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Senator Alan Eggleston
Chair
Senate Environment, Communications,
Information Technology and the Arts
Legislation Committee
S1.57
Parliament House
CANBERRA ACT 2600

Dear Senator

Broadcasting Legislation Amendment Bill (No.2)

Thank you for the opportunity to provide a submission to your inquiry and comment on the Broadcasting Legislation Amendment Bill (No.2) 2001 (the Bill). The following submission is provided on behalf of the Australian Subscription Television and Radio Association (ASTRA) and its members.

As you would be aware ASTRA is the peak industry body for subscription television and narrowcast radio. ASTRA represents subscription (multichannel) TV and radio platforms, narrowcasters and program providers. Our membership includes the major pay TV operators as well as stand-alone channels that provide programming to these platforms. Other members include narrowcast television and radio operators such as racing TV and radio and ethnic language and information radio, and major communications companies.

ASTRA notes that the Bill amends the *Broadcasting Services Act 1992* (the Act) and the *Radiocommunications Act 1992* in relation to additional commercial television licences in underserved areas; exemptions for HDTV simulcasting; and automatic de-listing of unwanted anti-siphoning events.

ASTRA's comments relate to the proposed HDTV exemptions and automatic de-listing. ASTRA has previously made submissions to the digital reviews relating to section 38B licences (underserved areas) and makes no further comment in relation to the relevant amendments proposed in the Bill.

Generally ASTRA supports the Bill as proposed. However ASTRA sees some merit in extending the proposed de-listing period from six to 10 weeks and has some concerns as to the circumstances in which HDTV programs will be exempt to 'time shift' and the wide discretion given to the Australian Broadcasting Authority (ABA) to determine such exemptions. ASTRA therefore seeks clarification as to the circumstances under which such exemption will be provided.

Automatic de-listing

The Bill amends section 115 of the Act to provide for an automatic process to de-list events from the Minister for Communications, Information Technology and the Arts' (the Minister's) anti-siphoning list of (sporting) where free to air (FTA) broadcasters have chosen not to acquire the event.

Comments

ASTRA's view on the particular issue of automatic delisting is well known and has been canvassed in its numerous submissions on the anti-siphoning regime to forums such as previous Senate Committee inquiries, relevant ABA inquiries, and most recently to the Productivity Commission Inquiry into Broadcasting.

The anti-siphoning regime established by Parliament is to prevent pay TV licensees from acquiring exclusive rights to broadcast events that should be freely available to the public. This is because, as explained in the regulatory impact statement to the Bill, "that the maximum public benefit from broadcasting of listed events, in terms of audience reach, is achieved when free to air broadcasters provide coverage."

The regime ensures FTA broadcasters have priority over pay TV licensees for the acquisition of all rights to listed (sporting) events. The regime however does not require nor compel FTA broadcasters to show those events once acquired. Subsection 115(2) of the Act gives the Minister discretion to remove an event from his anti-siphoning list where FTA broadcasters have chosen not to acquire an event.

ASTRA supports the Government's proposed amendments to section 115. As noted in the regulatory impact statement to the Bill 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. The Commission concluded in its inquiry that while some regulatory protection to prevent migration of major sporting events from FTA to pay TV is justified, it found that the current anti-siphoning regime has anti-competitive effects and its costs to the community as a whole exceeds its benefits.

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.

ASTRA supports this sensible policy approach to “reduce any unnecessary anti-competitive effects and improve the efficiency of the (anti-siphoning) regime - while ensuring the continued availability of significant sporting events on FTA television.” Such a sensible regulatory change can only be supported. It is a minor amendment to make some improvements and acknowledges the current administrative hurdles for pay TV to access rights to unwanted events.

The outcome streamlines a process and will allow pay TV access to unwanted listed events in a more timely manner. It is certain, simple and transparent, and will reduce the administrative burdens and costs imposed on all parties by the current de-listing process.

Current anti-siphoning provisions set FTA broadcasters up with substantial control over rights and when and if they will say yes or no in acquiring rights. If they do acquire the rights to an event (and they currently have first access to both pay TV and free to air rights), then pay TV can then attempt to get any rights available. If FTA broadcasters do not take up the rights and pay TV rights to the event are available, then pay TV must make a case to the Minister to start the de-listing process.

There is no time limit for a FTA broadcaster to acquire rights before events. If pay TV wants to broadcast these events they cannot do so until a FTA broadcaster acquires the event or has declined to acquire the event and the event is subsequently de-listed. In practice this often leaves little time for pay TV to acquire, publicise and use the event as a subscriber driver.

