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By email: Ann.Campton@dbcde.gov.au

Dear Ms Campton

2nd Exposure Draft of the Broadcasting Services Amendment (Anti-siphoning) Bill 2011

Free TV Australia welcomes the opportunity to comment on the second 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.

Limits on acquisition and conferral of rights

Free TV strongly objects to the amended wording in the provisions limiting subscription television and content service provider access to anti-siphoning events as they threaten to dilute the effectiveness of the provisions and are contrary to the stated policy objectives of the scheme.

Proposed new sections 145TX and 145W have been amended so that the limits on acquisition – the most important and fundamental provisions in the Bill – would be lifted in circumstances

where a free-to-air broadcaster has acquired the rights to televise only part of an anti-siphoning event. This is because of the insertion of the words "whole or part of the event" into sections 145TX and 145W, whereas in the previous draft of the Bill, the restriction would only be lifted where a free-to-air broadcaster had obtained substantive rights to televise the event.

The practical effect of this change is that a pay TV broadcaster would be able to circumvent the scheme's restrictions in circumstances where a free-to-air broadcaster has acquired only a limited highlights package (ie, part of an event). This is clearly at odds with the policy objectives underlying the scheme, which have consistently been stated in terms of ensuring the Australian public continues to have access to the same level of coverage as has been provided on free-to-air television historically. This means substantive coverage of events and not highlights or greatly restricted coverage. We note the Minister's statement that "The Gillard Government wants Australian sports fans to see major sporting events for free as they have always done"¹. The proposed amendments to 145TX and 145W undermine this objective, and would potentially lead to less free-to-air coverage of anti-siphoning events.

That the proposed new wording represents a fundamental change in the mechanics of the scheme is supported by previous judicial consideration of the anti-siphoning scheme, which concluded that highlights packages represent a substantially different viewer proposition.

In *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 & 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). If a national broadcaster or commercial television broadcasting licensee has only acquired the right to broadcast highlights of an event, having had a real opportunity to acquire the right to televise the event itself, the Minister may remove that event from the notice."

We understand from the Department's summary table that there was a need to amend the coverage obligations to ensure they applied if a broadcaster has the right to televise the "whole

¹ http://www.minister.dbcde.gov.au/media/media_releases/2010/103

or part” of an anti-siphoning event. However there is no apparent need to extend these changes to the provisions dealing with limits on acquisition and conferral of rights and we object to their inclusion in the strongest possible terms. The proposed wording has the potential to frustrate the fundamental objectives of the anti-siphoning scheme. The words “or part” should be removed from sections 145TX and 145W.

Quality Assurance Provisions

Free TV welcomes the inclusion in the Bill of a mechanism to safeguard 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.

However, proposed new section 145DC provides the Minister with a very broad power to determine the ‘associated set conditions’ for a Category B quota group. Free TV suggests that in the interests of transparency and certainty, the Bill should include examples of the kinds of conditions the Minister could determine with regards to an anti-siphoning event. It should also make clear not just that games on a particular day would be subject to a determination but also the quality of those games, for example the best game of the round for AFL must be on a Friday night and made available to the relevant free-to-air broadcaster

We note we have not yet seen an Explanatory Memorandum for the Bill and acknowledge that example conditions may be set out in such a document prior to the Bill’s introduction. However, given that the mechanism to guarantee that top quality matches in all sports remain available to the Australian public for free is critical to the effectiveness of the scheme, we submit that legislated criteria should be included.

We also note that draft Ministerial determinations to establish Category A groups and a new list with Tier A and Tier B events has been circulated. We believe a draft determination outlining the quality assurances to be provided by way of Category B groups should also be put in place at this time. In particular, in relation to the AFL and NRL it should make clear the quality of the games to be offered and not just the time that they are played.

Further, we reference the Minister’s press release of 25 November 2010 which stated that “changes to the listing of NRL and AFL games will only be made once a regulation is in place or an alternative mechanism to protect the quality of free-to-air games is agreed by stakeholders.”

