Submission to the Senate Environment and Communications Legislation Committee Inquiry into the Broadcasting Services Amendment (Anti-siphoning) Bill 2012

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1. Introduction

The Australian Subscription Television and Radio Association (ASTRA) welcomes the opportunity to comment on the Broadcasting Services Amendment (Anti-Siphoning) Bill 2012 (the Bill).

2. About ASTRA

ASTRA is the peak industry body for subscription TV (STV) in Australia. The STV industry is the undisputed leader of digital broadcasting with 200 channels (including HD and Plus2) broadcast on the FOXTEL and AUSTAR platforms, and channel packages offered through Telstra T-Box and Xbox360. STV platforms and channels directly employ over 7,400 people and in 2010 invested $578.4 million into Australian content. The direct economic contribution of STV to the Australian economy is estimated to be over $5 billion since its inception. Received by 34% of Australians through their homes and over a million more through hotels, clubs and other entertainment and business venues, STV provides 24 hour news, sport and entertainment.

3. General comments on the anti-siphoning scheme

ASTRA has welcomed parts of the Government's changes to the anti-siphoning scheme, as announced by the Minister on 25 November 2010, in particular the principle that free-to-air (FTA) broadcasters with legislated preferential access to the broadcast rights of major sporting events have an obligation to broadcast those events, or else on-sell those rights to a broadcaster willing to do so.

Changes to the list for 2011-2015, which were made soon after the November 2010 announcement, were partly in recognition of the fact that FTA networks historically have not broadcast the majority of sporting events on the list. Previously 1,300 events were listed with, on average, only 16 per cent of those events being shown live and only 23 per cent being shown at all.[1]

Competition in sports broadcast rights drives innovation and choice to the benefit of the consumer, while increasing the potential revenues for sports bodies to re-invest in their sports communities. ASTRA is concerned that the public interest in enabling the availability on FTA television of major sporting events does not disproportionately override the equally compelling public interest rationale for ensuring a vibrant and competitive sports broadcast rights market.

3.1 The anti-siphoning regime is inherently anti-competitive

Unbalanced and unnecessary regulation distorts competition in the broadcasting sector and hinders the development of content and services that consumers want. ASTRA and its members have consistently argued for reform of the anti-siphoning scheme as the list is the longest in the

[1] A finding of independent monitoring conducted by Ernst & Young for ASTRA—see ASTRA, New Research Exposes Chronic Failure of Sports 'Anti-siphoning' Regulation, Media Release, 13 July 2006.

world and is an anti-competitive tool in Australian legislation. The Productivity Commission concluded that "the anti-siphoning rules are anti-competitive and that the costs of the current scheme to sporting organisations, the broadcasting industry and the community as a whole, exceed their benefits".[2]

The anti-siphoning provisions directly limit competition between FTA broadcasters and STV for a very wide range of sports content, shifting the balance of negotiating power in favour of FTA networks.[3] The proposal in this Bill to extend the anti-siphoning regime to other delivery platforms maintains the regulatory advantage afforded FTA networks in an increasingly converged environment.

FTA broadcasters are already in a strong negotiation position in relation to their direct competitors without additional regulatory protection. Sports organisations will continue to seek exposure of FTA television given its universal reach, while FTA broadcasters will continue to bid for the rights to major sporting events, even where the event is removed from the anti-siphoning list, given their ratings success and advertising revenue potential.[4] For example, in 2009 the Ten Network secured exclusive broadcast rights to the ANZ Championships (the Australia and New Zealand trans-Tasman netball competition) after the tournament had previously been broadcast on STV. Events in this tournament are not on the anti-siphoning list.

ASTRA submits that where an event on the anti-siphoning list is consistently not shown live or near live and in full by FTA broadcasters, that event should be permanently removed from the list.

