AUSTRALIA'S SPORTS LEADER

FOX SPORTS: Submission to the Senate Environment and Communications Legislation Committee inquiry into the Broadcasting Services Amendment (Anti-Siphoning) Bill 2012

FOX SPORTS Australia Pty Limited (**FOX SPORTS**) welcomes the opportunity to make submissions on the *Broadcasting Services Amendment (Anti-Siphoning) Bill 2012* (Cth) (the **Bill**).

Our submission is structured as follows:

Section 1 provides a brief description of FOX SPORTS, its business and its views on anti-siphoning.

Section 2 provides a summary of our main concerns with the Bill.

Section 3 describes recent developments in the media industry. The effect of the Bill must be construed and evaluated against this background.

Section 4 describes how the Bill fails to properly implement the Government's policy objectives announced on 25 November 2010 following its review of the current anti-siphoning scheme[1].

Section 5 describes how the Bill will operate to divert revenue from sporting bodies to the free-to-air broadcasters.

Section 6 describes the detrimental impact that the Bill will have on sporting bodies and the further growth of the online and subscription television industries.

Section 7 addresses certain matters of practice arising under the Bill.

1. FOX SPORTS – our business and our views on anti-siphoning

FOX SPORTS is engaged in the sports, entertainment, production and news sectors. We acquire sports rights from sporting bodies and their agents, sports rights brokers as well as other broadcasters, and produce coverage of sports events for distribution on television, online and mobile.

FOX SPORTS produces and operates the FOX SPORTS, FOX SPORTS NEWS, FOX FOOTY, FUEL TV and SPEED sports channels which we supply to the main subscription television platforms in Australia, FOXTEL and Austar. FOXTEL in turn supplies our channels to Optus and Telstra for inclusion in their subscription television services. All of our channels with the exception of SPEED and FOX SPORTS NEWS are simulcast in high definition and standard definition. We also produce the *SPORTS Play* and *FOOTY Play powered by FOX SPORTS* IPTV channels available on Xbox360 and Telstra T-box and a range of video, text and statistical content for television, mobile and online delivery.

[1] http://www.dbcde.gov.au/television/antisiphoning_and_antihoarding/sport_on_television_review_of_the_antisiphoning_scheme

We also operate the FOX SPORTS website (www.foxsports.com.au), Australia's No. 1 general sports website which provides a full array of text, video, audio, images, fantasy tipping and statistical content including live online coverage of up to 4 matches from each of the 38 rounds of the English Premier League together with on-demand streaming of extended highlights of up to 5 matches per round.

FOX SPORTS invests in and produces live television coverage of many Australian sporting competitions and events such as the AFL, NRL, Super Rugby and in-bound rugby test matches, the T20 Big Bash and the domestic one day cricket competition. For this financial year, we will facilitate outside broadcasts to produce coverage of over 680 sporting events. Under our rights agreements with the relevant sports codes, we are obliged to provide access to this coverage to other broadcasters and media licensees based in Australia and overseas.

We pride ourselves on the breadth and quality of our coverage, incorporating not only well-established Australian sports (such as AFL, NRL, rugby union and cricket) but also less established sports codes in Australia (such as tennis and soccer) as well as overseas sports seeking to grow their profile among Australian sports fans. To that end, FOX SPORTS broadcasts all 4 tennis majors, various golf tournaments, the English Premier League and produces and broadcasts live coverage of the A-League and Socceroos matches held in Australia.

Our business model is premised on FOX SPORTS being able to offer a comprehensive range of live, innovative and high quality sports content and coverage which is more appealing to viewers than that broadcast by our competitors, primarily the free-to-air television broadcasters. We have therefore made an unparalleled investment to produce almost all of our live coverage of sporting events in high definition and are at the forefront of technological innovation in sports broadcasting and production offering a range of value-add interactive applications for our subscribers, including:

- ***Viewer's Choice:*** which enables viewers to choose between simultaneous broadcasts of selected matches with the press of a button;
- ***FOX Field:*** an in-match analysis tool (first launched during our Rugby World Cup 2011 coverage) that enables our commentary team to provide rich insights into key plays across all major sports codes that we cover;
- ***FOX Tracker:*** another in-match analysis tool which records the fastest bowler and biggest hitter during our domestic cricket coverage; and
- ***The Analyser:*** a red button interactive sports data service available during our live event coverage.

FOX SPORTS also made Australian television history on 24 May 2010 with the first ever 3D sports broadcast in Australia when the Socceroos' last home match before the 2010 FIFA World Cup was broadcast live in 3D from the MCG. Since that time, we have offered live 3D coverage of events such as the 2010 French Open Women's Final and the third and final rounds of the 2011 US Open golf.

While we have invested heavily in producing live coverage of a wide range of Australian based sports, we have only been able to do so because the majority of those sports events for which we produce coverage (with the exception of the AFL, NRL, in-bound rugby test matches and Australian Open tennis) are not on the anti-siphoning list. For those events that remain confined to the anti-siphoning list, we have been constrained over the years in regard to the type of coverage of those sports events that we can provide as ultimately the rights negotiations are controlled by the free-to-air broadcasters due to the operation of the anti-siphoning scheme.

