



Broadcasting Services Amendment (Anti-siphoning) Bill 2012

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Broadcasting Services Amendment (Anti-siphoning) Bill 2012

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Portfolio: Broadband, Communications and the Digital Economy

Commencement: Sections 1 to 3 on the day the Act receives Royal Assent. Schedule 1, Part 1 on the day after the Act receives Royal Assent and Schedule 1, Part 2 on a single day to be fixed by Proclamation. If the provisions do not commence within the period of six months beginning on the day the Act receives Royal Assent, they are to commence on the day after the end of that period.

Links: The links to the [Bill, its Explanatory Memorandum and second reading speech](#) can be found on the Bill's home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation. When Bills have been passed and have received Royal Assent, they become Acts which can be found at the ComLaw website at <http://www.comlaw.gov.au/>.

Purpose

The Broadcasting Services Amendment (Anti-siphoning) Bill 2012 (the Bill) proposes to repeal current anti-siphoning and anti hoarding provisions in the *Broadcasting Services Act 1992* (the BSA) and to introduce new anti-siphoning measures.¹

Background

Background information relating to the concept of siphoning—its definition and development in Australia and overseas—is comprehensively dealt with in the Parliamentary Library's research paper, *Sport on television: to siphon or not to siphon?* (the *To siphon or not to siphon* paper).²

The *To siphon or not to siphon* paper provides a definition of the practice of siphoning and the current anti-siphoning situation in Australia. This is summarised in the box below.

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1. Note: reference in this digest will be to the anti-siphoning regime for consistency with the Bill under discussion. However, it should be noted that other Library publications refer to anti siphoning and in other instances the regime is referred to as antisiphoning.
 2. R Jolly, *Sport on television: to siphon or not to siphon?* Research paper, no. 14, 2009–10, Parliamentary Library, Canberra, 2010, viewed 1 May 2012, <http://parlinfo.aph.gov.au/parlinfo/search/display/display.w3p;query=Id%3A%22library%2Fprspub%2FSOVV6%22>

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Current anti-siphoning rules

Siphoning refers to the practice used by pay television broadcasters by which they appropriate, or 'siphon off' certain events that have been traditionally shown on free-to-air television so that viewers who do not subscribe to their services are unable to view those events.

Under the existing Australian anti-siphoning scheme, pay television licensees are unable to acquire rights to televise listed events on pay television until rights have first been acquired by the Australian Broadcasting Corporation (ABC), the Special Broadcasting Service (SBS) or commercial free-to-air broadcasters who reach more than 50 per cent of the Australian population.

Section 115 of the BSA details the Australian anti-siphoning rules. Provisions in section 115 empower the Minister for Broadband, Communications and the Digital Economy to list in a formal notice, (known as the anti-siphoning list), events that must be available on free-to-air television for viewing by the general public.

There is provision in the rules for the Minister to delist an event on the anti-siphoning list if no free-to-air broadcaster displays an interest in acquiring the broadcast rights. Events are automatically delisted if no free-to-air broadcaster expresses such an interest 2016 hours (12 weeks) prior to their staging. The automatic delisting period can be terminated if the Minister considers 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 concerned'.³

The *To siphon or not to siphon* paper also traces the history of the anti-siphoning regime in Australia until the end of 2009. It discusses its development, and explores the arguments for and against its retention, both in past context and in relation to the most recent government inquiry into the relevance of the scheme in a changing 21st century media environment. A summary of the historical background in the paper is included in the box below.

Anti-siphoning developments which have taken place since the current government's review of the scheme commenced in late 2009 are provided in more detail in the section following the box.

Brief history of the anti-siphoning regime

During investigations into the possible social, economic and technical ramifications of the introduction of cable and subscription television to Australia in 1982 free-to-air broadcasters argued that siphoning of programs would be an inevitable consequence of a pay television environment and that this would have considerable social costs for audiences.⁴

3. Subsection 115(1AB) of the current *Broadcasting Services Act 1992*.

4. FACTS, submission 188, p. 17 to Australian Broadcasting Tribunal (ABT), *Cable and subscription television services for Australia*, vol. 1, Report (Part A), Australian Government Publishing Services (AGPS), Canberra, August 1982, p. 13.22. Note: FACTS is now called Free TV Australia.

In opposition, potential subscription television operators argued that such a scheme would prevent them from competing with free-to-air broadcasters to buy programs.⁵ Some sporting bodies were also opposed to the introduction of an anti-siphoning regime.⁶

After weighing the findings of these investigations, the Hawke Government decided to impose an anti-siphoning regime on pay television. Parameters for the anti-siphoning regime were established under the BSA which conferred power to introduce an anti-siphoning list and to specify events that should be televised free to the public.

The Government considered four options for events to be included on the list. The first was to institute a comprehensive list of events as nominated by the free-to-air broadcasters.⁷ At first glance, this option appeared to preserve the most viewer access, as it included every rugby league and Australian Rules football match, cricket test and one day international, each match in the tennis grand slam tournaments, the Tour de France, every national and international motor race, the Summer and Winter Olympics and the Commonwealth Games. But it was clearly impossible for the free-to-air services to broadcast all these events without displacing a significant amount of their other programming. So in effect, this 'comprehensive' option meant either that some events were not broadcast, or only short snippets were shown.

A further option was to include events on an anti-siphoning list if they met certain criteria.⁸ Another option was to adopt a watching list of events to be considered for inclusion on a future list as contractual arrangements for the coverage of certain sports expired and information on the numbers of pay television subscribers and the nature of its programming became more apparent.⁹

The anti-siphoning list announced by the Australian Labor Party (Labor) Minister for Communications and the Arts, Michael Lee, on 31 May 1994 was in effect the comprehensive list nominated by the free-to-air broadcasters.¹⁰

Almost from the onset there were difficulties with, and challenges to the anti-siphoning list, as the Howard Coalition Government discovered soon after its election in 1996 when it was forced to face concerns that the list contributed to limited free-to-air coverage of Australia's quasi national sport, cricket because broadcasters were 'hoarding' the rights they had obtained.¹¹

In 1999, the Government introduced amendments to the BSA to require broadcasters who did not intend to televise live a substantial portion of those events to which they had live rights, to offer the unused rights for a

5. Nilsen Premiere, submission 85, p. 95 to *Cable and subscription television services for Australia*, op. cit., p. 13.22.

6. Evidence to the ABT from the Confederation of Australian Sport, p. 1027, quoted in *Cable and subscription television services for Australia*, op. cit., p. 13.22.

7. M Westfield, *The gatekeepers: the global media battle to control Australia's pay TV*, Pluto Press, Annandale, 2000, p. 244.

8. The criteria were: events played or staged in Australia; international events that involved significant participation by Australians; events that attracted substantial public interest in Australia; events usually shown on commercial or national broadcasters and events that had broadcast rights that could be traded.

9. Australian Broadcasting Authority (ABA), *Pay TV 'siphoning' investigation: report to the Minister for Communications and the Arts*, May 1994.

10. ABA, *Investigation into the implementation of the anti-hoarding rules*, Issues paper, ABA, Sydney, June 2000.

11. A Davies, 'Pay TV chiefs seek overhaul of sport coverage', *The Sydney Morning Herald*, 10 July 1997.

nominal charge to the ABC and SBS.¹² The ABC and SBS were then bound to televise live the designated events they accepted or to offer the rights (either in total or in part) to the other national broadcaster. Only if the public broadcasters did not want events, would they then become available to pay television. The provisions were intended to provide an 'incentive for free-to-air broadcasters to only acquire live rights to a designated event or events in a series they can actually use, and to discourage the acquisition of live rights to designated events or series occurring during the same period where it would be impossible to provide full live coverage of both events or series on the one television channel'.¹³

From 2000, issues such as the multi channelling capacity for broadcasters associated with the introduction of digital television further complicated the anti-siphoning regime.

Before the renewal of the list in 2004 it was speculated that the Government intended to create two separate lists—an A list of premier events for which free-to-air broadcasters would have exclusive rights, and a B list for which free-to-air and pay operators could bid.¹⁴ Nothing came of this suggestion, but the Government did introduce some changes to the scheme notably the 'use it or lose it' provisions in conjunction with its media reform package in 2006.

Under use it or lose it the Australian Media and Communications Authority (ACMA) monitored free-to-air television coverage of events on the anti-siphoning list. The regulator found that over a two year period broadcasters generally provided adequate coverage of events to which they had secured rights.

Despite the use it or lose it rules, ensuring that free-to-air audiences were able to see popular sport still presented problems for government when Labor returned to office in November 2007. In 2009, the Minister for Broadband, Communications and the Digital Economy, Senator Stephen Conroy, in accordance with a legislative requirement in the BSA, commenced a review process of the anti-siphoning scheme with the release of the *Sport on Television* discussion paper.

The Government promoted the paper as a means through which public debate about the effectiveness and appropriateness of anti-siphoning could occur in the context of a contemporary digital television and sports rights environment.¹⁵

Government discussion paper

In October 2009 the Government published submissions to the *Sport on Television* Review paper (the *Sport on Television* review). For those familiar with the anti-siphoning debate there was nothing new revealed in the submissions; they effectively restated arguments that had been advanced for and against the maintenance of an anti-siphoning scheme since the early 1990s.

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12. *Broadcasting Services Amendment Act (No. 1) 1999*. The provision was inserted under a new Part 10A of the Act.
 13. Regulatory Impact Statement, Explanatory Memorandum, p. 10, cited in ABA, *Investigation into the implementation of the anti-hoarding rules, Issues paper*, ABA, Sydney, June 2000, p. 8.
 14. C Banham, 'Free-to-air right, siphoning back on the table', *The Sydney Morning Herald*, 12 July 2002.
 15. Department of Broadband, Communications and the Digital Economy (DBCDE), *Sport on television: a review of the anti-siphoning scheme in the contemporary digital environment*, Discussion paper, August 2009, viewed 2 May 2012, http://dpl/Books/2009/DBCDE_SportOnTelevisionReview.pdf

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Arguments¹⁶

Pay television

The Australian Subscription Television and Radio Association (ASTRA) submission to the Government's *Sport on Television* review labelled anti-siphoning as antiquated and anticompetitive and detrimental to sports codes and grass roots sports competitions.¹⁷ ASTRA strenuously maintained a previous stance that the majority of sport on the anti-siphoning list is not shown on free-to-air television.¹⁸ Foxtel also labelled anti-siphoning an 'historical relic' which does not serve the interests of consumers and stunts broadcasting industry growth.¹⁹

Optus and Telstra were 'strongly opposed' to the extension of the anti-siphoning scheme to new media platforms.²⁰ Telstra argued:

New media platforms provide new and innovative ways for sports events to reach existing and new fans and so facilitate the Government's policy objective. Examples of how new media supports rather than substitutes existing consumers' television consumption of sporting content are video-on-demand highlights, replays of key moments, immediate access to event results, player statistics and other related information. While these are valuable services to the consumers who access them, they do not replace current television offerings.²¹

Free-to-air television

Free TV, on the other hand, maintained all Australians should have access to free sport on television, not just the minority who could afford the added expense for family budgets that sports subscription packages entail.²² Free TV argued further that there would be adverse consequences for the viewing

16. The information in this section is largely taken from R Jolly, *Sport on Television*, op. cit.

17. Australian Subscription Television and Radio Association (ASTRA), Submission to *Sport on Television: a review of the anti-siphoning scheme in the contemporary digital environment*, October 2009, viewed 7 May 2012, http://www.dbcde.gov.au/_data/assets/pdf_file/0010/121330/Australian_Subscription_Television_-and-Radio_Association_main_submission.pdf

18. Auspoll research quoted in ASTRA submission to *Sport on television*, op. cit.

19. Foxtel, Submission to *Sport on Television: a review of the anti-siphoning scheme in the contemporary digital environment*, 16 October 2009, viewed 7 May 2012, http://www.dbcde.gov.au/_data/assets/pdf_file/0009/121320/Foxtel_main_submission.pdf

