

## GUIDE TO SUBSCRIPTION TELEVISION BROADCASTING SERVICES

**THE AUSTRALIAN BROADCASTING AUTHORITY (ABA) IS AN INDEPENDENT STATUTORY AUTHORITY ESTABLISHED UNDER THE BROADCASTING SERVICES ACT 1992 ('THE ACT') AND IS RESPONSIBLE FOR THE REGULATION OF ALL ASPECTS OF BROADCASTING. A RECENT AMENDMENT TO THE ACT, WHICH RECEIVED ROYAL ASSENT ON 11 DECEMBER 1992, PROVIDED FOR THE INTRODUCTION OF SUBSCRIPTION TELEVISION BROADCASTING SERVICES IN AUSTRALIA. PAY TV INCLUDES BOTH SUBSCRIPTION TELEVISION BROADCASTING SERVICES AND SUBSCRIPTION TELEVISION NARROWCASTING SERVICES.**

### **WHAT ARE SUBSCRIPTION TELEVISION BROADCASTING SERVICES?**

Under section 16 of the Act, subscription television broadcasting services are broadcasting services that:

- (a) provide programs that, when considered in the context of the service being provided, appear to be intended to appeal to the general public; and
- (b) are made available to the general public but only on payment of subscription fees (whether periodical or otherwise); and
- (c) comply with any determinations or clarifications under section 19 in relation to subscription broadcasting services.

Subscription television can be provided using any delivery system, including satellite, cable, MDS (microwave or multi-point distribution system), and optical fibre. However regulation of these services differs with the means of delivery.

### **SUBSCRIPTION TELEVISION NARROWCASTING SERVICES (SECTION 17)**

Subscription television narrowcasting services differ from subscription television broadcasting services as they are broadcasting services:

- (a) whose reception is limited:
  - (i) by being targeted to special interest groups; or
  - (ii) by being intended only for limited locations, for example, arenas or business premises; or
  - (iii) by being provided during a limited period to cover a special event; or
  - (iv) because they provide programs of limited appeal; or
  - (v) for some other reason; and

- (b) that are made available only on payment of subscription fees (whether periodical or otherwise); and
- (c) that comply with any determinations or clarifications under section 19 in relation to subscription narrowcasting services.

Narrowcasting pay TV services would be expected to raise only minimal public interest concerns because of their limited reception and as such are subject to minimum levels of regulation. Subscription television narrowcasting services are provided under a class licence.

Class licences are not individually issued but are a standing authority for any operator to enter the market and provide a service, as long as the operator has access to delivery capacity and abides by the conditions relevant to the particular category of class licence. Persons wishing to provide a subscription narrowcasting service should obtain a copy of the ABA's *Guide for Service Providers of Class Licences*.

### **LICENSING OF SATELLITE SUBSCRIPTION TELEVISION BROADCASTING SERVICES**

On 19 January 1993, the Minister for Transport and Communications, The Hon. R L Collins ('the Minister') determined a price-based allocation system for allocating subscription television broadcasting licences A and B [*Broadcasting Services (Subscription Television Broadcasting Licences A and B Price-based Allocation System) Determination*]. Each of these licences allow the provision of up to four subscription television broadcasting services with the use of a subscription television satellite.

With licence A, existing commercial television broadcasters, major newspaper proprietors and telecommunications carriers are limited to two per cent (2 per cent) equity and are not permitted to be

in control of the licence (refer subsections 106, 107, 108 the Act). No such restrictions apply to licence B.

The Secretary of the Department of Transport and Communications will advise the highest bidder for licences A and B in writing that the licence will be allotted upon payment of the price bid. The allotment is subject to the approval of the Trade Practices Commission (TPC) and to the possibility that the ABA may assess the applicant's suitability under subsection 98(2) of the Act (see below). The Secretary must then inform the ABA of the name of the first applicant after giving notice to that applicant. If the TPC reports that the allocation of the licence would contravene Part IV of the *Trade Practices Act 1974* ('TPA') or the ABA decides that subsection 98(2) applies to the first applicant, the Secretary must give notice that the licence will be allotted to the applicant bidding the next highest price, subject to the above procedures taking place.

