



**SENATE ENVIRONMENT, COMMUNICATIONS,
INFORMATION TECHNOLOGY AND THE ARTS
COMMITTEE INQUIRY INTO
THE *BROADCASTING LEGISLATION AMENDMENT BILL*
(NO. 2) 2001**

**SUBMISSION FROM THE
FEDERATION OF AUSTRALIAN
COMMERCIAL TELEVISION STATIONS**

1 JUNE 2001



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Ms Andrea Griffiths
Secretary
Senate Environment, Communications, Information Technology
and the Arts References Committee
S1.57 Parliament House
CANBERRA ACT 2600
AUSTRALIA

BY EMAIL: ecita.sen@aph.gov.au

Dear Madam

SUBMISSION ON THE *BROADCASTING LEGISLATION AMENDMENT BILL (NO.2) 2001*

This submission is made by the Federation of Australian Commercial Television Stations (**FACTS**).

FACTS has a number of concerns with the provisions of *Broadcasting Legislation Amendment Bill (No.2) 2001*. Of primary concern are the changes to the de-listing process under the anti-siphoning provisions in Section 115 of the Bill.

1 Changes to the De-listing Process for Anti-Siphoning

FACTS is concerned that the effect of the changes to the de-listing process goes beyond the intention of the amendment. We believe these changes have the potential to subvert the original intent of the anti-siphoning regime. As stated in the Second Reading speech: "This is not intended to affect the availability of major sporting events to the general public." However, we believe that the amendments will have precisely this effect.

As currently drafted, FACTS believes the changes to the de-listing process will fundamentally alter the operation of the anti-siphoning rules in the following ways:

- automatic de-listing at 6 weeks shifts the negotiating power to the sporting rights holder, creating an incentive to draw out negotiations close to the "drop dead" date;

- if one set of negotiations are not successful, there is no incentive to attempt to place the event with other free-to-air broadcasters;
- the onus of proof is switched from the pay operator to free to air i.e free to air broadcasters will be required to prove that rights have not been genuinely made available rather than pay having to show that they have not been acquired. This is also a change from an objective to a subjective assessment of the situation;
- an event may be automatically de-listed without free to air broadcaster/s being aware that the rights to the event are available;
- there is no requirement for the Minister to halt a de-listing even if a broadcaster notifies the Minister that it believes it has not had a genuine opportunity to acquire the rights;
- if a de-listing was to be disputed the administrative and political onus on the Minister will be greater, due to the short time frame and the uncertainty of the mechanism;

By moving the obligation to seek the de-listing away from the pay operator, there is a shift of the negotiating power towards the rights holder. There is a risk that the automatic de-listing provisions will be used by rights holders (often affiliated with a pay TV operator) to deliberately delay negotiations after the automatic de-listing date.

Under the current rules, if a rights holder is not successful in placing rights with one free-to-air broadcaster, they must attempt to place it with another. This mechanism acts to the benefit of the public in that the rights holder must make all possible attempts to place the event on free-to-air before the event can be de-listed.

Under the proposed new rules, this will not be the case. The event will automatically de-list unless a free-to-air broadcaster notifies the Minister that it has not had the opportunity to acquire the event. If a rights holder delays negotiations to the six week mark, the broadcaster involved in those negotiations may notify the Minister that negotiations are ongoing. There is no requirement for the Minister to halt the de-listing process even if such a notification is received.

Free to air broadcasters will be faced with the situation that stopping the automatic de-listing proceeding will be conditional upon positive action by the Minister. We consider this will place a considerable political and administrative burden upon the Minister within a very short time frame.

The Minister will be confronted with notifications from free-to-air broadcasters that they have not had an opportunity to acquire the rights to certain events. The Minister will be under pressure from the free to air broadcaster to determine the matter prior to the six-week point and the pay operator will have an incentive to drag the decision over the six-week mark.

We understand from comments from the Government and from the Pay TV operators that the intention of the amendment was to:

- “maximise the time free to air broadcasters have to negotiate rights while providing an adequate time prior to the event for subscription services to acquire and promote the event.” (Second Reading Speech); and
- minimise the involvement of the Minister in the process and remove his involvement where the issue is not contentious.

As stated we consider that the suggested amendment goes beyond this intention and suggest an alternative regime that meets the intention of the change and meets the objective of the pay broadcasters.

We understand from comments from Foxtel (including their submission to the ABA on the anti-siphoning list) that the primary concern of pay television operators is that they should have a period of at least 10 weeks to acquire, schedule and publicise de-listed events.

FACTS would like to propose an alternative mechanism which we believe achieves this objective and which steers a fairer middle path between the competing commercial interests of the pay and free-to-air operators. Our proposed model also shares the administrative responsibility of de-listing more evenly than the current model and avoids the possibility that the Minister would become more frequently involved in de-listing applications.

1.1 Alternate Regime

Our proposed mechanism is that at any time during a three month period prior to an event, a pay TV broadcaster may give two weeks notice that it wishes to have an event de-listed.

The notice could be triggered by a notice in a prescribed form which would be given to the Minister (or to the ABA) and to free to air broadcasters.

If the Minister received no objection to the notice in the two-week period the event would automatically be de-listed. Note that all requested de-listings to date have been uncontested by the free to air broadcasters. If this mechanism had been used in past de-listings the Minister would not have been involved in the process at all.

