on FOXTEL, AUSTAR and OPTUS are owned by more than 50 separate media companies, 22 of which are Australian owned or based, significantly contributing to media diversity in Australia.

SUBSCRIPTION TELEVISION'S DIGITAL INVESTMENT

The subscription television industry has invested $1 billion dollars in a world class digital platform for all parts of Australia. This is on top of the $8 billion already invested in infrastructure and content.

Together, the digital platforms provide 130 channels with:

- digital picture and CD quality sound
- an Electronic Program Guide
- near on demand movies
- interactive and enhanced services including premium sports, news and weather
- IQ - a personal digital recorder that allows FOXTEL subscribers to pause live television. AUSTAR will launch MyStar early next year.

Free-to-air has provided little digital innovation and not driven take up

The free-to-air networks were given free spectrum in 1998 and commenced Digital transmission in 2001. In all that time, they have failed to deliver attractive digital services to consumers. Only 17.9% of Australian homes have taken up the digital free-to-air service.

Media reforms substantially favour free-to-air TV and undermine subscription television

The proposed media reforms deliver relatively modest gains to consumers and do not advance Australia's wider digital industry as effectively as they might– they punish the innovative subscription television sector and reward the relatively indolent free-to-air sector.

The free-to-air networks, the most profitable in the world, have been rewarded with a gift of new services and continued protection with no 4th commercial network despite their comparative failure to deliver digital services. They have more opportunity and no obligation to deliver additional services to consumers.

Subscription TV is now faced with:

- *New competition from newly protected free-to-airs*.

- *New competition from new* services on the datacasting spectrum

- *Continued shackling by the anti-siphoning list* – the subscription television industry continues to be shackled by the anti-siphoning list which 'locks' it out of bidding with sporting bodies for over 1,300 events listed on the anti-siphoning list. 85% of these events are not shown live by FTA television.

ASTRA welcomes competition. But it must be on a level playing field.

Subscription television cannot keep investing, innovating and providing new services with both its hands tied behind its back. The reforms undermine the sector's ability to offer consumers:

- Live sporting events that are not shown by the free-to-airs
- Original and innovative Australian content
- New interactive digital television applications
- Broadband services to personal computers
- Mobile television
- Video on demand

A better outcome for consumers could be achieved by addressing two outstanding issues in media reform

1. **Use-it-or-lose-it approach to anti-siphoning**: The scheme the Minister has said she will introduce must have teeth through legislation so consumers can access live sport on television. The only way consumers will see more sport on television is with a Use it or Lose it sports rights regime that genuinely stops the hoarding of live sports rights by the free-to-air broadcasters.

2. **Allocation of licenses on the datacasting spectrum:** One block should be allocated for mobile TV and one for datacasting.

   The datacasting spectrum should not be allocated for subscription television services.

   The Government has decided not to use the spare spectrum for a fourth commercial TV network and there is no consumer benefit in just replicating already abundant subscription TV services to the home.

   ASTRA is pleased that the Minister has agreed with this position

ANTI-SIPHONING

The anti-siphoning list provides the free-to-air networks with exclusive first access to the broadcast rights of sporting events deemed to be of national and cultural significance. The list includes around 1,300 events from numerous sports. (Substantially more when Olympic and Commonwealth Games events are included).

The subscription television industry supports Communications Minister Helen Coonan's plan to introduce a "use-it-or-lose-it" regime to events on the anti-siphoning list. This will mean that the free-to-air networks either show the events, or they have to let somebody else show them.

FREE-TO-AIR ABUSE OF ANTI-SIPHONING

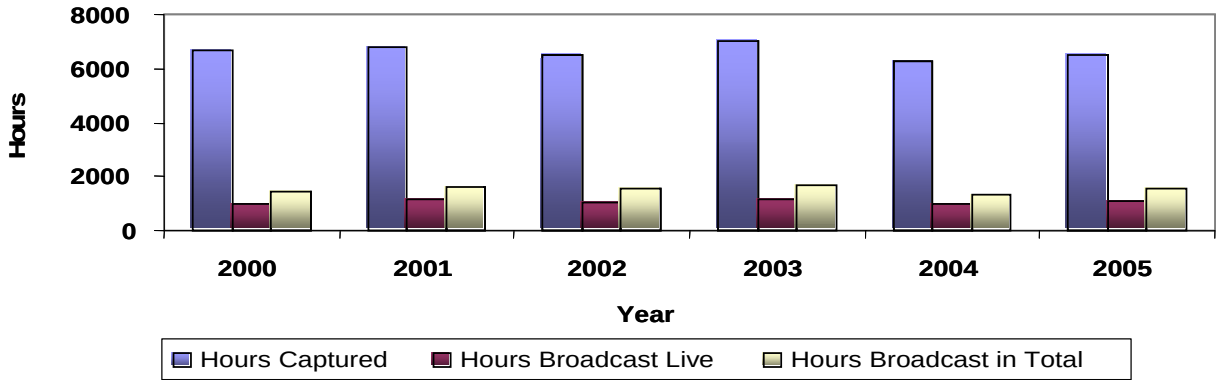
The free-to-air networks are abusing the privilege of the anti-siphoning list. They are buying rights to events they have no intention of showing and Australians are missing out on access to live sport on Television.