FOX SPORTS' views on anti-siphoning are well-known and are generally consistent with those held by FOXTEL, ASTRA and other participants in the subscription television and online industries as well as those held by regulatory authorities such as the Productivity Commission and the ACCC.

Put simply, we believe that the current anti-siphoning scheme is anti-competitive and is long overdue for proper reform which reflects 21st century principles. Given that the Australian media landscape and sports rights industry as well as consumers' viewing habits have changed significantly since the scheme's first inception over 15 years ago, we believe that the Government's focus going forward should be to simply reduce the list so that it only includes those nationally iconic sporting events which continue, in a converging media environment, to receive live coverage on free-to-air television. Underlying that, the Government should implement reforms to the current scheme that provide certainty and flexibility for all market participants to ensure that the widest possible coverage of listed sports events are available to consumers across a range of media platforms.

While the objectives announced in November 2010 were a step in the right direction towards implementing such much-needed reforms, the Bill fails to properly deliver many of the Government's promised policy initiatives.

2. Summary of Key Concerns

FOX SPORTS' key concerns regarding the effect of the Bill in its current form are as follows:

1. The Bill proposes a scheme that represents a significant Government intervention in the Australian sports rights and media industry that goes far beyond what is necessary to achieve the Government's stated policy objectives.
2. The Bill fails to properly implement these objectives in a fair and balanced way for all market participants which will have the most significant impact on the sporting bodies as the effect of the new scheme will be to reduce the overall value of their sports rights.
3. The manner in which the Bill seeks to achieve the policy objectives is overly complex, is subject to excessive Ministerial discretionary powers and unnecessarily creates significant regulatory burdens and uncertainty for sporting bodies and the media industry. This in turn:
   (a) diverts to free to air broadcasters revenue which sporting bodies might otherwise derive from the sale of their sports rights which has the flow-on effect of reducing the ability of those bodies to reinvest in the community and the development of their sports at the grass roots level; and
   (b) it also impacts detrimentally on existing and future contractual arrangements for sporting events. Such a result undermines commercial certainty for existing and potential parties to those arrangements, and has a general deterrent effect on participation in the market not only for sellers but also purchasers and/or users of sports rights in Australia.
4. The effect of the Bill will be to curtail the development of not only the subscription television but also the online content industry in circumstances where the Government is otherwise adopting policies (eg. the National Broadband Network) which are designed to 'embed the digital economy at the centre of Australian life'[2] by facilitating significant growth in this sector.

[2] Australian Government, *Convergence Review*, Interim Report, 15 December 2011, iv.

3. Recent developments in the sports rights and media industry

The proposed reforms of the anti-siphoning scheme in the Bill must be considered against:

- the way media rights to sporting events are bought and sold; and
- the development of new technologies and changes in viewing habits over recent years.

3.1 The sale and purchase of sports rights

Sporting bodies, both in Australia and overseas, organise sporting competitions and sell media rights to those competitions. Revenue from the sale of media rights constitutes an important source of revenue for sporting bodies and is typically used by them for community grass roots development and to ensure the continued financial stability of the sport.

Sports media rights may be sold by sporting bodies directly or by other intermediaries. Those intermediaries include agents, sports rights brokers, third party aggregators, broadcasters and now, increasingly, providers of content over the internet.

Free to Air broadcast rights are only one component of the media rights that are sold. Sports media rights are generally categorised as follows: Internet Rights, Mobile Rights, Free to Air Rights, Subscription Television Rights, IPTV rights, Pay-per-view Rights and Video on Demand Rights.

With the exception of the current anti-siphoning scheme which restricts the sale of exclusive broadcast rights to subscription television broadcasting licensees, sporting bodies are able to determine themselves how they manage the transfer of their rights. By way of example, a sporting body may either:

- establish its own website and supply content (i.e. broadcast their events) directly to consumers and either sell the balance of, or decide not to sell any, rights to their sporting events;
- offer all rights to a single party as a bundle and not offer separate rights. The person that acquires the rights (such as a broadcaster, content service provider or IPTV platform) may decide to sub-license the rights that it does not wish to use itself, or a sporting body may even require that they sub-license certain rights or alternatively, the sporting body may prohibit any sub licensing at all; or
- a sporting body may transfer the rights that it wants to sell and retain other rights. Accordingly, instead of acquiring all of the media rights, in some circumstances, a party may only buy the free-to-air broadcast rights. The purchase of these rights could also include a holdback provision which prevents the sporting body (or other intermediary) from then licensing rights to other media.

Anti-siphoning listed events typically relate to competitions or tournaments, many of which are conducted over a number of days or weeks. The sporting body may wish to sell rights to the whole competition or tournament or part of it (and not only that part of the event or competition that is on the anti-siphoning list). In making those decisions, the sporting body will take into account the interests of the sport. For example, in relation to multi-round tournaments such as Wimbledon, the sporting body may wish to promote the whole tournament and not only a select few matches (for example, the semi-finals and finals) as it assists them to derive sponsorship revenue, build their brand and establish loyalty with their audience and fans.

The revised anti-siphoning scheme as proposed in the Bill will unnecessarily interfere with the way sports rights can be bought and sold and will create significant uncertainty for sporting bodies in regard to the many types of arrangements described above.

