BROADCASTING SERVICES AMENDMENT (ANTI-SIPHONING) BILL 2012 – DRAFTING MATTERS

PURPOSE

The purpose of this document is to provide the Senate Standing Committee on Environment and Communications (the ***Committee***) with specific recommendations for drafting amendments in the Broadcasting Services Amendment (Anti-Siphoning) Bill 2012 (the ***Bill***).

Recommended amendments to the Bill refer to matters raised in FOXTEL's and FOX SPORTS Australia's written submissions to the Committee on the Bill,[1] and verbal submissions made by subscription television representatives to the Committee at its hearing of 13 April 2012.

SPECIFIC DRAFTING ISSUES WITH THE BILL

Below are set out specific recommendations in relation to the Bill.

Provision	Current clause	Issues and recommendation
AFL and NRL games		
145G (9)	Minister must take all reasonable steps to ensure that an event is in a quota group if it is a Tier B event and a match in the AFL Premiership competition (other than finals). No date specified.	**Recommendation**: Section 145G (9) should say that the Minister '<u>must</u>' ensure such a quota group is formed (that is, remove 'take all reasonable steps'). NB: we assume that the intention is that the 2012–2016 AFL competitions will not be on the lists.
145G(10)	Minister must take all reasonable steps to ensure that an event is in a quota group on and after 1 January 2013 if it a Tier B event and a match in the NRL Premiership competition (other than finals).	**Recommendation**: Section 145G (10) should say that the Minister '<u>must</u>' ensure such a quota group is formed as soon as possible after the Bill is passed in respect of NRL Premiership matches to be held after 1 January 2013 (that is, remove 'take all reasonable steps' and ensure that the quota group is formed prior to 1 January 2013 so that negotiations can be conducted this year).
Highlights packages		
145ZN, 145ZO	Limits on acquisition of rights by subscription television licensees.	Free TV argues that the acquisition of a highlights package of a listed event by a

[1] Both submissions are available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=ec_ctte/anti_siphoning_2012/submissions.htm.

	Limits on conferral of rights on content service providers.	FTA network should not remove the prohibition on acquisition of rights by a STV provider or a Content Service Provider. Free TV proposes amendments to section 145ZN and 145ZO so that in order for a STV provider or Content Service Provider to be able to acquire an event on the anti-siphoning list, a national or commercial broadcaster must have the right to televise a 'substantial proportion' of an event. FOXTEL considers that if an event is on the anti-siphoning list, the intention is that viewers see it—to the extent practicable—live and in full. We do not think allowing the FTA purchase of part of an event, just to show a highlights package, should be sufficient to prevent STV providers or Content Service Providers from acquiring and showing the event in full. **Recommendation:** Free TV's proposed amendment should <u>not</u> be made.
Must offer provisions		
145H	'Must broadcast' obligations will not apply if a commercial television licensee, or its program supplier, offers to transfer rights to televise.	It appears that the obligations on the FTA networks to 'offer' events to which they hold the rights but will not televise can be relatively easily circumvented, where an agreement prohibits an FTA from dealing with their rights (see paragraph 170 of the Explanatory Memorandum). **Recommendation:** We suggest that the Bill be amended to ensure that there is an obligation imposed on the commercial television licensees and their program suppliers to obtain the rights to sublicense to another free-to-air provider to ensure that they are able to comply with their 'must offer' obligations.

145L	Offers to transfer rights to televise live events—commercial television broadcasting licensees and national broadcasters.	We remain concerned about the operation of the must offer regime for anti-siphoning events in which there is little or no FTA commercial interest. Under current drafting FTA rights to these events can be gifted for $1, if the event operator needs to pre-sell the event. That value will not be recoverable from the sale of STV rights. FOXTEL considers that events that face this predicament are so 'unwanted' that the Minister should reconsider whether the event should be on the list in the first place. **Recommendation:** The Bill should be amended so that rather than selling rights for $1, the event should be de-listed so that it could be acquired by a STV licensee.
Delisting period		
145E(6)(b)(ii) 145E(6)(c)(ii) 145E(6)(d)(iii) 145E(6)(g)	Minister may specify a period other than 26 weeks (up to 52 weeks) for an AFL match to be automatically delisted.[2]	Free TV argues that the de-listing period should 2,016 hours (12 weeks). FOXTEL does not support this proposal. We have welcomed an increase of the automatic delisting period to a minimum of 26 weeks as notice of 26 weeks gives STV broadcasters a much more realistic opportunity to arrange acquisition of rights and to plan for the broadcast of the event. We note the Government's policy announcement of 2010 was that

