



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

**FOXTEL RESPONSE TO SENATE ENVIRONMENT AND
COMMUNICATIONS LEGISLATION COMMITTEE**

4 April 2012

INTRODUCTION

FOXTEL welcomes the opportunity to comment on the Broadcasting Services Amendment (Anti-Siphoning) Bill 2012 (the **Bill**), referred to the Senate Standing Committee on Environment and Communications (the **Committee**) for comment on 22 March 2012.

FOXTEL's submission is structured as follows:

1. The **Executive Summary** outlines FOXTEL's key concerns and submissions.
2. **Part A** sets out a sample of FOXTEL's history of extensive and innovative sports coverage, including in respect of the AFL, Olympic and Commonwealth Games competitions.
3. **Part B** sets out FOXTEL's position on anti-siphoning policy issues, including problems with the current anti-siphoning regime and our view on the Government's anti-siphoning policy announcement of November 2010—both the workable aspects, and those aspects where there is scope for improvement during implementation.
4. **Part C** sets out FOXTEL's feedback on specific drafting issues with the Bill.

EXECUTIVE SUMMARY

- The anti-siphoning list has reached its useful life. It is analogue-era regulation and has been the longest such list in the world, traditionally set at over 1300 events. Over its life it has been abused by commercial free-to-air (**FTA**) broadcasters to either buy events and not broadcast them, buy events and not broadcast them live or buy events which they will not broadcast but seek to sell them on to our sector. The policy has hurt consumers, sporting bodies and participants in grass-roots sports.
- FOXTEL supported the Government's anti-siphoning policy announcement of November 2010. The policy was by no means perfect and it still continued to favour the FTA networks—with more than 1000 events remaining on the list along with some events that the FTAs do not show (for example, some matches in the Australian Open tennis and the US Masters Golf). However, it represented a compromise between various interests.
- FOXTEL has serious concerns with a number of aspects of the Bill. While it goes some way to dealing with the significant flaws of the current anti-siphoning regime, we are concerned that, if enacted in its current form, it will cause problems as set out below and not give effect to the policy reforms the Government announced in 2010 in a fair manner.
- Our four key categories of concern are:
 - **Significant increase in Ministerial powers and discretion**—the Bill grants the Minister for Broadband, Communications and the Digital Economy (the **Minister**) extensive new powers.

Compared with current arrangements, the number of discretions given to the Minister would be increased nearly four fold (to 19).

FOXTEL submits strongly that clearly defined legal settings that involve keeping Ministerial discretions to a minimum and provide legal certainty are preferable and reflect both good governance and legislative best practice.

- **Instruments not introduced with Bill**—in the absence of the instruments attached to the Bill it is particularly difficult to provide a comprehensive response on how the legislation will work practically because the instruments are so important given the way the Bill is constructed. Among other things, this means that we cannot provide the Committee with feedback on:

- what sports events are to be on the Tier A anti-siphoning events list and what events are to be on the Tier B anti-siphoning events list;
- whether the Minister will allocate each of the AFL and NRL into a Category A Quota Group or a Category B Quota Group;
- what conditions the Minister will attach to the AFL or NRL events if they are allocated to a Category B Quota Group; and
- what events are to be allocated to a designated group and the total minimum number of hours for the group which a FTA network must televise.

Key draft Ministerial instruments that would need to be released for public consultation in order for FOXTEL to comment comprehensively on the scheme are instruments to give effect to:

- the 'delisting' of certain AFL and NRL games;
 - the specification of the associated set conditions that may attach to those games;
 - what competitions will fall within the definition of 'designated groups'; and
 - the total minimum number of hours that must be broadcast by the FTA rights holder for each of those events.
- **Significant uncertainties**—FOXTEL and our channel partners such as FOX SPORTS will not have certainty about the sports rights we can acquire because of the numerous discretions that now lie with the Minister. Most importantly, these discretions include the discretion to set out in a separate legislative instrument which weekly AFL and NRL games must remain on FTA television and the specific conditions that attach to those games.