20. Optus, Submission to *Sport on Television: a review of the anti-siphoning scheme in the contemporary digital environment*, 16 October 2009, viewed 7 May 2012, http://www.dbcde.gov.au/_data/assets/pdf_file/0010/121321/Optus_main_submission.pdf

21. Telstra Corporation, Submission to *Sport on Television: a review of the anti-siphoning scheme in the contemporary digital environment*, 16 October 2009, viewed 7 May 2012, http://www.dbcde.gov.au/_data/assets/pdf_file/0013/121243/Telstra_Corporation_Limited_main_submission.pdf

22. Free TV Australia, Submission to *Sport on Television: a review of the anti-siphoning scheme in the contemporary digital environment*, 16 October 2009, viewed 7 May 2012, http://www.dbcde.gov.au/_data/assets/pdf_file/0015/121236/Free_TV_Australia_main_submission.pdf

public if anti-siphoning were abandoned, citing the situation in the United States and New Zealand where 'sporting events are regularly shown exclusively on pay television'. Free TV noted also that since Test Match cricket was removed from the anti-siphoning list in England, audience numbers had declined dramatically.²³

Free TV refuted claims from pay television operators that it hoards events. It reasoned that as almost three quarters of the events it reputedly hoarded were matches in the Australian Open and Wimbledon tennis tournaments, half of which were not broadcast, pay television was attempting to mislead people by citing this figure.²⁴ It maintained that the number of events currently not broadcast (because of time and other programming commitments) would increase significantly if free-to-air broadcasters were to be allowed to make better use of their multi channels. In Free TV's view this was illustrated by the fact that pay television was able to run multiple channels of Olympics coverage, whereas free-to-air was restricted to coverage on a broadcaster's main channel.²⁵ The ABC and the SBS agreed. The ABC noting that the opportunity for free-to-air broadcasting to be able to use multi channels would assist them to contend with the vagaries of sport broadcasting due to weather, extra time or other disruptions.²⁶

Both commercial and public free-to-air broadcasters were of the view that the various iterations of new media had the potential to undermine the anti-siphoning list.

Sports organisations

The *Sport on Television* review illustrated that the arguments of the free-to-air and pay television operators surrounding anti-siphoning were conspicuous by the fact that they had changed little over time. On the other hand, sporting organisations which receive little free-to-air coverage were most concerned in 1994 that their sports were not placed on an anti-siphoning list, as they believed it would be detrimental to the development of their sports. In 2009, however, they appeared more

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23. The sources for these claims cited in the Free TV submission were: D Conn, 'Sky's limits leave cricket's fans in the dark and grass roots cut short', guardian.co.uk, viewed 22 May 2012, <http://www.guardian.co.uk/sport/blog/2009/jul/15/test-cricket-broadcast-rights-sky/print>; J Deans, 'Ashes fever lifts TV ratings as cricket fans tune in to see England v Australia', guardian.co.uk, 20 July 2009, viewed 22 May 2012, <http://www.guardian.co.uk/media/2009/jul/20/ashes-england-andrew-flintoff> and J Plunkett, 'TV ratings: 2m sky viewers see England clinch the Ashes', guardian.co.uk, 24 August 2009, viewed 22 May 2012, <http://www.guardian.co.uk/media/2009/aug/24/ashes-cricket-tv-ratings>
 24. M O'Reagan, Transcript of interview with Julie Flynn, 'Sport on TV', *Sports Factor*, ABC Radio, 20 October 2006, viewed 26 November 2009, <http://abc.gov.au/rn/sportsfactor/stories/2006/1768044.htm>
 25. Free TV, Submission to *Sport on Television*, op. cit.
 26. Special Broadcasting Service (SBS), Submission to *Sport on Television: a review of the anti-siphoning scheme in the contemporary digital environment*, October 2009, viewed 7 May 2012, http://www.dbcde.gov.au/_data/assets/pdf_file/0015/122640/SBS_main_submission.pdf and Australian Broadcasting Corporation (ABC), Submission to *Sport on Television: a review of the anti-siphoning scheme in the contemporary digital environment*, 23 October 2009, viewed 7 May 2012, http://www.dbcde.gov.au/_data/assets/pdf_file/0007/121768/Australian_Broadcasting_Corporation_main_submission.pdf

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willing to evaluate anti-siphoning from a whole-of-sport perspective and to conclude overall in favour of either substantially shortening the list, or abolishing it. For example, Basketball Australia suggested the list should be radically trimmed to include only the Olympics and the Commonwealth Games.²⁷

In opposition to a previously ambivalent stance on anti-siphoning, popular sports, such as cricket and rugby league, wanted to see the demise of the anti-siphoning list. Cricket Australia cited a number of reasons for this, but principally its stance was motivated by the belief the list restricted the power of its administrators to negotiate the best deal for its product.²⁸ In support of its argument, it contended that removing the Ashes cricket test series between England and Australia from the British anti-siphoning list had increased revenue for English cricket from the sale of rights to the series. The additional revenue had then been used to support the grass roots game.²⁹ This claim was in direct opposition to the free-to-air focus on audience loss for the Ashes, which was also a result of the move.

The Australian Rugby League (ARL) agreed with Cricket Australia's approach to anti-siphoning. It claimed that the existence of an anti-siphoning list had had a major negative impact on ARL revenues, and any expansion of the scheme would have equally adverse implications for the provision of grass roots programs.³⁰

In general, sporting groups appeared less than supportive of the free-to-air broadcasters' stance. In addition, sports groups identified the opportunities the rise of new media presented for them to repackage and redistribute their products. They agreed with the view that new media coverage complemented traditional sports broadcasting.

Moving towards change

When it released the anti-siphoning review submissions the Government promised that they would assist it in forming its views on the issues relevant to the future operation of an anti-siphoning scheme. It noted that it was aware the 'scope and nature of television broadcasting' had changed

27. Basketball Australia, Submission to *Sport on Television: a review of the anti-siphoning scheme in the contemporary digital environment*, 15 October 2009, viewed 7 May 2012,

http://www.dbcde.gov.au/_data/assets/pdf_file/0010/121231/Basketball_Australia_main_submission.pdf

28. Cricket Australia, Submission to *Sport on Television: a review of the anti-siphoning scheme in the contemporary digital environment*, 16 October 2009, viewed 7 May 2012,

http://www.dbcde.gov.au/_data/assets/pdf_file/0012/121233/Cricket_Australia_main_submission.pdf

29. Deloitte LLP, *The impact of broadcasting on sports in the UK: an independent economic study*, 20 July 2009, quoted in Cricket Australia, Submission to *Sport on Television*, op. cit.

30. National Rugby League and Australian Rugby League, Submission to *Sport on Television: a review of the anti-siphoning scheme in the contemporary digital environment*, 16 October 2009, viewed 7 May 2012, http://www.dbcde.gov.au/television/antisiphoning_and_antihoarding/sport_on_television_review_of_the_anti-siphoning_scheme_discussion_paper/sport_on_television_review_submission?121150_result_page=261

since the introduction of the scheme and implied that some changes were therefore imminent.³¹ However, it also took pains to emphasise that it was committed to ensuring events of national importance and cultural significance would continue to be freely available to the Australian public, whatever its decision.

Release of the submissions to the *Sport on Television* review prompted considerable speculation about what changes the Government was contemplating. This was initially fuelled by two amendments to the scheme which the Government allowed to remove Federation Internationale de Football Association (FIFA) World Cup matches from the anti-siphoning list and to allow continuous free-to-air coverage of the 2010 Commonwealth Games.³²

In November 2010 the Government's intention for reform was revealed—a two tier listing of anti-siphoning events. Tier A events were to comprise 'nationally iconic events' and free-to-air broadcasters were to be required, with limited exemptions, to broadcast these live and in-full. Tier B events were to comprise events such as regular games of the AFL and NRL premierships seasons. Free-to-air broadcasters were able to be flexible in televising these events on their digital multi-channels. The Government argued this would increase the free-to-air broadcasters' capacity to show more sport on free-to-air television.³³

Tier A and Tier B lists came into effect on 1 January 2011, but at the same time, the listing entailed no difference in treatment of events on either list as these reflected only an 'intended future framework' for anti-siphoning to be confirmed by legislation.

The Government promoted its new list as one framed with a dual purpose—to ensure that it remained relevant to Australian audiences, while reflecting the commercial realities of the sporting and broadcasting sectors.³⁴

31. S Conroy (Minister for Broadband, Communications and the Digital Economy), *Submissions to inform sport on television review*, media release, 30 October 2009, viewed 22 May 2012, http://www.minister.dbcde.gov.au/media/media_releases/2009/099

32. In May 2010, the Government amended the anti-siphoning list to remove eight group stage matches of the 2010 FIFA World Cup from the list. This gave SBS the flexibility to cover all 64 matches of the tournament. On 30 September 2010 Minister Conroy announced a change to the list to allow continuous, live free-to-air coverage of the 2010 Commonwealth Games from Delhi. The change allowed Network Ten to continue live coverage of the Commonwealth Games on its digital multichannel ONE, when its main channel switched to regular news programming. S Conroy (Minister for Broadband, Communications and the Digital Economy), *Live and continuous coverage of the 2010 Commonwealth Games*, media release, 30 September 2010, viewed 22 May 2012, http://www.minister.dbcde.gov.au/media/media_releases/2010/076

33. S Conroy (Minister for Broadband, Communications and the Digital Economy), *Reforms to the anti-siphoning scheme announced*, media release, 25 November 2010, viewed 22 May 2012, http://www.minister.dbcde.gov.au/media/media_releases/2010/103

34. Ibid.

Main issues³⁵

Commercial equity

Social equity arguments are often used to justify the imposition of anti-siphoning rules. One commentator argues, however, that while social equity is a 'noble sentiment', in reality it unfairly disadvantages certain commercial media groups. The argument being that under an anti-siphoning regime pay operators and sports rights holders are singled out for restrictions:

... while retailers in other fields are free to make commercial decisions. Certainly governments do not dictate to Woolworths where to establish the next supermarket. While it is understandable that politicians would seek to protect access to the Melbourne Cup for all, it does raise a dilemma as to what is in the national interest and what is a national sacred cow.

In reality, the Victorian Racing Club [VRC] is unlikely to want to sell the Melbourne Cup exclusively to a Pay TV enterprise until it is assured of maximum exposure across the country. Thus the VRC is certain to exercise commercial criteria anyhow. It will be an interesting debate should Pay TV offer a much higher rights fee than a free-to-air channel. If by regulation, the VRC is precluded from selling to the highest bidder, perhaps it could ask the government to make up the difference.

Furthermore, the notion that particular sporting events possess a special national cachet is questionable. To single out the AFL Grand Final or the NSW Rugby League Grand Final, neither constitute[s] a national event. Indeed in one context, both events manifest the sporting divide between the States. There is some argument in the case of Test cricket, but it is doubtful Australia v Sri Lanka evokes the same passions as do the Ashes series.³⁶

The question this assessment essentially asks is why it is imperative that government should intervene to ensure that a service is provided in this particular instance, and not in other cases. This leads to the further question: if government sees some sort of moral obligation to intervene to ensure that those who cannot afford, or do not choose to subscribe to pay television are able to view events, why does it not do something for those who cannot afford to buy a television set in the first place, or a radio or mobile phone for that matter?

