AUSTRALIA'S SPORTS LEADER

FOX SPORTS: Supplementary Submission to the Senate Environment and Communications Legislation Committee inquiry into the Broadcasting Services Amendment (Anti-Siphoning) Bill 2012

THE "PAY TV PROGRAM SUPPLIER" AMENDMENT TO THE BILL PROPOSED BY FREE TV

The commercial FTA networks, through Free TV, claim that there is a loophole in the anti-siphoning scheme which allows STV channel suppliers such as FOX SPORTS to acquire subscription television rights to anti-siphoning events before the free-to-air rights are licensed to free-to-air broadcasters. To address their concerns, Free TV proposes an amendment to ss145ZN(1), (2) and (3) of the Bill (by inserting the words "or the program supplier of a subscription television broadcasting licensee (as defined in section 145C)".

Because the definition of "program supplier" in section 145C is so broad, Free TV's amendment would vastly extend the ambit of the restriction in section 145ZN and would have extremely adverse consequences for sporting bodies, sports rights brokers, the entire subscription television sector as well as unrelated program supply arrangements.

The amendment is designed squarely to further protect the commercial free-to-air networks and to limit competition that exists between them and other parties which buy sports content. The scope of the proposed amendment is so wide that not only sports channels such as FOX SPORTS or ESPN would be in breach of section 145ZN if they acquired rights to an anti-siphoning event but also any other entity that "has an arrangement, or proposes to enter into an arrangement, to supply" a subscription television broadcasting licensee such as FOXTEL or Austar with programs that can be televised. This could therefore mean that a sports rights broker such as IMG would be in breach if it bought the rights to a listed event if it has an unrelated arrangement to supply a subscription television broadcasting licensee with television programs. The proposed prohibition could also extend to other FTA broadcasters if they have arrangements with a subscription television broadcasting licensee to supply programs. For instance, SBS owns the STUDIO channel which is available on the FOXTEL platform. Does this mean that SBS will be in breach of s145ZN if it acquires all television broadcast rights (ie. free-to-air and subscription television rights) in the next round of negotiations for the FIFA World Cup? The proposed amendment could potentially prevent free-to-air broadcasters from acquiring exclusive broadcast rights to listed events if they have other arrangements with subscription television broadcasters to supply television programs.

The existing anti-siphoning legislation as well as the provisions in the proposed Bill provide an absolute safeguard which rests with the Minister to ensure that FTA networks do get reasonable access to listed events.

The current anti-siphoning scheme works by imposing a specific condition on a subscription television broadcasting licensee which prevents them from acquiring rights to broadcast on subscription television a listed event unless a FTA TV licensee has the right to broadcast the event. This means that entities such as FOXTEL and Austar must not televise on any of the channels which they provide to subscribers any listed event unless a free-to air network has the FTA rights to that event or the event is automatically delisted as discussed below. This has always been the case and has not changed under the Bill.

An event is automatically delisted if no FTA network has acquired the FTA rights to the event within a specified timeframe. However, there is an absolute and important qualification to such delisting as the Minister can intervene at any time to keep an event on the list if he or she publishes a declaration to that effect. The Minister may do this if there is a concern that any of the FTA networks have not had a reasonable opportunity to acquire the rights to a listed event. This is currently included as s115(1AA) of the *Broadcasting Services Act* and will be provided for under s145E(6)(f) and (g) of the Bill. The Minister can therefore ensure that the FTA networks have had the opportunity to acquire rights to listed events and that the policy intention behind the legislation is not being circumvented.

The anti-siphoning scheme has been operating for over 15 years and channel suppliers such as FOX SPORTS and others have established their businesses on the basis, and with the FTA networks having full knowledge, that they would acquire rights to listed events and then include those events on their channels to the extent they are able under the law.

In practice, a channel supplier such as FOX SPORTS may acquire rights to listed events in one of four ways:

(a) acquiring the STV rights to the event from the sporting body organising the listed event;
(b) acquiring the STV rights from a person who has directly or indirectly acquired the rights from the sports body – this could be an intermediary which specialises in buying and selling sports rights or from a FTA network;
(c) acquiring both the STV rights and FTA rights from the sporting body organising the event; and
(d) acquiring the FTA and STV rights from a third party intermediary or sports rights broker such as IMG.

Over the last 15 years, FOX SPORTS has acquired rights using each of the above methods. For example, in the last 2 scenarios, a sporting body or sports rights broker may not wish to split up the rights to their competition or only wants to deal with one licensee in the Australian market. If that it is the case, it is often FOX SPORTS that will buy all rights and then sub-license the FTA rights to a FTA network to those events that they will show. The Rugby World Cups in 2011 and 2015 is an example where we did this and sub-licensed the FTA rights to the Nine Network for those matches that are on the list – in line with the spirit and intent of the law.

Where FOX SPORTS does acquire the right to a listed event before a FTA network, we are unable to exercise any rights to televise that event unless and until that event is de-listed or unless and until a FTA network has acquired the right to televise the event. In practical terms this acts as a safeguard because FOX SPORTS would not be able to supply coverage of the event to a subscription television broadcasting licensee such as FOXTEL because they would be unable to televise it. In other words, if FOX SPORTS acquires the rights before they are acquired by a FTA network, FOX SPORTS assumes the risk that the event will not be de-listed or bought by FTA, and then the rights cannot be exercised by FOXTEL.