It is also very concerning to FOXTEL that those games and the conditions that attach to those games can be changed by a separate legislative instrument at any time.

- **Diminished value of sports rights**—the regulatory uncertainty created by the Bill has the inevitable effect of reducing the value of sports rights. This has flow-on effects, ultimately including to the grass-roots sporting codes which support Australian communities.
- FOXTEL understands that anti-siphoning policy needs to finely balance the interests of all stakeholders but submits that subscription television (**STV**) should be given greater certainty under the scheme.
- There are a number of key amendments to the Bill which would go some way to improving the workability of the scheme. These are set out in more detail in Part C below.

PART A: BACKGROUND

FOXTEL is a significant sports broadcaster

FOXTEL is Australia's leading STV provider and is connected to over 1.66 million homes on cable and satellite through retail and wholesale distribution.

FOXTEL has been a significant investor in sports rights since its inception—both directly and indirectly.

FOXTEL broadcasts 23 dedicated sports channels (includes 16 sports channels and seven simulcast High Definition sports channels), offering FOXTEL customers the best in Australian and international sports coverage, news and programming. FOXTEL's 3D channel also regularly broadcasts exclusive sports content in 3D (available to HD subscribers).

On average, FOXTEL broadcasts over 1100 hours of live sport a month including local and international sport across the FOX SPORTS 1, 2 and 3 channels, FOX FOOTY, Eurosport and ESPN and ESPN2 channels. FOXTEL also has dedicated sport channels FUEL TV, Main Event, Speed, SKY Racing, Sky Racing World, Sky Racing 2, TVN, Eurosport News and FOX SPORTS News.

Australian sports include the NRL, the AFL, rugby union, football (including the up-coming live and exclusive broadcast of the Hyundai A-League Grand Final) and cricket (with the current Australian tour of the Caribbean). Our range of international sports includes rugby union, the NBA, NFL, cycling, football, cricket, tennis, golf, baseball and motor sports.

FOXTEL as acquirer of sports rights

Dedicated AFL channels

In 2000, FOXTEL acquired the subscription television rights to the 2002–2006 AFL competition and launched the FOX Footy channel which was a 24 x 7 channel that featured and profiled the AFL and was the first to broadcast in 16:9 widescreen. The FOX Footy channel ceased operating at the end of the 2006 AFL Premiership season.

FOXTEL entered into a further agreement with the Seven and Ten Networks and the AFL for the 2007–2011 seasons and in 2011 entered into a ground-breaking agreement with the Seven Network and the AFL which enables FOXTEL to broadcast all weekly games of the 2012–2016 premiership seasons live. Under the multi-party deal—the richest in the history of Australian sports broadcasting—the AFL secured \$1.253 billion for the rights over a five year period.

As a result, in 2012 FOXTEL premiered the new FOX FOOTY channel (the channel had not been in operation since closing in 2006) where every game of the premiership competition will be live, uninterrupted siren to siren and available in High Definition. FOX FOOTY commenced for season 2012 with live coverage of 30 pre-season matches of the NAB Cup, including the NAB Cup Grand Final (with 29 matches being live and exclusive). Every game of the AFL home and away season will be shown live and every game of the AFL Finals Series (excluding the Grand Final) will also be live on FOXTEL every week of the season. This coverage will be supported by a broad program schedule with expert AFL commentators and identities.

Olympic and Commonwealth games coverage

In 2007, FOXTEL entered into an agreement with the IOC and the Nine Network for the STV broadcast rights for the 2010 Vancouver Winter Olympics and 2012 London Summer Olympics.

FOXTEL's Vancouver broadcast included around 1600 hours of coverage—with over 340 hours being live—on four interactive High Definition and Standard Definition channels. Interactive channels featured statistics, athlete profiles and special content and coverage was streamed live to 3G-enabled mobile phones as well as streamed live over the internet.

For London 2012, FOXTEL will provide eight dedicated High Definition and eight Standard Definition channels available at no extra charge to every FOXTEL residential sports customer. FOXTEL will broadcast 1100 hours of live sport coverage and 3200 hours of Olympic competition sport in total. Subscribers will enjoy coverage of every gold medal live, as it happens.