Other arguments against anti-siphoning encapsulate a property rights dimension. The issue is whether it should remain the exclusive right of those who produce an event to control how, when and by whom that event is televised. Three of Australia's football codes have previously expressed the opinion that it is indeed their right to decide who televised their games, and not that of any government.³⁷ Understandably, this view is about the codes wanting to maximise the returns they

35. This section is based on comments in R Jolly, *Sport on Television*, op. cit. Links have been updated as required.

36. R Sutton, 'The flawed philosophy of anti-siphoning', *Communications Bulletin*, vol. 14, no. 1, Winter 1994, viewed 1 May 2012, <http://www.camla.org.au/clb/CLB%20-%20Volume%2014,%20Issue%201.pdf>

37. S Lienert, 'Codes united in view', *The Daily Telegraph*, 22 September 2006, p. 7, viewed 1 May 2012, <http://parlinfo.aph.gov.au/parlinfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2F7XXK6%22>

can make from selling television rights. From this perspective, as a number of sports have argued, the existence of an anti-siphoning scheme influences their bargaining position and unfairly advantages free-to-air broadcasters in relation to their dealings with sporting organisations. The football codes have maintained it is vital for sports to be able to achieve this balance between exposure and revenue so they are able to invest at the grass roots level.³⁸

This view has been supported by a number of studies and reports, including the report of the Government's Independent Sport Panel. The report of this panel (the Crawford Report) concurred with the views that anti-siphoning limited earning potential for sports and reduced the quantity and quality of sports coverage on television. In addition the report concluded that free-to-air television networks' decisions to buy and show popular sports reinforced the popularity of those sports.³⁹

Pay television arguments provide a complementary dimension to the property rights perspective. The anti-siphoning list imposes a significant burden on subscription broadcasters as a result of their having to negotiate with their competitors for the right to broadcast sports. These negotiations are more complex, drawn out and burdensome than if subscription broadcasters could negotiate directly with the underlying rights holder.⁴⁰

The arguments against anti-siphoning in Australia add that the scheme should be abandoned because it has not achieved what it set out to do. The purpose of the legislation was to protect consumers, but all it has meant is that the interests of free-to-air broadcasters prevail. What has occurred in essence is that free-to-air networks are the gatekeepers of access. Consequently, consumer choice is diminished.⁴¹ As one sports commentator has phrased it, 'populist garbage legislation' remains in place which supposedly protects viewers' rights. In reality, the legislation protects free-to-air broadcasters from competition and allows them to 'cherry pick' what they allow the public to see.⁴²

It has also been argued that the saga of free-to-air broadcasters gaining rights to multi channelling illustrates the hypocrisy of the commercial broadcasters with regards to anti-siphoning. This point of view sees their only agenda being to ensure the maintenance of their dominant broadcasting position; not concern with the public interest. The granting of multi channelling rights to listed sports has not necessarily meant that the public sees more sports, but it has ensured that pay

38. Australian Rugby Union, Submission 2008, pp. 12–13, Australian Rugby League and National Rugby League, Submission 2008, p. 13, Productivity Commission, *Annual review of regulatory burdens on business: social and economic infrastructure services*, Research report, Melbourne, 15 September 2009, viewed 2 May 2012, <http://www.pc.gov.au/projects/study/regulatoryburdens/social-economic-infrastructure/report>

39. Independent Sports Panel, *The future of sport in Australia*, (the Crawford Report), Commonwealth of Australia, Canberra, 2009, viewed 7 May 2012, [http://www.health.gov.au/internet/main/publishing.nsf/Content/1DDA76A44E5F4DD4CA257671000E4C45/\\$File/Crawford_Report.pdf](http://www.health.gov.au/internet/main/publishing.nsf/Content/1DDA76A44E5F4DD4CA257671000E4C45/$File/Crawford_Report.pdf)

40. ASTRA, Submission 37 to Productivity Commission, *Annual review of regulatory burdens*, op. cit.

41. Ibid.

42. G Parker, 'Free to air networks not playing the game', *West Australian*, 5 January 2008, p. 21, viewed 14 May 2012, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2F6ZCP6%22>

television presents less of a threat to the dominance of free-to-air broadcasters. As one observer commented in relation to the free-to-air petition free-to-air broadcasters promoted in their campaign to gain the right to show sports on their multi channels, these broadcasters had argued since the 1990s that maintaining an anti-siphoning list was ‘crucial to the fabric of the nation’. But when it came to the possibility that they could show sports on their new digital channels—which not everyone at the time could receive—they were prepared to argue that there should be an exemption to existing rules made specifically in their case—so they continued to remain viable in the switchover to digital period.⁴³

Public interest and national identity

The arguments used in favour of maintaining an anti-siphoning list have centred around two interconnecting issues—serving the public interest and creating and maintaining national identity. From this perspective, it is in the public interest for all people to be able to see the important events that reflect Australia’s national identity. The public interest is imperfectly served if important sporting events migrate permanently to pay television. Hence, governments impose licence conditions and regulations on free-to-air broadcasters which oblige those broadcasters to act in the public interest.

Proof that allowing a competitive market to operate with regards to events of national importance will mean that these events are inaccessible, is often illustrated by the example of live coverage of English cricket team home matches in recent times. Prior to 2005, these games were available on free-to-air and pay television. Since that time, they have been shown only on pay television. A report in 2009 noted that a significant audience decline had resulted from the change.⁴⁴

It is claimed also that maintaining an anti-siphoning list in the public interest does not impede pay television operators as significantly as these operators claim and their profit margins have been used to demonstrate that this may be the case.⁴⁵ In addition, while it must be acknowledged that Foxtel

43. ‘TV networks don’t deserve free ride’, *Australian Financial Review*, 1 September 2009, p. 62, viewed 14 May 2012, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2F1UJU6%22>

44. Frontier Economics, *The impact of listed events on the viewing and funding of sports: a report prepared for the chair and review panel*, April 2009—no longer available online. Note: Cricket will continue on pay television in the United Kingdom until 2017 at least as Sky Sports has recently signed a four year deal for the rights to England’s home Tests, one-day and T20 matches. J Plunkett, ‘Sky sports signs four-year England cricket deal’, *guardian.co.uk*, 31 January 2012, viewed 14 May 2012, <http://www.guardian.co.uk/media/2012/jan/31/sky-sports-england-cricket-dea>

45. Submission by Free TV Australia Limited to Department of Broadband, Communications and the Digital Economy, *National Broadband Network: regulatory reform for 21st century broadband discussion paper*, 3 June 2009, viewed 14 May 2012, http://www.dbcde.gov.au/data/assets/pdf_file/0013/115321/Free_TV_Australia.pdf

did take until 2006 to make a profit, its business has grown substantially since then, making pre tax profit of \$200 million in 2010–11.⁴⁶

Sport has traditionally been the promotional vehicle for national pride and the Australian collective identity. What it means to be Australian, it is often said, has been forged, not only on the battlefields of war, but also on the sports battlefields. It follows that it would be 'un Australian' if some people were not able to view events that define the Australian identity. In effect, such a situation would offend the Australian sense of a 'fair go' for all. There would appear to be a number of flaws in this 'sport as national identity' argument. For example, how can the various football codes on the anti-siphoning list promote national identity when their intentions are fundamentally divisive—each code seeking to hold the loyalty of their fans, while seeking to attract new devotees from their rival codes. It remains, however, that the perceptions of sport and national identity are inevitably intertwined as part of the national consciousness. It would be bold, and perhaps foolhardy to be seen to be depriving the less fortunate from continuing to share in that consciousness and identity.

In effect, the arguments for anti-siphoning culminate in the conclusion that it is a public good; the benefits it achieves for all Australians outweigh any benefits that broadcasters may derive as a result of its demise. The SBS submission to the *Sport on Television* review summarised the view well:

The anti-siphoning list is not about balancing the interests of competing broadcasters [or other players] it is about preserving access to key sporting events for the Australian public.⁴⁷

Commercial free-to-air broadcasters have exploited the public interest argument for many years. However, their demand for rights to show listed sports on their digital multi channels, to which not all Australians had access, seriously damaged their credentials as defenders of the public interest. In addition, pay television considers that research undertaken on its behalf for the *Sport on Television* review made it clear that free-to-air claims that the anti-siphoning list represents what the public wants were no longer legitimate. This research indicated that only 21 per cent of the population was passionate about sport and wanted to watch it live on television. Similarly, 78 per cent of Australians thought there was enough or too much sport on television and 65 per cent thought that anti-siphoning was bad for sport.⁴⁸ According to pay television operators, these findings exploded 'the myth that all Australians want sport to dominate their [television] viewing and that changes to the anti-siphoning list would cause widespread backlash'.⁴⁹

46. T Dick, 'Foxtel gets more out of existing customers to click up \$551m', *Brisbanetimes.com.au*, 12 August 2011, viewed 14 May 2012, <http://www.brisbanetimes.com.au/business/media-and-marketing/foxtel-gets-more-out-of-existing-customers-to-click-up-551m-20110811-1ioo0.html>

47. SBS, Submission to *Sport on television*, op. cit.

48. ASTRA, *Attitudes to sport on TV and anti-siphoning law*, media release, 29 October 2009, viewed 14 May 2012, <http://assets.astra.org.au.s3.amazonaws.com/f759260b3c7f447b2c5bfc8c64c0f90e/091026SportonTVResearch.pdf>

49. Ibid.

While the pay television research responses make a point, it is far from conclusive that only a minority of Australians are passionate about sports. It is equally inconclusive that there would not be a backlash if anti-siphoning list sports were unavailable to the current majority of viewers. Submissions from the public to the *Sport on Television* review were divided in their support for anti-siphoning. Some believed it would be unAustralian to deprive people of the simple pleasure of watching sport or the joy of seeing amazing sporting achievements. Others disagreed with how the current list operated, but remained committed to watching sport. The public views mirrored those of the main protagonists, and in a number of cases, appear to have restated the free-to-air/pay television arguments.

Governments have been accused of maintaining an anti-siphoning list because they are unwilling to face electoral consequences which may follow if families are made to pay for what some have labelled is their most passionate leisure pursuit; one which they have been able to watch all their lives for nothing.⁵⁰ There is a considerable degree of journalistic rhetoric in these claims and some cynicism about the extent to which all government actions can be linked to electoral considerations. No doubt governments of both persuasions have considered the possible electoral consequences associated with the anti-siphoning issue for many years. At the same time, it appears that all have been genuinely aware of the need to consider the public interest in making sports programs that reflect the Australian national identity available to all viewers. It has been convenient to date for governments that the most powerful broadcasters have chosen to echo the public interest argument. Their lapses with regard to that interest have mostly been able to have been resolved satisfactorily by governments also. The free-to-air campaign for multi channelling rights illustrated however that judgement about what is in the public interest cannot be the prerogative of commercial interests of any persuasion.

The media environment is now very different from the one in which anti-siphoning was introduced and the idea pay television is the province of an elite few who can afford to subscribe is not as convincing as it once was. While for the moment free-to-air television dominates, in 2010–11 there were more than 2.4 million subscribers to pay, and this figure increases with each year.⁵¹ So is there a level of penetration at which it is not feasible, but also contrary to the best interests of audiences to retain anti-siphoning? Niche markets that pay television has targeted in the past also have the potential to become important for free-to-air broadcasters as the conversion to digital television progresses. Fragmented viewing markets, rather than one mass audience are the norm of the future. Does this mean that the idea that any program or any sport can reflect a national interest becomes irrelevant at some point?

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50. H Mitchell, 'The anti-siphoning list won't get any shorter', *The Sydney Morning Herald*, 3 September 2009, p. 28, viewed 14 May 2012, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2FUPKU6%22>
 51. Australian Communications and Media authority (ACMA), *Communication report 2010–11*, ACMA, October 2011, viewed 14 May 2012, http://www.acma.gov.au/webwr/assets/main/lib410148/communications_report_2010-11.pdf

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The media environment will be further enhanced by the establishment of a national broadband network. The future will be one where people will be able to choose to see sport broadcast in its 'full glory' on television or 'just dive online and watch it'.⁵² Does the existence of an anti-siphoning list seem incongruous in such an environment? Or does the fundamental issue still apply—everyone, regardless of their ability to pay for new media gadgetry, should be entitled to see certain iconic sporting events?

Financial implications

It is not expected that the amendments proposed to the BSA in this Bill will have direct financial implications for the Government.⁵³

Committee consideration

On 22 March 2012 the Senate referred the Bill to the Environment and Communications Legislation Committee (the Senate Committee) for inquiry and report.⁵⁴

Submissions to the Senate Committee closed on 4 April 2012. Nineteen submissions were received, 18 of which were from industry. Interestingly, given that a consistent emphasis in arguments relating to the relevance of an anti-siphoning scheme is that it is in the public interest, and as such, it is important to the Australian public, only one submission was received from the public. It appears this was from a person who had frequently raised this issue with the Minister and other stakeholders in the past. Information about the matters raised by the various submitters about the amendments in Part 2 of Schedule 1 to the Bill is contained in this Bills Digest under the heading Key provisions and other issues below.