3.2 The growth of content delivered via IPTV and over the internet

The amount and availability of content delivered via IPTV and over the internet has generally grown over recent years due to the significant increase in the number of suppliers of IPTV and internet enabled TV (**IETV**) as well as the development of technology and devices such as Smart TVs and tablets which are able to deliver linear and non-linear streaming of content to consumers.

As broadband networks (including ADSL and mobile broadband) and compression technologies are increasingly able to facilitate the distribution of content via IPTV and over the internet, the amount of live sports content and coverage delivered via such media, and the number of IPTV and IETV providers making such content available to consumers, is likely to significantly increase. Unimpeded by regulatory constraints, overseas sporting bodies would appear to be leading the charge on this front at this point in time. For example, the NFL and NBA make coverage of all games available in Australia on their websites via the internet and the English Premier League clubs make matches available on delay in Australia via their club websites, such as chelseatv.com.

The NBN will also deliver the bandwidth and download speeds necessary for the successful development of IPTV or internet video in Australia.[3] In fact, media reports indicate that NBN Co's business case depends heavily on the growth of IPTV:

> Video is likely to be one of the major applications requiring truly high-speed internet in the next two to five years…NBN Co therefore regards securing an attractive wholesale IPTV application as a short-term priority. To this end, NBN Co is planning to support IPTV product offering and will continue extensive industry consultation and enable emerging IPTV wholesalers.[4]

IPTV and IETV providers also do not have the same infrastructure requirements as subscription television platforms nor do they need to obtain a subscription television broadcasting licence which means that there are low barriers to enter and take advantage of recent technological developments. For instance, television manufacturers such as LG and Sony are now offering internet enabled television sets, which connect to the internet and provide access to video content directly through the television set, without the need for the installation of a set-top box, satellite dish or PC.[5]

The Government has recognised the growth of content over the internet and the erosion of divisions between 'traditional' media and online media during its Convergence Review.[6] It has also recognised that its policy and regulation must take account of these developments:[7]

> 'Whilst technology has eroded the traditional divisions between free‑to‑air (FTA) television and the internet, newspapers and websites, radio and streaming services, our policy and regulation is still based on the industry and service structures of the early 1990s.
>
> Calibrating the policy and regulatory framework for the new environment is vital. The reforms recommended by the Convergence Review will require fundamental changes to communications legislation.'

The revised anti-siphoning scheme as proposed in the Bill is at odds will other Government policies such as the NBN which are designed to facilitate growth of emerging content distribution platforms and offer consumers with more choice than that available from traditional media such as free-to-air television.

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[3] Australian Government, *Sport on television: A review of the anti-siphoning scheme in the contemporary digital environment*, Discussion paper, August 2009, 23, http://www.dbcde.gov.au/__data/assets/pdf_file/0010/118864/Sport_on_Television_Review_discussion_paper.pdf .

[4] http://www.theaustralian.com.au/national-affairs/free-to-air-pay-tv-face-nbn-assault/story-fn59niix-1225974169098.

[5] ACMA, *IPTV and internet video delivery models: Video content services over IP in Australia*, June 2010, 26.

[6] Australian Government, *Convergence Review*, Interim Report, 15 December 2011.

[7] Australian Government, *Convergence Review*, Interim Report, 15 December 2011, iv.

4. The Bill fails to properly implement the Government's policy objectives

4.1 The Government's policy objectives

Despite our views on anti-siphoning, FOX SPORTS welcomes the Government's efforts to address the issues with the current scheme through the proposed implementation of its policy objectives announced in November 2010.

We understand these policy objectives were intended to balance the interests of broadcasters and the affected sporting bodies without further compromising the interests of Australian sports fans by[8]:

1. ensuring that only events which are of national significance and cultural importance remain on the anti-siphoning list.
2. imposing new coverage obligations on free-to-air broadcasters to televise live and in full on their main channels nationally iconic events to which they hold broadcast rights;
3. allowing free-to-air broadcasters to first broadcast on their digital multi channels regionally iconic and nationally significant events to which they hold broadcast rights and imposing obligations on them to televise those events within 4 hours and in full;
4. introducing must-offer requirements to ensure that free-to-air broadcasters either use the rights they acquire to listed events or offer those rights to other broadcasters;
5. extending the automatic delisting period to 26 weeks and for seasonal tournaments with complex fixture systems to 52 weeks; and
6. removing 4 AFL Premiership matches and 5 NRL Premiership matches per round from the anti-siphoning list entirely.

Reform in this area can have the dual goals of achieving these policy objectives effectively, and do so without unreasonably interfering with and harming the existing and future functioning of the market for broadcasting and content provision in Australia and placing unnecessary regulatory burdens on, and creating significant business uncertainty, for participants in that market including, most importantly, sporting bodies.

Unfortunately, the Bill in its current form is unlikely to implement such much-needed progressive reform. The aspects of the Bill which cause FOX SPORTS most concern are set out in the following paragraphs.

4.2 Excessive and unnecessary Ministerial discretion

The Bill provides the Minister of the day with significant and ongoing discretionary power in respect of all aspects of the revised anti-siphoning scheme.

