

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

4 April 2012

Introduction

Telstra welcomes the opportunity to provide a submission on the proposed changes to the anti-siphoning regime. In Telstra's view the legislation would enact some substantial improvements to the existing regime, but also contains elements that would make it more difficult to deliver benefits to the audience for listed events and their communities. Fundamentally, Telstra does not see the need for an anti-siphoning regime and does not support the inclusion of new media within the regime.

With regard to the proposed changes, Telstra supports the "must offer" framework that would apply to rights held by Free-To-Air (FTA) broadcasters, but believes Content Service Providers (CSPs) should be recipients of rights offers alongside Subscription Television (STV) broadcasters. Telstra supports limitation of the regime for new media to events held in Australia, but does not support the great discretion afforded the Minister to set the regime's parameters after the legislation is passed. We also believe the new mechanisms for AFL and NRL weekly round matches are unnecessarily complex. These views are developed further below.

Anti-siphoning rules are unnecessary and should not be extended to CSPs

Telstra has previously questioned whether anti-siphoning rules are necessary given that they seek to achieve by regulatory means what is achieved naturally by market forces: screening of the most popular content on platforms commanding the greatest audience share. In accordance with best practice regulation, the absence of need should be reason enough to remove the anti-siphoning regime. In addition, it slackens competitive tension for listed content rights and thus reduces the potential for reinvestment in grass roots development to the clear detriment of Australian communities.¹

We have also stated our view that anti-siphoning rules should not be extended to new media because there is no evidence that deleterious siphoning to new media has occurred or will occur in the foreseeable future. These views are explained and supported in Telstra's October 2009 submission in response to the discussion paper "Sport on television: A review of the anti-siphoning scheme in the contemporary digital environment."²

The "must offer" framework should include CSPs as potential recipients of unused rights

Telstra supports the inclusion of "must offer" rules that would oblige FTAs to broadcast listed events to which they hold the rights or offer the rights to other broadcasters. The new rules should effectively limit the number of listed events that are never broadcast by requiring FTAs to offer unused rights first to other FTAs, and if there are no takers even at the minimum price of \$1, then to STV broadcasters on the same basis. However, it is not clear why the provisions are limited to the right to "televise live" and thus exclude new media as potential recipients of unused rights alongside STV. As a consequence an FTA could acquire new media rights to an event and fail to exercise the right without penalty. New media has been included in the anti-siphoning regime in recognition of its growing importance in the delivery of popular content to Australian audiences in ways that are increasingly indistinguishable from traditional television services. By the same token, new media is also worthy of protection on the same basis as STV against the potential for hoarding of unused content by FTAs. The exclusion of new media from the "must offer" rules should be removed and the legislation amended accordingly.

Limiting the regime for new media to events held in Australia is appropriate

Telstra is encouraged to see that the unique position of online broadcasters has been recognised in the proposed legislation by limiting the application of the anti-siphoning rules for content service providers to events held in Australia. The advent of online broadcasting has caused a paradigm-shift in the effect of domestic regulation which has not so far been widely reflected in policy solutions. Imposing regulation

¹ The DBCDE acknowledged this effect in its 2009 discussion paper *Sport on television: A review of the anti-siphoning scheme in the contemporary digital environment*, p.10.

² http://www.dbcde.gov.au/television/antisiphoning_and_antihoarding/sport_on_television_review_of_the_anti-siphoning_scheme_discussion_paper/sport_on_television_review_submission?result_121150_result_page=298

on domestic online broadcasters that cannot be enforced against offshore broadcasters places them at a competitive disadvantage without delivering any real benefits for consumers. The proposed legislation avoids this pitfall for events occurring outside Australia and in that regard has Telstra's strong support.

The great degree of Ministerial discretion would create unnecessary commercial uncertainty

The revised regime delivers a great deal of discretion to the Minister to set important parameters by determination once the legislation is passed. The effect will be to introduce unnecessary commercial uncertainty into rights negotiations and further distort the basis on which rights are acquired. For example, the Ministerial discretion to impose or vary the conditions that apply to Tier B Quota Groups A and B will directly affect negotiations for the rights to broadcast weekly round matches of the NRL. Some degree of discretion may be necessary to accommodate future changes in the commercial environment, but this need is closely limited by the mandatory review to be undertaken by the end of 2014. On that basis most outstanding parameters should either be fixed in a schedule to the legislation, or made by determinations which cannot be varied before the regime is reviewed.

Conclusion

Overall, the new legislation would create a regime that is more complex and difficult to negotiate than the existing regime. Some valuable improvements have been made, but only at a cost to rights holders and broadcasters, and therefore ultimately also to consumers. If the anti-siphoning regime must apply to new media, Telstra advocates a regime that retains the improvements but dispenses as far as possible with the complexity and uncertainties inherent in the proposed legislation.