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Ann Campton
Assistant Secretary
Broadcasting and Switchover Policy Branch
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By email: Ann.Campton@dbcde.gov.au

Dear Ms Campton

Exposure Draft of the Broadcasting Services Amendment (Anti-siphoning) Bill 2011

Free TV Australia welcomes the opportunity to comment on the Exposure Draft of the Broadcasting Services Amendment (Anti-siphoning) Bill 2011 (the Bill).

As you are aware, Free TV Australia represents all of Australia's commercial free-to-air television broadcasters. In 2011 commercial free-to-air television is the most popular source of entertainment and information for Australians, with our members providing nine channels of content across a broad range of genres, as well as rich online and mobile offerings, all at no cost to the public.

Free TV is generally supportive of the legislative changes introduced by the Bill. Overall the proposed changes to the structure and operation of the anti-siphoning list maintain the public interest in ensuring that all Australians are able to see major sporting events for free, while delivering more flexibility to free-to-air broadcasters and increased access to listed sports for pay television operators.

However, there are a number of specific provisions of the Bill on which we wish to comment.

Must-Offer Provisions

Free TV objects to the proposed \$1 "must-offer" provisions set out in Division 3 of the Bill. The provisions specifying that commercial free-to-air television broadcasters must be able to guarantee compliance with the requirements of the Bill at least four months out from an event or on-sell them for a specified amount (ss145E, 145G and 145H) are unnecessary, unreasonable, unworkable and represent a significant derogation of the rights of broadcasters.

It is unclear why these provisions are required. There are already significant incentives, both commercial and regulatory, to ensure that commercial free-to-air broadcasters air the programs they purchase in a timely fashion. Even in the current environment in which multi-channelling of events is not permitted, broadcasters show virtually all purchased material in a timely manner. For example, all Test Cricket events are shown live nationally, as well as one-off events such as the Australian Formula 1 and the Australian Motorcycle Grand Prix (Moto GP). For longer competitions, such as AFL, NRL and Wimbledon, all events are shown to which the rights are acquired, with rights to all other matches available for purchase by pay television. The Olympics and Commonwealth Games currently receive the most comprehensive coverage in their history. In the new flexible programming environment, non- or late broadcast of an event is even less likely to occur.

Most importantly, where broadcasters do fail to comply with the Bill's requirements, they will already be subject to substantial penalties, including fines of \$220,000 per incident. It seems unclear why this provision of the Bill needs an additional 'stick.'

Another concerning element of this proposal is the long timeframe associated with these provisions. It is not clear why the Government has determined that all rights negotiations and scheduling decisions must have been concluded 120 days before the event in question. This timeline is out of line with norms in an industry where deals can happen only weeks before the event and scheduling decisions can be made in the days leading up to broadcast. Australian Netball contracts, for example, are often entered into within the four month period leading up to the event, as are some motor racing rights and, recently, the rights for Wimbledon 2011. Matches for the Davis Cup are frequently scheduled at short notice. The provision is therefore redundant, as it is unlikely that the broadcaster will know that they will not be complaint four months out and so will be unable to make the offer as prescribed.

The requirement to offer the material for \$1 makes this timeframe and the provisions in general more problematic. As you are aware, broadcasters pay substantial amounts for the rights to sports. If for some reason they are unable to show the events they will therefore naturally seek to transfer them to others through a reasonable commercial deal. However, the must-offer provisions restrict this option by limiting the right or ability for the broadcaster to negotiate for just terms less than four months out from the event. This is particularly pertinent with respect to subscription TV providers, who are in a position to pay much higher prices for sporting matches than free-to-air broadcasters.

This seems unreasonable, as it essentially applies a fine to what is otherwise being billed as an "exception," punishing the broadcaster in a circumstance in which they are trying to do the right thing by making material available to others. It is also out of line with the approach otherwise taken in the Bill. For example, s145C(6)(c) requires that the Minister be satisfied that broadcasters have had a "reasonable opportunity to acquire the right" before it is delisted. There seems no reason why a similar requirement could not be applied in this case.

Free TV therefore submits that the \$1 must-offer provisions are inappropriate and unnecessarily punitive, and should be removed.

If the must-offer provisions are kept, at a minimum the timeframe at which they apply should be shortened substantially, and flexibility should be added to the \$1 limit, to provide broadcasters with the opportunity to negotiate a commercial outcome. Free TV would propose that a more appropriate approach, which more accurately recognises industry practice and provides greater commercial freedom and equity, would be to require broadcasters to provide others with a “reasonable opportunity to acquire the rights” six weeks before the event. If the Government still deems the punitive \$1 requirement necessary, it should be applied no earlier than two weeks before the event date. This would meet the Government’s policy aim of creating additional incentives for compliance with the objectives of the anti-siphoning regime while at the same time being more just towards the interests of broadcasters and more accurately recognising commercial realities.