It is in the best interests of all stakeholders, including the affected sporting bodies and the Australian viewing public, that the Bill expressly give effect to the Government's stated policy objectives in a straightforward and decisive way, rather than leaving the implementation of those objectives open to the exercise of nearly 20 Ministerial discretions (with further discretions reserved for the ACMA) which creates an unacceptable degree of uncertainty for all.

For instance, the de-listing period for multi-round competitions should be 52 weeks (before the first event in that competition) as announced in November 2010 and not subject to the various discretions

[8] http://www.dbcde.gov.au/television/antisiphoning_and_antihoarding/sport_on_television_review_of_the_antisiphoning_scheme

contained in s145E(6) which would allow the Minister to specify a number of different timeframes for delisting of such competitions including the AFL and NRL Premiership competitions. These additional discretions to stipulate varying timeframes for delisting are unnecessary in circumstances where the Minister can, under s145E(6)(f), determine that an event stays on the list if he or she is satisfied that at least one commercial television broadcasting licensee or national broadcaster has not had a 'reasonable opportunity to acquire the right to televise the event'. Any additional capacity for the Minister to unilaterally vary the applicable timeframe for delisting is simply unnecessary and creates significant uncertainty for any future rights negotiations in relation to these anti-siphoning events.

FOX SPORTS has further concerns about the extent of the Minister's discretionary powers as it relates to the current round of negotiations for the NRL as set out in further detail in the following section below.

4.3 Current bidding for the NRL rights for 2013 and beyond is undermined by the Bill

FOX SPORTS currently holds subscription television rights to NRL Premiership matches and other rugby league matches such as the State of Origin, and the Nine Network holds the free-to-air rights to those matches, until the end of the 2012 season. Nine has the right to exclusively broadcast 3 NRL Premiership matches before those matches are shown by FOX SPORTS. In recent years, Nine has broadcast 1 match live and 2 matches on delay in NSW and Queensland licence areas and all those matches on delay in other licence areas.

The newly formed ARL Commission will be seeking to conclude before the end of 2012, negotiations for the sale of media rights to the NRL Premiership competition and other rugby league matches from 2013 onwards.

Since the November 2010 announcement, FOX SPORTS has been made aware that 5 NRL Premiership matches will not be removed from the list contrary to the Government's original announcement.[9] Instead, those matches will remain listed and will be subject to a complex discretionary process that will undermine the ability of the ARL Commission to hold any meaningful negotiations with potential bidders and deprive it of reaping the benefits from unfettered competition for the rights to those matches.

The mechanism by which the Minister intends to allow the ARL Commission to offer 5 NRL Premiership matches to both free-to-air broadcasters and subscription TV, in a manner which is not artificially constrained by the anti-siphoning regime, is contained in section 145G where such matches can be specified as a Category A or Category B Tier B quota group. This mechanism may be invoked by the Minister solely at his or her discretion – it does not delist the matches as was originally announced and does not provide any certainty for future licensing arrangements to be entered into by the ARL Commission in respect of these matches.

Further, there is no guarantee as to when the Minister might make a Category A or Category B quota group determination under section 145G(1) or (2) or whether the matches will be in a category B quota group and have additional "associated set conditions" attached. The only obligation on the Minister is to take 'reasonable steps' to ensure that, on and after 1 January 2013, Tier B NRL Premiership matches (other than the NRL final series) are in a quota group, and that the quota number for the quota group must not be greater than 3: ss145G(10) and 145(11).

[9] http://www.dbcde.gov.au/__data/assets/pdf_file/0003/131457/The-Future-Anti-siphoning-List-26-11-2010.pdf

Given that negotiations currently being conducted by the ARL Commission for its media rights are likely to be concluded before 1 January 2013, there is a significant risk that the ARL Commission will not be able to derive the rights fees it is hoping to achieve if it has to conduct its negotiations pursuant to the regime proposed under the Bill.

The provisions in the Bill will detrimentally affect the ARL Commission's ability to secure true market value for live television coverage to NRL Premiership matches that the free-to-air broadcasters have no interest in showing (and which traditionally have never been shown on free-to-air television).

4.4 The 'must offer for $1' regime entrenches exclusivity for free-to-air broadcasters and undermines the value of important sporting events

The 'must offer for $1' regime is also inconsistent with the Government's objective of ensuring that only events of true national significance and cultural importance are required to be freely available to the Australian public. The overall "must offer" framework (Division 3 of the Bill) goes much further than is necessary to achieve the Government's objective that free-to-air broadcasters either use the rights they acquire to listed events or offer those rights to other broadcasters[10]. It further entrenches the opportunity for free-to-air broadcasters to manipulate the acquisition process to ensure their **exclusive** access to the rights to broadcast anti-siphoning events, at the expense of sporting bodies who may wish to secure coverage of their events via other media.

This is because the proposed framework operates to provide free-to-air broadcasters with **not only two opportunities** to acquire rights **before** subscription television and content service providers are able to acquire any rights to the event, **but** also the opportunity to acquire the rights for a token $1.