In the first six months of this year, of the total **4961** hours of sporting hours the free-to-air networks have exclusive first access to:

- Only **13.7%** were shown **LIVE** by free-to-air;
- A further **7%** were shown **delayed** or as **highlights** by free-to-air;
- Making a **total** of **20.7%** of available hours broadcast by free-to-air.

This compares to an average level of 16% live and 23% either live, delayed or as highlights over the past six years.

Hours captured vs. hours broadcast by free-to-air



FTA Coverage of anti-siphoning events	2000	2001	2002	2003	2004	2005
Hours Captured	6660	6767	6490	6997	6288	6503
Hours Broadcast Live	950	1170	1062	1159	975	1092
Hours Broadcast Live as a % of Hours Captured	14.3%	17.3%	16.4%	16.6%	15.5%	16.8%
Hours Broadcast in Total	1428	1605	1536	1645	1349	1560
Hours Broadcast as a % of Hours Captured	21.4%	23.7%	23.7%	23.5%	21.4%	24.0%

IMPACT ON SPORT DEVELOPMENT, LOCAL SPORT CLUBS

This situation has two key impacts on sport development at the grassroots:

1. Sports are missing out on a significant amount of exposure they would get if the networks were made to show the events or let someone else show them.

2. The restricted market means less competition for the rights, meaning reduced prices. Higher prices for broadcast rights means more money for sport development and local, grassroots sports clubs.*

** See attachment A soccer case study for more information.*

USE-IT-OR-LOSE-IT

The subscription television industry supports the Government's proposal for an effective use-it-or-lose-it condition to apply to events on the anti-siphoning list.

Under a use-it-or-lose-it system, the networks would be required to show the restricted events they buy, or let someone else show them.

Under the industry's proposed operation of use-it-or-lose-it, more live sport would be shown on Australian television.

- Any restricted event the networks DO NOT buy is removed from the list.

- If an event is bought by the networks and NOT SHOWN, it is removed from the list.

- For an event to be deemed as "used", the free-to-air networks must broadcast it:

    (1) **Live**, or near-live (within one hour of starting);

    (2) **Nationwide** (to more than 50% of the population); and

    (3) **In full**.

Once an event is removed from the list, all parties can continue to bid for it, allowing for a fairer, open market that provides greater benefits to the sporting bodies and sport-viewing public.

Use-it-or-lose-it will have NO IMPACT on the amount of sport shown on free-to-air television.

Under the reform, only the events that are NOT shown by the networks would be removed from the list.

Attachment A

SOCCER: A CASE STUDY

The removal of soccer from the anti-siphoning list was the best thing to happen to the long-overdue development of this sport, and the benefits are already being felt at all levels.

When soccer was on the anti-siphoning list, the game was receiving sporadic television coverage and was largely inaccessible to fans, despite the huge numbers playing it at junior level. As a result, it struggled to attract the interest of sponsors and the financial backing to help it to grow.

Channel 7 bought the television rights to broadcast the NSL, after a push by soccer's governing body to broaden the game's media appeal.

No commitment was given on how the game would be covered and instead of the move bringing the game to the mainstream media, Channel 7 broadcast only 1 match out of the 31 they owned the rights to. The remaining 30 matches were locked away by the network and never shown. Subscription TV was unable to secure the rights from Channel 7.

As a result of this hoarding by the Seven, the game virtually disappeared from TV screens, sponsors walked away and crowd numbers fell. Of course, the NSL also eventually collapsed.

When Soccer came off the anti-siphoning list, it allowed the new Football Federation Australia (FFA) to negotiate with ALL bidders for television rights to their newly formed A-League competition.

In 2006, FFA sold the rights to broadcast soccer in Australia for the next seven years to FOX SPORTS. The deal allows FOX SPORTS to broadcast all 90 A-League games a season plus Socceroos games and the Asia Cup competition.

All these games are now broadcast to viewers live, in full and uninterrupted.

The FFA has stated that the deal it was able to negotiate with FOX SPORTS has increased its revenue by 600-700%!

The additional funding from this deal can now be pumped into the development of the sport at the local grassroots level, benefiting young players, community clubs and professionals.

Soccer clubs are now able to seek funding assistance from the FFA to grow the sport in their communities, as well as develop initiatives such as soccer programs for children with special needs and soccer coaching programs.

