IMG

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MR GORDON PITT
Vice President

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Committee Secretary
Senate Standing Committees on Environment and Communications
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Dear Committee Secretary,

Inquiry into Broadcasting Services Amendment (Anti-siphoning) Bill 2012

International Management Group of America Pty Limited (***IMG***) appreciates the opportunity to make a submission to the Senate Standing Committees on Environment and Communications on the significant reforms set out in the Broadcasting Services Amendment (Anti-siphoning) Bill 2012 (the ***Bill***). The Bill effects significant amendments to the current anti-siphoning and anti-hoarding provisions in the *Broadcasting Services Act 1992* (the ***BSA***).

By way of background, IMG's business in Australia includes the acquisition of both local and international media rights and the on-selling of those rights to television networks and digital media content providers within Australia. It is fundamental to the success of this aspect of our business that the rights that we acquire are subsequently on-sold and exercised. Our business is not about brokering deals involving or acquiring rights that we do not see a value in being broadcast as widely as possible.

We have noted the definition of *program supplier* in clause 145C of the Bill. Our submission is in the context of our holding of rights to events on the anti-siphoning list which we acquire from overseas sporting organisations and then offer for sale in Australia.

1. Executive Summary

We have significant concern with the proposed changes to the current anti-hoarding regime in the BSA proposed in the provisions of the Bill. In particular, we have significant reservations about the practical operation of the provisions in the Bill which provide that the must-offer obligation will apply to *program suppliers*.

In summary, our concern is that if we have acquired from sporting organisations the rights to confer the right to televise *anti-siphoning events* then the combined effect of sections 145J-145M (together, the must-offer regime) is an unwarranted interference with arm's length commercial negotiations of rights contracts and is ultimately to the detriment of the sporting bodies and the Australian viewing public.

The must-offer regime wrongly assumes that a *program supplier* such as IMG would have an incentive to hoard rights. There is no basis for that assumption. In fact, success for a program supplier such as IMG relies on the rights being on-sold. However, given the provisions of the Bill we expect counterparties in a rights negotiation to act in the best interests of their respective companies and to use all opportunities open to them to reduce the cost of programming. We strongly suggest that this legislation, if enacted, will be used in tough negotiations to achieve commercial outcomes that the Parliament has not anticipated. This includes the removal of an incentive to negotiate if a counterparty has the prospect of the benefit of an offer for valuable rights for $1.00.

We therefore strongly submit that the proposed general application of a more extensive must-offer regime to all *program suppliers* is not justified or necessary. The provisions should be confined to broadcasters and program suppliers that are in some way related to, or controlled by, the broadcasters.

2. Anti-Hoarding Provisions

(a) Background to new regime

The BSA currently includes a regime (which is separate to the anti-siphoning regime) which requires commercial television broadcasting licensees and *program suppliers* who acquire the right to televise a designated event, but who do not propose to fully use that right, to offer the unused portion to the ABC and SBS for a nominal charge within a specified offer time. The national broadcasters must also offer unused portions of rights to each other.[1]

In the government's report on the review of the anti-siphoning in November 2010 *Sport on television: A review of the anti-siphoning scheme in the contemporary digital environment* it noted the limited use of the anti-hoarding provisions since their inception in 1992.[2] It also acknowledged calls for various reforms to these provisions, including to strengthen and enhance the provisions, expand the rules to apply to all anti-siphoning events and the call from sporting bodies for a more open arrangement whereby all potential broadcasters are able to bid for rights where a primary free-to-air broadcaster does not intend to show a listed event live.[3] The report focused on strengthening and expanding the provisions applying to broadcasters[4]:

> The control and use of rights to anti-siphoning listed events also elicited strong views from submissions, and these views were closely tied to the concerns regarding coverage. **There is a clear expectation among members of the public and sectors of the industry that if a free-to-air broadcaster acquires a right to an anti-siphoning listed event and doesn't intend to use it, other broadcasters should be provided with an opportunity to do so.** The Government shares this view, and there is a sound case to be made for the existing anti-hoarding rules to be **strengthened and enhanced.**

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[1] See for example, BSA, ss 146F- 146J.

[2] In particular the government noted that only the 2002 and 2006 FIFA World Cup were designated under the current anti-hoarding provisions - Department of Broadband, Communications and the Digital Economy, *Sport on television: A review of the anti-siphoning scheme in the contemporary digital environment*l November 2010, page 23.

[3] Ibid, pages 21-24.

[4] Ibid 24.

It did not consider the application of the regime or any reforms in connection with *programs suppliers*.