Free TV notes that s 145DC(3) means that any determination under s 145DC (1) or (2) will not apply to existing rights agreements. Therefore the mechanisms to protect the quality of games offered to free-to-air television broadcasters should be in place well ahead of any negotiations.

Conferral of rights on content service providers

Whilst not a new provision of the Bill, we seek further clarity regarding the proposed new section 145W, which limits conferral of rights on content service providers. The limits on conferral are worded only in terms of 'live' coverage of the event. We query whether this could lead to circumvention of the restriction if the content service provider acquires coverage on a marginally delayed basis.

Reporting Requirements

Free TV notes that the amended Bill extends the time frame for notification to the ACMA from 5 to 10 days (ss115B and 145Y).

Free TV restates its view that three months would be a more appropriate timeframe for the ACMA to be notified of the acquisition and divestment of relevant rights. This would better reflect existing commercial practices, in which it can take significantly more than 5 days for deals to progress from agreement to signature, whilst still enabling the ACMA to effectively monitor implementation of the provisions.

Free TV notes new provisions (ss 115E and 145YE) which would require notification to ACMA in a form approved by the ACMA. However, there is no requirement placed on ACMA to develop a form within a particular timeframe, and so it is not clear how broadcasters could comply with the notification requirements if the ACMA had not approved a form within 10 days of the commencement of the provisions.

Free TV also suggests that the legislation should set out the kinds of information that broadcasters will be required to provide and how that information should be handled. Past experience with anti-siphoning reporting obligations is that there is the potential for complex and onerous reporting pro-formas and the Bill should be amended to ensure broadcasters are only 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.

Must-Offer Provisions

Free TV retains its previously stated opposition to the proposed \$1 "must-offer" provisions set out in proposed new Division 3 of Part 10A. 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.

We again note that 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 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.

We remain concerned that the effect of the provisions is to require all rights negotiations and scheduling decisions to 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. Furthermore, it is unlikely that the broadcaster will know that they will not be compliant four months out and so will be unable to make the offer as prescribed.

As previously stated, the requirement to offer the material for \$1 makes this timeframe and the provisions in general more problematic. 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.

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.

Automatic Delisting Period

Free TV notes that the Bill retains the proposed 26-week delisting period and that we oppose this extension.

As previously noted, 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.

We note that the Bill includes a new provision enabling the Minister to specify an alternative delisting period for an event and that this is stated to be to allow for a 52 week delisting period for AFL and NRL. Free TV opposes any such extension. As evidenced by the recent AFL negotiations, rights deals are frequently concluded well within a 52 week period of the next season. Free TV opposes the introduction of this new power which we believe is unnecessary. If it is retained, we seek further clarity regarding the circumstances in which such a power would be used and to what end.

Multi-channel restrictions

Under sections 145TA to 145TH, commercial broadcasters are restricted from premiering Tier A anti-siphoning events on their SDTV or HDTV multi-channels unless the licensee has previously televised the event on their core/primary service. Free TV submits that the multi-channel restrictions should be lifted, not just in circumstances where the event had previously been televised on that licensee's core/primary service, but should also be lifted where the event has previously been televised on any other free-to-air broadcaster's primary channel.

This would be more proportionate to the policy objective of ensuring Tier A events are not premiered on a multi-channel – it is not necessary to the attainment of this objective to only lift the restriction where the event has previously been televised on that licensee's own primary/core service.

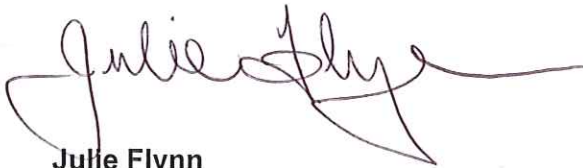
Exemptions from coverage obligations

Free TV welcomes the inclusion in the Bill of coverage requirement exemptions for specified interruptions (such as significant news events, likely emergencies and technical difficulties). We suggest that subpara 145E(8)(d)(i) be expanded to cover technical or engineering difficulties experienced by a commercial television licensee's transmission infrastructure

provider. This would more accurately reflect current industry arrangements and make the provision more effective.

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



Julie Flynn
CEO