In practice as outlined above, there are regular commercial negotiations and offers to acquire listed events which take place among the free-to air networks and STV providers in relation to listed events. This demonstrates that the application of the current system to only subscription television broadcasting licensees is appropriate and that the regulatory regime in this particular regard is correctly positioned – in other words, by looking only at the subscription television broadcasting licensee and not what occurs upstream.

The anti-siphoning scheme is not designed to deliver exclusivity to the FTA networks nor has this ever been intended. This is clear both from the legislation itself and from ongoing policy statements by all political parties. The legislation has always contemplated that there will be subscription TV coverage of listed events.

Any person who acquires the STV rights to events which are listed runs the substantial risk that the event will not be de-listed and the FTA rights will not be acquired. In these circumstances the acquirer will not be able to supply the rights to a subscription television broadcasting licensee to exercise them.

If Free TV's proposed amendment was implemented preventing program suppliers such as FOX SPORTS or even sports rights brokers such as IMG from acquiring rights to listed events before FTA, sporting bodies would not be able to achieve any significant commercial revenue from the sale of their rights as there would be no competition for their rights. .

The effect of the proposed amendment is to make a single FTA network potentially the only buyer of any TV rights to a listed event allowing them to freely both name their price (to the detriment of the sports bodies trying to raise money for their sports), and lock out all other TV operators (even potentially other free-to-air broadcasters), even when there is no current impediment to their ability to buy FTA rights under the existing anti-siphoning scheme or the proposed scheme under the Bill.

The proposed amendment would totally destroy the ability for any sports body or entity selling rights to a listed event to sell its sport and achieve a worthwhile commercial return. For example, if their proposed amendment was enacted, sporting bodies such as the NRL or ARU would be forced to sell their TV rights to listed events to the FTA networks for less than what they would be able to achieve in a more competitive market to the detriment of their stakeholders and the future of grass roots, community and training development at all levels for those particular sports. Similarly, sports rights brokers that buy and sell sports rights would simply be put out of business if they could not acquire and sell STV rights to listed events. The amendment should be rejected for these reasons alone as it puts into jeopardy the future funding of a number of iconic sporting events and the commercial viability of important businesses such as IMG.

In relation to overseas events on the anti-siphoning list, such as major global cricket events, the Ashes, rugby union tests, and the golf and tennis majors, there is also every possibility that the scheme would result in no Australian television coverage being available to Australian viewers. This is because overseas rights sellers of listed events would choose not to license Australian TV rights at all because they could not offer those rights in a competitive market and would not be prepared to give their rights away for next to nothing to the FTA networks.

In summary, the proposed amendment is anti-competitive and designed to cement the free-to air networks as the only buyers of television rights to listed events. It also perhaps has the unintended effect on the part of Free TV of shutting out competition from other free-to-air broadcasters if they have unrelated arrangements to supply subscription television broadcasting licensees with television programs. It should be assessed on this basis and rejected.

THE "HIGHLIGHTS PACKAGE" AMENDMENT TO THE BILL PROPOSED BY FREE TV

Free TV also claim that a problem exists with the drafting of certain provisions of the Bill (section 145ZN(1)(a) and (b)) which provide that if a free-to-air broadcaster only purchases a highlights package of a listed event ("part of an event"), then a subscription television broadcasting licensee can acquire the rights to televise the whole event.

Free TV say, as a consequence, "free to air viewers will miss out on seeing the vast majority of the event". We say free-to-air viewers will miss out because the free-to-air networks have made a commercial decision not to acquire the rights to the whole event – it has nothing to do with the inclusion of the words "whole or part" in section 145ZN(1)(a) or (b). To support their argument, Free TV use the example of where FTA may have only purchased highlights rights to the Bathurst 1000. If that happens, they say, STV should still be prevented from acquiring the rights to the event. Again, there is no logical or public policy reason to deny STV the opportunity to provide full and live coverage of such a nationally iconic event if a FTA network takes the commercial decision not to acquire the rights to show the whole event. As we have mentioned previously, the anti-siphoning scheme is not designed to provide FTA with exclusivity over sports events. Allowing

subscription television to acquire the rights to the whole event in these circumstances would at least ensure that live national coverage was available on television.

Further, the reference to “parts of an event” in section 145ZN is necessary because of the way the “must televise” obligations work. FTA broadcasters only have the obligation to show events to the full extent of their rights. For instance, they only have obligations to show “parts of events” that are contained in a designated group and only obliged to show parts of Tier B events on delay and in highlight form. In these circumstances why should STV be prevented from being able to acquire rights to those events so that they can be shown live and full on national television?

If the changes proposed by Free TV are made to further restrict the acquisition of rights by STV, this would effectively enable FTA to continue to hoard events that they are not willing to show live and in full, undermining the Government’s policy intentions, to the detriment of sporting bodies and Australian sports fans.

Free TV claim that if enacted in its current form, s145ZN may result in less rather than more free-to-air coverage of listed events. This may well be true if a FTA networks makes the commercial decision to only buy the highlights rights to an event. A simple solution to this perceived problem would be for free-to-air networks to take advantage of having first access to listed events by actually acquiring the rights to show the whole event before they are acquired by another party. We believe the current provisions of the Bill as drafted may potentially promote more competition and act as an incentive for the free-to-air networks to acquire events in full as soon as they become available on the market and then broadcast those events to the full extent of their rights in accordance with their “must televise” obligations. This would meet the underlying policy objective of the new scheme to ensure that events are shown “live” and in full on free-to-air television and not hoarded by the free-to-air networks.

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