For example:

- A free-to-air broadcaster acquires the exclusive broadcast rights to an anti-siphoning event after having been protected from competition from subscription television and content service providers by reason of the operation of ss145ZN and 145ZO. Other free-to-air broadcasters may also have been interested in acquiring the rights during the initial negotiations with the sporting body but were either unsuccessful or were unwilling to acquire the rights for the commercial terms offered.
- If the free-to-air broadcaster which holds the exclusive rights is subsequently unable to televise the anti-siphoning event "live" (as defined according to the various scenarios in the Bill), it (or its program supplier) is required under the proposed Bill to offer the free-to-air rights to another free-to-air broadcaster for $1.
- The free-to-air broadcasters which were therefore unsuccessful in purchasing the rights initially may then obtain the rights subsequently for only $1 under ss145K and 145L. It is only if all other free-to-air broadcasters pass up the opportunity to take up such an offer that the rights are **then** offered to the subscription television industry: s145H(3).
- It is implausible to think that a free-to-air broadcaster (national or commercial) would pass up an opportunity to acquire the rights to show an anti-siphoning event if they only had to pay $1 for those rights.
- Therefore, it is unlikely that an offer for such rights would **ever** extend to a subscription television broadcasting licensee or its program supplier.

[10] http://www.dbcde.gov.au/__data/assets/pdf_file/0003/131466/MR_101123_Anti-siphoning_Reforms_-_Fact_Sheet.pdf

- Further, a free-to-air broadcaster may not have acquired the subscription television rights, but may have negotiated a 'holdback' with the sporting body which prohibits the sporting body from offering subscription television broadcast rights on a live or near live basis to subscription television. There is no requirement in the Bill for such a holdback to be waived where rights are subsequently acquired for only $1 by another free-to-air broadcaster which means that the second free-to-air broadcaster is effectively being handed live broadcast exclusivity (and all the commercial returns that flow from that) for free.
- Subscription television is therefore placed at a significant competitive disadvantage under the operation of the proposed scheme both at the time of initial purchase and at the second stage with the “must offer” regime.

There is no legitimate policy rationale for preventing subscription television from competing with the free-to-air broadcasters for these rights at the time of the first round of “must offer”. Nor is there any legitimate basis for requiring free-to-air broadcasters or their program suppliers to dispose of the rights for $1.

First, it is not the Government's policy to provide free-to-air broadcasters with exclusivity in relation to televising listed events, but rather to ensure that such events are available on free-to-air television. As the November 2010 Review Report states, the current scheme *does not require free-to-air broadcasters to buy the rights, show listed events or prevent those broadcasters from on-selling some or all of the rights they have acquired to pay television broadcasters. Nor does the anti-siphoning scheme prevent parties other than pay television broadcasters from acquiring the rights to televise events on the anti-siphoning list before the free-to-air broadcasters*.[11] In effect, free-to-air broadcasters are granted de facto exclusivity under these proposed provisions of the Bill.

Second, the Bill contemplates, under s145E, that events relevantly cease to be anti-siphoning events at least 26 weeks (or 176 days) before the event occurs, on the basis that the free-to-air broadcasters should have had a reasonable opportunity to acquire the right to televise the event before that date. By contrast, s145L continues to give priority to free-to-air broadcasters up until 106 days before the event. Third, for Tier B events, free-to-air broadcasters continue to be prioritised notwithstanding the fact the first free-to-air broadcaster which holds the rights and is unable to televise the event, is given the opportunity under the proposed amendments to broadcast the event ‘live’ by using their digital multi-channels.

Fourthly, free-to-air broadcasters and their program suppliers are exempt from the must offer for $1 obligation where disposing of the rights on this basis would amount to an acquisition of property on unjust terms in contravention of the Constitution. This raises serious concerns about the validity and effectiveness of the ‘must offer for $1’ regime in circumstances where its effect may be the diminution or modification of the rights of commercial parties in an unconstitutional manner.

Finally, and importantly, legislatively imposing the ‘must offer for $1’ regime sits uncomfortably with the objective of ensuring that events of true national significance and cultural importance are freely available to the Australian public. If the anti-siphoning list and regime is limited to events which truly meet that description, it is difficult to see why the rights should not be on-sold at market value, rather than for a nominal sum of $1. It is difficult to see how an event which is truly nationally significant or culturally important could, at the same time, be an event for which there is little public appetite as

[11] November 2010 Review, 5 http://www.dbcde.gov.au/__data/assets/pdf_file/0017/131462/Review_Report_-_Sport_on_Television-the_anti-siphoning_scheme_in_the_contemporary_digital_environment_-_25-11-2010.pdf.

evidenced by the fact that none of the 5 free to air broadcasters with 15 channels between them, have any incentive to pay market value.

Legislatively attributing a nominal value to the broadcast rights for an event of great intrinsic value is an unnecessary and artificial constraint on what would otherwise be a functional market. Where the broadcast rights to an event would only 'reluctantly' be acquired for $1 by a free-to-air broadcaster, such an event logically **should not** stay on the list.

4.5 The Bill does not properly implement the objective that free-to-air broadcasters televise live and in full nationally iconic events

The exemptions to the must televise obligations are too broad

Section 145H(7) of the Bill allows the ACMA to exempt, by legislative instrument, a free-to-air broadcaster from its 'must televise' obligations. However, the ACMA is afforded considerable discretion as to whether and when an exemption should be provided ‘having regard to’ certain principles set out in s145(10) which includes the very broad canvas of “such other matters (if any) as the ACMA considers relevant”.

