Chapter 2

Key issues regarding the bill

2.1 As mentioned in Chapter 1, numerous submitters voiced their opposition to the anti-siphoning scheme because it is, in their view, anti-competitive but at the same time acknowledged the need for such a scheme.[1] During the course of the inquiry, various stakeholders raised issues about some aspects of the bill, including:

- designated groups and the quota group mechanism;
- de-listing of events, in particular AFL and NRL games;
- the definition of 'live' and exemptions from the coverage obligations;
- the must offer provisions and their impact on commercial negotiations;
- the right to televise an anti-siphoning event in part (highlight packages);
- the application of the anti-siphoning scheme to content service (new media) providers;
- the notification requirements, in particular the requirement to notify of rights no longer held;
- ministerial discretion; and
- the timing of the proposed statutory review.

2.2 These issues are discussed in the following sections.

Listing and de-listing

2.3 Some submitters to the inquiry expressed concerns about the treatment of designated group and quota group events, as well as the de-listing of some anti-siphoning events. These issues are discussed below.

Designated groups

2.4 The bill would enable the minister 'to determine the circumstances in which multiple simultaneously and consecutively occurring Tier B anti-siphoning events would be broadcast on free-to-air television'.[2] As outlined in Chapter 1, this is the "designated group mechanism" and is intended to deal with events such as the Olympic and Commonwealth Games where each day of the event can exceed 12 hours

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1 See for example Mr Tim Browne, Advisor—Office of the Chief Executive Officer, Tennis Australia, *Proof Committee Hansard*, 13 April 2012, p. 3; Australian Football League (AFL), *Submission 3*, p. 2; ASTRA, *Submission 6*, p. 2; International Olympic Committee (IOC), *Submission 6*, pp 4–5; Fox Sports, *Submission 14*, p. 3 and Australian Rugby League Commission (NRL), *Submission 19*, p. 1.

2 Explanatory Memorandum, p. 18.

duration or involves multiple simultaneously occurring contests and it would be impractical for a broadcaster to televise the event in full in order to fulfil their coverage obligations.[3]

2.5 The International Olympic Committee (IOC) and FOXTEL raised concerns about the designated group mechanism. The IOC noted that the explanatory memorandum specifically identifies the Summer and Winter Olympic Games as examples of events that may be determined to be a designated event.[4] The IOC was concerned, however, that there was no certainty that the Olympic Games would be declared a designated group:

> The IOC assumes the Minister intends to declare the Summer and Winter Olympics after the 2012 Olympic Games to be a designated group. If this does not occur, the capacity constraints will mean that the Bill is simply unworkable in respect of the Olympic Games. However, there is presently no certainty for the IOC that a declaration will actually be made.[5]

2.6 FOXTEL was similarly concerned about which events would be declared designated group events as well as the total minimum number of hours free-to-air broadcasters would be required to televise of each designated event.[6] FOXTEL opined that the minimum number of hours for multi-round events such as the Olympic Games 'should not be too high':

> In FOXTEL's view it is critical that in calculating the number of hours in each designated group the Government use the actual number of hours of original content broadcast—and excludes from its calculation advertising, recaps and news breaks always contained in any one hour of such multi-round broadcasts.
>
> If this is not done it will lead to the unintended consequence of [free-to-air] broadcasters having to broadcast events on their second channel, in order to comply with the 'must broadcast' obligation, that they would not otherwise broadcast. This will have flow-on effects for [subscription television] in terms of how the broadcast rights would be typically split for such events.[7]

Quota groups

2.7 The bill proposes to enable the minister to determine that certain Tier B events comprise a quota group, and subsequently whether that quota group is a Category A quota group or a Category B quota group.[8] Category A quota groups would comprise solely of a numerical quota—the 'quota number' (that is, the number

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3 Explanatory Memorandum, pp 18–19.

