



Professor Richard Snape
Deputy Chairman
Productivity Commission
Level 28 , 35 Collins Street
Melbourne VIC 3000

Dear Richard,

BROADCASTING INQUIRY

Please find attached our submission to your inquiry into Broadcast legislation.

While we are represented by the Australian Subscription Television and Radio Association ("ASTRA"), in a quite detailed submission to the Commission, we thought that it was important to add our individual voice to your inquiry through this paper. The issues that you will need to form views on during your inquiry are vital to our business.

We believe that you have a difficult job given the specialised nature of broadcast legislation, its increasing isolation from other radio frequency, telecommunications and competition law, the privileges it confers and the length of time that it has been in operation.

We are scheduled to appear at the Commission's public hearing where we look forward to being able to answer any questions the Commission has in relation to our submission. However, should you have any questions please call Bruce Meagher.

Yours Sincerely,

John Porter
Managing Director



PRODUCTIVITY COMMISSION SUBMISSION

Introduction and AUSTAR's interest in the Commissions review.

AUSTAR welcomes the opportunity to make a submission to the Commission's enquiry into broadcasting. As the major provider of pay TV and communications services to regional and rural Australia, AUSTAR has a vital interest in the scope of issues being considered by the Commission.

AUSTAR is a member of ASTRA, the Australian Subscription and Radio Association which has also made a submission to this review. AUSTAR fully supports the submission made by ASTRA, particularly in relation to anti-siphoning, piracy and retransmission, but has thought it worthwhile to make a separate submission in its own right in order to address some additional areas which are not addressed in the ASTRA submission.

AUSTAR Background

AUSTAR is the second largest pay TV provider in Australia.

AUSTAR provides its pay TV services by way of MDS, satellite and by a cable network in Darwin. AUSTAR provides pay TV services to rural and regional Australia in NT, QLD (excluding Brisbane), NSW (excluding Newcastle and Sydney), Vic (excluding Melbourne and Geelong), SA (excluding Adelaide) and Tasmania (excluding Hobart). A map showing the AUSTAR service areas is attached as Appendix 1.

AUSTAR invests in parts of Australia shunned by much of corporate Australia.

Over the last five years, AUSTAR has invested \$600m establishing a pay TV business in regional Australia. Although this is still quite early in our business plan, we have established a robust foothold in our market place from which we are planning the introduction of a range of additional services. These services include the delivery of internet and high speed internet to our customer base, in addition to a range of potential telecommunications services.

AUSTAR is an example of a company that has demonstrated its commitment to rural and regional Australia. AUSTAR has 315,000 subscribers in a total service area of 2.1 million homes, meaning an average penetration of 15%.

AUSTAR's parent company is United International Holdings, Inc ("UIH"). UIH is a media investment company based in Denver, USA, that has investments in pay TV and telephony businesses in 22 countries around the world. UIH's support has enabled AUSTAR to be independent from the existing interests that dominate Australia's media and communications industries, and yet to still enable its business to grow. Without the technical expertise and financial support that UIH has provided to the AUSTAR business, AUSTAR's business would not have grown and developed so successfully.

We made our investment decisions given a certain base of regulation covering our industry. While we accept some dynamics in how this regulation evolves, as it has surrounding Digital TV, and embrace any moves towards an open and competitive market place, we have an interest in ensuring that the rules are not selectively changed to tilt the playing field further against us. It is for this reason that we take an interested and active role in the Commission's review of the regulation of the broadcasting industry.

The Privileged position of the FTA operators

The existing broadcast industry is dominated by the terrestrial Free To Air ("FTA") networks who have significant regulatory protection for their industry, control over their infrastructure and access to their broadcasting stream, under specialised broadcasting legislation, the Broadcasting Services Act ("BSA").

Overlaid on this, the recent specific amendments to the BSA for the introduction of High Definition digital FTA television, provided a mixture of incentives and further protection for the incumbent FTA broadcasters with some checks and balances over possible abuse of a privileged position.

As a new entrant to the broadcasting landscape, we face formidable competitors in the mature FTA terrestrial distribution business who have been operating for over 40 years, in comparison to pay TV which has been operating for four years. Nurtured by a sympathetic regulatory regime, over time, the FTA operators have reached close to 100% penetration of households in Australia. The average pay TV penetration is currently about 15%.