To achieve the November 2010 policy objectives, any exemptions afforded by the ACMA under the Bill should be specifically articulated in the legislation and limited to exceptional circumstances such as 'significant difficulties of a technical or engineering nature'. Significant news events or emergencies, for instance, could simply be brought to the viewers’ attention by way of a ticker or graphic directing viewers to the broadcaster’s other channels for further information without having to interrupt its broadcast of the anti-siphoning event. Presumably, there would be other programming that may be shown on a free-to-air broadcaster’s other channels that would be of less “national significance” to the anti-siphoning event and therefore could be interrupted in order to screen a breaking news bulletin in relation to a significant news event.

The exemptions to Tier A events being broadcast on the core channel are too broad

There are also a number of exemptions in relation to the requirement that free-to-air broadcasters televise certain anti-siphoning events on their primary/core channel which are too broad and compromise the Government's objective of ensuring that Tier A events are broadcast on a free-to-air broadcaster's primary/core channel. For example, Section 145ZM provides the Minister with an unfettered discretion to determine that particular Tier A events are not required to be televised on a free-to-air broadcaster's core channel. The Bill already provides a number of circumstances in which a free-to-air broadcaster may be entitled to televise a Tier A event on a digital multi-channel. It is difficult to envisage any other circumstances (other than to suit their own commercial interests) in which a free-to-air broadcaster would need to televise the event on a digital multi-channel. Section 145ZM should therefore either be deleted or specify limited circumstances in which the Minister may exercise the discretion.

The Bill does not require free-to-air broadcasters to televise Tier A events in full

The November policy objective that nationally iconic events be televised live and in full is further undermined by incorporating the ‘relevant portion’ concept in respect of the ‘must televise’ live obligations of free-to-air broadcasters in regard to Tier A events.

Given that it would be rare based on current sports rights industry practice to acquire the rights to televise live only parts of an individual event, match, race, or round that is a Tier A event, it is difficult to understand why it is necessary to include the “relevant portion” concept in this context.

The additional layer of complexity in the Bill increases the possibility of non-compliance (whether intentional or inadvertent) thereby potentially depriving viewers of being able to see such important events in full. The provision for televising 'all but an insubstantial proportion' of an event, and the capacity for exemptions and post hoc determinations of 'deemed compliance' in exceptional circumstances provide more than adequate flexibility for free-to-air broadcasters where they are only able show parts of a Tier A event.

5. Unnecessary regulatory uncertainty and diversion of revenue from sporting bodies to free-to-air broadcasters

This section highlights how the effect of the Bill is to divert revenue from sporting bodies to free-to-air broadcasters because it will ultimately make the bidding process less competitive which supresses the value of sports rights for the benefit of free-to-air broadcasters (who can dictate lower rights fees) but results in the financial detriment of sporting bodies.

5.1 The ‘must offer for $1’ regime is misconceived and disadvantages sporting bodies

The most adverse impact of the market distortion from the ‘must offer for $1’ regime will be suffered by the sporting bodies. For instance, a free-to-air broadcaster which is not certain that it will televise a particular event will be deterred from bidding for that event, given the risk that it will be obliged to offer the rights for $1 if it ultimately does not televise the event. Even where the broadcaster does bid for such an event, it will be likely to offer, and ultimately pay, less than it otherwise would, to account for the possibility of a forced sale of those rights for a nominal value under the ‘must offer for $1’ regime. Such a situation may arise in relation to listed events where the ratings appeal of the event is largely dependent on whether an Australian person will be participating in the event. A free-to-air-broadcaster may be reluctant, for instance, to acquire the rights to, or subsequently, televise events from multi-round tournaments such as Wimbledon, the US Open tennis or the US Masters golf if there is no real prospect of an Australian progressing through to, or succeeding in, the final rounds of the tournament.

The ultimate effect is that competition, and therefore the market value, for sports rights to these events is lessened, reducing the revenue that sporting bodies are able to obtain through the sale of these rights and conferring a corresponding benefit to free-to-air broadcasters who will be able to justify lower offers to purchase those rights. This diversion of revenue away from sporting bodies (including those based overseas), which are more likely to reinvest in their community and the development of sports at grass roots level, directly to the private commercial interests of the Australian free-to-air broadcasters, is an unnecessary and undesirable effect of the artificial ‘must offer for $1’ regime and is not in the public interest.

Such an outcome could be avoided if the ‘must offer for $1’ regime was replaced with a framework that guaranteed the free-to-air broadcaster the ability to sell for a competitive price the rights to the events that it does not wish, or is unable, to televise whereby it would be permitted to offer the rights it holds to those events to all broadcasters (including subscription television) in an open competitive forum.

5.2 The definition of 'program supplier' in s145C is too broad and the time at which a program supplier must comply with the 'must offer' obligations is unclear

The definition of program supplier in s145C(1) is unnecessarily broad and as a result creates further uncertainty in terms of the operation of the 'must offer for $1' regime. One of the consequences of this regulatory uncertainty will be to lessen competition for the acquisition of sports rights by driving down the price which media companies including broadcasters are willing to pay sporting bodies for the media rights to their events.