3.2 Benefits of increased revenue from competitive tension in sports broadcast rights acquisition – community development and social inclusion

The anti-siphoning scheme has a negative impact on the ability of sporting organisations to maximize the value of their rights, even for those listed events that the FTA networks will not broadcast. This adversely impacts the sporting organisations, the funding for their key participants, the costs of staging events and other downstream impacts such as grassroots and junior bodies.[5]

A significant proportion of revenue returned from the sale of broadcast rights is returned to development of sports at the grassroots level and to programs aimed at greater community participation and social inclusion. In its 2010 report of the review of sport on television, the Government acknowledged that revenues from broadcast rights are an important component of sports organisations' total revenues. The Report noted that:

> Submissions from Australia's major sports bodies indicated the sale of media rights is the largest source of funding for these organisations. For the 2008-09 period, 23 per cent of Tennis Australia's

[2] Productivity Commission, *Broadcasting*, Inquiry Report, No.11, 3 March 2000, p.449.
[3] Productivity Commission, *Annual Review of Regulatory Burdens on Business: Social and Economic Infrastructure Services*, August 2009, p.157.
[4] ibid, p.167.
[5] ibid, p.158.

> revenue was derived from the sale of broadcast rights. For the 2009 calendar year, broadcast revenue accounted for 34.2 per cent of the total income of the Australian Rugby Union.[6]

More importantly, these revenues enable sports bodies to increase investment in the development of their particular sport, particularly at the grassroots level. In its report the Government acknowledged the importance of such grassroots development for promoting physical and mental wellbeing as well as promoting social inclusion:

> Sport and physical recreation are important in supporting health outcomes and enhancing physical and mental wellbeing. Sport can also provide opportunities for social interaction, sharing common interests and enhancing community…
>
> Sport and physical education is also vital to childhood development. As noted in the report by the Commonwealth Government's Independent Sport Panel, *The Future of Sport in Australia*, the exposure to sport and physical activity is crucial in the transition from early development to formal education, with physical activity found to improve academic outcomes, self-esteem, mental health and create a sense of inclusion.[7]

Many sports bodies have developed programs for Indigenous and multicultural communities, as well as promoting and encouraging the participation of people from disadvantaged backgrounds as part of their grassroots activities. As recently as 13 February this year, the then Minister for Sport acknowledged that the capacity to maximise broadcast revenues for investment in grassroots programs is of critical importance to sporting bodies and for sports participation:

> …We understand that if the sports are losing revenue …then where it's going to end up is with those kids on the sporting field and they'll be paying more to play and they're going to be paying more for their registration and they're going to receive less.[8]

The greater the competitive tension for the acquisition of broadcast rights, the more likely that sporting bodies will receive greater revenues and be able to increase investments in local communities and programs. Amendments that go beyond the Government's policy intention and further distort the sports rights market in favour of FTA broadcasters will mean even less competitive tension for sports bodies to maximise broadcast revenues that could be invested back into grassroots participation and community activities.

3.3 Continuing rationale for the anti-siphoning scheme

Despite the reforms to be implemented by the Bill, ASTRA submits that convergence brings into question the rationale for the anti-siphoning scheme in the longer term. Convergence is giving consumers an ever-increasing choice in platforms, services and providers through which they can access and view content. In such an environment, there is fast diminishing public policy

[6] DBCDE, *Sport on television: A review of the anti-siphoning scheme in the contemporary digital environment*, Review Report, November 2010, p.9.
[7] ibid, p.10.
[8] The then Sen the Hon Mark Arbib, Minister for Sport, speaking in the context of the Optus TV Now Federal Court case (see "Sports funding 'rests on copyright change', says Mark Arbib", *The Australian*, 13 February 2012).

justification and little logic in continuing to reserve preferential access to major sporting events to just one of those sources of content.

STV broadcasters (and other players in the media and communications environment) will continue to remain at a competitive disadvantage with FTA broadcasters in relation to access to sports content, while the sporting codes will continue to be limited with regard to whom they can sell their rights. The long-term efficacy of the anti-siphoning regime – a regulatory regime devised in the analog era – should be measured against clear criteria demonstrating that its benefits to consumers outweigh the loss to consumers through reduced competition and choice.

4. Comments on the Bill

ASTRA welcomes, in principle, several aspects of the intended operation of the proposed Bill, including:

- the obligations on terrestrial broadcasters to televise events on the anti-siphoning list;
- the requirements on terrestrial broadcasters to on-sell rights to anti-siphoning events that they do not intend to broadcast;
- the extension of the automatic delisting period; and
- the requirement for the Minister to review all aspects of the anti-siphoning scheme by 31 December 2014, including whether the scheme itself is necessary.