In announcing the current reforms to the anti-siphoning and anti-hoarding regimes under the BSA in November 2010, the Minister stated that the reforms 'will introduce 'must-offer' obligations on the free-to-air broadcasters, requiring them to televise anti-siphoning listed events they acquire or offer those rights on to another broadcaster'.[5] This reform was intended to prevent rights to important sporting events going unused.[6]

In contrasting the existing regime with the proposed reforms, the Minister only highlighted the new obligations as they apply to broadcasters stating:

> Must-offer rules
>
> *Current scheme* There are no requirements for the broadcast rights to anti-siphoning listed events to be used.
>
> *New scheme* Must-offer requirements will mean that **free-to-air broadcasters** must use the rights they acquire to anti-siphoning listed events or offer those rights on to **other broadcasters**.

In our submission, the evident policy concern underpinning the reforms to the anti-hoarding regime is the failure by commercial television broadcasting licensees to televise events that they have acquired. The imperative for reform is not the acquisition of rights by *program suppliers* who are rights brokers for the purpose of on-selling rights to broadcasters. *Program suppliers* like IMG are not in the business of acquiring the rights to events and not seeking to appoint broadcasters or on-sell the rights. It was not contemplated in the government's policy announcements and overview of the reforms that, the more extensive anti-hoarding provisions should also apply to *program suppliers* and there is no soundly based evidence or other justification for such an application.

(b) Operation of the anti-hoarding provisions

We understand that the new must-offer rules in the Bill as they apply to a *program supplier* would operate in the following way:

(i) Sections 145J and 145P impose anti-hoarding obligations on *program suppliers of* commercial television broadcasting licensees and national broadcasters respectively.

For the purpose of these provisions, section 145C provides that an organisation will be a *program supplier* if the person *has an arrangement, or proposes to enter into an arrangement* to supply the licensee or national broadcaster directly or indirectly (through one or more interposed entities) with programs that can be televised.

Having acquired rights to events on the anti-siphoning list, IMG will be a *program supplier* under section 145C.

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[5] Senator Conroy Minister for Broadband Communications and the Digital Economy, *Media Release* – Reforms to the Anti-Siphoning Scheme Announced– 25, November 2010.

[6] Senator Conroy Minister for Broadband Communications and the Digital Economy, *Media Release* – Anti-Siphoning Scheme – Fact Sheet , November 2010.

In respect of *program suppliers* of commercial television broadcasting licensees, section 145J(1) provides:

- If:

  (a) a *program supplier* (the ***first supplier***) of a commercial television broadcasting licensee (the ***first licensee***) is entitled to confer on the first licensee a right to televise live, in the licence area for the licence, the whole or a part (which whole or part is in this section called the ***relevant portion***) of an anti-siphoning event; and

  (b) the first supplier acquired the entitlement when the event was an anti-siphoning event;

  the first supplier must confer on the first licensee, or on another commercial television broadcasting licensee whose licence area is the same as that of the first licensee, the right to televise live, in that area, the relevant portion of the event.

If a *program supplier* fails to satisfy these obligations, it faces a maximum penalty of $220,000.

(ii) Sections 145J(3)-(6) provide an exception to a *program supplier's* obligations under section 145J(1) where the *program supplier* complies with the 'must-offer' rules. It is the operation of these exceptions that we have grave concern about. Section 145J(3) provides that a *program supplier* will not be liable for failing to confer rights on a commercial television broadcasting licensee where:

(A) it has offered to transfer to all commercial television broadcasting licensees and each national broadcaster (or their *program suppliers*) the right to televise live in the corresponding area, the relevant anti-siphoning event; and

(B) where no offers are accepted, the *program supplier* has offered to transfer to each subscription television broadcasting licensee.

(iii) The offers made by the *program supplier* must satisfy the requirements in sections 145K and 145L (for commercial television broadcasting licensees and national broadcasters) and 145M (for subscription television licensees), including that in substance the offer contains an entitlement to confer or a right to televise the anti-siphoning event and that the offer be in exchange for $1 from the offeree.

(iv) Section 145L provides that offers to a commercial television broadcasting licensee or national broadcaster must be made at least 120 days prior to the start of the event and remain open for 14 days (that is, until 106 days prior to the start of the event). Section 145M provides that subsequent offers to subscription television licensees must be made no less than 90 days before the event and remain open until immediately before the start of the event.

(v) Sections 145L provides that the first commercial television broadcasting licensee or national broadcaster to accept the offer will acquire the rights or entitlement to confer rights (as applicable) and provides that in the case of

simultaneous offers, the offeror can treat one offer as having preceded others. Section 145M provides the same regime in respect of offers to subscription television broadcasting licenses.

(vi) Section 145J(7) provides that section 145J will have no effect to the extent to which it purport to authorise acquisitions of property which are otherwise than on just terms and invalid as a result of paragraph 51(xxxi) of the Constitution.