FOXTEL also offered expansive coverage of the Delhi 2010 Commonwealth Games, with six channels available for the 11 competition days in High Definition and Standard Definition. FOXTEL's innovative coverage included a six-screen multi-view application enabling subscribers to simultaneously watch all channels and decide exactly what they wanted to see.

By buying rights to expansive Olympic and Commonwealth Games coverage, FOXTEL makes a substantial financial commitment which flows through to the funding of grass-roots sports. This investment, together with the exposure of lesser-known events that only FOXTEL's coverage offers, helps to lift the profile and viability of niche sports in the Australian community.

PART B: KEY POLICY ISSUES

The Australian anti-siphoning list has traditionally been the longest such list in the world, covering over 1300 sporting events in a non-Olympic year. Historically, FTA networks did not broadcast 77 per cent of the events on the list.¹

It is widely recognised that the current anti-siphoning legislation is analogue-era regulation, is out of date and acts as a protection mechanism for the commercial FTA networks.

Recognition the current scheme is outdated

The current regime is based on a number of premises which FOXTEL has, for some time, submitted are unsustainable in a digital economy—namely that:

- audiences will only receive sport if there is a protectionist regime that provides commercial preferential treatment to the FTA networks;
- FTA networks need to be protected; and
- Australians' primary in-home source of news and information is the FTA networks and that Australians accept the FTA networks should control their viewing.

It is commonly understood that protectionist measures such as the anti-siphoning regime reduce economic efficiency and innovation.

In this case the scale of the substantial cross-subsidy to FTA networks afforded by the anti-siphoning scheme is also significant. A recent report commissioned by the Australian Subscription Television and Radio Association (**ASTRA**) and undertaken by Deloitte Access Economics estimates that the anti-siphoning scheme amounts to net government support to terrestrial broadcasters of \$415 million in the 2010–2011 financial year alone, and will amount to \$1.561 billion for the financial years 2011–2012 to 2014–2015 if retained in its current form.²

The cost of regulated protection for FTA commercial broadcasters' sports coverage should also be seen in the context of broader regulatory support for the sector most recently evidenced by the extension of the licence fee rebates for the FTA networks. As reported by ASTRA, the concessions announced in March 2012 mean that licence fee rebates to commercial broadcasters over the past two years will be at least \$260 million, with the licence fee rebate extension adding to the nearly \$800 million per year in total in Government support to commercial broadcasters (including through the value to commercial broadcasters of the anti-siphoning scheme and assistance for digital conversion, as well as subsidised access to broadcast spectrum).³

Moreover, Australians increasingly expect that the content they want—including sporting events—should be available when they want to watch it and on a device of their choosing. The convergence of the media and communications industries, and the very rapid take-up of alternative media services, means that it is anachronistic that one industry sector, the FTAs networks, should continue to be privileged at the expense of others.

As a result, an anti-siphoning regime that locks up sporting content for FTA networks, including significant amounts of content that is not ultimately shown, does not act in the best interests of the public.

¹ A finding of independent monitoring conducted by Ernst & Young for the Australian Subscription Television and Radio Association (ASTRA)—see ASTRA, *New Research Exposes Chronic Failure of Sports 'Anti-siphoning' Regulation*, Media Release, 13 July 2006.

² Deloitte Access Economics, *ASTRA Submission to the Convergence Review Report*, 20 October 2011, p 32 – available at http://assets.astra.org.au.s3.amazonaws.com/38a716f5472cb5b34b03578b442dd5fb/AppendixC_DeloitteAccessEconomicsReportforASTRA-Final.pdf.

³ ASTRA, *Government Hand Out Continues For Commercial Broadcasters*, Media Release, 23 March 2012 – available at <http://www.astra.org.au/Menu/News/News#>.

The Productivity Commission inquired into the effect of anti-siphoning policy in both its 2000 landmark report on broadcasting, and its 2009 review of regulatory burdens on business.