The inclusion in s145C(1) of the words *'proposes to enter into an arrangement'* may capture any potential supplier of programs to free-to-air broadcasters, whether or not the supplier actually supplies a broadcaster with a program or enters into an agreement to so supply. The only arrangements that are not caught are those where the program consists of coverage of a sporting event and the person that *supplies* (as defined in the Bill) the program has control of the sporting event, or organises or administers it: s145C(3).

Such a broad definition potentially captures sports rights brokers that are in the business of buying and selling media rights to sporting events. The inclusion of program suppliers in the 'must offer for $1' regime in this context will have a number of unintended consequences that will adversely impact a sports rights broker's negotiations with free-to-air broadcasters for listed events and ultimately drive down value of the sports rights. FOX SPORTS refers the Committee to the submission of IMG for a more detailed analysis in this regard.

The scope of the 'must offer' obligation on program suppliers under s145J is also unclear. The time by which the program supplier must confer on a free-to-air broadcaster the right to televise the event is not clear in the Bill or the Explanatory Memorandum. On one view, the program supplier only contravenes s145J if it has not conferred the right to televise the event at any time immediately before the event occurs. However, it is also equally arguable that the right to televise the event must be conferred at any time up to 120 days before the event occurs. Given that civil pecuniary penalties are payable for contravening the provision, the time at which the obligation arises must be expressly clarified in the Bill.

5.3 The concept of a 'scheme' for the acquisition of rights to NRL and AFL Premiership matches is unnecessary and confusing

Sections 145ZN and 145ZO, as currently drafted, unnecessarily extend the ambit of the restrictions on the acquisition by subscription television broadcasting licensees, and the conferral on content service providers, of rights to listed events and, in particular, NRL and AFL Premiership matches.

The words *'or is part of a scheme that would prevent'* should be deleted from ss145ZN and 145ZO.[12] There is no basis, as a matter of policy, for seeking to incorporate such a broad prohibition nor is there any evidence to suggest that the AFL, NRL or subscription television industry will seek to circumvent the provisions of the Bill. Indeed, the AFL and NRL's position is that free-to-air television coverage is in the best interests of their competition, as demonstrated by the arrangements negotiated to date. Further, these words and the associated guidance in the Explanatory Memorandum render the provisions unnecessarily complex and vague. For example:

- Why is ***intention*** relevant if the effect is not to prevent a free-to-air broadcaster acquiring the rights?

[12] As a consequential amendment, the definition of 'scheme' should be deleted from s145A.

- How will one determine whether there are ***conditions which purport to influence the acquisition of rights by a free-to-air broadcaster***? At what point is that assessment to be made?
- How will one determine whether the price ***vastly exceeds the objective market value***? And who makes such determination?
- And what constitutes the objective market value when there are arguably no comparable competitions against which to compare?

To the extent it is found that ss145ZN and 145ZO are being circumvented by rights holders and the subscription television and content service providers, the issue should be addressed at that time. The advantages of doing so are that the legislation can be drafted in a manner which addresses specifically the problems that have arisen rather than taking pre-emptive action to fix a problem which does not currently exist. In the meantime, the NRL, AFL, subscription television and content service providers are entitled to have some certainty (to the extent realistically possible under the proposed Bill) as to how such events can or cannot be acquired and the circumstances in which a subscription television broadcasting licensee, content service provider or their program suppliers will be found to have contravened these provisions.

If these provisions remain as drafted free-to-air broadcasters will continue to control the rights negotiation in respect of these sporting events to the detriment of the affected sporting bodies.

5.4 The 'associated set conditions' concept is complex and generates further uncertainty

It should be the prerogative of sporting bodies to decide what is in the best interests of their sport and they should be entitled to choose a media partner that is able to deliver the best quality coverage to the right audience while still maximising its revenue streams in order to support and fund grass roots development and community participation and facilities. Therefore it is the AFL and the ARL Commission (and not the Australian Government) that have the indisputable and most appropriate expertise to determine the best possible mix of television coverage of their respective codes to meet the interests of their sport and the Australian viewing public.

The concept of the Minister imposing “associated set conditions” as part of a Category B quota group determination to ensure that quality matches are shown on free to air television is an unnecessary intervention in the way that these organisations conduct their business and manage their dealings with their broadcast partners. This is highlighted by the fact that the AFL was able to recently structure a deal with the Seven Network and FOXTEL to ensure that certain AFL Premiership matches with particular attributes are shown live in different licence areas on free to air television without any legislative ‘guidance’.

However, if the concept is to remain in the Bill, the types of conditions the Minister can determine to be 'associated set conditions' and the timeframe in which the Minister can make such a determination must be expressly clarified.

As the negotiations for the next round of NRL media rights are already underway, it is extremely difficult for such negotiations to progress in any kind of constructive way without knowing what the Minister’s proposed associated set conditions might be and accordingly what package of rights can be made available by the ARL Commission to the prospective bidders.

The Bill should therefore specify that any associated set conditions to be made in respect of the NRL Premiership matches from the start of the 2013 season should be made as soon as possible after the

passage of the Bill, and for future rounds of negotiations in relation to the NRL and AFL, within a reasonable timeframe before the next round of negotiations are due to commence.