3. IMG's Concerns

(a) Gaming of legislation

Section 145J(1)(b) can be interpreted to extend the operation of the anti-hoarding provisions to events which were anti-siphoning events at the time that a *program supplier* acquired rights, but which have since ceased to be anti-siphoning events.

The operation of the section is unclear as section 145J(1)(a) refers to an "anti-siphoning event" which implies that only current anti-siphoning events are captured. The Explanatory Memorandum at paragraph 184 provides that the 'rule will apply where the *program supplier* is entitled to confer on the licensee the right to televise... an anti-siphoning event and that entitlement was acquired after the event was specified as an anti-siphoning event under section 145E.'

IMG considers that any must-offer process should apply only to events that are anti-siphoning events at the time that the process is required to commence. As such, IMG considers that if the anti-hoarding provisions continue to apply to *program suppliers*, section 145J(1)(b), should be clarified or removed.

Even without section 145J(1)(b) IMG believes that the timing of the must-offer process as it applies to *program suppliers* is significantly problematic.

Under section 145E(6) an event will cease to be an anti-siphoning event at a nominated time from its commencement unless the Minister declares that the event continues to be an anti-siphoning event. The Minister may make such a declaration where he or she 'is satisfied that at least one commercial television broadcasting licensee or national broadcaster has not had a reasonable opportunity to acquire the right to televise the event.' No guidance is given in the Bill as to what constitutes a 'reasonable opportunity'.

As such it would be open for broadcasters to petition the Minister to declare that an event continues to be an anti-siphoning event on the basis that it has not been offered to all commercial television broadcasting licensees and national broadcasters on certain favourable financial terms. In the absence of the *program supplier* conferring the rights on a commercial television broadcasting licensee, the must-offer provisions would apply and the *program supplier* would be forced to offer the rights to those same broadcasters at $1.

(b) Impact on commercial negotiations

IMG strongly suggests that the application of the must-offer regime in sections 145J-145M to *program suppliers* is not commercially workable. The process creates a situation where broadcasting licensees and national broadcasters have a strong incentive not to enter into negotiations with *program suppliers* for the right to

broadcast an anti-siphoning event held by a *program supplier* as a failure by a *program supplier* to reach such an agreement will result in the right being offered to all broadcasting licensees and national broadcasters for $1.

We anticipate that the commercial and national television broadcasters will act in their own best interests, and they are entitled to do so. However, the Parliament should hesitate if it in fact is creating circumstances or incentives under which one commercial party can destroy the value of a product held by another commercial party. What incentives would a firm have to deal with a *program supplier* for value if an event, which is not delisted, becomes subject to the must-offer regime and the event rights being ascribed a value of $1.00?

The risk of this destruction of value and of sports broadcasters gaming the legislation is not avoided or mitigated by the potential under section 145L(6) or 145R(G) for offerees to provide more consideration than $1 in accepting the offer. It is commercially naïve to think that this potential will become a reality. Offerees are rewarded under the Bill for being the first to reply to the *program supplier's* offer, not for being the person who puts up the greatest offer.

We have noted the constitutional savings provision dealing with acquisition of property other than on just terms. However, it is bad public policy and completely unacceptable to us as a commercial party and a *program supplier* to be forced to bring an action relying on section 145J(7) for constitutional invalidity in order to avoid liability under anti-hoarding provisions from arising.

4. Conclusion

The application of the revised anti-hoarding regime to *program suppliers* is an unwarranted intrusion into the market for sports rights and an obtrusive extension of policy reform.

The reforms to the anti-hoarding regime in the form of new 'must-offer' rules should be confined to broadcasters who acquire the rights to anti-siphoning events and are unable or unwilling to use those rights. It should not interfere with arm's length commercial terms in an environment where sports rights brokers, who do not themselves broadcast content, are appointed by sporting bodies to maximise rights deals and publicity for a particular sport.

Further, while the regime may not explicitly prohibit a *program supplier* from being able to reach a deal of more value, any suggestion that greater deals could be achieved against the backdrop currently provided under the proposed anti-hoarding regime is naive at best. The regime creates a highly undesirable risk that the legislation is undermined and gamed by hard nosed participants acting legitimately in their best interests who are able to acquire the desired rights at $1 rather than through a commercial negotiation process. The result of such manipulation of the regime is ultimately the destruction of commercial value of rights to the detriment of sporting bodies and the Australian public.

Accordingly, we strongly suggest that the application of these extensive reforms to *program suppliers* requires a rethink.

We would be pleased answer any questions arising out of this submission or provide any further information if required.

Yours sincerely.

Gordon Pitt
Director of Corporate & Legal Affairs