4 IOC, *Submission 9*, p. 8.

5 IOC, *Submission 9*, p. 8.

6 FOXTEL, *Submission 11*, p. 11.

7 FOXTEL, *Submission 11*, p. 13.

8 Explanatory Memorandum, p. 20.

of events that must be made available on free-to-air television)—while Category B quota groups would comprise a quota number and qualitative conditions known as 'associated set conditions'.[9]

2.8 The bill would require a quota number not greater than four for a quota group containing matches in the AFL Premiership competition and not greater than three for matches in the NRL Premiership competition.[10]

2.9 The quota group mechanism '...is designed to deal with, and is limited to, the multi-round inter-state competitions of the AFL Premiership and NRL Premiership'.[11]

2.10 The Australian Football League (AFL) was concerned about the application of the Category B quota group mechanism to certain rounds of the AFL Premiership competition. The AFL suggested that a quota number of four was inappropriate in cases where there was a split round or a round where fewer than nine games are played:

> From time to time, AFL will conduct a round over a period of two weeks (for example, round 1 of the 2012 Season). The legislative instrument needs to accommodate this situation and avoid fettering the AFL's ability to schedule its matches and provide for broadcast of 4 matches on free-to-air television during a split round.
>
> ...
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> In a season the AFL may schedule some Premiership Season rounds of less than 9 matches. For example, rounds 11, 12 and 13 in 2012 will each feature 6 matches. These rounds contain less than 9 matches because it enables the AFL Clubs competing in the AFL Competition to enjoy a bye (a week without a match) without the AFL schedule requiring a full week without any matches being played. In effect, 2 rounds of 9 matches are spread across 3 rounds, with each of the 18 Clubs playing 2 matches across the 3 rounds.
>
> In these rounds, less than 4 matches in each round will be broadcast on free-to-air television (however 8 matches of the 18 across those 3 rounds will be broadcast on free-to-air television). Accordingly, the legislative instrument needs to be amended to recognise this broadcasting and scheduling reality.[12]

9 Explanatory Memorandum, p. 20 and Broadcasting Services Amendment (Anti-siphoning) Bill 2012, subsection 145G(2).

10 Broadcasting Services Amendment (Anti-siphoning) Bill 2012, subsection 145G(11).

11 Explanatory Memorandum, p. 20.

12 AFL, *Submission 3*, p. 4.

2.11 The AFL also raised the associated set conditions which may be applied to Category B quota groups, as did Free TV Australia.[13] The AFL was of the view that it was best placed to decide which AFL games are "quality" games:

> We have an equalised competition which is cyclical and what are the best matches—a term used regularly in the context of these negotiations—is best determined by us. What is the best game depends on where you live. If you live in Western Australia, you will have a different view as opposed to those living in South Australia or Melbourne. You would also have a different view if you are a coach of a club as opposed to CEO of a club—football versus commercial interests. You would also have a different view if you are a player about what you would want out of your fixture. We maintain—and I think we have a track record over the last 10 years—a clear view of what are appropriate games to put on free-to-air television. We are [a] mass-market code and there are a series of things which need to be considered in determining which games are shown in which slots and on what platform. We certainly think we are in the best position to do that and to balance the needs of players, travel loads, club issues commercial issues and football issues.[14]

2.12 Free TV Australia was concerned that the bill did 'not provide sufficient guarantees to ensure that the best games are not siphoned [to] pay TV'.[15] Ms Julie Flynn, Chief Executive Officer of Free TV Australia, noted statements by the minister that "blockbuster" games, such as Friday and Saturday night games, would remain on free-to-air television. However, Free TV Australia wanted this explicitly in the bill:

> When the minister first announced these changes in November 2010, he said, for instance:
>
> "However, the Government will put in place a mechanism to:
>
> Protect the quality of games on free-to-air television, ensure that Friday and Saturday night games remain ‘blockbuster games’ in the round..."
>
> Then he went on to say:
>
> "We've got commitments from the AFL that the Friday night game is the best game, the Saturday night game is the second-best game."
>
> There is no evidence of that that we can see in the drafting.
>
> ...
>
> So our concern is that these rules need to be in place to ensure that those games do not suddenly get siphoned off. Bear in mind that we have access

13 AFL, *Submission 3*, p. 4 and Ms Julie Flynn, Chief Executive Officer, Free TV Australia, *Proof Committee Hansard*, 13 April 2012, p. 16.