Attachment B

EXAMPLES OF FREE-TO-AIR TV HOARDING IN 2006

WINTER OLYMPICS

Channel 7 broadcast **just 3 of an available 492** events live throughout the Torino Winter Olympics. Delayed coverage was scheduled up to 20 hours after events had taken place. This decision to delay coverage denied Australians the opportunity to watch live Dale Begg-Smith's Gold Medal winning performance in the Final of the Men's Moguls.

COMMONWEALTH GAMES

Channel Nine broadcast just 154 hours and 446 different events from the 2006 Commonwealth Games, this equates to **just 14% of all events** caught by the anti-siphoning list from the Games.

RUGBY UNION

Channel 7 broadcast the Wallabies' 3 Internationals played in July live in Sydney and Brisbane. Only 1 of the 3 Tests were broadcast live in Perth and **all matches were delayed in Adelaide and Melbourne**. In these cities, the deciding Bledisloe Cup match on July 29 was broadcast on delay only at 12:05am following a replay of the 40-year old movie *The Sound of Music*!

TENNIS

Channel Nine broadcast just 20 of the 284 **Wimbledon** matches protected by anti-siphoning live in July, 6 matches were broadcast on delay. This equates to coverage of just 9% of all protected events. Free-to-air coverage of the tournament did not regularly commence till half an hour after the start of each day's play to accommodate regular Channel Nine prime time programming.

Throughout the 2 weeks of the **Australian Open**, Channel 7 broadcast just 12% of all matches live. Coverage was delayed in some markets to accommodate regular prime time programming.

Since 2004, no free-to-air network has broadcast coverage from the **French Open**. Despite this lack of consistent coverage, the Men's and Women's Quarter Finals, Semi Finals and Finals will continue to be protected by anti-siphoning.

NETBALL

The ABC broadcast only delayed coverage of Australia's two match Test series against World Champions New Zealand in July. In place of live coverage of the Netball, the ABC chose to broadcast Creature Comforts and Star Portraits with Rolf Harris.

Attachment C

WHAT OTHERS SAY

GILLON McLACHLAN, General Manager of Commercial Operations

From our point of view we support the relaxation of the anti-siphoning list, we support use-it-or-lose-it and we would probably advocate going potentially further than that…. Relaxing the rules could increase competition and from our point of view, in markets like NSW and QLD, relaxing the rules could broaden the reach of our sport….. The AFL believes that we should decide where the game should be played out.

- Address to Sports Business Conference, Melbourne, 17 August 2006

JOHN O'NEILL, Chief Executive

…. And if you're an emerging …sport like us - I mean and people say well you should go free to air because that's where all the TV sets are. Well I'll say what will they offer me? Next to nothing. Therefore I can't pay to run the game. So, in this developmental stage of football, with Foxtel and FoxSports coming to the party with an offer that no one – no one – got within a bull's roar of, the decision was in the end very easy.

In terms of anti-siphoning generally … I think it's past its use by date. I think it's a form of protection that isn't perhaps as necessary as it might have been in the past and, and stifles competition…. You don't get the competitive tension that, that a seller of rights needs. It's like selling your house. You need a couple of bidders, but in our case we, we didn't get any bids from the free-to-airs and thank God for us there was a cable subscriber channel that really wanted to make FoxSports the home of football. So I think politically it's a hot potato but from someone who's now run two national sporting bodies, I haven't found anti-siphoning helpful.

- Address to the National Press Club, 26 July 2006

JOHN O'SULLIVAN, Head of Commercial Operations, FFA

Case in point with Football – we are not on the anti-siphoning legislation and we've just done a deal that's increased our revenue by 600-700%... the fact of the matter is that if we had been on the anti-siphoning list as it currently stands we would not have been able to do that deal, and from our point of view we are able to invest that money now into grass roots development, we are able to invest that into playing talent, we are able to invest that into a virtuous circle for the betterment of the sport. So from our perspective, we are very much in favour of a deregulated market on this …. The list needs a good review.

- Address to Sports Business Conference, Melbourne, 17 August 2006

Attachment D

QUESTIONS & ANSWERS

What is anti-siphoning?

The anti-siphoning list is a restrictive sports broadcasting rights regime that was introduced by the previous Government. The list contains more than 1,300 events that subscription television can not bid for directly until the free-to-air networks have decided that they do not want to bid for the event.
Australia's anti-siphoning list is the most extensive in the world with 1,300 events, compared to a significantly reduced number of events in the UK and none in the USA, Italy and New Zealand.

Why does the anti-siphoning list need to be reformed?

The list has been abused by the free-to-air networks who hoard sports on the list and does not work to deliver live sport on Australian television. In fact according to independently audited monitoring by ASTRA, from 2000 to 2005 only 16% of events on the list were broadcast live and only 23% of events on the list were broadcast at all.

How should the anti-siphoning regime be reformed?

