

2 February 2005

The Secretary
Senate Environment, Communications, Information Technology and
the Arts Legislation Committee
Parliament House
CANBERRA ACT 2006

Dear Secretary

Submission on the Broadcasting Services Amendment (Anti-Siphoning) Bill 2004

This submission is made by Free TV Australia (**Free TV**) which is the peak industry body representing all 48 commercial free-to-air television licensees in Australia.

Free TV welcomes the opportunity to comment on the *Broadcasting Services Amendment (Anti-siphoning) Bill 2004*.

Summary

- Free TV is opposed to the extension of the automatic de-listing period from 6 to 12 weeks as it provides greater opportunities for subscription broadcasters and rights holders to circumvent the anti-siphoning rules by stringing out negotiations for rights until the automatic deadline approaches.
- If the Parliament is to agree to the extension of the de-listing arrangements, the existing loophole in the legislation that allows subscription channels to acquire rights to listed events before they are offered to Free TV broadcasters should be closed. This loophole is contrary to the spirit and intent of the anti-siphoning rules.
- Free TV is concerned that if passed, the combination of the amendment and the loophole will rapidly undermine the integrity and effectiveness of the anti-siphoning list.
- The sale of the rights to the 2005 Ashes cricket series highlights Free TV's concerns that the loophole is already being exploited by pay TV operators to undermine the operation of the list.

Why the antisiphoning list matters

The antisiphoning list remains as important to Australian viewers today as when the list was first legislated in 1994.

Nearly four in five Australians choose not to subscribe to Pay TV.

The intention of the list (as stated in the Explanatory Memorandum at the time) is to ensure that all Australians continue to have free availability of sports on the anti-siphoning list and to encourage complementary coverage on pay TV for those who choose to pay.

To date the list has delivered on that promise. Over 72% of listed events are broadcast on Free TV, the majority live.

The Government's decision to renew the list in March 2004 (with the stated support of the Federal Opposition) reflected the continuing importance of the anti-siphoning list to Australian viewers.

Extension of automatic de-listing provision

In 2001 the Parliament changed the de-listing mechanism of the antisiphoning list to allow for automatic de-listing six weeks prior to an event.

At that time Free TV (formerly FACTS) made a submission to this Committee arguing against the change on the grounds that it would fundamentally alter the operation of the anti-siphoning rules.

Free TV believes that those arguments remain relevant to the current debate and that extending the automatic de-listing period from 6 to twelve weeks will provide greater opportunities for subscription broadcasters and rights holders to circumvent the anti-siphoning rules, by stringing out negotiations for rights until the automatic deadline approaches.

The new rules will probably affect smaller and less powerful sports to a greater degree because the higher profile sports such as the AFL are usually licensed on a longer term basis. However, smaller sports are often made available on a case by case basis closer to the event. International rugby tests are an example of a sport that would usually be made available closer to the time the event is played.

Loopholes in the existing legislation

The proposed amendment to extend the automatic delisting period provides an opportunity for the Parliament to address the very pressing issue of the loophole that currently exists in the rules. This loophole is increasingly being exploited by subscription broadcasters with the result that some listed events will not be seen on Free TV.

The anti-siphoning regime is designed to prevent pay television from acquiring rights to a listed event prior to a free-to-air broadcaster having a reasonable opportunity to do so. However, due to the manner in which the anti-siphoning rules are drafted, this intention is being circumvented.

Clause 10(e) of Schedule 2 to the BSA places a condition on subscription television broadcasting licensees that they "will not acquire the right to televise, on a subscription television broadcasting service, an event that is specified in a notice under section 115(1) unless [it has been acquired by a national broadcaster or a commercial free-to-air broadcaster serving more than 50% of the population]"

There are two problems with the drafting of this provision:

- The licence condition only applies to subscription television broadcasting licensees. This does not include shareholding entities like News Limited due to the absence of any tracing provisions applicable to this section. More importantly, it does not apply to Pay TV channel

providers such as Fox Sports, which is not a licensee (Foxtel is the licensee, Fox sports is only a channel provider).