If the TPC reports that the allocation of the licence would not contravene Part IV of the TPA and the ABA has not decided that subsection 98(2) of the Act applies to the applicant, then the ABA must notify the applicant that the licence will be allocated upon payment of the amount bid by the applicant. The price bid must be paid within 30 days of the ABA advising the applicant of the allocation of the licence.

If the applicant fails to pay the price bid, the Secretary will then notify the next highest bidder.

Following the allocation of licences A and B, the Minister is to allocate a third satellite subscription television broadcasting licence to a subsidiary of the Australian Broadcasting Corporation (licence C). Licence C allows for the provision of up to two services.

The ABA is not able to issue further

licences, in addition to licences A, B and C, that use satellite as a means of delivery before 1 July 1997. A licensee must not, before 1 July 1997, provide a subscription television broadcasting service using a satellite other than one operated by Optus.

#### **TRANSMISSION SYSTEM STANDARDS**

Following the allocation of licences A and B, both licensees must agree to a standard for a full digital transmission system which the Minister must then declare in the *Gazette* to be the standard that must be used by all satellite subscription television broadcasting licensees. If the licensees do not agree on a standard, the Minister must then choose, after consultation with the licensees, the operator of the subscription television satellite, and having regard to any international standard, a standard to be declared by notice in the *Gazette* as the standard to be used by all subscription television broadcasting licensees.

This standard must use reception equipment which is capable of being manufactured in Australia, under licence or otherwise.

If the Minister has declared a standard for a full digital transmission system and is satisfied that transmission and domestic reception equipment for broadcasting in that standard is commercially available, the Minister may advise the holders of licences A and B that the services must commence within six months of the notification (s.103).

#### **LICENSING OF NON-SATELLITE SUBSCRIPTION TELEVISION BROADCASTING SERVICES** (\*SEE NOTE)

Under section 96(1) of the Act the ABA is empowered to allocate a subscription television broadcasting service licence where the proposed service does not use a satellite as its means of delivery.

A **service licence** is a licence which authorises the holder to provide a broadcast service and is distinct from a **technology licence or permit** which authorises the use of a particular means of carriage. Subscription television broadcasting licences are to be allocated on the basis of one licence per service. Holders of subscription television broadcasting

licences must separately organise the **delivery** of their services under the relevant legislation or by commercial arrangement with potential carriers.

When issuing a service licence, the ABA does not have regard to the geographical limitations that may be imposed by a condition of a transmitter licence or other service delivery permit or authority. It is, therefore, not necessary to apply for more than one service licence where the proposed service may extend beyond a discrete transmitting licence area.

An application for allocation of a non-satellite subscription television broadcasting licence must be on a form specified by the ABA (Form ABA16) and be accompanied by an application fee of \$785.

NOTE: On 28 January 1993, the Minister notified the ABA of the Government's general policies in relation to subscription television broadcasting services delivered by MDS and directed the ABA to act in accordance with those policies when considering allocation of subscription television broadcasting licences using MDS. A copy of the Government's policy and direction is published in the *Government Gazette* No. S 35 dated 1 February 1993.

#### **ROLE OF THE TRADE PRACTICES COMMISSION**

Prior to the allocation of both satellite and non-satellite subscription television broadcasting licences, the Authority is required, under section 97 of the Act, to request a report from the Trade Practices Commission ("TPC") in relation to whether the allocation to the applicant would, if applicable, contravene section 50 (mergers or acquisitions that would result in a substantial lessening of competition) and would not be authorised under section 88 (power of TPC to grant authorisations) of the TPA.

#### **SUITABILITY OF LICENSEES OR APPLICANTS FOR LICENCES**

Under subsection 95(2), the ABA is not required to consider the suitability of an applicant prior to the allocation of a subscription television broadcasting licence.

A company is deemed to be a suitable subscription television broadcasting li-

cence (the holder of licences A, B and C allocated by the Minister) or a suitable applicant for a subscription television broadcasting licence (non-satellite licences allocated by the Authority) if the Authority is satisfied that the company is not at significant risk of an offence against the Act or the regulations or a breach of the conditions of the licence [subsection 98(2)]. In deciding whether such a risk exists, the ABA must take into account the business records of the company and each person in a position to control the licence and the record of the company and any person in a position to control the licence in situations requiring trust and candour [subsection 98(2)].