In 2000, the Productivity Commission found that the anti-siphoning rules were anti-competitive and that the costs of the scheme, as it was then, to sporting organisations, the broadcasting industry and the community as a whole, exceeded the benefits.⁴

This finding was echoed when, in 2009, the Productivity Commission suggested that consideration should be given in the shorter-term to reducing the list; and, in the longer-term, abolishing the list.

It stated that:

As an interim measure, the burden imposed by the regime should be alleviated by substantially shortening the list and simplifying the process for enabling access by subscription broadcasters to events not broadcast by free-to-air networks.⁵

The Commission noted that while inhibiting the broadcasting industry more generally, the anti-siphoning regime was also not meeting key aims:

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.⁶

Key problems with the current scheme

FOXTEL submits that the problems with the current scheme are extensive. They fall under the following themes:

- **The anti-siphoning list is overly burdensome**—the inclusion in the list of events which can not be, or are not, broadcast by FTA broadcasters makes the negotiation process for STV broadcasters difficult.
- **The anti-siphoning list is anti-competitive**—the anti-siphoning list is inherently anti-competitive. Its provisions directly limit competition between subscription and FTA networks, as STV broadcasters are unable to compete for exclusive broadcast rights for listed events.
- **The anti-siphoning list has a negative impact on sporting bodies**—the anti-siphoning regime has a negative impact on sporting bodies as a result of the substantial reduction in competition during negotiations with broadcasters for the rights.
- **The anti-siphoning list has limited effectiveness**—there are a number of reasons why it could be expected that broad coverage of sporting events would be maintained in the absence of anti-siphoning regulation and that the current regime may not be necessary to ensure broad access to sports broadcasts.
- **The anti-siphoning list is long compared with overseas jurisdictions**—the Australian anti-siphoning list is relatively long compared with those used overseas, such as in the United Kingdom. Further, there are no such restrictions in many countries including New Zealand or the United States.

⁴ Productivity Commission, *Broadcasting, Inquiry Report, No. 11*, 3 March 2000, p 444.

⁵ Productivity Commission, *Annual Review of Regulatory Burdens on Business: Social and Economic Infrastructure Services, 2009*, p 163.

⁶ Productivity Commission, *Annual Review of Regulatory Burdens on Business: Social and Economic Infrastructure Services, 2009*, p 163.

Over time, FOXTEL has submitted that the key solution to overcoming the problems caused by the anti-siphoning list is to shorten the list to those events that the FTA networks broadcast (sometimes referred to as a 'use it or lose it' approach).

The Government's review and subsequent policy announcement

Under the *Broadcasting Services Act 1992*, the Minister was required to conduct before the end of 2009 a review of certain aspects of the anti-siphoning scheme.

In August 2009, the Government released a discussion paper as part of this review, which was intended to stimulate public debate about the scheme and inform the consideration of its effectiveness and appropriateness in the contemporary digital television and sports rights environment.⁷

FOXTEL made extensive submissions in the interests of reforming the scheme—these are available for the Committee to view online.⁸

In November 2010, the Government announced a new anti-siphoning policy which was supposed to represent a compromise that sought to balance the interests of viewers, sports codes, FTA broadcasters and STV broadcasters.

While in announcing the reforms the Minister noted that 'sports fans were at the centre of the Government's reforms',⁹ it was clear that the interests of FTA providers were also at the heart of the reforms. This was evident from the Prime Minister's statement that:

These reforms to the anti-siphoning regime ensure that it continues to be the strongest such regime in the world, protecting the interests of free to air viewers as we move into the digital multi-channel era.¹⁰

Key elements of the new policy included the following:

- **Reducing the length of the list marginally**—from 1300 events to over 1000 events.
- The introduction of **different broadcast obligations and entitlements for different 'tiers' of events**, determined according to whether the event is considered nationally significant.

Tier A was to include events considered by the Government to be 'nationally iconic' and Tier B was to include events such as regular games of the AFL and NRL.

The Government announced its intention that Tier A events be required to be broadcast live and in-full by FTA networks—with limited exceptions, these events would be required to be shown first on FTA providers' main channels.