It should be noted that submissions to the Senate Committee from the major stakeholders not only outline their general comments on the Bill but also their views about the merits of an anti-siphoning scheme. Sports organisations like the Australian Football League (AFL) for example, opine that the costs of the scheme far outweigh the benefits.⁵⁵ New media representatives, such as Telstra, have also dismissed the scheme as unnecessary given that they believe it seeks 'to achieve by regulatory

52. L Sinclair, 'Google enters fight for sports broadcast rights', *The Australian*, 21 January 2010, p. 5, viewed 14 May 2012,

<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2FFROV6%22>

53. Explanatory Memorandum, p. 2.

54. Information about the terms of reference of the inquiry and the submissions to the Senate Committee can be viewed at:

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=ec_ctte/anti_siphoning_2012/index.htm

55. Australian Football League, Submission to Environment and Communications Legislation Committee, *Inquiry into Broadcasting Services Amendment (Anti-siphoning) Bill 2012*, 4 April 2012, viewed 3 May 2012,

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=ec_ctte/anti_siphoning_2012/submissions.htm

means what is achieved naturally by market forces: screening of the most popular content on platforms commanding the greatest audience share'.⁵⁶

As for the main protagonists—the free-to-air broadcasters and subscription television operators—the arguments they presented to the Senate Committee reflect the same diametrically opposed views they have held since the issue of siphoning was first raised. In essence, these are that free-to-air broadcasters continue to claim that maintaining an anti-siphoning list delivers a public benefit—it is, in fact in the public interest. Subscription operators counter the free-to-air stance with the argument that an anti-siphoning list only serves the interest of free-to-air broadcasters.⁵⁷

The Committee report was tabled on 4 May 2012.⁵⁸

Key provisions and other issues

Part 2 of **Schedule 1** to the Bill amends the BSA to repeal the existing provision in the BSA relating to anti-siphoning and to insert replacement provisions.

Ministerial Discretion

Provisions

Part 2 of Schedule 1 to the Bill contains numerous proposed provisions which vest the Minister with discretion. This includes a power to:

- declare that an event is a **'Tier A anti-siphoning event'** or a **'Tier B anti-siphoning event'**⁵⁹:
proposed section 145E

56. Telstra, Submission to the Senate Environment and Communications Legislation Committee, *Inquiry into Broadcasting Services Amendment (Anti-siphoning) Bill 2012*, 4 April 2012, viewed 3 May 2012, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=ec_ctte/anti_siphoning_2012/submissions.htm

57. As is seen in the Free TV and ASTRA, Submissions to the Senate Environment and Communications Legislation Committee, *Inquiry into Broadcasting Services Amendment (Anti-siphoning) Bill 2012*, 4 April 2012, viewed 3 May 2012, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=ec_ctte/anti_siphoning_2012/submissions.htm

58. Environment and Communications Legislation Committee, *Broadcasting Services Amendment (Anti-siphoning) Bill 2012*, The Senate, Canberra, May 2012, viewed 7 May 2012, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=ec_ctte/anti_siphoning_2012/report/index.htm

59. The definitions of **'Tier A anti-siphoning event'** and **'Tier B anti-siphoning event'** in **proposed section 145A** of Part 2 of Schedule 1 to the Bill state that these terms are defined in section 145E. However, **proposed section 145E** provides that the definitions will be made by the Minister by legislative instrument. Drafts of the relevant Determinations are contained in Appendix C to this Bills Digest.

- exempt from, or vary the application of coverage obligations on the grounds that such events should be available free to the public: **proposed subsection 145E(3)**
- determine that specified ***‘Tier B anti-siphoning events’*** can be categorised as a ***‘designated group’***: **proposed section 145F**
- determine the existence of a ***‘Category A quota group’*** and a ***‘Category B quota group’*** and so impose ***‘associated set conditions’*** on those groups: **proposed section 145G** and
- exempt commercial or national broadcasters from obligations to broadcast a specified anti-siphoning event: **proposed section 145ZM**.

In each case, the Minister must exercise the discretion in a legislative instrument. This ‘delegated’ legislation is required to be laid before each chamber of the Parliament, thereby becoming subject to Parliamentary scrutiny and the Parliament’s ultimate power of veto. Under section 38 of the *Legislative Instruments Act 2003*, tabling must occur within six sitting days following registration on the Federal Register of Legislative Instruments.

A legislative instrument can be subject to disallowance if either a Senator or Member of the House of Representatives moves a motion of disallowance within 15 sitting days of the day that the legislative instrument is tabled. The motion to disallow must be resolved or withdrawn within a further 15 sitting days of the day that the notice of motion is given. However, it should be noted that if there is no notice of motion to disallow a legislative instrument, then there is no debate about its contents.

Comments

While the Senate inquiry into this Bill noted various concerns expressed about the amount of Ministerial discretion which will be afforded under the new anti-siphoning scheme, the final report of the Senate Committee appeared not to stress this aspect of the legislation. In contrast, however, subscription television lobby body ASTRA’s (Australian Subscription Television and Radio Association) assessment of the Bill, calculated that the Bill contains 19 separate discretionary powers for the Minister. Each of these powers, in ASTRA’s view, has the potential ‘to substantively alter the scope and effect of the anti-siphoning scheme’ (see Appendix B for ASTRA’s assessment list of discretionary powers in the Bill).

ASTRA has not been alone in its concern about the number of discretionary powers available to the Minister in this legislation. Cricket Australia’s submission to the Senate Committee alleged that the Bill gives the Minister discretion that is ‘unnecessarily broad’. This situation, Cricket Australia believed, creates uncertainty for sport governing bodies, which in turn, will have an impact on the ability of these bodies to optimise their primary revenue source—selling the rights to the broadcast of their products.⁶⁰

60. Cricket Australia, Submission to the Senate Environment and Communications Legislation Committee, *Inquiry into Broadcasting Services Amendment (Anti-siphoning) Bill 2012*, 4 April 2012, viewed 3 May 2012,

Essentially, all submissions to the Senate Committee queried the extent of discretionary power proposed to be granted to the relevant Minister in the Bill. The multimedia sports entertainment company, ESPN, labelled the legislation as a whole as unnecessarily complex, and emphasised that it believed the wide ministerial discretion in the legislation could affect future rights negotiations.⁶¹ Telstra, the Australian Football League and BBC Worldwide, the commercial arm of the BBC, agree the Minister's broad powers were likely to deliver uncertainty for stakeholders.⁶² The one public submission to the Senate Committee also expressed concern that the legislation will give the Minister 'unreasonable and excessive power' to remove events from the anti-siphoning list.⁶³

The international media network operator Viacom, which owns the MTV and Nickelodeon subscription channels as well as ASTRA, granted that some degree of Ministerial discretion should be included in the Bill to enable unusual circumstances to be addressed. However, Viacom was also concerned that the level of discretion given will create uncertainty for business as decisions to invest or expand in particular markets 'often hinge on the clarity or favourability of the legal and regulatory environment'.⁶⁴

The ASTRA submission added that the uncertainty which results from the wide Ministerial discretion in the Bill applies equally to sporting bodies and their agents, broadcasters and program suppliers, particularly as there are no explicit criteria or parameters set for the exercise of these discretionary powers.⁶⁵ In making its comments on Ministerial discretion ASTRA did not miss the opportunity to criticise free-to-air broadcasters. It claimed that in most cases the discretionary powers in the Bill 'work only to the benefit of [free-to-air] broadcasters and to the detriment of all other potential providers of content on the anti-siphoning list'.⁶⁶

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=ec_ctte/anti_siphoning_2012/submissions.htm

61. ESPN, Submission to the Senate Environment and Communications Legislation Committee, *Inquiry into Broadcasting Services Amendment (Anti-siphoning) Bill 2012*, 3 October 2011, viewed 3 May 2012, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=ec_ctte/anti_siphoning_2012/submissions.htm
62. Telstra and Australian Football League (AFL) submissions, op. cit and BBC Worldwide, Submission to the Senate Environment and Communications Legislation Committee, *Inquiry into Broadcasting Services Amendment (Anti-siphoning) Bill 2012*, 31 October 2011, viewed 3 May 2012, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=ec_ctte/anti_siphoning_2012/submissions.htm
63. I Flatley, Submission to the Senate Environment and Communications Legislation Committee, *Inquiry into Broadcasting Services Amendment (Anti-siphoning) Bill 2012*, 11 April 2012, viewed 3 May 2012, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=ec_ctte/anti_siphoning_2012/submissions.htm
64. Viacom, Submission to the Senate Environment and Communications Legislation Committee, *Inquiry into Broadcasting Services Amendment (Anti-siphoning) Bill 2012*, 10 April 2012, viewed 3 May 2012, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=ec_ctte/anti_siphoning_2012/submissions.htm
65. ASTRA, submission, op. cit.
66. Ibid.

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Dr Simon Pelling from the Department of Broadband, Communications and the Digital Economy (DBCDE) in verbal evidence to the Senate Committee answered the concerns of stakeholders by insisting that the purpose of providing for so much Ministerial discretion in the legislation was to serve the interests of all stakeholders. Ministerial discretion would in fact deliver the legislative flexibility they sought. Dr Pelling remarked:

The more you put stuff into black-letter legislation—specifically about what people should and should not do—the more you risk coming up against something which you did not anticipate or some future situation about the way a sport is handled or the rights surrounding something ... there is always a balance in these things, and all the instruments here will be subject to parliamentary scrutiny.⁶⁷

The Senate Committee accepted the Department's argument and further assurances that the Government intended to engage stakeholders in the development legislative instruments in 'a meaningful and collaborative fashion'.⁶⁸

It remains, however, that unless more certainty is provided in the legislation, the Minister of the day will have considerable power to decide, some may argue all too subjectively, about what programs should be subject to anti-siphoning regulation. Foxtel's comment is perhaps worth noting in this context—it is preferable for good governance and best legislative practice to restrict the number of instances where discretionary Ministerial power is able to be used.⁶⁹

Quota groups

Provisions

Proposed section 145G of Part 2 of Schedule 1 to the Bill authorises the Minister to determine that specified Tier B anti-siphoning events are to be either a Category A or Category B quota group for

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67. S Pelling, Department of Communications, and the Digital Economy evidence to Environment and Communications Legislation Committee, *Inquiry into Broadcasting Services Amendment (Anti-siphoning) Bill 2012*, The Senate, Hansard, 13 April 2012, p. 39, viewed 14 May 2012, http://parlinfo.aph.gov.au/parlInfo/download/committees/commsen/0d0f3b8d-3dc8-4662-bc0a-1609bc01de0c/toc_pdf/Environment%20and%20Communications%20Legislation%20Committee_2012_04_13_958_Official.pdf;fileType=application%2Fpdf#search=%22committees/commsen/0d0f3b8d-3dc8-4662-bc0a-1609bc01de0c/0000%22
 68. Senate Environment and Communications Legislation Committee, *Broadcasting Services Amendment (Anti-siphoning) Bill 2012*, op. cit., http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=ec_ctte/anti_siphoning_2012/report/index.htm
 69. Foxtel, Submission to the Senate Environment and Communications Legislation Committee, *Inquiry into Broadcasting Services Amendment (Anti-siphoning) Bill 2012*, 4 April 2012, viewed 3 May 2012, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=ec_ctte/anti_siphoning_2012/submissions.htm

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the purposes of the BSA—and to set a **‘quota number’** for each quota group.⁷⁰ In addition, **proposed paragraph 145G(2)(c)** empowers the Minister to determine (again by legislative instrument) specified **‘associated set conditions’** for anti-siphoning events that are part of a Category B quota group.

Under **proposed subsection 145G(5)** an **‘associated set condition’** may be a contingent condition. In the event that the contingency does not happen, and cannot happen after a certain time, then the associated set condition is to be disregarded.

Proposed section 145ZN must be read in conjunction with **proposed section 145G**. That section sets limits on the acquisition of rights by subscription television broadcasting licensees which are not in a quota group, or are in a Category A or Category B quota group. The provisions will operate so that anti-siphoning events are not siphoned away from free-to-air television.