Even when subscription TV was introduced, it was introduced in such a way that the entrenched FTAs suffered little from exposure to a potential new source of competition, after already having successfully postponed it for thirty years:

- The service delivery technology was favoured towards satellite which had to be digital and which had to use the Optus satellite, this meant that the introduction of other technologies such as cable and MDS were delayed until satellite was operational (which as it was a world first had an in built delay factor while technical issues were resolved);
- Satellite services were restricted to 10 broadcasting services until 1 July 1997;
- There was no advertising allowed until 1 July 1997 and even following that subscription revenue has to remain the main source of revenue;
- R-rated programming is not allowed on broadcasting services only on narrowcasting services; and
- Anti-siphoning rules were introduced that restricted the availability of prime sports content to pay TV operators. The anti-siphoning regime goes beyond ensuring that consumers are guaranteed the right to view certain events on free to air, but we refer you to the ASTRA submission for further detail on this issue.

Following 1 July 1997, any person is able to purchase a pay TV licence and commence provision of a pay TV service. This is in stark contrast to the FTA environment where the number of licences is strictly regulated and protected.

Given the historical privileges that have been given to incumbent FTA operators and remaining protection, we urge caution in how these privileges are extended to a digital world and the degree to which the FTA's are able to then compete with players outside their existing markets.

Regulatory Protection

While seemingly attractive as a concept, AUSTAR does not believe that the introduction of de-regulated open competition environment would be equitable for both existing and future providers of broadcasting services to

consumers in Australia or for consumers. There is too much history behind how the industry has evolved to date to mean that the wholesale removal of the existing regulations would create a level playing field.

From an economic perspective, the current regulatory environment has been relied on by operators such as AUSTAR when decisions in relation to the investment of millions of dollars were made. The current regulatory environment has evolved over time as a series of gives and takes and checks and balances and the wholesale removal of those would create huge operational and thus investment uncertainty.

As pay TV is only in its infancy, AUSTAR believes that it should continue to be afforded the very small degree of regulatory protection that it currently has, and that in fact some of the protections provided to the FTAs should be removed in order to enable the ongoing economic viability of the pay TV industry.

An additional point against the introduction of a de-regulated regime is that in global terms Australia is only a small market, in that while we have a large land mass the actual population is very small. There is not a large enough consumer base to enforce adequate self-regulation of the market. Much of that consumer base is in regional and rural areas such as those serviced by AUSTAR, where the cost of providing the services is higher due to a lower density of population against which to offset costs.

Digital FTA TV

The introduction of Digital FTA TV presents a new decision point for regulation protecting the privileged position of the FTA operators. Other users of spectrum are subject to rules that encourage market forces to determine the most efficient use of spectrum. This includes auctions when demand for spectrum would dictate that this is the most efficient method of allocation and finite terms of access to spectrum under either an apparatus or spectrum licence.

If economic efficiency was paramount in the FTA environment, analogue operators may have been given warning to vacate their spectrum within a period of time and new spectrum would have been identified in an appropriate frequency range suitable for TV reception. Perhaps, recognising the efficiencies of digital TV, less spectrum would have been identified than is currently being used for analogue. Perhaps it would have been mandated that the spectrum should be used for FTA television. That spectrum could be then auctioned. However, that is not what occurred and FTA operators were given the spectrum with few checks and balances over its use, despite some vocal opposition from other potential service providers.

It is the historical grant of privilege resulting in almost ubiquitous coverage at low cost to consumers, the continuation of this privilege and its expansion to the proposed digital television environment that justifies the protections that have been included in the digital TV regime to date for subscription operators. Broadly defined these are prohibitions on:

- multi-channeling;
- subscription services;
- enhanced services; and
- the requirement to pay for the use of spectrum for datacasting services.

AUSTAR would argue strongly that these protections should be put in place and enforced for the maximum period of time envisaged under the current legislation, namely to 2006. The legislation has been worded and structured so that, although it appears that these protections should be in place up to at least 2006, there appear to be ways that they may be removed in reviews prior to 2001 for some protections and by another review which could happen anytime "before 2005".