FTA providers were to be permitted to televise Tier B events on their digital multi-channels.

- **'Must offer' obligations** for FTA providers requiring them to televise anti-siphoning events for which they have acquired live rights or offer those rights to other broadcasters.

⁷ DBCDE, *Sport on television: A review of the anti-siphoning scheme in the contemporary digital environment*, Discussion Paper, August 2009 – available at http://www.dbcde.gov.au/_data/assets/pdf_file/0010/118864/Sport_on_Television_Review_discussion_paper.pdf. See page 4 for context about the review of anti-siphoning.

⁸ FOXTEL, *Sport on television: A review of the anti-siphoning scheme in the contemporary digital environment – FOXTEL submission on discussion paper*, 16 October 2009, available at http://www.foxtel.com.au/cms/groups/webcontent/@fox/@corporate/@dotcom/documents/webcontent/p_017831.pdf.

⁹ Senator the Hon Stephen Conroy, Media Release, *Reforms to the Anti-Siphoning Scheme Announced*, Media Release, 25 November 2010, available at http://www.minister.dbcde.gov.au/media/media_releases/2010/103.

¹⁰ Senator the Hon Stephen Conroy, Media Release, *Reforms to the Anti-Siphoning Scheme Announced*, Media Release, 25 November 2010, available at http://www.minister.dbcde.gov.au/media/media_releases/2010/103.

Along with these changes it was announced that the Government would implement a mechanism to guarantee the 'quality' of the NRL and AFL games on FTA television. This mechanism was intended to ensure that key matches, such as the Friday and Saturday night games, remain 'blockbusters' by being shown on FTA television. The development of a quality mechanism was to accompany the removal from the anti-siphoning list of NRL and AFL games that were currently shown on STV.

The Minister's press release of 25 November 2010 indicated that the implementation of the quality mechanism would be by regulation or 'an alternative mechanism' to be agreed by stakeholders.¹¹

It was announced that changes to the list—taking some events off the list, and adding others (such as some Twenty 20 cricket matches)—would be implemented first, with the legislative change required to implement the full package of reforms to follow.

Understanding the context of the policy

It is critical to understand that in the consultations with Government on anti-siphoning the STV sector agreed and accepted that the Government would allow the FTA networks to premier listed sports on their multi-channels. They had always been able to premier non-listed sport on their multi-channels.

As is recognised by both the Productivity Commission and the ACCC, this puts the STV sector at an even greater disadvantage *vis a vis* the FTA networks than under today's scheme as it means that FTA networks continue to get preferential access to sport and are handed greater programming options to schedule that sport. The Government agreed that it would reduce the length of the list down to those events that the FTAs actually broadcast—otherwise its new multi-channel policy would very adversely affect STV.

Concerns with the 2010 policy announcement

There were key elements of the 2010 policy announcement that FOXTEL, and the STV sector more generally, did not agree with. We were particularly concerned by the large number of events that remained on the list that should have been removed under the Government's own 'use it or lose it' principle (for example, all of the Australian Open tennis and each round of the US Masters Golf were left on the list even though not all of these events have traditionally been shown by the Seven and Ten Networks respectively).

Since the Minister's 2010 policy announcement, FOXTEL has been constructively involved in discussions with the Government to assist in formation of the draft legislative amendments set out in the Bill.

While far less than perfect, and containing significant compromises, FOXTEL indicated to the Government its acceptance of the general terms of the reforms. We considered that the legislative package, with some refinements, was *just workable* for the STV sector. Key aspects to the compromise included that:

- the list was actually shortened, including the de-listing of weekly AFL games and NRL games;
- the quality mechanism for NRL and AFL games would be achieved by a deed between the Government and sports bodies;
- the Minister would not have the power to intervene in the scheduling of games and where they were broadcast; and
- the AFL and NRL would retain control over where their games were broadcast (that is, whether on STV and FTA)—subject to complying with clearly defined requirements set out in a deed.