Comments

A Category A quota group will consist of a numerical quota⁷¹; while Category B quota group will comprise a numerical quota with added qualitative conditions.⁷² It is currently intended that the quota group arrangements will be limited in application to the Australian Rules and Rugby League national football competitions.

The Explanatory Memorandum describes that with reference to Category A quota groups, the Government intends, for example, to specify all matches for each round of the AFL Premiership, excluding the finals, as a quota group and that the quota number for each round will be four.⁷³ This means that in an eight match round of AFL subscription television broadcasters could acquire exclusive rights to four of those matches.⁷⁴

It is intended that a Category B quota group will exist when the Minister makes a determination that specifies Category B events that are to form a group, the quota number for the group and **‘associated set conditions’** that apply to the group. As the Explanatory Memorandum details, the Government intends to set a quota number of three for each round of the NRL.⁷⁵ It may however, specify associated set conditions that apply to particular licence areas in Queensland, such as:

- (a) one match involving two of the Queensland teams (Gold Coast Titans, North Queensland Cowboys and Brisbane Broncos) ;

70. **Proposed subsection 145G(11)** sets the limits on what the **‘quota number’** must be.

71. **Proposed subsection 145G(1)**, Part 2 of Schedule 1 to the Bill.

72. **Proposed subsection 145G(2)**, Part 2 of Schedule 1 to the Bill.

73. **Proposed paragraph 145G(11)(b)**, Part 2 of Schedule 1 to the Bill.

74. Explanatory Memorandum, Broadcasting Services Amendment (Anti-siphoning) Bill 2012, pp. 21–22.

75. **Proposed paragraph 145G(11)(c)**, Part 2 of Schedule 1 to the Bill.

- (b) where there is no 'local derby' in a round, one event that involves one of the Queensland teams;
- (c) two events on a Friday night (since there are normally two such events scheduled);
- (d) one event on a Sunday afternoon.⁷⁶

Tennis Australia expressed discontent that the quota group listing described in **proposed subsections 145G(1) and (2)** should apply only to the AFL and NRL competitions. It suggested several ways in which the mechanism could apply also to the Australian Tennis Open. These included: a minimum number of hours could be required to be broadcast on free-to-air television or specific matches from the centre court could be required to be broadcast on free-to-air. At the same time Tennis Australia could be unhindered in negotiating with other operators for the rights to show the remaining matches of the Open.⁷⁷

The Senate Committee saw the merit in the Tennis Australia proposal and therefore recommended amendments to the Bill to allow the quota group mechanism to be extended to certain events in addition to the AFL and NRL competitions. The Senate Committee did not suggest a mechanism for deciding to what events the quota group listing would apply, however. Given the general tendency in the legislation to allow for these decisions to be made at the Ministerial level, it is likely that if this recommendation is to be accepted it would further add to the discretionary power of the Minister.

The Australian Rugby League Commission (ARLC; also referred to as the National Rugby League or the NRL in this digest) saw problems with the Minister determining associated set conditions in terms of broadcasters being able to comply with some existing contractual rights, with determining the quality of matches to be included in a quota group and mandating time slots for matches.⁷⁸

The ARLC and the AFL also expressed concern with **subsections 145ZN(2) and 145ZN(3)** which will allow the rights to Tier B NRL matches in either Category A or Category B quota groups to be acquired by subscription television, wholly or in part, provided those matches have been acquired by a national or commercial television broadcaster. As these provisions do not extend to the finals series of the codes, the NRL and AFL considered amendments should be made to the sections cited to apply the same conditions as those that affected regular matches. These would allow the codes to

76. Explanatory Memorandum, p. 23.

77. Tennis Australia, Submission to the Senate Environment and Communications Legislation Committee, *Inquiry into Broadcasting Services Amendment (Anti-siphoning) Bill 2012*, April 2012, viewed 3 May 2012, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=ec_ctte/anti_siphoning_2012/submissions.htm

78. Australian Rugby League Commission (ARLC) (also referred to as National Rugby League or NRL), Submission to the Senate Environment and Communications Legislation Committee, *Inquiry into Broadcasting Services Amendment (Anti-siphoning) Bill 2012*, 12 April 2012, viewed 3 May 2012, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=ec_ctte/anti_siphoning_2012/submissions.htm

continue with arrangements under which they had previously licensed broadcasting rights for a full season.⁷⁹

The AFL has expressed some concerns that quota group provisions in the current Bill will not take into account split competition rounds or rounds in which a number of clubs enjoy a bye. It appears, however, that there may already have been agreement that these issues can be addressed by drafting a revision.⁸⁰

ASTRA labelled the quota group provisions ‘unnecessarily complex’ and advantageous to free-to-air broadcasters in their operation. These provisions will bring uncertainty to rights negotiations in ASTRA’s view, with the possibility that a quota determination concluded at the Minister’s discretion will deter broadcasters and content service providers from investing in sports coverage—a ‘disproportionate and unnecessary consequence of the Government’s desire to ensure that certain ‘blockbuster’ AFL and NRL matches remain on [free-to-air] television’.⁸¹ ASTRA argues:

For example, future negotiations over the NRL rights will be conducted with uncertainty as to (a) if or when a Category A or B quota group determination will be made, and (b) where a determination is made, whether the Minister will vary the determination (to, for example, include specific matches at the request of FTA broadcasters that may not have been included in the Category B determination) before rights negotiations have been concluded.

ASTRA submits that the two-tiered quota mechanism goes beyond what would be required to ensure that 4 AFL and 3 NRL matches are reserved for FTA broadcasters ... the interests of both consumers and sports organisations are best served by allowing sports administrators to retain flexibility in their broadcast rights negotiations.⁸²

Moreover, according to ASTRA, overseas-based rights holders will not be inclined:

... to invest the time, effort and cost involved in understanding such a complex legislative framework, with a likely consequence that rights holders will be very reluctant to negotiate with providers of content over subscription television services or online services unless and until they have dealt with the FTA broadcasters. This is likely to stymie the development of the online content industry and the further growth of the subscription television industry in circumstances where the Government is otherwise adopting policies (such as the National Broadband Network) which are designed to facilitate the growth of these industries.⁸³

With regards to the listing of events as Tier A or Tier B, a submission from the International Olympic Committee (IOC) again raised the associated issue of Ministerial discretion, by observing that the Bill does not specify what matters the Minister should take into account in determining that an event should be available to the general public. The IOC considered criteria for declaring events to be

79. Ibid.

80. AFL, submission, op. cit.

81. ASTRA, submission, op. cit.

82. Ibid.

83. Ibid.

anti-siphoning events should be stated in the Bill; it should not be left to a ‘readily changeable legislative instrument, on the discretionary and potentially arbitrary grounds of the opinion of the Minister’.⁸⁴

Free TV saw the quota issue from another perspective. It cited the Government’s initial commitment that it will protect the quality of AFL and NRL games on free-to-air television by ensuring that Friday and Saturday night games remain the ‘blockbuster’ games within each round. But, as Free TV observed, a draft Broadcasting Services (Category B quota groups) Determination in relation to the AFL does not actually achieve this aim (see draft at Appendix C). Free TV was concerned therefore that there needs to be some more specific mechanism in the legislation to protect the scheduling of ‘blockbuster’ games on free-to-air television on these nights.⁸⁵

It appears the Free TV argument is that while a local team game will be shown in particular regions—and that is a positive outcome—the match of the round, which is likely to attract viewers across regions may not be aired on free-to-air. There is some justification for this argument if it is concluded that games of the highest quality are those that should be aired. This may not always be the case, however, and it remains that the judgement of which are blockbuster games and which are not will often be subjective.

Designated groups

Provisions

Proposed section 145F will empower the Minister to determine the circumstances in which multiple simultaneously and consecutively occurring Tier B events (or events where each day can exceed 12 hours duration) are to be broadcast free-to-air. In that case, the Minister will determine that those anti-siphoning events are a ‘**designated group**’ and specify the ‘**total minimum number of hours**’ which must be televised in order for the free-to-air broadcaster to satisfy its coverage obligations. In addition, **proposed subsection 145F(3)** allows the Minister to determine an ‘**applicable group day**’ being a 24 hour period within which the total minimum number of hours must be broadcast.

Comments

The IOC submission registered its objection to aspects of **proposed section 145F**. Any suggestion that every event in the Summer and Winter Olympics after 2012 will be included as a Tier B

84. IOC, Submission to the Senate Environment and Communications Legislation Committee, *Inquiry into Broadcasting Services Amendment (Anti-siphoning) Bill 2012*, 4 April 2012, viewed 3 May 2012, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Committees?url=ec_ctte/anti_siphoning_2012/submissions.htm

85. Free TV, submission, op. cit.

anti-siphoning event is not feasible in the view of the IOC. It cites two reasons for its objections to this proposal:

- not all Olympic events are nationally significant for Australians, nor will all events attract public attention
- Olympic events comprise thousands of hours of live audio-visual coverage; it is not possible to broadcast all events or even highlights within a four or 24 hour period.⁸⁶

The Explanatory Memorandum maintains that this mechanism was intended in fact to deal with events such as the Olympics and Commonwealth Games—where ‘it would be impractical for a broadcaster to televise every event in full in order to meet their television coverage obligations’.⁸⁷ Under the section, events will form a **‘designated group’**. Coverage obligations for designated event components are to be more flexible and free-to-air broadcasters will be required to meet, or exceed, a minimum number of broadcast hours. The Explanatory Memorandum cites the example of the Minister specifying that the telecast of the Summer Olympics should be at least 160 hours:

To meet their coverage obligations, the free-to-air broadcasters may elect to televise Olympic events using one or more of their authorised television services. Accordingly, different Olympic events within a designated group may be broadcast simultaneously using digital multi-channelling capacity.⁸⁸

The Bill allows the Minister to specify merely the minimum number of hours overall to be broadcast. Depending on the nature of a determination, the number of hours to be broadcast daily over the Olympic period therefore could be the prerogative of the broadcasters and would allow them to tailor their coverage to accommodate days on which high profile events would occur. Conversely, the Minister may decide to require a minimum number of hours that must be broadcast each day, or he or she may determine that both a minimum number of hours overall and a minimum number of hours daily is required.⁸⁹

The IOC made the point, however, that while it is assumed the Minister will declare the Summer and Winter Olympics a designated group, if that does not occur, ‘capacity constraints will mean that the Bill is simply unworkable in respect of the Olympic Games’.⁹⁰ The IOC proposed that a specific provision is inserted in the Bill expressly recording that the Olympic Games will be a designated event after the 2012 Olympics, as presently there is ‘no certainty for the IOC that a declaration [of designated event] will actually be made’.⁹¹

While it supports the idea of a minimum amount of coverage for the Olympics, the IOC also objects to the Minister determining a minimum number of hours for broadcasts. In the case of the Winter

86. IOC, submission, op. cit.

87. Explanatory Memorandum, op. cit., pp. 18–19.

88. Ibid., p. 26.

89. Ibid., pp. 26–27.

90. IOC, submission, op. cit.

91. Ibid.

Olympics in particular it is concerned hours which may be required by the Minister will be greater than its own contractual requirements and that this may affect rights negotiations.⁹²

Hours set for designed events also concerned FOXTEL which was worried that it could be possible the number of hours set for multi-round events could be too high. In FOXTEL's view, it was critical that in calculating the number of hours in each designated group the Government used the number of hours of original content broadcast; and that it excluded from its calculation advertising, recaps and news breaks. If this is not done according to Foxtel, free-to-air broadcasters would be forced to broadcast parts of events on their multi channels (which they would not normally broadcast) in order to comply with the 'must broadcast' obligation in the Bill. Foxtel saw flow-on effects for subscription television from this situation 'in terms of how the broadcast rights would be typically split for such events'.⁹³

Definition of live

Provisions

Proposed section 145B of the Bill defines '*live*' coverage in relation to anti-siphoning events. It is proposed that this will amount to 'with no delay' or with 'as short a delay as is technically feasible' for Tier A events: **proposed subsection 145B(1)**. For Tier B events that are in a designated group 'with no delay' or 'with a delayed starting time of not more than 24 hours': **proposed subsection 145B(2)**.