- The condition only prevents a licensee from acquiring the right to televise an event on subscription television. This would not prevent the acquisition of the free-to-air rights by a licensee or a channel provider even though they would not be able to use them.

In practice, sports rights are not acquired by subscription television licensees (eg Foxtel) but by other parties including subscription television channel providers such as Fox Sports.

As the anti-siphoning legislation applies only to licensees, this enables channel providers to acquire rights to listed events in advance of them being offered to free-to-air broadcasters.

Free TV has been concerned about this loophole for a long time. It has been raised on numerous occasions including in the FACTS submission to the Australian Broadcasting Authority Review of the Anti-Siphoning List in April 2001.

This loophole is being increasingly used to get around the rules and when combined with the increased power given to the subscription broadcasters through the extension of the automatic de-listing period has the potential to seriously undermine the spirit and intent of the list.

2005 Ashes cricket

Free TV's concerns have been highlighted by the sale of the 2005 Ashes cricket series to be played in the United Kingdom. Fox Sports acquired the Pay TV rights to broadcast the series from the English Cricket Board. Only after the rights had been sold to Fox Sports were they offered to any Free TV broadcasters and they were only made available on a **non-exclusive** basis. A free-to-air broadcaster could only purchase the live rights if they were prepared to accept that the event would also be broadcast at the same time on Pay TV.

As a result the event will only be available to pay television subscribers.

In the complex world of sporting rights exclusivity is of paramount importance to advertisers. Advertisers demand exclusivity to maximise the available audience and the value of their advertising dollar.

Simultaneous coverage on pay TV fragments the available audience, reducing the amount of revenue a free-to-air broadcaster can raise.

The economies of advertiser funded broadcasting mean that if sufficient revenue is not available the cost of acquiring the event (or the revenue foregone if it is acquired) cannot be justified.

This is not the only occasion on which the loophole has been exploited. Fox Sports wrote to Free TV broadcasters in December 2003 informing them that,

"We have acquired the Australian television rights for the Australian cricket tour to India in 2004...could you please let me know by return e-mail if you are interested in acquiring the free-to-air TV rights to this tour".

On that occasion it would seem that both the pay and free-to-air rights had been acquired. Again, this is clearly contrary to the intention of the anti-siphoning rules.

The difference between complementary and simultaneous coverage

It should be noted that “simultaneous” coverage is not the same as “complementary” coverage. There are many examples of complementary coverage. Pay TV has been able to provide extensive complementary coverage of listed sports such as Rugby World Cup, Australian Open Tennis, Wimbledon and the AFL.

The 2004 Rugby World Cup is a good example of complementary coverage. On that occasion Seven acquired exclusive live rights to the majority of matches including all matches involving the Australian team, the opening and closing ceremonies and the finals. However, Pay TV provided complementary coverage with live broadcast rights for a number of other matches.

Complementary coverage maximises the broadcast hours (live/delayed and repeat) of these sports available to viewers while ensuring that they are delivered in an economically viable framework for both free-to-air and subscription broadcasters.

Experience overseas shows that dual rights/simultaneous coverage results in a migration to Pay TV

In other countries major sporting events are rarely shown simultaneously on both a subscription channel and a free-to-air advertiser funded channel because of the economics of simultaneous coverage discussed above. In the United Kingdom, even where events are available for purchase by both free and pay broadcasters, events are either on free or pay, and where pay TV has rights, the free-to-air coverage is usually only a delayed highlights package.

The English Cricket Board has recently been heavily criticised for its failure to maintain at least half England’s Test matches on terrestrial television. The ECB had promised the UK Government that this would be the case if cricket was removed from their anti-siphoning list. (See attached story).

This situation demonstrates that even for high profile sports such as cricket, free-to-air coverage cannot be taken for granted in the absence of rules preventing them being siphoned exclusively to pay TV.

In a previous submission to this Committee the Australian Subscription Television and Radio Association (**ASTRA**) argued that “there is no incentive for a rights holder to avoid, or deliberately delay, negotiations with a FTA network as this would work against the right’s holders commercial imperatives – which are to have early certainty of FTA coverage and related revenue”.

