

11th April 2012

INQUIRY INTO THE BROADCASTING SERVICES AMENDMENT (ANTI-SIPHONING) BILL 2012

Sports Fan Submission to Senate Environment and Communications Legislation Committee.

The anti siphoning legislation provisions of the Broadcasting Act are “to ensure that events of national importance and cultural significance were made freely available to the Australian public”.

The last two weeks have seen regular live Free to Air programming of National Rugby League matches across Australia. Prior to the 30th April 2012, those unfortunate to live outside of New South Wales and Queensland have had to endure unnecessary delays due to hoarding of the sport by the television rights holder, lack of action from the Minister, the Department of Broadband, Communications and the Digital Economy, and a poorly written contract between compromised media ownership interests some five years prior.

Submission

The focus of my submission today is the inaction of the Ministry and Department to ensure that listed events are shown to the wider Australian community. This is of particular concern to me as the proposed amendments plan to introduce wider powers for the Minister. Over the last three years, hoarding of rugby league has been allowed to continue while various favourable concessions have been made to free to air networks (such as reductions in broadcasting license fees) with no “quid pro quo” for the consumer.

The minister has held over this period the power to delist sport or invoke anti-hoarding provisions and since November 2010 (when the sport on TV review was tabled in Parliament) there have been over sixteen separate amendments to the list which have seen virtually every listed sport delisted in some manner. I have sought many times an answer as to why the minister will not use his powers under the act to stop the hoarding of rugby league into Victoria, even requesting a delisting of the sport itself in the hope of watching my sport of choice at a reasonable time. As a resident and tax payer I still feel I’m at least entitled to an answer as to “why” the Minister continues to allow for this sport to be hoarded in this manner.

The Minister once following a request from the Nine Network, delisted last year’s semi-final match between the Melbourne Storm and the New Zealand Warriors, however Nine decided to show the game live on their primary channel anyway rendering the delisting irrelevant.

Until very recently, with no improvement as to the hoarding of rugby league in non-traditional areas and in increasing frustration with many delays since first contacting the department, I was preparing for remedy through an injunction and advised the Department of my intention in February this year - refer attachment 1 (5th February 2012 email). Coincidentally, and in

the same week of the AFL's "first bounce", Rugby League was finally shown on the Nine Networks GEM channel live outside of New South Wales and Queensland. I trust you'll therefore appreciate my cynicism as to the timing of the improved coverage and recent introduction of the amended bill, which bears little resemblance to that first proposed back in November 2010 when the Sport on TV review was tabled in Parliament.

Proposed Legislation

The proposed amendment to the Broadcasting Act includes the following subdivision which allows for various exemptions;

Subdivision C—Exemptions

145ZM Exemptions—Ministerial determination

(1) The Minister may, by legislative instrument, determine that this Division does not apply to the televising of a specified anti-siphoning event.

Note 1: For specification by class, see subsection 13(3) of the *Legislative Instruments Act 2003*.

Note 2: For variation and revocation, see subsection 33(3) of the *Acts Interpretation Act 1901*.

(2) The Minister may, by legislative instrument, determine that this Division does not apply to the televising of a specified anti-siphoning event in a specified licence area and the corresponding coverage area.

Note 1: For specification by class, see subsection 13(3) of the *Legislative Instruments Act 2003*.

Note 2: For variation and revocation, see subsection 33(3) of the *Acts Interpretation Act 1901*.

(3) A determination under this section may be:

- (a) unconditional; or
- (b) subject to such conditions (if any) as are specified in the determination.

The above exemptions appear to give the Minister unreasonable and excessive power to remove an event of the list. The Minister and his department have shown to date that they seldom acted in the consumer's interest, appearing to only act on free to air network's requests at the same time as allowing hoarding of sport to continue unabated whilst sports fans are denied any appeal.

Definition of Live

The definition of Live in the proposed amendment (Clause 145 B Live) appears to also be whatever the Minister determines. Live or near Live is exactly that – not a 4, 12 or 24 hour delay. The clause also appears to specifically exclude AFL premiership competition in the case of *Tier B anti-siphoning events not in a designated group* thus implying special treatment over other listed events. It is not clear why this is so.

Recommendations

1. The Australian Government should abolish the anti-siphoning legislation to increase sports availability to wider consumers and discourage such anti competitive behaviour that is the current norm.
2. If the Government does not abolish the anti-siphoning legislation (above), at the very least the process for enforcement of a “use it or lose it” policy should be transparent with clear guidelines.
3. In addition to increased transparency above, applying the use it or lose it list automatically to sports not shown nationwide such that regional hoarding of sports on the list, is discouraged.
4. The Ministers powers as detailed in 145ZM (and many other clauses) leave the Minister with too much power. If the anti-siphoning legislation is not abolished, then clear guidelines as to the applicability of various exemptions and determinations should be developed and administered by an independent body (such as ACMA).
5. The definition of live is “Live” or “near Live” (ie with no delay or with as short a delay as is technically feasible) is exactly that – not a 4, 12 or 24 hour delay as the current wording of the legislation would seem to suggest.