14 Mr Gillon McLachlan, Chief Operating Officer, AFL, *Proof Committee Hansard*, 13 April 2012, p. 5.

15 Ms Julie Flynn, Chief Executive Officer, Free TV Australia, *Proof Committee Hansard*, 13 April 2012, p. 16.

> to only four games in every round; we do not have access to all games in every round.[16]

2.13 Tennis Australia raised a different concern about the quota group mechanism, questioning why it was limited to competitions of the AFL and NRL. Tennis Australia proposed that the quota group mechanism be extended to the Australian Open so that the new anti-siphoning scheme did not result in a perverse outcome where less, rather than more, tennis would be shown on television:[17]

> The proposed bill creates an exception for the AFL and the NRL. The exception is called the 'quota group' and it is set out in section 145G. Tennis Australia submits that this exception should be applied to the Australian Open and other applicable sporting events because there is simply more Australian Open match content available than can be possibly broadcast by a free-to-air broadcaster. To confirm, Tennis Australia believes that the introduction of the quota group mechanism is an important and sensible legislative initiative. However, we do not believe that it is equitable to permit this mechanism to be applied to only two sports and we cannot identify any objective criteria or compelling policy rationale for doing so. Tennis Australia is prepared, like the other sports, to commit to guaranteeing free-to-air coverage of parts of the Australian Open to ensure that the most important matches remain on free-to-air television. However, the remainder of the Australian Open should be removed from the list and excluded using the same exceptions afforded to the AFL and the NRL.[18]

2.14 To address some of the concerns raised about the content of the anti-siphoning list and the quota groups, the Department of Broadband, Communications and the Digital Economy (DBCDE) provided the Committee with a draft of the anti-siphoning list comprising Tier A and Tier B events as well as a draft of the Category B quota groups determination, including the associated set conditions for each AFL premiership quota group. These are attached at Appendix 3.

De-listing

2.15 As outlined in Chapter 1, the bill would provide for the de-listing of anti-siphoning events 4368 (182 days) before the start of the event, where the event is in a designated group, or in the case of the AFL and NRL premiership competitions, 4368 hours (182 days) before the start of the first event in the competition, for the purposes of the acquisition of broadcast rights by subscription television broadcasters and the conferral of rights on content service providers.[19] The bill would also enable the

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16 Ms Julie Flynn, Chief Executive Officer, Free TV Australia, *Proof Committee Hansard*, 13 April 2012, p. 17.

17 Mr Tim Browne, Advisor—Office of the Chief Executive Officer, Tennis Australia, *Proof Committee Hansard*, 13 April 2012, pp 3–4.

18 Mr Tim Browne, Advisor—Office of the Chief Executive Officer, Tennis Australia, *Proof Committee Hansard*, 13 April 2012, p. 4.

19 Broadcasting Services Amendment (Anti-siphoning) Bill 2012, section 145E.

minister to further extend this period to 8736 hours (364 days) for AFL and NRL competitions.[20]

2.16 Sporting organisations and broadcasters alike raised the de-listing provisions during the course of the inquiry. The AFL and NRL were supportive of their events being delisted 364 days (52 weeks) rather than 182 days prior to their commencement.[21] The AFL stated its preference to have the '52-week delisting period...hard-wired into the bill, not left to ministerial discretion in a legislative instrument'.[22]

2.17 With respect to the de-listing of anti-siphoning events that are not AFL or NRL games, the SBS felt that the proposed timing of 26 weeks prior to an event 'leaves a very small window of opportunity, and for some matches no opportunity at all, to acquire the rights'.[23] The SBS indicated its desire 'to acquire the rights to televise the Socceroos qualifiers' but suggested that the de-listing period as proposed in the bill would hamper its efforts to do so.[24] Further, the SBS was concerned that if the de-listing period remained at 26 weeks it would '...have to rely on the Minister to determine an appropriate delisting time under section 145E(d) or determining an alternative delisting time under section 145E(f)'.[25]

2.18 As an alternative, the SBS recommended that:

> A better way of dealing with these situations would be to specify an appropriate delisting period which allows for a reasonable opportunity to acquire the rights to the event counting back from the date on which the rights holders are known.[26]

2.19 In response to the AFL's concerns, DBCDE stated:

> The AFL appears to be seeking an outcome whereby the automatic delisting of a particular AFL Premiership season applies to additional seasons occurring in the future. This is not how the delisting provisions will operate, or are intended to operate.
>
> ...