Clearly this statement cannot be sustained in the face of increasing migration of sports from free to pay TV. It was Rupert Murdoch who described sport as “the battering ram of Pay TV”. It is imperative that our anti-siphoning rules are adequately framed to prevent Australians being forced to pay for the sporting events they have come to expect to watch for free.

Conclusion

Over the last decade the antisiphoning list has fulfilled its aim to deliver major sporting events for free to all Australian viewers while providing a complementary coverage for those who choose to pay.

For the list to continue to deliver those outcomes we believe it is important to close the loophole to ensure that sports cannot be siphoned off the list by using the loophole and the greater bargaining

power of an extended automatic de-listing date to undermine the list and bring its operations into question.

We therefore respectfully ask the Senate to give consideration to introducing an amendment to close the loophole.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Julie Flynn', with a long horizontal flourish extending to the right.

JULIE FLYNN
Chief Executive Officer

Greg Dyke on Broadcasting

This sell-off of sporting events just isn't cricket, gentlemen

20 December 2004

Only six years after the "gentlemen" who run cricket promised the Government that at least half England's Test matches would stay on terrestrial television if cricket was removed from the Government's list of protected sporting events, they've sold the lot to BSkyB.

Of course, the England and Wales Cricket Board faced a classic dilemma when making the decision. The up side of going with BSkyB was that it would rake in an extra £20m a year for cricket. The down side was that not only did it mean going back on what the Board had promised the Government, it also almost certainly meant a further decline in interest in cricket in the UK.

In the end, money talked, but no one should underestimate the impact the decision is likely to have. It will mean that more than half of the country's homes will, for the first time, not be able to receive live Test cricket. But it's worse than that; it's also likely to mean that fewer people will watch cricket overall - even in the homes that can receive BSkyB.

You can see the likely impact the move will have on cricket by looking at the viewing figures for other sports. Some years back, the English Rugby Football Union decided to sell all its internationals at Twickenham to BSkyB while the rest of the home countries sold their matches to the BBC. This meant that, one year, the England vs Wales rugby international was shown on BSkyB, while the next year, when it was played at Cardiff, it was on BBC1.

The audience figures tell all. When the match was on Sky the audience was a few hundred thousand; when it was on the BBC it was 20 times larger at seven million.

And rugby isn't an isolated case. The golf industry certainly blames the lack of new people taking up the game in recent years on the fact that most golf tournaments are now broadcast on one of the Sky Sports channels and not on terrestrial television. What this has meant is that while the ardent golf fans still watch, not many others do.

The truth is that when most sports events are broadcast on terrestrial television they become just that - events. That is just not the case when they are on BSkyB, even though the actual coverage is as good and often better than on the terrestrial channels. What many sports organisations have learnt over the years is that, without terrestrial television coverage, interest in the sport declines - soccer aside.

But while this latest deal might not turn out to be a good one for the long-term future of cricket, it certainly is a coup for James Murdoch and BSkyB. Back when the fledgling Sky first started, one of its early boosts in subscriber numbers came when it bought the exclusive rights to the cricket World Cup. With the growth in subscriber numbers now slowing and people turning in vast numbers to Freeview for multi-channel digital television, BSkyB needed something new to sell. Faced with either paying for BSkyB or not seeing live cricket at all, some cricket lovers are bound to sign up.

However, the deal raises the whole question of "listed events" legislation all over again. The Test matches were originally on the list of sporting events that successive governments said must be shown on terrestrial television, along with the Olympics, the soccer World Cup finals, Wimbledon and others.

But back in 1998, after a long campaign by the cricket authorities, the then Secretary of State for Culture, Media and Sport, Chris Smith, agreed that the Test matches should not, any longer, be included in the list. He did this having had assurances from the Cricket Board that they would not sell more than half of the Test matches to BSkyB. Six years later, they have sold the lot.

What this is almost certain to mean is that the fledgling campaign by BSkyB and Fifa to change the listed events rules for the 2010 football World Cup, so that some of the games can be shown exclusively on BSkyB, is probably dead in the water. Which Government minister will trust a sporting body now?

Source: The Independent, UK, 20 December 2004