#### **REASONS FOR NOT ISSUING A SUBSCRIPTION TELEVISION BROADCASTING LICENCE**

A subscription television broadcasting licence must not be allocated to an applicant if the applicant is not a company formed in Australia or in an external Territory and which has a share capital [s.95(1)].

With regard to satellite subscription television broadcasting licences, under section 93(7) the Authority must not allocate a licence if the TPC reports within 45 days after being requested for a report that, in its opinion, the allocation of the licence would, if applicable, contravene Part IV of the TPA. Part IV prohibits, in addition to mergers that substantially lessen competition (section 50), other types of anti-competitive conduct including agreements that substantially lessen competition, price agreements, misuse of market power, exclusive dealing arrangements, resale price maintenance and anti-competitive price discrimination. The TPC may grant authorisation under section 88 of the TPA for some of these types of conduct (including mergers that substantially lessen competition), even though they would otherwise contravene Part IV. Authorisation may be granted on public benefit grounds as outlined under section 90(9) of the TPA.

With regard to non-satellite subscription television broadcasting licences, under section 96(5) the Authority must not allocate a licence if the TPC reports within 30 days after being requested for

a report that, in its opinion, the allocation of the licence would, if applicable contravene section 50 of the TPA and would not be authorised under section 88 of the TPA.

#### **CONDITIONS APPLICABLE TO SUBSCRIPTION TELEVISION BROADCASTING LICENCE**

The conditions set out in Parts 2 and 6 of Schedule 2 of the Act apply to the provision of a subscription television broadcasting service. Under section 99 of the Act, the ABA is able to specify additional conditions which may be applicable to a licensee or vary or revoke existing conditions. Section 100 sets out some of the matters about which the ABA may impose conditions.

The ABA may impose conditions which require a licensee to comply with an applicable code of practice, or that ensure that a breach of a condition does not recur, or to ensure compliance with the film classification system administered by the Office of Film and Literature Classification.

The Minister may direct the ABA to impose conditions designed to ensure that licensees A, B and C involve the Australian industry in the provision of services under those licences.

The ABA **must** impose conditions on **satellite subscription television broadcasting licences** that will ensure that the domestic reception equipment used by each licensee is accessible by other satellite broadcasting services and that each licensee with a subscriber management system provides access to that system to other satellite subscription television broadcasting licensees at a fair price. The ABA **must** impose a condition on **all subscription television broadcasting licences** which require each licensee to make domestic reception equipment available on a rental basis as an option.

The ABA **must** impose a condition on all **non-satellite subscription television broadcasting licences** which will allow a consumer to terminate a rental agreement for domestic reception equipment on giving one month's written notice to the licensee.

Subscription television broadcasting services are subject to the condition that subscription fees will continue to be the

predominant source of revenue for the service.

### **PROGRAM REQUIREMENTS FOR SUBSCRIPTION TELEVISION BROADCASTING SERVICES**

#### **CODES OF PRACTICE**

Section 123 of the Act sets out the matters upon which an industry group representing providers of subscription television broadcasting services may develop codes of practice relating to various issues. Codes developed should be appropriate to this sector of the broadcasting industry.

The codes may cover issues including the classification of program material, the promotion of accuracy and fairness in news and current affairs programs, ways of protecting children from unsuitable material and preventing programs which simulate news so that it misleads or alarms people. A code of practice should be developed for the method of handling complaints from the public about program content or compliance with codes of practice and the method of reporting about complaints to the ABA.

Subscription television broadcasters are also to develop a code of practice relating to methods of billing, fault repair, privacy and credit management, in dealings with their customers.

Codes are to be developed in consultation with the ABA and take account of any relevant research conducted by the ABA. In developing their codes, broadcasters are also to take into account community attitudes to issues such as the portrayal of physical and psychological violence, sex and nudity and the portrayal of matter likely to incite or perpetuate hatred against, or vilify, any person or group on the basis of ethnicity, nationality, race, gender, sexual preference, age, religion or physical or mental disability.