¹¹ Senator the Hon Stephen Conroy, Media Release, *Reforms to the Anti-Siphoning Scheme Announced*, Media Release, 25 November 2010, available at http://www.minister.dbcde.gov.au/media/media_releases/2010/103.

As set out above, critical to the acquiescence of FOXTEL and the STV sector to the reforms was the clear *quid pro quo* in the policy where the STV sector accepted that the FTAs would be able to put Tier B listed sport on their multi-channels only if the list was shortened to those events that the FTAs actually had a history of showing. This was to include amending the list so that only three weekly NRL games and four weekly AFL games remained on the list.

Workable aspects of the 2010 policy announcement

It is important that FOXTEL notes that the 2010 policy announcement represented some steps forward in correcting what had been a broken regime.

In particular, although not perfect as currently drafted, the new obligation on FTA providers to broadcast events on the anti-siphoning list, or offer the rights to other broadcasters, is a significant advance. These 'must offer' obligations recognise that the FTA networks have not, to date, broadcast the majority of sporting events on the list but have instead hoarded those rights. The practice of hoarding such rights has historically resulted in a poor consumer outcome as those hoarded events were not available to either FTA viewers or STV viewers.

Other workable aspects of the reforms are:

- The extension of the **automatic delisting period** for anti-siphoning events from 12 to 26 weeks.

This reform means that FTA broadcasters must decide if they will acquire the rights to an event on the anti-siphoning list at least 26 weeks prior to its broadcast. If they do not acquire the rights, then subject to the Minister not determining otherwise, the event is automatically removed from the list and STV broadcasters will have the chance to acquire it. 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.

- The requirement for the **Minister to review all aspects of the anti-siphoning scheme** by 31 December 2014, including whether the scheme itself is necessary.

As noted above, we question the ongoing need for an anti-siphoning scheme in a converged media and communications environment. We consider that further review of the scheme in 2014 will be timely.

Differences between the Bill and the policy announcement

In FOXTEL's view the Bill, as currently drafted, does not enact the Government's announced policy in some fundamental respects.

In summary, the problems are:

- that it sees a massive increase in ministerial powers;
- it introduces greater uncertainty in bidding for sports rights; and
- the uncertainty introduced is likely to suppress the value of sports rights.

The specific differences between the Bill and the November 2010 policy are as follows.

Delisting of weekly AFL/NRL games

The Government said in its November 2010 policy announcement that it would delist AFL and NRL games currently shown on STV.

The Bill does not actually delist AFL and NRL games. It leaves them on the list and introduces the concept of Category A and Category B quota groups as the mechanism to specify the number of AFL games that must be available on FTA and to also specify certain conditions that must attach to those games. The process is wholly dependent on the Minister issuing the relevant instrument and not withdrawing or varying it.

There is no certainty in the Bill that the Government will move the instrument to create a 'quota group' for AFL and NRL games. The Bill only says the Minister 'must take all reasonable steps' to ensure that NRL matches and AFL matches that are events on a Tier B list are in a quota group. However, this is dependent on the Minister first issuing an instrument to specify which sports are on the Tier A list and which are on the Tier B list.

Mechanism to 'protect' certain AFL and NRL games on FTA television

The November 2010 policy announcement said that the Government would 'protect' quality AFL and NRL games on FTA television either 'by regulation or an alternative mechanism agreed by stakeholders'. In addition, the policy announcement also stated that the AFL will continue to determine which games are broadcast on FTA 'as is the case now'.

The current Bill moves away from the policy announcement in that:

- the mechanism is incorporated in legislation (and the Minister has significant discretions to give effect to the quality guarantee); and
- the AFL and NRL have lost control of their schedules.

Sports bodies' control over their rights

Should the Bill be passed in its current form, the sports codes would lose control over their rights. This is inconsistent with the announced policy which was clear that the AFL and NRL would continue to determine which games are broadcast on FTA television so long as they complied with a clearly specified number of games being on FTA television.

The Bill, however, would grant the Minister sweeping powers to determine through legislative instrument what games are scheduled on FTA television without reference to the sporting bodies.