For Tier B events that are not in a designated group, **proposed paragraph 145B(3)(a)** provides that for televising in a licence area⁹⁴ or a coverage area⁹⁵, '*live*' means 'without delay'. In the circumstances set out in **proposed paragraphs 145B(3)(b)** and **(c)**, the Minister may, by legislative instrument, provided that the event is not a match in an AFL Premiership competition, specify a number of hours that is less than four. In all other circumstances the delayed starting time must be not more than four hours: **proposed paragraph 145B(3)(d)**.

Comments

Ian Flatley's submission to the Senate Committee stated that this definition will effectively be whatever the Minister determines, whereas '*live*' or '*near live*' should in fact be 'exactly that—not a 4, 12 or 24 hour delay'.⁹⁶ Flatley also asked, as did Foxtel, why the AFL Premiership is a specific focus

92. Ibid.

93. Foxtel, submission, op. cit.

94. **Proposed section 145A** defines '*licence area*' as the licence area for a commercial television broadcasting licence.

95. Clause 2 of Schedule 4 to the *Broadcasting Services Act 1992* defines the term '*coverage area*' as a metropolitan coverage area or a regional coverage area.

96. I Flatley, submission, op. cit.

of this section. Foxtel did not understand why the Bill takes a different approach in relation to what constitutes 'live' coverage for the NRL as compared with the AFL:

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.⁹⁷

Tennis Australia made the valid point that if a sporting event warrants listing on the anti-siphoning list, then the Australian public is entitled to view that event as close to live as possible, 'especially given the prevalence and scope of modern media which provide instantaneous match results and statistics'. It suggested that a delay in live broadcast should extend to no more than one or two hours.⁹⁸

Free TV on the other hand noted that the definition of live as it stands will allow events streamed with only a very short delay to 'fall outside the prohibition'. According to Free TV, **proposed section 145ZO** (which limits the conferring of rights to provide audiovisual content upon a content service provider) in fact will not be effective unless the provision is amended so that live is defined to provide a more appropriate window.⁹⁹

Must offer

Provisions

Proposed section 145H sets out the obligations of licensees to televise anti-siphoning events. Where the event is a Tier A anti-siphoning event, the commercial television broadcasting licensee must televise the event live in the license area. Where the event is a Tier B anti-siphoning event, that is, in a designated group, the commercial television broadcasting licensee must televise the event live for a number of hours that are not less than the total minimum number of hours and where an applicable group day has been determined by the Minister, for the number of hours specified.

According to **proposed subsection 145H(2)** a licensee will have complied with the requirement to broadcast live, providing that, all but an insubstantial proportion of the event is televised. Although the term 'insubstantial proportion' is not defined in the Bill, the note to the subsection provides by way of example that interruptions for commercial breaks, news breaks or program promotions would amount to an insubstantial proportion of the event.

The exception to the rule is the '**must offer**' regime which is contained in **proposed subsection 145H(3)**. The exception applies if a licensee or the licensee's program supplier offers to transfer to each commercial television broadcasting licensee and each national broadcaster the right to televise

97. Foxtel, submission, op. cit.

98. Tennis Australia, submission, op. cit.

99. Free TV, submission, op. cit.

the anti-siphoning event live. The offer must be in accordance with the terms of **proposed sections 145K and 145L**. In particular, **proposed section 145L** provides, amongst other things, the time limits within which an offer to transfer the right to televise live the whole or part of a particular anti-siphoning event to another person must be made¹⁰⁰, and accepted¹⁰¹, and the requirement that consideration for the offer must be \$1.¹⁰²

Comments

Telstra supported the inclusion in the Bill of ‘must offer’ rules for free-to-air broadcasters to oblige those broadcasters to televise listed events to which they hold the rights, or to offer the rights to other broadcasters. In effect, these rules are meant to ensure that broadcasters do not acquire rights to programs and then proceed to hoard them. In Telstra’s view, the new rules:

... should effectively limit the number of listed events that are never broadcast by requiring FTAs [free-to-air broadcasters] to offer unused rights first to other FTAs, and if there are no takers even at the minimum price of \$1, then to STV [subscription television] broadcasters on the same basis. However, it is not clear why the provisions are limited to the right to ‘televise live’ and thus exclude new media as potential recipients of unused rights alongside STV. As a consequence an FTA could acquire new media rights to an event and fail to exercise the right without penalty. New media has been included in the anti-siphoning regime in recognition of its growing importance in the delivery of popular content to Australian audiences in ways that are increasingly indistinguishable from traditional television services. By the same token, new media is also worthy of protection on the same basis as STV against the potential for hoarding of unused content by FTAs.¹⁰³

Telstra therefore sought an amendment to the Bill to include new media under the ‘must offer’ rules.

Tennis Australia also stated its support for the idea behind the ‘must offer’ provision in this Bill. However, the provisions were concerning for tennis administrators ‘because they take control of the grant of broadcasting rights to sporting events away from the sporting organisations that own them’.¹⁰⁴ Tennis Australia argued that if a free-to-air broadcaster elects not to televise a listed event, the sporting organisation which owns the event should have the opportunity to deal directly with pay television and other free-to-air providers to ensure that the event is available to Australian television audiences.¹⁰⁵

Program supplier IMG had ‘grave’ concerns about the must offer rules as they are intended to apply to **program suppliers**. Program suppliers are defined in **section 145C** as persons who have

100. **Proposed subsection 145L(3)** requires the offer to be made not less than 120s before the start of the event.

101. **Proposed subsection 145H(4)** requires that the offer be accepted within 14 days.

102. **Proposed subsection 145H(5)** of Part 2 to Schedule 1 of the Bill.

103. Telstra, submission, op. cit.

104. Tennis Australia, submission, op. cit.

105. Ibid.

arrangements (or proposed arrangements), either directly or indirectly, to supply national television broadcasters, commercial television broadcasters or subscription television broadcasters with television programs.¹⁰⁶ IMG falls within this definition. According to IMG, **proposed paragraph 145J(1)(b)** is unclear. It could be interpreted to extend the operation of anti-hoarding provisions to events which were anti-siphoning events at the time a program supplier acquired rights, but which have since ceased to be anti-siphoning events. IMG sought clarification of, or removal of this section.¹⁰⁷

In addition, IMG saw **subsection 145E(6)**, under which an event ceases to be an anti-siphoning event at a nominated time before its commencement as problematic. This was because the Minister is able to declare that an event remains an anti-siphoning event if he or she is satisfied that at least one commercial or national broadcaster has not had a 'reasonable opportunity' to acquire the event under **proposed paragraph 145E(6)(f)**. As IMG pointed out, there is no guidance in the Bill on what would constitute 'reasonable opportunity'. IMG continued:

As such it would be open for broadcasters to petition the Minister to declare that an event continues to be an anti-siphoning event on the basis that it has not been offered to all commercial television broadcasting licensees and national broadcasters on certain favourable financial terms. In the absence of the program supplier conferring rights on a commercial television licensee, the must-offer provisions would apply and the program supplier would be forced to offer the right to those same broadcasters at \$1.

It appeared to Foxtel that obligations on free-to-air networks to 'offer' events to which they hold the rights, but will not televise, 'can be relatively easily circumvented'. Foxtel asked that an amendment was made to the Bill to oblige free-to-air broadcasters to obtain the rights to sublicense to another free-to-air broadcaster to ensure that they are able to comply with their 'must offer' obligations.¹⁰⁸ Foxtel remained concerned also:

... about the operation of the must offer regime for anti-siphoning events in which there is little or no FTA [free-to-air] 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

106. IMG, Submission to the Senate Environment and Communications Legislation Committee, *Inquiry into the Broadcasting Services Amendment (Anti-siphoning) Bill 2012*, 4 April 2012, viewed 4 May 2012, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=ec_ctte/anti_siphoning_2012/submissions.htm

107. Ibid.

108. Foxtel, submission, op. cit.

that face this predicament are so ‘unwanted’ that the Minister should reconsider whether the event should be on the list in the first place.¹⁰⁹

Free TV opposed the must offer provisions in the legislation as it believed they ‘do not recognise the complex nature of contracts for sports rights’. The provisions were unworkable for a number of reasons in Free TV’s view, not least of which because broadcasters are not the owners of rights. According to Free TV, the objective of this provision would be better fulfilled if **subsection 145H(3)** provided that a free-to-air broadcaster:

... would not be in breach of its coverage obligations where it arranged for another free-to-air broadcaster to televise the event. The provision does not need to lay out the terms of supply because failure by a broadcaster to transfer coverage rights would lead to a breach of its licence condition. This can result in a range of sanctions including a substantial penalty of up to \$220,000.

The threat of these sanctions is sufficient incentive for broadcasters to comply with the anti hoarding provisions, and it still achieves the public policy goal of ensuring that events on the anti-siphoning list are shown on free-to-air television.¹¹⁰

The Department of Broadband, Communications and the Digital Economy described the \$1 arrangements as a disincentive to hoard, and the Senate Committee agreed with this assessment.¹¹¹ The Committee concluded, however, that if this proves not to be the case, the proposed statutory review of the new regime which is required before 31 December 2014 will provide an opportunity to examine this aspect of the scheme.¹¹²

Delisting

Provisions

Under the current anti-siphoning scheme, an event is removed from the anti-siphoning list if the rights to the event have not been acquired by a free-to-air broadcaster within 12 weeks of the event’s commencement. It is intended under **proposed paragraph 145E(6)(a)** of this Bill that the automatic delisting period will be increased to 26 weeks.

Comments

Both the AFL and NRL expressed their preferences that delisting of matches occurs sooner, rather than later in a season—if a situation warranting delisting occurs then in the view of these sports

109. Ibid.

110. Free TV, submission, op. cit.

111. S Pelling, Evidence to Environment and Communications Legislation Committee, *Inquiry*, op. cit.

112. Environment and Communications Legislation Committee, *Inquiry report*, op. cit.

organisations, the earlier events are removed from the list, the better. Indeed, these sporting bodies wanted changes to **proposed subsection 145E(6)** which would allow for matches to be removed 52 weeks prior to the start of a relevant season, rather than the extension of delisting time being subject to a legislative instrument.¹¹³

SBS identified an aspect of delisting in relation to the Socceroos FIFA World Cup Qualification matches, which have been proposed as Tier B events which it believed will disadvantage the national broadcaster. According to SBS, the 26 week delisting cut off period under **proposed paragraph 145E(6)(e)** 'leaves a very small window of opportunity, and for some matches no opportunity at all to acquire the rights to televise the qualifiers'. SBS argued there are a number of reasons for this situation, including that while the approximate dates of each round are known, as the competition progresses the identification of teams to play in later rounds depends on the results of a previous round. SBS maintained it will therefore have to rely on the Minister to determine an appropriate delisting time under **proposed subparagraph 145E(6)(d)(iii)**. The broadcaster considered a better way of dealing with the situation would be 'to specify an appropriate delisting period which allows for a reasonable opportunity to acquire the rights to the event counting back from the date on which the rights holders are known'.¹¹⁴

In addition to the delisting issues raised by SBS, the Football Federation of Australia feared its ability to fund its business and strategic development will be impeded by the proposed inclusion of Soccer World Cup matches on the anti-siphoning list.¹¹⁵

Foxtel calculated the legislation did not actually delist AFL and NRL games, as was promised in the Government's announcement in November 2010. Instead, it left the games on the list through Category A and Category B quota groups, with the process wholly dependent on the Minister issuing the relevant instrument and not withdrawing or varying it. Foxtel saw no guarantee therefore that the Government will create a 'quota group' for AFL and NRL games.