Transfer Rights

Free TV is concerned that the provision that automatically voids all contracts that do not provide a transfer right in accordance with the must-offer provisions of the Bill (s145K) is unworkable in practice.

Such a provision may have the unintended consequence of preventing free-to-air broadcasters from acquiring rights at all to some of the major events on the anti-siphoning list. For example, the International Olympic Committee are highly specific in their contracting requirements, with strong consent obligations, and will never agree to such a condition being placed in contracts. As the Act does not apply to foreign corporations, the obligation requiring a program supplier to include the transfer provisions is redundant in relation to overseas events. This will place broadcasters in the impossible situation in which they are unable to enter into a valid contract for major listed events, thereby preventing their acquisition by free-to-air broadcasters while pay television and other services are not bound by similar conditions. In instances where a free-to-air broadcaster can clearly meet the coverage requirements, it is manifestly unfair to insist that a potentially unobtainable provision be included in the contracts, especially considering that the offer to transfer is merely an option and not a requirement, and can be exercised at the election of the particular broadcaster.

Free TV therefore proposes that this provision be removed. As with the above, broadcasters will still be required to comply with the must-offer conditions, subject to strict penalties, but will be free to arrange to do so through normal commercial avenues.

Automatic Delisting Period

The timeframe for the automatic delisting of events 26 weeks before they air (s145C) is similarly unworkable and does not reflect commercial realities.

As is discussed above, broadcasters cannot ensure that all rights negotiations will be concluded in this timeframe. Negotiations often continue until only weeks or even days before events occur. Automatic delisting at such an early stage will therefore result in the anti-siphoning list being able to be circumvented simply by delaying tactics.

We would propose that a 12 week period is more appropriate, and reflects more accurately current practices in the industry.

Reporting Requirements

Free TV objects to the short time frame of only 5 days for the reporting of rights to the Australian Communications and Media Authority (ACMA) (ss115B and 145Y).

Sporting event broadcast deals will often not be publicly announced, or even circulated to interested parties, for weeks after their conclusion. It can take significantly more than 5 days for deals to simply progress from agreement to signature.

Three months would be a more appropriate timeframe for the ACMA to be notified of the acquisition and divestment of relevant rights. This would seem equally well suited to enabling the ACMA to effectively monitor implementation of the provisions, while placing substantially less of a burden on broadcasters and rights holders.

Free TV also requests greater clarity with regards to the information that must be provided to the ACMA, and how that information would be handled. Broadcasters should only be required to provide the name and date of the event. Other details of the deal would not be appropriate and may be commercial-in-confidence. As broadcasters are obliged to meet the live and minimum coverage requirements, it can be assumed that the rights necessary to achieve these have been purchased. Other aspects of the deal would not be relevant to the ACMA's role.

Finally, details provided to the ACMA should not be made publicly available, to allow for proper publication and announcement of the deal by the parties involved.

Quality Assurance Provisions

Free TV also seeks clarity with respect to the mechanism for the selection of quality matches for broadcast on free-to-air networks. It is central to the very purpose of the list that quality games remain on the free-to-air channels. While there have been public assurances that this will be the case, we are concerned that these assurances are not reflected in the proposed

legislation and that no framework is provided for regulation or other agreed measures to be implemented.

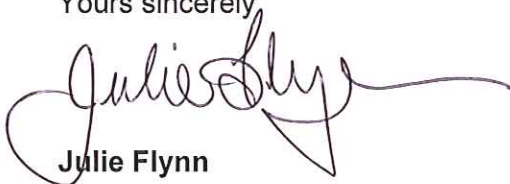
Free TV therefore proposes that the Bill be amended to include provisions acknowledging the importance of match selection and permitting the government to provide a mechanism to guarantee that top quality matches in all sports remain available to the Australian public for free.

Retrospectivity

Finally, Free TV objects to the currently retrospective application of the Bill to existing agreements. Compliance with this aspect could require the renegotiation of many existing and long-term agreements. However, we understand that this is an unintended consequence of the drafting of the Bill, and will be rectified.

Thank you again for the opportunity to provide comment on the Bill. Please contact me if you require any further input or clarification.

Yours sincerely

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

Julie Flynn
CEO