Once the ABA is satisfied that the codes provide appropriate community safeguards, that they have been endorsed by the majority of service providers in that sector of the industry and that the public has an adequate opportunity to provide comment, the ABA will register the code and include it in the register of

codes of practice. This register will include all codes of practice and will be open for public inspection.

#### **PROGRAM STANDARDS**

Schedule 2 Part 6 of the Act states that licensees are to comply with any program standards applicable under Part 9 of the Act.

There are no such program standards for subscription television broadcasting services but the ABA may determine program standards where codes of practice have failed or where no code of practice has been developed. However, standards do exist for narrowcast services. See the ABA's *Guide for Service Providers of Class Licences*.

#### **ADVERTISING**

Section 101(1) states specifically that no advertisements or sponsorship announcements will be broadcast on subscription television broadcasting services before 1 July 1997.

This does not include advertising that is accidental or incidental to the broadcasting of other matter, or matter for which no payment or any form of 'valuable consideration' is received. Another exception is matter which promotes the subscription television broadcasting service being provided under the licence.

While there will be no advertising on subscription television broadcasting services until 1997, the Act sets down certain requirements for such a time when advertising does commence.

Schedule 2 Part 6 states that no advertisements or sponsorship announcements for cigarettes, cigarette tobacco, or any other tobacco products are to be broadcast.

Schedule 2 Part 2 also relates to pay TV services. This sets down the requirements for advertisements relating to medicines. The text of advertisements relating to medicines must be approved by the Secretary to the Department of Community Services and Health or his delegate, or by the Minister.

#### **AUSTRALIAN CONTENT**

If the licensee provides a service devoted predominantly to drama programs,

the licensee will, for each year of operation, ensure that at least 10 per cent of the licensee's program expenditure for that year in relation to that service is spent on new Australian drama programs.

This is a special condition of a subscription television broadcasting licence. A set of guidelines has been drafted, and is available from the ABA.

### **CLASSIFICATION**

Classification issues would generally be covered in the industry code of practice. However, the ABA is able to impose a condition on a licence obliging a licensee, amongst other things, to comply with a particular code of practice and also to ensure compliance with the film classification system administered by the Office of Film and Literature Classification (OFLC).

In addition, Part 6 of Schedule 2 of the Act states that access to films rated 'R' by the OFLC is to be restricted by the use of disabling devices acceptable to the ABA. In addition, no 'R' rated films are to be scheduled until the results of ABA research into community standards in relation to pay TV (particularly attitudes to the depiction of sex and of violence) are known and the ABA has approved their broadcast.

No 'X' rated programs, or programs refused classification by the OFLC, are to be broadcast.

### **EMERGENCY PROVISIONS**

The Minister may, if an emergency arises that causes him to decide that it would be in the public interest for him to do so, notify the licensees that certain authorized persons may have access and control over a licensee's broadcasting facilities and material broadcast over those facilities.

### **POLITICAL AND CONTROVERSIAL MATTER**

Schedule 2 Part 6 obliges licensees to

comply with special conditions outlined in Clauses 3, 4, and 5 of Schedule 2 Part 2.

These deal with the broadcast of political and controversial matter. They place the following obligations on a licensee.

- The broadcaster is to allow reasonable opportunities for all parties contesting an election to broadcast election matter. This applies to all parties who were represented in either House of the Parliament at the time of the last meeting before the election was called.
- There is no obligation on the licensee to broadcast any matter free of charge.
- The broadcaster is to observe election advertising blackout provisions; that is, broadcasters are to refrain from broadcasting political advertisements from midnight on the Wednesday prior to polling day, to the close of the polls for an election to a Parliament. This does not prohibit news coverage of the election, discussion of political issues or interviews with candidates.
- Particulars about the political matter broadcast at the request of another person should be announced in a form approved (in writing) by the ABA. The required particulars are set out in the 'Definitions' section of Schedule 2 to the Act.
- The broadcaster must also keep records (for a required period) of the name and address, or the name and address of the principal office, of the person or company requesting the broadcast of political matter. The ABA may request, in writing, any particulars of these records. The required period is also defined in paragraph 1 of Schedule 2 to the Act.
- A broadcaster is to keep records (in a form approved, in writing, by the ABA) of any matter broadcast which relates to a political subject or current affairs. This may be broadcast in the form of news, an address or statement, commentary or discussion. Unless the ABA directs otherwise, these records are to keep for a mini-

imum period of 6 weeks from the date of broadcast. However, if a complaint has been made about the matter the records are to be kept for 60 days from the date of broadcast.