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20 Senator Jacinta Collins, *Second reading speech*, 22 March 2012, p. 2570.

21 Mr Gillon McLachlan, Chief Operating Officer, AFL, *Proof Committee Hansard*, 13 April 2012, p. 8 and Ms Nicky Seaby, Strategy and Government Relations Manager, NRL, *Proof Committee Hansard*, 13 April 2012, p. 7.

22 Mr Gillon McLachlan, Chief Operating Officer, AFL, *Proof Committee Hansard*, 13 April 2012, p. 2.

23 Special Broadcasting Service (SBS), *Submission 5*, p. 1.

24 SBS, *Submission 5*, p. 1.

25 SBS, *Submission 5*, p. 2.

26 SBS, *Submission 5*, p. 2.

> The anti-siphoning scheme does not restrict the acquisition of rights to events not on the anti-siphoning list. This includes events removed from the list, provided acquisition takes place after their removal. Based on the above expectations about the composition of the future anti-siphoning list, it would be open to the AFL to negotiate its next rights deal in the period in 2016 after the 2017 competition had been delisted (under the automatic delisting provisions). This would mean the AFL would not be restricted by the operations of the anti-siphoning scheme for the matches in 2017. However, the anti-siphoning scheme would still apply to the 2018 competition and beyond.
>
> It should be emphasised that these conditions are less restrictive than those under which the current AFL rights deal was negotiated in 2011. Nonetheless, it would be open to the AFL to request in 2016 that the Minister remove all matches in all years covered by its proposed next rights agreement from the anti-siphoning list. In considering that request, it could be expected that the Minister would consider whether the proposed agreement met expectations about the quality of free-to-air coverage of AFL matches. If matches were removed from the anti-siphoning list in this manner, the Minister would not be obliged to make a category A or B quota group instrument covering the period in which those matches were played as such an instrument would no longer be necessary.[27]

Committee view

2.20 In regards to the quota group mechanism, the Committee accepts Tennis Australia's concern that the new anti-siphoning scheme may unintentionally prevent more live tennis being seen on television in Australia, albeit subscription television.

2.21 As such, the Committee sees merit in Tennis Australia's suggestion that the quota group mechanism be expanded to include the Australian Open so that certain content from this tournament is available to subscription television broadcasters, whilst ensuring that key matches remain on the Tier A anti-siphoning event list and available on free-to-air television. The Committee therefore recommends that the Commonwealth Government consider amending the bill so that, if and where appropriate, the quota group mechanism can be applied to specified sporting events in addition to the AFL and NRL premiership competitions.

Recommendation 1

2.22 The Committee recommends that the Commonwealth Government consider amending the bill so that, if and where appropriate, the quota group mechanism can be applied to specified sporting events in addition to the AFL and NRL premiership competitions.

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27 Department of Broadband, Communications and the Digital Economy (DBCDE), *Answer to question on notice*, 13 April 2012 (received 20 April 2012).

Coverage obligations

2.23 Some of the coverage obligations proposed in the bill were the subject of debate during the inquiry. These are discussed in the following sections.

Definition of live

2.24 The bill defines 'live' coverage for Tier A anti-siphoning events as 'with no delay' or 'with as short a delay as is technically feasible'.[28] For Tier B events, live is defined as 'with no delay' or 'with a delayed starting time of not more than 24 hours'.[29]

2.25 For Tier B events that are not in designated a group, the bill would accommodate televising 'live' with a delay in coverage of up to four hours, depending on the type of event.[30]

2.26 During the course of the inquiry, sporting organisations expressed different views about the definitions of live proposed in the bill. The AFL was supportive of the flexibility provided in the bill to enable AFL games to be broadcast with up to four hours delay, as this would assist the AFL to obtain the 'maximum television audience'.[31] The NRL shared this view.[32] Cricket Australia voiced its support for the definition of live for Tier A events but was concerned by some of the exemptions to the coverage obligations:

> Cricket is always broadcast live and substantially in full and we want to see that continue. We like the definition of live as it stands for tier A events and we acknowledge that it also includes or extends to an in-full concept is well. The issue we have, which we would like some clarity around, is that there is an ability for the Australian Communications and Media Authority to prospectively say that a free-to-air broadcaster has broadcast an event live and in full when in fact there have been interruptions or other breaks in their coverage. To our mind, we would like the guiding principles in the act to be for the ACMA to take into consideration where those events occurred to be tightened up. We think if the event is good enough to be on tier A and the principles are that it is live and in full, that there should not be broad exceptions or a broad discretion for the regulatory body to prospectively deem something to be live and in full. It should be live and in full—it is as simple as that.[33]

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28 Broadcasting Services Amendment (Anti-siphoning) Bill 2012, subsection 145B(1).