Free TV was concerned that free-to-air broadcasters will not be able to conclude all rights negotiations within the extended timeframe proposed. It claimed that as negotiations often continue until only weeks or even days before events occur automatic delisting at an early stage will result in the anti-siphoning list being circumvented through the use of delaying tactics.¹¹⁶

113. AFL and ARLC submissions, op. cit.

114. SBS, Submission to the Senate Environment and Communications Legislation Committee, *Inquiry into the Broadcasting Services Amendment (Anti-siphoning) Bill 2012*, 4 April 2012, viewed 3 May 2012, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=ec_ctte/anti_siphoning_2012/submissions.htm

115. Football Federation Australia, Submission to the Senate Environment and Communications Legislation Committee, *Inquiry into the Broadcasting Services Amendment (Anti-siphoning) Bill 2012*, 4 April 2012, viewed 3 May 2012, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=ec_ctte/anti_siphoning_2012/submissions.htm

116. Free TV, submission, op. cit.

Extending the scheme

Provisions

Proposed section 145ZO imposes limits on conferral of rights to provide particular audiovisual content to end-users in Australia by means of a carriage service'.¹¹⁷ Importantly, the restriction on content service is only concerned with the acquisition of exclusive coverage rights by a content service provider.

Comments

The ABC supported provisions in the Bill which extend the anti-siphoning scheme to new media operators in **proposed section 145ZO** as it believed there would be a great potential for sports rights to be acquired exclusively by a subscription based non broadcaster if these were not covered by the scheme; in turn this would undermine the public interest objective.¹¹⁸

SBS wanted to see **proposed section 145ZO** changed. In particular, **proposed paragraph 145ZO(1)(b)** provides that 'a person must not confer on a content service provider the right to provide particular audiovisual content on a content service to end users in Australia' if the content consists of live coverage of an anti-siphoning event that occurs or is to occur in Australia. The broadcaster considered this will diminish protection; so events staged outside Australia may be siphoned off by subscription television of content service providers. Moreover, the restriction in this section does not apply to content service provider licensees as it does to the licensor conferring the rights.

In the case of subscription television broadcasting licensees, the restriction applies to the licensee and prevents them from *acquiring* the rights (section 145ZN). In the case of content service providers, the restriction applies to the rights holder and states that they "must not *confer* on a content service provider" the rights (section 145ZO). Accordingly, an Australian content service provider may licence the rights from an overseas "person" or licensor who determines that it is out of reach of Australian regulation. There would be no penalty on the Australian content service provider for flaunting the legislation, and there would be doubt as to whether the licence would be void or voidable under the Australian legislation.¹¹⁹

SBS called for **section 145ZO** to apply therefore to anti-siphoning events wherever played and for it to apply to both a licensor and the licensee content service provider.

117. Explanatory Memorandum, p. 41.

118. Australian Broadcasting Corporation (ABC), Submission to the Senate Environment and Communications Legislation Committee, *Inquiry into Broadcasting Services Amendment (Anti-siphoning) Bill 2012*, 3 April 2012, viewed 3 May 2012, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=ec_ctte/anti_siphoning_2012/submissions.htm

119. SBS submission, op. cit.

Free TV concurred, adding that it could see no reason why the prohibition in **section 145ZO** should be restricted to cover events taking place in Australia. It argued that there were ‘a number of means by which a jurisdictional connection with Australia could be established without limiting the events only to those held in Australia’.¹²⁰ It provided no detail of those means, however.

Highlights packages

Provisions

Proposed subsection 145ZN(1) limits the acquisition of rights to televise the whole or part of an anti-siphoning event that is not in a quota group, by subscription television broadcasting licensees—subject to certain conditions.

Comments

Free TV objected to the use of the words ‘whole or part’ in **proposed paragraphs 145ZN(1)(a) and (b)** of the Bill. It argued that this wording could result in a situation where after a free-to-air broadcaster had purchased a highlights package of a listed event, a pay television channel could then acquire the rights to televise that whole event. Free TV concluded that consequently, ‘free-to-air viewers will miss out on seeing the vast majority of the event’.

Under the current rules, a pay TV broadcaster cannot obtain rights to televise a listed event that had only received limited highlights coverage on free-to-air. This is in line with the policy objectives of the anti-siphoning scheme, which are to ensure maximum coverage of significant sporting events on free-to-air channels.

Members of the public expect the anti-siphoning scheme to deliver more than just a highlights package of a nationally significant event. This view is supported by previous judicial consideration which concluded that highlights packages represent a substantially different viewer proposition to the event as a whole.¹²¹

It could of course be argued that free-to-air viewers miss out on seeing the majority of an event if free-to-air broadcasters choose only to present highlights. There may therefore be a case in asking

120. Free TV Australia, submission, op. cit.

121. Free TV Australia cites: *Nine Network Australia Pty Ltd v Australian Broadcasting Authority, Foxtel Cable Television* [1997] FCA 104 (25 February 1997), Lockhart J stated: ‘The right to televise highlights of a cricket match is not substantially the same as the right to broadcast the match itself, so it could not be said that the rights acquired by Seven to televise the highlights of the various matches are sufficient to prevent breach of condition 10(1)(e) by Foxtel Cable’. The matter was appealed to the Full Court: *Foxtel Cable Television Pty Ltd v Nine Network Australia Pty Ltd and Australian Broadcasting Authority* [1997] FCA 185 (26 March 1997) in a unanimous judgement dismissing the appeal, the Full Court said: ‘...it cannot be said that a right limited to the broadcast of one-hour of highlights of each day of an event is a right to televise the event. A summary of a work is not the work itself. This approach is consistent with the terms of s 115(2)’. Free TV, submission, op. cit.

what the harm is if the significant number of households in Australia with pay television can also have access to the full coverage of that same event? In response to the Free TV complaint Foxtel made a similar point 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.¹²²

DBCDE explained to the Senate committee that the intention of these provisions was once more to provide flexibility for broadcasters. In Dr Simon Pelling's words:

Basically it means that, if a free-to-air broadcaster and a rights holder are able to come to an agreement about how a particular set of rights is packaged and the agreement is that the free-to-air broadcaster want this particular set of highlights or key points in the game or whatever, then that is a perfectly legitimate thing for them to do. Having done that, that means that the right to televise is acquired, which then releases the rights in terms of the things that the subscription broadcasters can do to them.¹²³

The Senate Committee made no comment on the issues of highlight packages. This issue does, however, illustrate very clearly the argument that each stakeholder in the anti-siphoning debate has a view of what constitutes the public interest in relation to the broadcast of events and, more importantly, that this view is dependent on a 'bottom line' assessment of what is in the interest of that particular stakeholder.

Notification requirements

Provisions

Part 1 of Schedule 1 to the Bill amends the BSA to insert **proposed sections 115A–115E**. These sections provide for interim rights for broadcasters who hold, may acquire or may cease to have a right to televise the whole or part of an anti-siphoning event during the period commencing on the day after the Act receives the Royal Assent and the commencement of those amendments that are contained in Part 2 of Schedule 1 to the Bill.

Proposed sections 145ZQ–145ZU in new Division 6 of the BSA also contain notification requirements in relation to anti-siphoning events. The provisions will require broadcasters to notify ACMA in writing within ten business days about any rights to televise an anti-siphoning event that the broadcaster has acquired—and the attributes of those rights. Broadcasters will also be required to notify if they cease to hold rights.

122. Foxtel, Supplementary Submission to the Senate Environment and Communications Legislation Committee, *Inquiry into the Broadcasting Services Amendment (Anti-siphoning) Bill 2012*, 20 April 2012, viewed 3 May 2012, http://www.apph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=ec_ctte/anti_siphoning_2012/submissions.htm

123. S Pelling, Evidence to the Senate Environment and Communications Legislation Committee, *Inquiry*, op. cit.

Comments

Free TV believed that ten days was an unreasonable period; it advocated a period of 30 business days as more appropriate to reflect existing commercial practices. It added that the reporting requirement for notification of the cessation of rights was ‘not efficient’ on the grounds that the wording of the Bill prevents a broadcaster from notifying the cessation of rights at the same time the rights are acquired, even though the cessation date is usually known at the time of acquisition because these rights are negotiated for a specific period.¹²⁴

Free TV was also unhappy that while a previous exposure draft of the Bill required pay television licensees and content service providers to notify ACMA of their rights acquisitions and cessations, these provisions had since been removed from the Bill:

There is good reason to require pay TV licensees to notify of rights held for events on the anti-siphoning list. Without a requirement to notify, the ACMA will not be able to effectively measure compliance with the prohibition provisions and monitor the effective operation of the anti-siphoning scheme. Notification requirements for pay TV broadcasters and content service providers should be reinstated to the Bill.¹²⁵

SBS also called for notification requirements in **proposed section 145ZQ** to be strengthened, recommending that ACMA should either be required to make available, or publish a register of events on the anti-siphoning list for which the rights have been acquired and, if relevant also publish when rights cease to be held.¹²⁶

Timing of review

Provisions

Proposed section 145ZV requires that, before 31 December 2014 the Minister must order a review to be conducted about a range of matters which are set out in paragraphs 145ZV(1)(a)–(j):

- the operation of the anti-siphoning provisions which are contained in **new Part 10A** in this Bill (inserted by **item 11** of Part 2 of Schedule 1 of the Bill)—including whether it should be amended or repealed and
- the operation of paragraphs 7(1)(ha)¹²⁷, 7(1)(hb)¹²⁸, 7(1)(ob)¹²⁹ and paragraph 10(1)(e)¹³⁰ of Schedule 2 to the BSA—including whether any or all of those paragraphs should be amended or repealed.

124. Free TV Australia, op. cit., p. 10.

125. Free TV Australia, submission, op. cit.

126. SBS, submission, op. cit.

127. Paragraph 7(1)(ha) (amended by **item 18** of Part 2 of Schedule 1 to the Bill) provides that a commercial broadcasting licence is subject to the condition that the licensee will comply with section 145H.

Proposed subsection 145ZV(3) requires the Minister to table copies of the report of the review in each of the Houses of the Parliament within 15 sitting days of that House after the completion of the report.

Comments

There was some disagreement about the timing of review of the new anti-siphoning provisions. Free TV argued that given that the new scheme is unlikely to come into effect until late 2012, review should not be required before a substantial period of operation of the scheme had passed.¹³¹

In contrast, sporting organisations and pay television operators were supportive of the timing of the review.¹³² Foxtel maintained the shorter period for review, given the pace of change in Australian converging media environment, was entirely appropriate. Tellingly, Foxtel added that its support also hinged on the possibility that the ‘necessity of the scheme in its entirety’ would be addressed as part of the review.¹³³

DBCDE offered the explanation that there was ‘no particular magic’ in the date; it was chosen as it was thought it would allow the legislation to operate for a reasonable period and provide time for an unintended consequences or industry difficulties to emerge and for them to be assessed.

The Senate Committee shared DBCDE's view that the timing of the statutory review was an appropriate length of time to assess the impact and effectiveness of the new anti-siphoning scheme.

Concluding comments

This legislation attempts to create an anti-siphoning scheme which balances the interests of the various commercial stakeholders with those of the public. In attempting this it is no different from its predecessors. In not wholly achieving its aim it is equally no different from its predecessors. Indeed, some stakeholders have implied that the complications of a twenty first century media landscape make anti-siphoning even less viable than it has been in the past.

In 2009, the Parliamentary Library's discussion of anti-siphoning concluded:

128. Paragraph 7(1)(hb) (inserted by **item 6** of Part 2 of Schedule 1 to the Bill and then amended by **item 19** of Part 2 of Schedule 1 to the Bill) provides that a commercial broadcasting licence is subject to the condition that the licensee will comply with the requirements set out section 145ZQ.

129. Paragraph 7(1)(ob) provides that a commercial broadcasting licence is subject to the condition that if a clause in Subdivision A of Division 4 of Part 10A (which imposes restrictions on the televising of Tier A anti-siphoning events) applies to the licensee, then the licensee will comply with that clause.

130. Paragraph 10(1)(e) (amended by **item 21** of Part 2 of Schedule 1 to the Bill) provides that each subscription broadcasting licence is subject to the condition that the licensee will comply with section 145ZN (which deals with limits on acquisition of rights to televise anti-siphoning events).

131. Free TV, submission, op. cit.

132. NRL, AFL and Tennis Australia submissions, op. cit.

133. Foxtel, supplementary submission, op. cit.

It is likely that the anti-siphoning issue will once more prove too complicated to resolve in the short term, for one reason the media environment is indeed diversifying and evolving quickly ... In such an environment, what constitutes the public interest will not be easily identifiable. Additionally, as in the past, any government decision on anti-siphoning will be contentious. There will be winners and losers and numerous interpretations about who fits into which category.