The proposed amendments will streamline this process for unwanted events. It will help to ensure more of the list is shown, not less, so that at least pay TV subscribers have the opportunity to watch events FTA networks do not want or cannot show.

There have been about 11 previous delistings under the current de-listing process. These include Cricket on the sub-continent and the Hong Kong Sevens Rugby competition. In order to have these events de-listed and allow pay TV access to the rights, 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.

The sensible proposal within the Bill bypasses this cumbersome process and also provides discretion for the Minister to intervene at any time and ‘re-declare’ the event if a FTA broadcaster makes a case that they have not had a reasonable opportunity to acquire the event. This is not radical surgery to the anti-siphoning regime but rather a ‘nip & tuck’.

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.

Additional Comments

Given the sports rights acquisition practices of FTA broadcasters ASTRA proposes a longer de-listing period of 10 weeks then the proposed six weeks.

The reality is that FTA networks acquire rights to major sporting rights as far as possible in advance. For example, the FTA rights deal for the AFL for 2002-2006 was concluded in 2000, the FTA rights to the 2001 Ashes Cricket series were bought in 1997 and the NRL FTA rights deal for 1998-2007 was concluded in 1997.

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.

ASTRA understands that one concern expressed by the FTA commercial networks under the Government's proposed amendments is that they will not be aware that broadcast rights to events on the anti-siphoning list are available. The evidence does not support this concern. 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 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.

There is no incentive for a rights holder to avoid, or deliberately delay, negotiations with a FTA network as this would work against the rights holder's commercial imperatives – which are to have early certainty of FTA coverage and related revenue. 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.

On the few occasions that rights to listed events have been acquired by a pay TV participant, the event has been de-listed because the FTA networks have been disinterested in telecasting the event.

There is no evidence that any events on the list have occurred without the FTA networks knowing the rights are available and the proposed amendments will not alter that fact.

Conclusion

The Bill is transparent in its objective and operation and simplifies an administrative procedure. 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.

HDTV exemptions

The Bill also amends the provisions of Schedule 4 of the Act relating to HDTV programming.

Currently the Act requires that HDTV is exactly the same as SDTV and there is no flexibility to allow differences between SDTV and HDTV as is currently allowed between SDTV and the analogue signal. The Act currently provides for the ABA to allow such differences between SDTV and analogue versions in certain circumstances.

The Bill will enable the ABA to grant an exemption authorising commercial and national FTA networks to 'time shift' HDTV programs. The term 'time shift' is used in the explanatory memorandum and second reading speech but is not defined. Essentially it means that the FTA broadcasters will be able to show the HDTV version of a program at a different time to when the SDTV and simultaneous analogue versions are shown.

The exemption for time shifting can be provided for up to one year for programs and up to two years for advertising and sponsorship, from the date of an ABA determination. FTA broadcasters will be required to show HDTV material in SDTV within a period of 168 hours (one week) before or after the time of the first transmission of the HDTV material. The HDTV material may also be transmitted more than once.

The reason given for the changes is to give retailers the opportunity to display the benefits of HDTV receivers to consumers at a point of purchase and to provide broadcasters with opportunities to invest in infrastructure (including new technologies) and advertising to develop HDTV. Apparently FTA broadcasters do not show enough quality programs during normal shopping hours (which is non-prime time for FTA broadcasters) to attract and 'showcase' HDTV qualities. Unlike pay TV, where prime time is all the time.

Comments

While ASTRA supports the Bill, it makes the following comments in relation to the possible impact of the HDTV exemption.

The Bill may impact on pay TV because it provides an avenue for the FTA broadcasters to undertake a form of multi-channelling. It certainly gives the FTA networks an opportunity to test their technology and perfect their HDTV products and programming and opens the way for the FTA networks to approach the ABA for approval of additional programming which can then be broadcast outside of the simulcast requirements. This concern is not new and relates to ASTRA's concern to maintain the integrity of the Parliament's decision to ban multichannelling for the FTA networks until at least 2005.

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. The programs that qualify for HDTV time shifted transmission are those which fall within an ABA determination.

The ABA has a wide discretion with respect to making determinations. The ABA may make further determinations under the time shifting provision with respect to programs and advertising. ASTRA would prefer a provision or avenue to allow comment on the making of further determinations with respect to this kind of programming.

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

Yours sincerely

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Executive Director