- Time limits also apply to records which are to be used in evidence for any proceedings which may be instituted in a court.
- The ABA may determine that a matter which had been broadcast and recorded may be of sufficient historical interest for it to be permanently preserved. The ABA may direct the custodian of the record to deliver it to a specified person or authority. Should this occur, the custodian is entitled to 'fair compensation'.

### **SERVICE NOT TO BE USED IN THE COMMISSION OF AN OFFENCE**

Part 6 Schedule 2 makes it clear that a subscription television broadcasting service is not to be used in the commission of an offence against another Act or law of a State or Territory.

### **SIPHONING**

Section 115(1) gives the Minister the prerogative to specify, by way of notice in the Gazette which event (or events of a kind) should be, if televised, available free to the general public.

This list may be revised, but only if the Minister is satisfied that the ABC and SBS, and the commercial TV operators have had 'a real opportunity to acquire, on a fair commercial basis, the rights to televise the event', and have not done so within a 'reasonable' time.

Part 6, Schedule 2 also refers to the 'anti-siphoning' requirements of subscription television broadcasting services, in that a licensee will not acquire the right to broadcast an event to which a notice under section 115(1) applies unless a national broadcaster or a commercial television broadcasting licensee has acquired the right to broadcast the event.

**REGULATION OF SUBSCRIPTION TELEVISION SERVICES**

	<b>Subscription Broadcasting (Pay TV)</b>		<b>Subscription Narrowcasting</b>	
	SATELLITE	NON-SATELLITE	SATELLITE	NON-SATELLITE
<b>Examples</b>	Optus satellite Other satellite (after July 1997)	Cable (Telecom, Optus) Optical fibre Fibre/coaxial combination ADSL (phone line video) Terrestrial (unlikely)	Optus Other	Cable (Telecom; Optus) Optical fibre Fibre/copper combination ADSL (telephone line video) MDS Terrestrial (unlikely)
<b>Ownership Restrictions (cross media)</b>	Yes: for licence A	No: except with licence A.	No	No
<b>Foreign Ownership Limits</b>	20% individual 35% total	20% individual 35% total	No limit	No limit
<b>Licensing Mechanism</b>	ABA allocates a service licence	ABA allocates a service licence	Class licence	Class licence
<b>Allocation System (service licence)</b>	Price-based (determined by Minister)	On application to ABA	None (there is no service licence)	None (there is no service licence)
<b>Capacity</b>	Lic A: up to 4 services Lic B: up to 4 services Lic C: (ABC) up to 2 services	One licence per service - No limit to number of services	No limit	No limit
<b>TPC Involvement</b>	ABA must request TPC report re: s.50 & s.88 Trade Practices Act before allocating licence	ABA must request TPC report re: s.50 & s.88 Trade Practices Act before allocating licence	No	No
<b>Program Standards</b>	ABA has not determined any	ABA has not determined any	Some existing ABT standards apply	Some existing ABT standards apply
<b>Special Licence Conditions (Part 7 Broadcasting Services Act)</b>	1. 10% of program expenditure on Aust. drama 2. No advertising until July '97 3. Rental availability of reception equipment 4. N/A  5. Adequately involve Aust industry (Lic. A ,B & C only) 6. Accessibility of domestic reception equipment 7. Fair price access to subscriber management system 8. Lic. A & B will commence within 6 months of notifying digital transmission system standard	10% of program expenditure on Aust. drama No advertising until July '97 Rental availability of reception equipment Termination of rental agreement with 1 month's notice  N/A  N/A  N/A	No  N/A  N/A  N/A  N/A	No  N/A  N/A  N/A  N/A