If an objection is made, the de-listing is halted. At this point, the pay television operator could either request the Minister to make a determination that free to air broadcasters have had a reasonable opportunity to obtain the rights on reasonable commercial terms. If the Minister is satisfied there was a reasonable opportunity the de-listing would proceed. The current de-listing processes would also remain in place to allow a further application from a pay operator if a free-to air broadcaster did not acquire the event after that time. As a Pay broadcaster is likely to provide the original notice as early as possible, the Minister would have sufficient time to undertake any relevant investigation well before the event. However, on past experience, free-to-air broadcasters have not hindered de-listing applications and the Minister would be unlikely to be involved at all.

FACTS believes the alternative regime has the following advantages:

- removes the administrative burden where the issue is not contested;
- alleviates pressure on the Minister six weeks prior to the event where the matter is contested;
- creates more certainty in the process;
- does not create a mechanism whereby the rules can be avoided;
- creates a mechanism that ensures free to air broadcaster/s are aware of any event that is to be de-listed;
- provides more time for pay TV to acquire, schedule and publicize de-listed events

1.2 Reasonable commercial terms

The original intent of the anti-siphoning regime was to ensure that free-to-air broadcasters had a reasonable opportunity to acquire the broadcast rights on reasonable commercial terms. The proposed amendments do not require "reasonable commercial terms", but only " a reasonable opportunity to acquire" the rights. This omission could also allow rights holders to protract negotiations on an unreasonable basis and in effect, withhold rights from free-to-air television.

FACTS believes that the existing wording should be retained.

2 HDTV Exemptions

2.1 Exemption relating to advertising/sponsorship matter

FACTS welcomes this amendment, which is designed to promote the early availability of native high definition throughout Australia before the 2003 quota requirements are triggered.

Existing paragraphs 37E(1)(c) and (d) of Schedule 4 of the Act require programs (including advertising matter) on a HDTV version of a service to be the same as those broadcast simultaneously on either the analog or SD versions.

Currently, subclauses 6(9) and 6(10) of Schedule 4 allow the ABA to grant determinations that provide an exemption from the simulcast requirement for analog and SDTV versions in relation to specified programming. However, these exemption provisions do not extend to the HDTV service.

Accordingly, all advertising matter on a HDTV service must be the same as that on the analog/SD services. Currently, broadcasters are not in a position to transmit in each licence area HD programming that separates out different commercials for different licence areas.

Expensive presentation equipment duplicating the existing analog/SD equipment is required in each station's local studios to insert local advertisements into a HDTV

service. This will involve the re-design and construction of studio space, and the availability, supply and installation of equipment from overseas.

Broadcasters wish to make available to Australian consumers native HDTV programming in advance of the legislative quota requirement of at least 20 hours per week which takes effect from 2003. The availability of native HDTV programs will provide a major driver for the take-up of HDTV television receivers and set top boxes. Without this amendment, it will only be possible to provide native HD programming in one area, depriving viewers in other parts of Australia from the benefits of HDTV until the necessary HD presentation equipment can be installed around the country.

2.2 Exemption relating to Demonstration Loop Tape

As HDTV is a new technology in the Australian marketplace, it is important that retailers have the capacity to demonstrate the benefits of HDTV to consumers. The US experience has shown that a lack of HDTV material during retail hours to showcase HDTV has caused a level of frustration amongst retailers and consumers who cannot see HDTV demonstrated when they are in retail outlets.

Australia's free-to-air broadcasters are committed to facilitating the take-up of digital television and to promoting its benefits to Australian viewers. As one of the measures to promote the benefits of digital television, and in particular to assist the early take-up of HDTV in Australia, broadcasters intend to create a 30 to 60 minute tape of extracts of high definition material for promotional purposes. The tape would be broadcast on a loop basis to enable retailers to tune to the broadcast to demonstrate the benefits of High Definition to their customers

Such a tape would typically show extracts from programs and possibly material filmed particularly for the tape to demonstrate the superior technical capabilities of HDTV. The tape would not contain whole programs and given the initial availability of material would be unlikely to contain material recently broadcast on the analog and SDTV service.

However, as the existing exemption provisions in subclauses 6(9) and 6(10) of Schedule 4 do not extend to the HDTV version of a service, there is no capacity for the ABA to make a determination to enable such a promotional tape to be broadcast just on the HDTV service.

The ABA has granted a determination in relation to demonstration programs under the existing provisions of the Act.¹ However, due to the legislative restrictions, the limitation of the determination (which enables a breakaway of the SDTV service from the analog service to promote digital television) is that any HDTV promotional tape must also be broadcast on either the SDTV or analog services. As a result, this determination is of limited utility, and has been relied upon only for major demonstration events, such as the recent Consumer Electronics Show in Sydney. As the number of digital viewers increases it will not be viable to broadcast a HDTV

¹ *Determination under Clause 6 of Schedule 4 to the Broadcasting Services Act 1992 (No 1) 2000*

demonstration tape which is required also to be simulcast on the SDTV service, as viewers will expect to see mainstream programs on their SDTV service.

Whilst we welcome the intent of these provisions, we are concerned that the current drafting of clause 37EA(6) - which requires the demonstration material to be broadcast in the previous or subsequent seven days on the SD/analog services - precludes the broadcast of a promotional tape. A promotional tape would simply be unsuitable for mainstream audiences and would not find a place in primary SD/analog program schedules.

FACTS is happy to appear before the Committee to speak to our submission.

Yours faithfully

JULIE FLYNN
Chief Executive Officer