Finally, the Bill should specify that associated set conditions can only be made following a public consultation process in which the Minister can satisfy him or herself as to the need to make any such associated set conditions (if at all) having regard to the interests or needs of the AFL or the ARL Commission and the Australian viewing public.

6. Detrimental impact on sporting bodies, the subscription television and online content industries

The complexity and ambiguity arising from the current Bill creates unnecessary certainty and regulatory burdens regarding the sale of media rights to affected sporting events. In our experience, sporting bodies' understanding of the current Australian regulatory framework for the acquisition of broadcast rights to sporting events varies significantly. Some sporting bodies such as the AFL and NRL are sophisticated bodies, while others lack any substantial degree of understanding of the Australian regulatory regime. Other sporting bodies, such as the majority of those based overseas, do not have any incentive to invest the time, effort and cost involved in understanding the current Australian regulatory framework and are even less likely to be convinced and motivated to decipher and monitor the convoluted and fluid framework proposed under the Bill.

Acquiring broadcast rights to sporting events is costly. Program suppliers and subscription television providers invest hundreds of millions of dollars each year in acquiring and producing that content. Sporting bodies also depend significantly on the revenue they obtain from the sale of media rights to their events. They require certainty as to the terms, validity and enforceability of their rights agreements. Accordingly, it is not unreasonable to expect a level of certainty as to the regulatory environment in which media rights are bought and sold. Conferring extensive and ongoing discretionary power on the Minister, without specifying meaningful limitations as to how it may be exercised, creates significant uncertainty for sporting bodies and program suppliers and will dissuade sporting bodies (particularly those based overseas) from dealing with subscription television and online content providers in Australia.

Further, ensuring compliance with the Bill could make such negotiations inordinately expensive and imbalanced for overseas sporting bodies and sports rights brokers potentially requiring them to procure legal advice on various aspects of the Bill including in relation to the notoriously complex Constitutional issue of the acquisition of property on unjust terms which needs to be considered under the ‘must offer for $1’ regime. Ultimately, such sporting bodies and sports rights brokers may have no choice but to abandon the Australian market. Put simply, it is not commercially feasible for sporting bodies and sports rights brokers to conduct their businesses on this basis.

As ASTRA has also stated in its submission, the statutory entrenchment of preferential treatment of free-to-air networks' **commercial** interests distorts the market for broadcast and content rights, and will continue to curtail the growth of the subscription television and online content sectors. This is clearly undesirable in an environment where IPTV and IETV represents a significant growth sector of the digital economy, and forms an integral part of the NBN business case, as outlined above. An attempt to achieve policy goals concerned with access by the general public to nationally significant content **must**, in order to be effective, be reflective of the public's approach to and habits in accessing content in the 21st century, and not based on historical market paradigms and preferences.

Calibrating the regulatory framework to the 'new paradigm' requires an approach informed by the realities of convergence. For example, how are the Government's policy objectives advanced by prohibiting the acquisition of rights by content service providers who will not charge viewers a fee to watch content? Why should those providers be treated differently to free-to-air broadcasters in circumstances where they will, like free-to-air broadcasters, broadcast such events free to the general public?

7. Matters of Practice

7.1 Absence of associated legislative instruments

It will be difficult for the Committee and affected parties to provide a fully constructive assessment as to how the proposed overall anti-siphoning scheme will work in the absence of being able to consider the various legislative instruments that also need to be introduced to give effect to the scheme such as the actual proposed list of Tier A and Tier B anti-siphoning events as well as any quota group and/or designated group determinations. These documents should also be released for public consultation in order to give not only the Committee an opportunity to make a fully informed evaluation of the effect of the Bill but also to provide the public including the affected sporting bodies with the opportunity to comment on the overall operation and effect of the proposed scheme.

7.2 Transitional provisions should be deleted

Clause 28 of the Bill contains transitional provisions which create considerable practical uncertainty in respect of concluded and current negotiations for the acquisition of broadcast rights to anti-siphoning events. The clause should be deleted.

In circumstances where it is not clear what the final form of the Bill will be, and where specific details were not made available on 25 November 2010 as to how the regime would operate, considerable commercial uncertainty is created for arrangements concluded, and negotiations that have commenced, since that time.

Therefore, the Bill should only apply to rights acquired **after** the final terms of the Bill are determined, that is, when the Act commences. There is no justifiable reason to retrospectively alter commercial arrangements entered into in the 16 months (or more) since the November 2010 policy objectives were first announced.

7.3 Timing of Review

FOX SPORTS agrees that the Government should conduct a further review of the anti-siphoning scheme before 31 December 2014, if not sooner. By at least the end of 2014, the roll-out of the NBN will be well-advanced and the Convergence Review and digital switchover will have been completed. It is therefore quite likely that many of the provisions in the Bill, and in particular those set out in Division 4, will have become redundant as a practical matter.

7.4 Detailed Schedule of our proposed Amendments to the Bill

FOX SPORTS would be happy to provide a detailed schedule of our proposed amendments to the Bill to address the issues and concerns we have raised in this submission as well as other relatively less material concerns and drafting issues not specifically addressed in this submission if requested.