[2] For the purposes of the limits on acquisition and referral of rights on subscription television broadcasting licensees (per s 145ZN) and content service providers (per s 145ZO), 26 weeks is the default period for events to cease to be anti-siphoning events.

		seasonal tournaments with complex fixtures would have a longer delisting period of 52 weeks. We support the greatest amount of forward notice possible to facilitate business planning. **Recommendation:** No amendment should be made.
Ministerial Discretion		
145ZM	Minister may determine additional circumstances in which Tier A event can be premiered on a digital multi-channel	This section should be deleted or alternatively specific limited circumstances in which the Minister may determine that a particular Tier A anti-siphoning event is not required to be televised on a free-to-air broadcaster's primary/core channel.
Program supplier provisions		
145C	Program supplier definition	The words 'an arrangement, or proposes to enter into an arrangement' should be deleted and replaced with 'contract, arrangement or understanding'.
145J	Offers by program suppliers	The time by which the program supplier must, for the purpose of section 145J confer on the first licensee the entitlement to televise the event live should be clarified in the Bill
145ZN	A STV broadcasting licensee must not acquire certain rights to televise, on a subscription television broadcasting service, anti-siphoning events unless certain conditions are met.	Free TV argues that program suppliers of STV broadcasters should be subject to the prohibition on acquiring rights to listed events. FOXTEL does not support this proposal. For commentary on this issue, see further information provided by FOX SPORTS Australia. **Recommendation:** Free TV's proposed amendment should not be made. Also, delete the words 'or is part of a scheme that would prevent' in section 145ZN and ZO. Delete the definition of scheme in section 145A.

Definition of 'live'		
145B(3)(b)(ii)	Minister may specify that the definition of 'live' for a particular Tier B event that is not in a designated group, nor an AFL match, is less than 4 hours.[3]	**Recommendation:** Each provision should be amended so that NRL matches, like AFL matches, are excluded from the class of events in relation to which the Minister may determine that 'live means' less than 4 hours.
145B(3)(c)(iii)	Minister may specify that, in relation to a particular licence area, the definition of 'live' for a particular Tier B event that is not in a designated group, nor an AFL match, is less than 4 hours.	
Notification requirements		
145ZR(1)	A program supplier of a commercial television broadcasting licensee who has a right to confer an entitlement to broadcast an anti-siphoning event must notify certain matters to the ACMA.	We are concerned that STV licensees will retain some notification requirements as a potential 'program supplier' to the FTA networks. **Recommendation:** The Bill should be amended to exclude STV licensees from the definition of 'program supplier' in a manner similar to the exemption for sporting bodies set out in section 145C(3).
New provisions at 145 proposed by Free TV	Free TV proposes provisions with the effect that if a subscription television licensee acquires the right to televise live the whole or a part of an anti-siphoning event, it must notify the ACMA in writing of the acquisition. Free TV also proposes that suppliers of programs to STV licensees and Content Service Provider be subject to requirements to notify the ACMA.	FOXTEL does not believe that it is necessary to include subscription television licensees, program suppliers to subscription television or Content Service Providers in such notification requirements—the purpose of these requirements is to ensure that the FTAs (not STV operators) comply with things such as the 'must offer' and 'must televise' obligations under the Bill. **Recommendation:** Free TV's amendments should not be introduced.
Review		
145ZV	The Minister must cause to be conducted before 31 December 2014 a review of the anti-siphoning provisions.	Free TV has argued that the review should be postponed until 2016. Given the fast pace of change in

[3] Four hours from the start of the event is the default definition of 'live' for Tier B anti-siphoning events (see s 145B).

		Australian converging media environment we agree with the Government and the Department that further review of the scheme in 2014, including of the necessity of the scheme in its entirety, will be timely. **Recommendation:** No amendment should be made.
Transitional provisions		
Clause 28	Clause 28 provides that the new "must televise" and "must offer for $1" provisions in the Bill apply to all rights acquired by a free-to-air broadcaster between 25 November 2010 and the commencement of the Bill. Therefore, those provisions will apply in respect of agreements which may be concluded before the Act commences such as the NRL.	**Recommendation:** Delete the clause. The revised regime should only apply to rights acquired on or after the commencement of the amended Act.