Automatic delisting period

The November 2011 policy announcement stated that the AFL and NRL premiership season would have a delisting period of 52 weeks. The current draft of the Bill provides for an automatic delisting at 26 weeks with discretion for the Minister to specify up to 52 weeks.

Four hour definition of live

The policy announcement said that if an event was on Tier B the definition of a live broadcast would be four hours, being a delayed starting time of not more than four hours. Under the Bill the Minister has the discretion to vary this which again creates further uncertainty when trying to contract for these rights.

Ministerial discretions too broad

The Bill will provide the Minister with broad and sweeping powers to intervene in sports broadcasting.

Even without the new discretions set out in the Bill, a willingness to intervene has been highlighted by the recent practice of de-listing events to allow them to be shown on FTA multi-channels (for example, recent cricket test matches and certain Australian Open tennis matches).

In the absence of the instruments attached to the Bill it is particularly difficult to provide a comprehensive response on how the legislation will work practically because the instruments are so important given the way the Bill is constructed. Among other things, this means that we cannot provide the Committee with feedback on:

- what sports events are to be on the Tier A anti-siphoning events list and what events are to be on the Tier B anti-siphoning events list;
- whether the Minister will allocate each of the AFL and NRL into a Category A Quota Group or a Category B Quota Group;

- what conditions the Minister will attach to the AFL or NRL events if they are allocated to a Category B Quota Group; and
- what events are to be allocated to a designated group and the total minimum number of hours for the group which a FTA must televise.

FOXTEL submits that the Committee should carefully consider the effect of including in legislation so many discretions, where the ability of the Minister to determine key operational aspects of the scheme could undermine any perceived certainty.

PART C: FEEDBACK ON SPECIFIC DRAFTING ISSUES WITH THE BILL

Areas of Concern in the Bill

Reliance on Ministerial instruments

A significant problem with the Bill is that it creates massive uncertainty around sports rights for the STV sector and sporting bodies as follows:

- It is uncertain what sports events are on the Tier A list and the Tier B list.
- It is uncertain whether the Minister will allocate the AFL and NRL competitions into Category A quota groups or Category B quota groups.
- It is uncertain what associated set conditions the Minister will attach to events in the 'Category B quota group', particularly as the Minister retains very broad discretions.
- It is uncertain what events are to be allocated to a designated group and the total minimum number of hours for the group which a FTA must televise.

This will make contracting for these rights in the future very difficult.

Need for greater certainty on delisting of AFL and NRL games

As noted above, a *quid pro quo* in FOXTEL accepting the Government's intention to allow FTA networks to premier listed sport on their multi-channels was that the Government would reduce the length of the list (including removing five weekly AFL games and five weekly NRL games) which would enable the STV sector to negotiate directly with the AFL and NRL rather than maintaining the status quo which sees the FTA networks in control of these negotiations.

FOXTEL appreciates that the Government has now made it clear that the Minister cannot make a determination in relation to a quota group number of AFL games above four games. However, this is still dependent upon the relevant instrument being introduced.

The Bill provides that the Minister must take all reasonable steps to ensure that where an event is on the Tier B list and part of the AFL competition, that it is in a quota group. However, again this is dependent upon the Minister having specified what is on the Tier B list via an instrument.

FOXTEL is also concerned that the Government, in attempting to ensure the quality of games available on FTA, may fail to recognise the practical realities associated with scheduling the competition which is best determined by the AFL itself.

Paragraph 130 of the Explanatory Memorandum says that the 'associated set conditions' may specify that one event takes place on a Friday night and one event takes places upon a Saturday night,¹² however there may not always be a Saturday night game to fulfil the condition. There may also not be four games in each week of the competition where there is a split round.

¹² *Broadcasting Services Amendment (Anti-Siphoning Bill) Bill 2012 – Explanatory Memorandum*, p 23 – available at <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fs872%22>.

This highlights the difficulties of trying to provide a comprehensive response to the Bill in the absence of the instruments.

The same can be said for the NRL.