Background

Channel Nine are the current rights holder to the National Rugby League (NRL) which was negotiated under the auspices of the current anti siphoning legislation. This sees Channel Nine as sudo custodians of the sport at this professional level and in my opinion, morally responsible for live free to air coverage of rugby league to Australian consumers in. Clearly Channel Nine are not in a position to show all of the games each week so six weeks prior to each round, they preferentially pick three games and provide rights to Fox Sport to produce and provide the remaining games to the remainder of fans through subscription TV access.

As a result Channel Nine obtain top value for their investment and up until recently, showed the important two Friday night football games to markets in Sydney and Brisbane and one Sunday afternoon game. However as mentioned above, access to live rugby league on Friday night, and Sunday afternoon continued to be hoarded in Victoria, Tasmania, South Australia and Western Australia until very recently.

Channel Nine, and their local affiliates outside New South Wales and Queensland had been showing the rugby league game after midnight which results in fans either having to wait up or video the games and watch in the morning.

Despite paying for the production costs, Channel Nine would not show the rugby league live into the wider market, or even on-sell these live rights and it is my opinion that this was due to a cosy local arrangement with the local Australian Football League (AFL) such that the later could be shown free of competition.

- Channel Nine benefit locally by a contra arrangement which sees access to AFL Players and officials for their popular “Footy Show” and other AFL promotional programs.
- The AFL benefit by avoiding an advertising split across other sports for their free to air rights holder, therefore maximising revenue by restricting other sports access to the consumer. The dominance of the AFL locally has seen live Olympics (which is also on the anti siphoning list), Rugby Union Test matches and Soccer disappear off our screens in preference to the local code.
- This was demonstrated clearly last year when the Seven Network delayed the screening of top rating “Packed to the Rafters” program into Melbourne, while Nine premiered an AFL legends game
<http://www.heraldsun.com.au/news/packed-to-the-rafters-return-delayed-in-melbourne/story-e6frf7jo-1225739362282> .

Perversely, the NRL is on-sold across the globe and it is possible to watch every game live throughout Asia, Northern Africa, USA, New Zealand, Europe and the Pacific on subscription TV options or pay to watch games live online through, Omni Sports TV. No such live options existed for Australian fans outside of New South Wales or Queensland until very recently and there still remains no guarantee or longer term commitment of continued coverage at a reasonable time.

After following what little rugby league is played by subscription TV, Channel Nine continued to show their utter contempt for the game, recently prohibiting last years (and previous years) finals series from being shown into Victoria with the exception of a Melbourne storm semi-final and the final itself. After watching a great final game, one can imagine the disappointment and demonstration of the Networks contempt, when coverage of the final stopped at the final whistle. This has even occurred when the local Melbourne side won and fans are subsequently denied the opportunity to see the cup and player celebrations.

Given the incestuous relationship between various media parties including ownership of the various sporting franchises and clubs, the lines are extremely blurred with respect to obligation and the responsibility of showing the rugby league or any other sports hoarded by similar actions. As such, the regulatory regime currently in place provides for an environment of anti-competitive and collusive behaviour, with the effect of (until recently) restricting available sport to one option in Victoria (in this case the AFL) with no option for a live alternative despite the existence of rugby union, soccer and in my case the NRL franchise. Whilst I acknowledge that anti-competitive behaviour and collusion / corruption are difficult to prove, I'd suggest the actions and conduct of the various media and sporting bodies in Victoria are not above suspicion.

Abolishing the anti-siphoning legislation would enable a transparent free market approach to sports broadcasts. The sporting bodies are aware that continued free to air TV access is still required to grow, support and not antagonise their existing fan base. Hence the current and proposed anti-siphoning legislation only complicates a balance which would be provided by natural market forces. The annual review undertaken and published by the Productivity Commission in 2009 also came to a similar conclusion (see below).

The Productivity Commission Annual Review of Regulatory Burdens on Business: Social and Economic Infrastructure Services, 2009

Anti-siphoning list is overly burdensome (page 156)

Anti-siphoning regime is anti-competitive (page 157)

Anti-siphoning regime has limited effectiveness (page 158)

*The anti-siphoning list appears to be unnecessary to meet the objectives of wide consumer access to sports broadcasts (it may actually reduce consumer access to sports broadcasts). Further, it imposes substantial regulatory burdens and competitive disadvantages on subscription television networks. **The option to abolish the anti-siphoning regime should be explored.***

Excerpt from the Productivity Commission Annual Review of Regulatory Burdens on Business: Social and Economic Infrastructure Services, 2009

Thank you for the opportunity to submit my thoughts. I trust that my recent experience is of value to the committee when reviewing the proposed changes to the legislation and recommending any necessary changes to ensure that sport is televised as intended (to the sports fan) rather than utilised as a commodity to be "warehoused" for the benefit of others.

Kind Regards

Ian Flatley