29 Broadcasting Services Amendment (Anti-siphoning) Bill 2012, subsection 145B(2).

30 Senator Jacinta Collins, *Second reading speech*, 22 March 2012, p. 2571.

31 Mr Gillon McLachlan, Chief Operating Officer, AFL, *Proof Committee Hansard*, 13 April 2012, p. 11.

32 Ms Nicky Seaby, Strategy and Government Relations Manager, NRL, *Proof Committee Hansard*, 13 April 2012, p. 11.

33 Ms Libby Owens, Broadcast Rights and Regulatory Manager, Cricket Australia, *Proof Committee Transcript*, 13 April 2012, p. 11.

2.27 As a result, Cricket Australia submitted that exemptions from the coverage obligations applicable to Tier A events should not be left to ministerial discretion but rather '[i]f the exceptions are retained in the Bill, a full replay should immediately follow the News Bulletin or other listed events with no exceptions'.[34]

2.28 Tennis Australia indicated that sporting organisations have differing views about what constitutes live coverage and remarked that the inherent value in sporting events was that 'people want to see events live'.[35]

Must offer arrangements

2.29 Some submitters expressed concerns about the provisions in the bill that would require free-to-air broadcasters to offer to other free-to-air broadcasters, and subsequently subscription television broadcasters, rights they had acquired but are unable to meet the relevant coverage obligations for a nominal consideration of $1.[36]

2.30 Free TV Australia opposed the must offer arrangements, stating:

> The $1 must offer scheme is just impractical and does not understand the nature of sporting rights and how they are located. I am sure there was not anyone sitting at this table who would have been prepared to do a deal with a free-to-air broadcaster on the understanding that you could then pass on the rights to anyone you chose for a dollar.[37]

2.31 Free TV Australia outlined a number of reasons why it believed these provisions would be 'unworkable', including that broadcasters do not own the rights they acquire and therefore do not have an unfettered right to deal with the rights in any manner they so choose and that broadcasters are 'subject at all times to the requirements of upstream licensors and the scope of the licence granted to the broadcaster by the principal licensor to whom the broadcaster is contractually bound'.[38] Free TV Australia proffered that anti-hoarding could instead be prevented:

> ...if section 145H(3) simply provided that a free-to-air broadcaster would not be in breach of its coverage obligations where it arranged for another free-to-air broadcaster to televise the event. The provision does not need to lay out the terms of supply because failure by a broadcaster to transfer coverage rights would lead to a breach of its licence condition. This can

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34 Cricket Australia, *Submission 13*, p. 3.

35 Mr Tim Browne, Advisor—Office of the Chief Executive Officer, Tennis Australia, *Proof Committee Hansard*, 13 April 2012, p. 12.

36 See Cricket Australia, *Submission 13*; Free TV Australia, *Submission 12*, p. 7; Tennis Australia, *Submission 17*, p. 8; IMG Pty Ltd, *Submission 10*, pp 5–6; FOXTEL, *Submission 11*, p. 13 and Fox Sports, *Submission 14*, p. 8.

37 Ms Julie Flynn, Chief Executive Officer, Free TV Australia, *Proof Committee Hansard*, 13 April 2012, p. 16.

38 Free TV Australia, *Submission 12*, p. 7.

> result in a range of sanctions including a substantial penalty of up to $220,000.[39]

2.32 Tennis Australia and Cricket Australia agreed with Free TV Australia's assertion that the must offer arrangements would undermine sporting organisations' ability to control their broadcast rights.[40] Tennis Australia stated:

> Tennis Australia does not object to the principle underpinning the "must offer" scheme, but we do maintain that the sporting organisations themselves (not FTA broadcasters) should retain control of, or be meaningfully in involved in, the process of granting broadcast rights to their sporting events. In the in the event that a FTA broadcaster elects not to televise a listed event, the sporting organisation that owns that event should have the opportunity to deal directly with Pay TV and FTA providers to ensure that, given the possible short timeframe, their event is televised and available to Australian television audiences. This "must-offer" scheme is also potentially inconsistent with the contracts agreed between sporting organisations and FTA broadcasters (including assignment and subcontracting clauses).[41]

2.33 Subscription television broadcasters were supportive of measures to prevent hoarding by free-to-air broadcasters[42] but argued the must offer provisions could have an adverse impact on commercial negotiations and may be susceptible to "gaming" by free-to-air broadcasters.[43] Fox Sports claimed that the must offer provisions would entrench:

> ...the opportunity for free-to-air broadcasters to manipulate the acquisition process to ensure their exclusive access to the rights to broadcast anti-siphoning events, at the expense of sporting bodies who may wish to secure coverage of their events via other media.
>
> This is because the proposed framework operates to provide free-to-air broadcasters with not only two opportunities to acquire rights before subscription television and content service providers are able to acquire any rights to the event, but also the opportunity to acquire the rights for a token $1.[44]

2.34 With respect to the must offer for $1 arrangement, the department explained that this was '[o]ne of the central tenets of the anti-siphoning regime as it is proposed

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39 Free TV Australia, *Submission 12*, p. 7.

40 Cricket Australia, *Submission 13*, p. 3 and Tennis Australia, *Submission 17*, p. 8.

41 Tennis Australia, *Submission 17*, p. 8.

42 See for example Mr Richard Freudenstein, Chief Executive Officer, FOXTEL, *Proof Committee Hansard*, 13 April 2012, p. 26.

43 See IMG Pty Ltd, *Submission 10*, pp 5–6; FOXTEL, *Submission 11*, p. 13 and Fox Sports, *Submission 14*, p. 8.

44 Fox Sports, *Submission 14*, p. 8.

in the bill' and would be such a disincentive to hoard that the provision would not be used.[45] Dr Simon Pelling, First Assistant Secretary, Broadcasting and Digital Switchover Group, DBCDE continued:

> We would assume that when people buy rights they buy them to show them. That would be the normal course of business. But there may be circumstances where somebody acquires the right to televise but then for various reasons cannot show it...what happens once you reach the 120 days is some fairly tough provisions kick in that say you have to do something with those rights now. The whole objective is to make sure that those rights are available to the public or to maximise the opportunity for those rights to be available to the public, so you have to put it on the table for a peppercorn rent and give other free-to-air broadcasters the chance to do that.
>
> That is done quite deliberately because what you do not want is to have any barriers in the way such as financial barriers. You do not want people to game the system and say, "Oh, nobody took it up because we offered it for an enormous price." Having said that, of course, nothing stops a broadcaster negotiating in advance of the 120 days to sell the rights on normal commercial terms with anybody, including a subscription broadcaster. So, if well before the event they knew they were not going to be able to show it, they could go negotiate with other free-to-air broadcasters or a subscription broadcaster and say: "Here's a package of rights. Can we work out a deal and a price for those rights?" Why a subscription broadcaster would do that might be because they have said: "This is a very valuable set of rights. We'd like to get it. If we wait till it comes to us at the end of the peppercorn rent period then there is a good chance we might not ever get those rights because somebody else may have taken it up".[46]

Committee view

2.35 In regard to the must offer arrangements, the Committee agrees with the department's position that these provisions will be a sufficient disincentive so as to deter free-to-air broadcasters from deliberately hoarding broadcast rights. If this proves not to be the case, the proposed statutory review of the anti-siphoning regime before 31 December 2014 will provide an opportunity to critically examine this aspect of the scheme.

Right to televise an anti-siphoning event in part (highlights packages)

2.36 Section 145ZN of the bill proposes to limit the circumstances in which subscription television broadcasters can acquire the right to televise anti-siphoning events. In particular, subscription television broadcasters would be prevented from

45 Dr Simon Pelling, First Assistant Secretary, Broadcasting and Digital Switchover Group, DBCDE, *Proof Committee Hansard*, 13 April 2012, p. 42.