In essence, a similar situation will apply under this legislation; the brief is complex, the media environment is evolving ever more quickly, and most importantly, what constitutes the public interest is more of a moving feast than in the past. The Government's proposal has not satisfied any one group fully; and there will be winners and losers, whatever the final legislative outcome from this Bill.

It remains to be seen if this iteration can improve on the past and deliver more winners than losers, while delivering what governments have promised since the anti-siphoning list was first introduced—a situation in which the interests of audiences are paramount.

Appendix A

Future anti-siphoning list for the rights to events acquired between 1 January 2011 and 31 December 2015

Tier A—Broadcast on main channel Sport	Events
Horse Racing	Melbourne Cup
AFL (Australian Football League)	AFL Grand Final
NRL (National Rugby League)	NRL Grand Final
Rugby Union	Rugby Union World Cup Final
Cricket	Each Test match involving Australia, played in Australia
	Each Test match involving Australia and England played in the United Kingdom
Cricket	Each one-day international match involving Australia, played in Australia
Cricket	Each Twenty20 match involving Australia, played in Australia
Cricket	ICC Cricket World Cup: semi-finals, final and each match involving Australia
Cricket	ICC Twenty20 World Cup: final and each match involving Australia
Football	FIFA World Cup: quarter-finals, semi-finals, final and each match involving Australia
Tennis	Australian Open men's singles final
	Australian Open women's singles final
Tennis	A 'World group' Davis Cup final tie involving Australia
Motor Sports	Each race of the F1 Grand Prix held in Australia
Motor Sports	Each race of the Moto GP held in Australia
Motor Sports	V8 Supercars—Bathurst 1000
Tier B—Any channel (1) SPORT	Events
Olympic Games	The Summer Olympics event and the Winter Olympics event (Summer: including Opening and closing ceremonies except any event declared a Tier A event for the purposes of the Act) (Winter including opening and closing ceremonies)

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Commonwealth Games	The Commonwealth Games event
AFL	4 matches per round of the AFL premiership season *
AFL	Each match of the AFL finals series (except the grand final)
NRL	3 matches per round of the NRL premiership season *
NRL	Each match of the NRL finals series (except the grand final)
Rugby League	Each match of the State of Origin series
Rugby League	Each Test match involving the Australian team, played in Australia, New Zealand or the United Kingdom (including the Rugby League World Cup)
Rugby Union	Rugby Union World Cup: quarter-finals, semi-finals and each match involving Australia
Rugby Union	Each Test match involving Australia, played in Australia, NZ, SA or as part of the 'spring tour'
Tennis	Each match of the Australian Open (except for the men's singles final and women's singles final)
Tennis	Wimbledon: Each men's and women's singles quarter-final, semi-final and final
Tennis	US Open: Each men's and women's singles quarter-final, semi-final and final
Tennis	Each 'World group' tie involving Australia played as part of the Davis Cup (excluding a final involving Australia)
Golf	Each round of the Australian Open
Golf	Each round of the Australian Masters
Golf	Each round of the United States Masters
Netball	Each Test match involving the senior Australian team, played in Australia or New Zealand
	Netball World Championships: Semi-finals and Finals matches involving the senior Australian team

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Football	All matches of the FIFA World Cup (excluding those on Tier A)^
Football	FIFA World Cup qualifiers: each match involving Australia (the Socceroos)^
Football	English Football Association Cup Final
Motorsports	V8 Supercars Championship Series: each race not specified on Tier A

¹ Prior to the passage of the legislative amendments to implement the Government's reforms, these events must be premiered on the main channel, or premiered simultaneously on the main channel and a related multi-channel.

* The Government will not de-list any NRL or AFL games until a mechanism which protects the quality of free-to-air games has been settled.

^ These events are subject to final negotiation with rights holders and broadcasters over the detail of the listing, and obligations attached to that listing.

Source: Department of Broadband, Communications and the Digital Economy and Broadcasting Services Events Notice.¹³⁴

134. Summary on DBCDE website, 'Future anti-siphoning list', viewed 14 May 2012, http://www.dbcde.gov.au/_data/assets/pdf_file/0003/131457/The-Future-Anti-siphoning-List-26-11-2010.pdf taken from Broadcasting Services (Events) Notice (No. 1) 2010, 21 December 2010, viewed 14 May 2012, <http://www.comlaw.gov.au/Details/F2010L03383>

Appendix B

ASTRA Assessment of Ministerial discretion in Bill

ATTACHMENT: MINISTERIAL DISCRETIONS

Provision	Effect
s 115E(1)	Minister may exempt a commercial or national broadcaster from interim notification requirements
s 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 ¹⁰
s 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
s 145D(2)	For a part of an anti-siphoning event, the Minister may determine that the anti-siphoning scheme does not apply
s 145E(1)	Minister may declare an event to be a 'Tier A anti-siphoning event'
s 145E(2)	Minister may declare an event to be a 'Tier B anti-siphoning event'
s 145E(4)	Minister may declare an event continues to be an anti-siphoning event
s 145E(6)(b)(ii)	Minister may specify a period other than 26 weeks (up to 52 weeks) for an AFL match to be automatically delisted ¹¹
s 145E(6)(c)(ii)	Minister may specify a period other than 26 weeks (up to 52 weeks) for an NRL match to be automatically delisted
s 145E(6)(d)(iii)	Minister may specify a period other than 26 weeks for an event that is not an AFL or NRL match to be automatically delisted
s 145E(6)(g)	Minister may declare an event an continues to be an anti-siphoning event (and thus not automatically delisted 26 weeks before the event)
s 145F(1)	Minister may specify a 'designated group' of Tier B events, and a 'total minimum number of hours' for that designated group
s 145F(2)	Minister may specify a 'designated group' of Tier B events, and a 'daily minimum number of hours' and 'applicable group day' for that designated group
s 145F(5)	Minister may make a supplementary determination in relation to a determination made under s 145F(1) to specify a 'daily minimum number of hours' and 'applicable group day', where the relevant events have not occurred
s 145G(1)	Minister may determine a 'Category A quota group' of Tier B events
s 145G(2)	Minister may determine a 'Category B quota group' of Tier B events, and the 'quota number' and 'associated set conditions' for that quota group

¹⁰ Four hours from the start of the event is the default definition of 'live' for Tier B anti-siphoning events (see s 145B).

¹¹ 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.

s 145ZM(1)	Minister may exempt a commercial or national broadcaster from obligations to broadcast a Tier A event on the primary service
s 145ZM(2)	Minister may exempt a commercial or national broadcaster from obligations to broadcast a Tier A event on the primary service in a particular licence area/coverage area
s 145ZO(6)(c)	Where coverage of an event is provided by a content service provider, the Minister may specify that the definition of 'live' for a particular Tier B event that is not in a designated group is less than 4 hours

Source: ASTRA submission to Senate inquiry.¹³⁵

135. ASTRA, submission, op. cit.

Appendix C

Broadcasting Services (Category B quota groups) Determination Draft

Commonwealth of Australia

Broadcasting Services Act 1992

Broadcasting Services (Category B quota groups) Determination (No. [insert]) 2012

I, STEPHEN MICHAEL CONROY, Minister for Broadband, Communications and the Digital Economy, make the following Determination under subsection 145G(2) of the *Broadcasting Services Act 1992*.

Dated [insert] 2012

[DRAFT - NOT FOR SIGNATURE]

STEPHEN MICHAEL CONROY
Minister for Broadband, Communications and the Digital Economy

1. Name of Determination

This Determination is the Broadcasting Services (Category B quota groups) Determination (No. [insert]) 2012.

2. Commencement

This Determination commences immediately after the commencement of Part 2 of Schedule 1 to the *Broadcasting Services Amendment (Anti-siphoning) Act 2012*.

3. Interpretation

(1) In this Determination:

Act means the *Broadcasting Services Act 1992*.

AFL Premiership competition means the multi-round competition known in the community as the Australian Football League Premiership or the AFL

Premiership (including, if there is a change in the name by which that competition is known in the community, the competition known in the community by the changed name).

AFL Premiership quota group means a Category B quota group listed in column 2 at item 1 of the table in Schedule 1.

licence area has the same meaning as in Part 10A of the Act.

- (2) In this Determination, an anti-siphoning event is **included in the set** in relation to a licence area if, for the purposes of each of the following provisions of the Act, the event is included in the set of anti-siphoning events described in the provisions:
 - (a) subsection 145ZN(3);
 - (b) subsection 145ZO(3).
- (3) In this Determination, a match is taken to be played in the **evening** on a day if the match commences at or after 6:00pm AEST/AEDT on the day.
- (4) Unless the contrary intention appears, a word or phrase in this Determination has the same meaning as it has in the Act.

4. Category B quota groups

Each group of Tier B anti-siphoning events specified in column 2 of the table in Schedule 1 is determined to be a **Category B quota group** for the purposes of the Act, in relation to the licence area or licence areas specified in column 3 at the same item of the table in Schedule 1.

5. Quota numbers

The **quota number** for each Category B quota group listed in column 2 of the table in Schedule 1 is determined to be the number specified in column 4 at the same item of the table in Schedule 1, in relation to the licence area or licence areas specified in column 3 at the same item of the table in Schedule 1.

6. Associated set conditions

The **associated set conditions** for each AFL Premiership quota group, in relation to the licence area or licence areas specified in Schedule 2, are determined to be the conditions specified in Schedule 2.

SCHEDULE 1

CATEGORY B QUOTA GROUPS, LICENCE AREAS AND QUOTA NUMBERS

Column 1 (Item)	Column 2 (Category B quota group)	Column 3 (Licence area)	Column 4 (Quota number)
1	Each group of matches that makes up a round of the AFL Premiership competition, played after 1 January 2017, excluding the Finals Series	Each licence area in Australia	4

SCHEDULE 2

ASSOCIATED SET CONDITIONS FOR EACH AFL PREMIERSHIP QUOTA GROUP

General Conditions

- 1.1 If the quota group includes one or more matches that are played on a Friday evening, then at least one of those matches must be included in the set in relation to each licence area in Australia.
- 1.2 If the quota group includes one or more matches that are played on a Saturday evening, then at least one of those matches must be included in the set in relation to each licence area in Australia.

Specific Conditions

- 2.1 If the team known as the West Coast Eagles is playing in a match in the quota group, then the match must be included in the set in relation to each of the following licence areas:
 - (a) Perth TV1;
 - (b) Geraldton TV1;
 - (c) Kalgoorlie TV1;
 - (d) Remote and Regional WA TV1;
 - (e) South West and Great Southern TV1;
 - (f) Western Zone TV1.
- 2.2 If the team known as the Fremantle Dockers is playing in a match in the quota group, then the match must be included in the set in relation to each of the following licence areas:
 - (a) Perth TV1;
 - (b) Geraldton TV1;
 - (c) Kalgoorlie TV1;
 - (d) Remote and Regional WA TV1;
 - (e) South West and Great Southern TV1;
 - (f) Western Zone TV1.
- 2.3 If the team known as the Adelaide Crows is playing in a match in the quota group, then the match must be included in the set in relation to each of the following licence areas:
 - (a) Adelaide TV1;
 - (b) Mount Gambier/South East TV1;
 - (c) Riverland TV1;
 - (d) Spencer Gulf TV1.
- 2.4 If the team known as the Port Adelaide Power is playing in a match in the quota group, then the match must be included in the set in relation to each of the following licence areas:

4

Source: Senate Standing Committee on Environment and Communications¹³⁶

136. Senate Standing Committee on Environment and Communications, *Inquiry into the Broadcasting Service Amendment (Anti-siphoning) Bill 2012*, Answers to Questions on Notice, Public Hearing, 13 April 2012, Broadband, Communications and the Digital Economy Portfolio Department of Broadband, Communications and the Digital

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Economy, viewed 14 May 2012,

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=ec_ctte/anti_siphoning_2012/submissions.htm

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