Again, we appreciate that it was made clear in the Second Reading speech that 'it is the Government's intent that a 'quota group' legislative instrument be made for the NRL Premiership with a quota number of 3'.¹³ The Bill says, at section 145G (10), that the Minister must 'take all reasonable steps' to ensure that on or after 1 January 2013 a quota group is formed for the NRL (and therefore the games are removed from the operation of the list).

Given the centrality of actually removing NRL and AFL games from the list to the Government's agreement with the STV sector, we believe that sections 145G (9) and (10) should simply say that the Minister 'must' ensure such a quota group is formed (that is, remove 'take all reasonable steps').

Notification obligations still catch subscription television as a 'program supplier'

FOXTEL is concerned that our sector will retain some notification requirements as a potential 'program supplier' to the FTA networks. This may particularly arise where the FTA networks and STV operators are obliged to provide access to each other for certain coverage.

We do not believe that it is necessary to include program suppliers in such notification requirements. This is because 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.

Such obligations are not relevant to program suppliers and there is therefore no justification to imposing additional, onerous and unnecessary reporting obligations on STV indirectly via the definition of 'program suppliers'.

FOXTEL recommends that there should be exclusion for such arrangements for program suppliers similar to the 'carve-out' that has been created for sporting organisations (see section 145C (3)).

Grandfathering of London Olympics

It is also unclear to us as to how the Government intends to grandfather the 2012 London Olympics. The Government made a commitment to our sector as part of ongoing discussions to grandfather these rights for FOXTEL so that they would continue to be governed under the current regime which requires that the FTAs not broadcast any event on their multichannel unless it is broadcast concurrently with the broadcast on the main channel or it has had a prior broadcast on the main channel.

FOXTEL has paid a significant amount of money for those rights based upon the assumption of the continuation of a particular legislative environment that would prohibit events on the anti-siphoning list premiering on a multi-channel until at least the end of the simulcast period.

Accordingly, FOXTEL suggests that the 2012 London Olympics have a specific carve-out in the legislation from the right for the FTAs to include these events on their multi-channels.

Designated groups – total number of hours

FOXTEL is concerned that the number of hours under the designated group for multi-round events such as the Olympics should not be too high.

¹³ *Broadcasting Services Amendment (Anti-siphoning) Bill 2012 – Second Reading Speech* – available from <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fs872%22>.

In FOXTEL's view it is critical that in calculating the number of hours in each designated group the Government use the actual number of hours of original content broadcast—and excludes from its calculation advertising, recaps and news breaks always contained in any one hour of such multi-round broadcasts.

If this is not done it will lead to the unintended consequence of FTA broadcasters having to broadcast events on their second channel, in order to comply with the 'must broadcast' obligation, that they would not otherwise broadcast. This will have flow-on effects for STV in terms of how the broadcast rights would be typically split for such events.

Differential approaches in definition of live for NRL and AFL

FOXTEL does not understand why the Bill takes a different approach in relation to what constitutes live coverage for the NRL as compared with the AFL (in the definitions of 'live') for events on Tier B. This differential approach arises as the Minister has more power to intervene in the definition of 'live' in the case of the NRL than he or she does in relation to the AFL. FOXTEL believes the approach should be the same in both cases. The AFL drafting should be used for both codes.

FTA 'must broadcast' obligations can be circumvented

It appears to FOXTEL 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 169 of the Explanatory Memorandum). We suggest that the Bill be amended to ensure that there is an obligation inserted on the FTAs to seek to obtain the rights to sublicense to another FTA to ensure that they are able to comply with their 'must offer' obligations.

Potentially adverse impact of must offer regime

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. The must offer regime ultimately gifts the FTA rights to these events to the national broadcasters for \$1, if the event operator needs to pre-sell the event. Event operators cannot rely on the delisting process if they need to pre-sell events. If they cannot muster sufficient interest from the FTAs on a commercial basis, the must offer regime drives them to allow the FTA rights to go to the national broadcasters for \$1, and so destroys the value of the event. That value will not be recoverable from the sale of STV rights where the national broadcasters can use the event as low cost programming. 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.

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FOXTEL