46 Dr Simon Pelling, First Assistant Secretary, Broadcasting and Digital Switchover Group, DBCDE, *Proof Committee Hansard*, 13 April 2012, pp 42–43.

acquiring the rights to televise an anti-siphoning event unless a national or free-to-air television broadcaster has the right to televise 'the whole or a part' of that event.[47]

2.37 The ability of subscription television broadcasters to acquire rights for an anti-siphoning event when free-to-air broadcasters had only acquired the right to televise that event in part was of concern to Free TV Australia. Ms Julie Flynn of Free TV Australia remarked:

> The determination that a highlights package qualifies as free-to-air coverage in our view undermines the intent of the act. Viewers expect that free-to-air coverage means more than a highlights package and previous court rulings also support this position.[48]

2.38 Free TV Australia claimed international experience demonstrated 'that major sporting events move to pay TV once regulatory protections are removed or relaxed':

> The experience in the UK serves as a powerful example of the detrimental effects of allowing a highlights package to qualify as coverage of a significant sporting event. Any relaxation of the regulatory protections will inevitably result in the migration of sport to pay TV and a significant overall reduction in Australians seeing these events.
>
> Limited highlights coverage of a listed event on free-to-air should not remove the prohibition on pay TV acquiring rights to that listed event. If enacted in its current form, section 145ZN may result in less rather than more free-to-air coverage of listed events, as seen in the UK.
>
> This can be remedied by amending the relevant provision so that the prohibition on acquisition of rights to the event applies, unless a national or commercial free-to-air television broadcaster has acquired “a substantial proportion” of the event. The amendment should replace “in whole or part” in sections 145ZN(1)(a) and (b) with the words “a substantial proportion”. The wording “a substantial proportion” will also encompass the whole of the event. A similar approach should be taken in sections 145ZN(2) and (3), and 145ZO (in relation to content service providers).[49]

2.39 Sporting organisations, such as the AFL, NRL and Tennis Australia, emphasised the importance of free-to-air television to their sports and rejected the claim that less of their sports would be shown on free-to-air television in the future.[50] Mr Gillon McLachlan of the AFL and Mr Tim Browne of Tennis Australia summarised these views:

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47 Broadcasting Services Amendment (Anti-siphoning) Bill 2012, section 145ZN.

48 Ms Julie Flynn, Chief Executive Officer, Free TV Australia, *Proof Committee Hansard*, 13 April 2012, p. 16.

49 Free TV Australia, *Submission 12*, pp 5–6.

50 See Ms Nicky Seaby, Strategy and Government Relations Manager, NRL, *Proof Committee Hansard*, 13 April 2012, p. 2; Mr Gillon McLachlan, Chief Operating Officer, AFL, *Proof Committee Hansard*, 13 April 2012, p. 14 and Mr Tim Browne, Advisor—Office of the Chief Executive Officer, Tennis Australia, *Proof Committee Hansard*, 13 April 2012, p. 14.

> **Mr McLachlan:** ...I think it would be an extraordinary day when our sport in that context would ever sell all of our games to pay television. [All I] can say is that we are on record as saying that we have a position that we would always see four games of football on free-to-air television.
>
> **Mr Browne:** If I could just confirm that we are in the same position. Free-to-air is essential. Our free-to-air broadcaster, it should be noted, does a fantastic job of showcasing our event to Australia and around the world.[51]

2.40 The department explained that the provisions in the bill allowing a broadcaster to televise an anti-siphoning event in whole or in part were intended to provide flexibility and enable rights holders and broadcasters to freely negotiate packages of broadcasting rights:

> Generally speaking, there is a great deal of flexibility for people to decide how they want to package their rights. It does not say that you have to package it in a particular way. Essentially, what the bill does is talk about rights being made available. It allows for people to have the whole of or part of a right. That would certainly include what might be called a highlights package, although I imagine that there are different ways you could do a highlights package, and that is not inconsistent with the provisions of the bill. Basically it means that, if a free-to-air broadcaster and a rights holder are able to come to an agreement about how a particular set of rights is packaged and the agreement is that the free-to-air broadcaster wants this particular set of highlights or key points in the game or whatever, then that is a perfectly legitimate thing for them to do. Having done that, that means that the right to televise is acquired, which then releases the rights in terms of the things that the subscription broadcasters can do to them. So certainly a package of rights can be dealt with in this way.[52]