ASTRA does, however, have a number of concerns with the Bill in its current form, particularly:

- the potential for provisions in the Bill to create uncertainty for commercial negotiations and agreements, in particular the significant amount of detail left to Ministerial discretion;
- where the Bill as currently drafted does not appear to reflect the Minister's policy intentions as announced on 25 November 2010 and/or where the provisions in the Bill extend the favourable position of FTA broadcasters beyond the stated policy intention;
- where the intention and operation of the reforms of the anti-siphoning scheme could be subsequently undermined or distorted; or
- whether the new obligations on FTA broadcasters will be effectively enforced.

ASTRA does not propose to make detailed comments on specific provisions in the Bill, but would refer the Committee to the submissions of FOXTEL and FOX Sports for detailed analysis and specific drafting recommendations that would:

- improve the operation of the Bill;
- ensure the balance of regulatory benefits and obligations for FTA broadcasters reflects the Government's policy announcement of November 2010; and
- ensure the Bill does not tilt the balance too far towards the FTA broadcasters, to the detriment of sporting bodies, other content providers including STV and, ultimately, the consumer.

4.1 Uncertainty for current and future commercial negotiations

The Bill proposes 19 separate discretionary powers for the Minister, each with the potential to substantively alter the scope and effect of the anti-siphoning scheme. In most cases, these discretionary powers work only to the benefit of FTA broadcasters and to the detriment of all other potential providers of content on the anti-siphoning list. A list of Ministerial discretions proposed in the Bill is attached to this submission.

ASTRA recognises that some discretionary powers may be necessary for the Government to put into effect certain aspects of the revised anti-siphoning scheme as announced in November 2010. However, a substantial increase in discretionary power covering all aspects of the scheme creates uncertainty for sporting bodies and their agents, broadcasters and program suppliers, particularly as there are no explicit criteria or parameters set for the exercise of these discretionary powers.

In particular, we believe the "quota group" mechanisms are unnecessarily complex. The operation of Category A and Category B quota groups gives the Minister the power to determine not only the number of AFL and NRL matches in a particular round that are to be subject to the anti-siphoning provisions, but also to determine individual matches that are to be protected. This has the potential to substantially weaken the negotiating position of both sports bodies and platforms other than FTA broadcasters that may want to provide coverage of these events.

ASTRA submits that the provisions as drafted are likely to cause significant uncertainty surrounding future rights negotiations, threatening the willingness of broadcasters and other content service providers to invest in sports coverage. For example, future negotiations over the NRL rights will be conducted with uncertainty as to (a) if or when a Category A or B quota group determination will be made, and (b) where a determination is made, whether the Minister will vary the determination (to, for example, include specific matches at the request of FTA broadcasters that may not have been included in the Category B determination) before rights negotiations have been concluded.

ASTRA submits that the two-tiered quota mechanism goes beyond what would be required to ensure that 4 AFL and 3 NRL matches are reserved for FTA broadcasters, and the uncertainty likely to be created by Category B would appear to be a disproportionate and unnecessary consequence of the Government's desire to ensure that certain "blockbuster" AFL and NRL matches remain on FTA television.

ASTRA submits that the interests of both consumers and sports organisations are best served by allowing sports administrators to retain flexibility in their broadcast rights negotiations. Given the outcome of the recent AFL rights negotiations, the proposed provisions seem to be an attempt to solve a perceived problem that does not actually exist.

The Bill's complexity may also have a significant deterrent effect for international rights holders. The majority of overseas-based rights holders will have little inclination to invest the time, effort and cost involved in understanding such a complex legislative framework, with a likely consequence that rights holders will be very reluctant to negotiate with providers of content over

subscription television services or online services unless and until they have dealt with the FTA broadcasters. This is likely to stymie the development of the online content industry and the further growth of the subscription television industry in circumstances where the Government is otherwise adopting policies (such as the National Broadband Network) which are designed to facilitate the growth of these industries.