The Minister for Communications, Helen Coonan, has announced as part of her media reform package that she will introduce a "use-it-or-lose-it" approach to the anti-siphoning list to stop the free-to-air Networks from hoarding sports on the list.

How would use-it-or-lose-it work?

Use-it-or-lose it would prevent sports being hoarded by free-to-air networks who buy the rights to sports on the list that they then do not show.. Any event on the anti-siphoning list NOT broadcast live and in full to over half the population would be removed from the list.

If use-it-or-lose-it is introduced, will I still be able to watch my team on free-to-air TV?

Use-it-or-lose it will have NO IMPACT on the amount of sport currently shown on free-to-air television.

After the scheme commences, the networks will continue to have total control over which events sports fans see on free-to-air. Only the events the free-to-air networks choose NOT to show would come off the list.

If an event comes off the list, the free-to-air networks can still bid for the sport if they choose.

Why should we risk changing a system that is working?

The system is not working – almost 80% of the events chained to the list are not shown by the free-to-air networks and sports fans are missing out.

The lack of a competitive process means that sports bodies are missing out exposure for their sports and on funds that could be dedicated to development at the local level.

Opening the market will mean more live and uninterrupted sport on Australian television.

The NRL and AFL are both seen on Pay TV, yet they are on the list? Doesn't this mean the system is working?

Subscription television is able to pick up the rights to some events (like individual AFL and NRL games). However this is achieved by negotiating with the free-to-air networks, rather than directly with the sporting bodies. That means that the money paid by subscription television to broadcast these events goes to the networks, not the sporting bodies. This benefits the networks but means that sports miss out on funds that could be pumped into junior and grassroots development.

The fact is that the anti-siphoning regime prevents subscription television from dealing directly with any sports body in the acquisition of sports broadcasting rights. Both the sporting body and subscription television are left at the free-to-air network's whim as to whether a deal can be done. In some circumstances, we may be able to achieve an outcome, (such as with the NRL), but in others we may not and that level of uncertainty is not a satisfactory position for any business, the sports bodies nor the sports fans.

How can you guarantee relaxing the anti-siphoning rules won't result in less sport on free-to-air?

Under the proposed change, it is only the events NOT shown that are opened up to all bidders.
Australia's free-to-air networks are the most profitable in the world. They are in the best financial position to bid for sports rights – even if they fall off the list. To illustrate the point, there is no anti-siphoning list for drama, but the big dramas like *Lost*, *Desperate Housewives* and *CSI* are all seen first on free-to-air because the highly profitable networks are able to bid more for the rights.

What impact would strengthening the use-it-or-lose-it provisions have on the sporting codes?

The sporting codes would be able to deal directly with all parties who broadcast their sport. They could secure more live exposure for their sports and benefit from increased competition with more funds from sports rights negotiations that could be channelled into junior and grassroots development.

They would also have more control over when and where their product is shown, because they would be allowed to negotiate directly with all parties, as opposed to being forced to deal exclusively through the free-to-air networks as occurs now.

What does subscription television want to take off the list?

Under a Use-it-ot –Lose-it approach, only the events that are NOT SHOWN by the free-to-air networks would come off the list. There would therefore be no impact on the amount of sport shown on free-to-air television.

How will this affect my constituents?

There would be two key positive impacts:

i) More money flowing through to grassroots sports clubs and local sport development thanks to more open competition for broadcast rights.
ii) More live sport on television in total.

There would be NO IMPACT on the amount of sport being shown on free-to-air television.

If use-it-or-lose-it is introduced, what's to stop subscription television taking all the best sport in Australia and making people pay to watch it?

This reform will NOT affect the amount of premium sport shown on free-to-air, but it WILL increase the total amount of sport shown on Australian television and the funds sporting bodies can invest in their development.

If the free-to-air networks show the events they get preferential access to, then those events will stay on the list. If the networks don't show them, someone else gets a go – sport won't be locked away from sports fans any more.

Are you saying that under "use-it-or-lose-it" if a sport falls off the list it should be off forever?

Releasing an event from the list does not mean that it cannot be shown by free-to-air or that subscription television will be successful in acquiring the event. It simply means that all parties can bid for it on fair and equal terms. If the free-to-airs want to show an event in future, they simply have to put in the best bid.

But would that mean that sport is lost to viewers on FTA forever?

No, the free-to-airs can show any event that is not on the list. They simply have to be the highest bidder under fair, open market conditions.

How can you guarantee grass roots sporting clubs will get more money under the use-it-or-lose-it system?

Sporting bodies will benefit from additional funds and exposure if they are unchained from the list. For example, Football Federation Australia has said its removal from the list delivered them 600-700% more for their broadcast rights than they received when they were listed. They also have 95% more exposure for their game. They have said that these benefits will naturally flow through to the development of soccer at the grassroots level.