For example, AUSTAR believes that the prohibition on FTAs providing multi-channelling should continue, including by the ABC and SBS. Pay TV operators have expended considerable capital in being able to

provide such services. The digital spectrum that was given to the FTAs should be used for the purpose for which it was given, namely high definition digital television. If FTAs intend to use this for any other purpose then they should have to pay for the spectrum, as does any other proposed spectrum user. From the perspective of the Australian tax payer or consumer AUSTAR cannot see any justification for allowing FTAs to use the spectrum to multi-channel, particularly if it would threaten the economic viability of services such as the pay TV services that AUSTAR provides to rural and regional Australia.

The introduction of digital TV marks a new point in time when standards can be set to enable a new generation of affordable reception equipment that will enable ubiquitous reception of signals. Early indications of standards for reception equipment have indicated that FTA incumbents have sought to prevent the benefits of economies of scale from being available to pay TV operators, and thus to consumers.

AUSTAR would support a regime that encourages the development of technical standards for the provision of services to consumers that will allow the reception of all services and so allow all parties the benefits of economies of scale in the production and purchase of equipment and content.

New FTA operators

AUSTAR does not believe that the Australian market can necessarily support an additional FTA operator.

We maintain that the existing number of FTA operators are unfairly advantaged within the existing broadcast regime. The market has adapted to some extent to some of the long term advantages given to these operators. We have made our significant investment to compete with the existing regime and number of protected operators. Simply extending the privileges to another one or two operators does not level the playing field and would penalise the business plans of AUSTAR and other pay TV operators.

Ownership Restrictions

We also put to the commission that diversity of ownership is a key issue that needs to be faced in Australia to ensure a competitive market.

As new entrants to this market, AUSTAR sees that the predominant ownership issue is a lack of diversity amongst existing players in the broadcast and broader media industries. A small handful of media companies control a disproportionate share of platforms and outlets. The Packer and Murdoch owned and controlled companies are positioned to dominate the convergent space.

We see the answer to this lies in removing barriers to foreign investment. This should increase the number of competitors and allow market forces to increase efficiency, as the world continues to move into a more integrated global environment.

In particular, AUSTAR submits that restrictions on foreign ownership of pay TV broadcasting licences should be removed, in line with the provisions in the BSA that currently allow pay TV licensees to be controlled by foreign entities.

However, given the existing heavy concentration of ownership that exists in the Australian market place today, we would caution against removing cross media rules from the mainstream media (FTA, newspapers and radio) until there is sufficient evidence of diversity of ownership in the broader media industry.

Access to Networks and to Customer equipment

Given the huge investment required to compete with incumbent television and telecommunications operators, AUSTAR has an interest in ensuring that it has maximum control over its infrastructure and how it is used, access to key customer information and the terms of access to equipment in the home.

Unlike the FTA operators, we are subject to competition law and access to our infrastructure and set tops, should our network prove to be a bottleneck over time.

In the short term, we are subject to competitive forces and technologies and should not be dissuaded from further investment. We have little or no editorial control over channels that we can economically offer over our infrastructure and "forced access" will weaken our negotiating power with content providers and may introduce uneconomic distortions into the market.

Regulation

There is currently some overlap between the new Telecommunications regime and the BSA. For example as a carrier, content provider or carriage service provider we should be members of the telecommunications industry ombudsman scheme which would purport to then have jurisdiction over consumer complaints in relation to content, while at the same time we have a Code of Conduct that is registered with the ABA which purports to do the same thing. There is a general exemption for FTA broadcasting but this has not extended to cable pay TV which is inconsistent.

In addition we have unworkable provisions in section 100 of the BSA and the interaction between these provisions and Part 11C of the Trade Practices Act is entirely unclear. So far these have not been problematical in practice but as pressure for a movement towards an open access regime continues this may become an issue in the future. The question must be asked about which of the ABA or the ACCC is the better agency to adjudicate on issues of access to pay TV infrastructure.

Conclusion

In evaluating the industry structure and regulation, the commission should have regard to the ubiquitous coverage of the terrestrial operators, regulatory protection and the start up nature of the subscription TV industry.

Protections that the subscription TV industry have sought for the introduction of digital terrestrial TV are in recognition that the FTA operators are having their existing privileged position extended to the introduction of a new technology that will populate a new generation of receiver.

We would welcome any outcomes from the commission that would encourage diversity of ownership in the Australian market.

We remain available and willing to take part in your review.