4.2 Obligations on free-to-air broadcasters

ASTRA supports, in principle, the range of obligations intended to be placed on FTA broadcasters by amendments in the Bill including:

- Requirement to broadcast Tier A events live and in full;
- Requirement to broadcast non-grouped Tier B events within 4 hours of their commencement, and grouped Tier B events within 24 hours of their commencement;
- Requirement for FTA broadcasters to on-sell rights to events they do not intend to broadcast.

However, the provisions as drafted have the potential to significantly dilute obligations on FTA broadcasters to show anti-siphoning events for which they have acquired the broadcast rights. For example:

- the broad discretion proposed in section 145ZM would enable the Minister to exempt a FTA broadcaster from requirements to show Tier A events being broadcast on a FTA broadcaster's main channel (with or without conditions attached);
- sections 145H(7)-(10) would enable the ACMA to exempt a commercial broadcaster from a breach of its coverage obligations in certain undefined circumstances, where the ACMA would have regard to various "principles" before determining an exemption – the lack of specificity in these provisions has the potential to give FTA broadcasters increased scope to avoid coverage obligations.

ASTRA is also concerned that the provisions regarding requirements for FTA broadcasters to on-sell their rights (sections 145J to 134L) have the effect of:

- entrenching the opportunity for FTA broadcasters to have exclusive rights to broadcast anti-siphoning events at the expense of all other content providers; and
- ensuring that even where there is little commercial interest to acquire and broadcast a particular event, the rights holder must nonetheless offer the event for sale to a FTA broadcaster for only $1, before offering the event to a STV broadcaster.

The must-offer provisions have the potential to destroy the value of such events and also increase confusion and uncertainty for sporting bodies as well as the STV industry and content providers.

It is in the interests of consumers that the coverage and must-offer obligations operate effectively to compel FTA broadcasters to broadcast the events to which they have exclusive broadcast rights (and, to the full extent possible, live and in full), particularly when subscription television broadcasters or other content service providers are willing to provide coverage of these events to

the public but have been unable to acquire STV rights due to the operation of the anti-siphoning scheme.

4.3 Restrictions on STV and other content providers

The limits on acquisition of rights by STV broadcasters in section 145ZN and on content service providers in section 145ZO are convoluted and overly complex. These provisions will only cause greater uncertainty for STV and content service providers as to when rights to anti-siphoning events can or cannot be acquired, while helping to limit the extent to which fees for broadcast rights paid by FTA broadcasters might be subject to true market valuation.

The Explanatory Memorandum states that the intention of subsection 145ZN(2) is to prevent a circumstance where an arrangement between a rights holder and an STV broadcaster "includes conditions that purport to influence or regulate the acquisition of corresponding rights by any FTA broadcaster", for example, where FTA rights would only be offered for a price that "vastly exceeds an objective market value for those rights".[9] Given that compliance with these provisions will be a licence condition for subscription television broadcasting licensees, this presumably means that, were such circumstances to arise, the ACMA would be given the highly problematic task of determining whether the price offered to a FTA broadcaster for sports broadcast rights represented "an objective market value".

To the extent that it is found that the new laws do not operate as intended, the issue should be addressed at that time. The advantages of doing so are that the legislation can be drafted in a manner which specifically addresses any problems that have arisen rather than taking pre-emptive action to fix a problem that does not currently exist.

4.4 Enforcement

Where the Government decides, as in the case of anti-siphoning legislation, to regulate in such a way that discriminates in favour of one section of the broadcasting industry, any obligations under that regulation should be strictly monitored and enforced for the benefit of consumers. As FTA broadcasters are to continue to have the first option to obtain exclusive broadcast rights to most major sporting events, the overarching objective of the legislation must be to ensure that the legislated privilege of (effectively) exclusive access to events on the anti-siphoning list should be accompanied by legislated obligations to guarantee live or near live coverage of those events in full by FTA broadcasters.

As such, ASTRA welcomes the proposed additional licence condition on commercial television broadcasters in relation to the obligation to televise anti-siphoning events, or to on-sell those rights, under section 145H. ASTRA expresses its hope that the ACMA will use its discretionary enforcement powers appropriately to ensure FTA broadcasters fully comply with their new obligations and consumers receive the full benefit of the 'use it or lose it' provisions.

[9] Explanatory Memorandum to the Broadcasting Services Amendment (Anti-Siphoning) Bill 2012, p.40.

5. Conclusion

While ASTRA welcomes the efforts made by the Government to address many issues with the existing anti-siphoning scheme, ASTRA remains concerned that many of the proposed changes in the Bill serve to provide continued preferential treatment of FTA networks and their commercial interests which in turn not only continues to distort the market for broadcast and content rights, but also significantly stifles the growth of the subscription television and online content sectors. This is clearly undesirable in an environment where IPTV represents a significant growth sector of the digital economy, and forms an integral part of the NBN business case. An attempt to achieve policy goals concerned with access by the general public to nationally significant content must, in order to be effective, be reflective of the public's approach to and habits in accessing content in the current digital economy, and not based on historical market paradigms and preferences.

Please feel free to contact myself or Simon Curtis, Policy and Regulatory Affairs Manager, on (02) 9776 2684 if you have any queries relating to the above.

Yours sincerely

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Chief Executive Officer

ATTACHMENT: MINISTERIAL DISCRETIONS

Provision	Effect
s 115E(1)	Minister may exempt a commercial or national broadcaster from interim notification requirements
s 145B(3)(b)(ii)	Minister may specify that the definition of 'live' for a particular Tier B event that is not in a designated group, nor an AFL match, is less than 4 hours[10]
s 145B(3)(c)(iii)	Minister may specify that, in relation to a particular licence area, the definition of 'live' for a particular Tier B event that is not in a designated group, nor an AFL match, is less than 4 hours
s 145D(2)	For a part of an anti-siphoning event, the Minister may determine that the anti-siphoning scheme does not apply
s 145E(1)	Minister may declare an event to be a 'Tier A anti-siphoning event'
s 145E(2)	Minister may declare an event to be a 'Tier B anti-siphoning event'
s 145E(4)	Minister may declare an event continues to be an anti-siphoning event
s 145E(6)(b)(ii)	Minister may specify a period other than 26 weeks (up to 52 weeks) for an AFL match to be automatically delisted[11]
s 145E(6)(c)(ii)	Minister may specify a period other than 26 weeks (up to 52 weeks) for an NRL match to be automatically delisted
s 145E(6)(d)(iii)	Minister may specify a period other than 26 weeks for an event that is not an AFL or NRL match to be automatically delisted
s 145E(6)(g)	Minister may declare an event an continues to be an anti-siphoning event (and thus not automatically delisted 26 weeks before the event)
s 145F(1)	Minister may specify a 'designated group' of Tier B events, and a 'total minimum number of hours' for that designated group
s 145F(2)	Minister may specify a 'designated group' of Tier B events, and a 'daily minimum number of hours' and 'applicable group day' for that designated group
s 145F(5)	Minister may make a supplementary determination in relation to a determination made under s 145F(1) to specify a 'daily minimum number of hours' and 'applicable group day', where the relevant events have not occurred
s 145G(1)	Minister may determine a 'Category A quota group' of Tier B events
s 145G(2)	Minister may determine a 'Category B quota group' of Tier B events, and the 'quota number' and 'associated set conditions' for that quota group

[10] Four hours from the start of the event is the default definition of 'live' for Tier B anti-siphoning events (see s 145B).
[11] For the purposes of the limits on acquisition and referral of rights on subscription television broadcasting licensees (per s 145ZN) and content service providers (per s 145ZO), 26 weeks is the default period for events to cease to be anti-siphoning events.

s 145ZM(1)	Minister may exempt a commercial or national broadcaster from obligations to broadcast a Tier A event on the primary service
s 145ZM(2)	Minister may exempt a commercial or national broadcaster from obligations to broadcast a Tier A event on the primary service in a particular licence area/coverage area
s 145ZO(6)(c)	Where coverage of an event is provided by a content service provider, the Minister may specify that the definition of 'live' for a particular Tier B event that is not in a designated group is less than 4 hours