Application of the scheme to content service providers

2.41 As mentioned in Chapter 1, the bill would, for the first time, extend the anti-siphoning regime to content service providers, for use online or on mobile devices such as mobile phones. Telstra and Cricket Australia opposed the application of the anti-siphoning scheme to content service providers on the basis this was unnecessary[53] and, in Testra's opinion, 'there is no evidence that deleterious siphoning to new media has occurred or will occur in the foreseeable future'.[54] Cricket Australia claimed that extending the anti-siphoning regime to new media would 'artificially [hinder]

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51 Mr Gillon McLachlan, Chief Operating Officer, AFL, *Proof Committee Hansard*, 13 April 2012, p. 14 and Mr Tim Browne, Advisor—Office of the Chief Executive Officer, Tennis Australia, *Proof Committee Hansard,* 13 April 2012, p. 14.

52 Dr Simon Pelling, First Assistant Secretary, Broadcasting and Digital Switchover Group, DBCDE, *Proof Committee Hansard*, 13 April 2012, p. 41.

53 Telstra, *Submission 8*, p. 2 and Cricket Australia, *Submission 13*, p. 4.

54 Telstra, *Submission 8*, p. 2.

convergence and innovation via unnecessary regulatory interference and should therefore be removed from the Bill'.[55]

2.42 Other submitters, however, were supportive of the anti-siphoning regime being applied to content service providers and wanted to see these provisions strengthened.[56] Both SBS and Free TV Australia wanted the provisions extended so that they captured events that occur outside Australia.[57] SBS explained:

> The requirement that the event occur "in Australia" is too limited and introduces a further tier of lesser protection for events occurring outside Australia. In SBS's view, if an event has qualified for the list, it should qualify to ensure that it cannot be siphoned by either a subscription television broadcasting licensee or a content service provider. For example the current drafting would mean that a Socceroos match in Australia would be potentially protected from siphoning by an IPTV provider but not one played overseas, even if a World Cup match – a distinction unlikely to be appreciated by SBS's viewers.[58]

2.43 Despite opposing the application of the anti-siphoning scheme to content service providers, and in contrast to SBS' position, Telstra was:

> ...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 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.[59]

Committee view

2.44 Given the burgeoning use of new media the Committee believes it is appropriate for the anti-siphoning regime to take account of content service providers. The Committee is also aware that the rapidly evolving media landscape will likely impact on the new anti-siphoning regime and its application to new media platforms. The proposed statutory review of the anti-siphoning scheme is an appropriate process during which the relevance and effectiveness of the regime in this regard can be assessed.

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55 Cricket Australia, *Submission 13*, p. 4.

56 See the Australian Broadcasting Corporation (ABC), *Submission 2*; SBS, *Submission 5* and Free TV Australia, *Submission 12*.

57 SBS, *Submission 5*, p. 2 and Free TV Australia, *Submission 12*, p. 9.

58 SBS, *Submission 5*, p. 2.

59 Telstra, *Submission 8*, pp 2–3.

Notification requirements

2.45 As discussed in Chapter 1, the bill would impose notification requirements on commercial television broadcasting licensees, national broadcasters and program suppliers.[60] The notification requirements imposed on broadcasters would require a broadcaster to notify the ACMA in writing within 10 business days about any rights to televise an anti-siphoning event that the broadcaster has acquired, or of any rights the broadcaster ceases to hold.[61]

2.46 Free TV Australia was critical of the requirement of broadcasters to notify the ACMA of rights no longer held within 10 days and described the notification requirements as 'cumbersome and unnecessary'.[62] As an alternative, Free TV Australia recommended that broadcasters be given 30 days to notify the regulator of rights no longer held or advise at the time rights are acquired when those particular rights will cease:

> An extension of 30 days is not an unreasonable ask. Our issue about not having to notify is: what is the point of notifying when you no longer have them? Let us just say that, at the end of five years, if the AFL were covered and Channel 7 decided not to pursue them and another network took them, they would have to notify you that they have them. What is the point of that? There would be serious financial payments and penalties if you did not, yet you have only 10 days. It is not really going to be of any concern to anyone at the network, presumably, if they are no longer doing it...In the way it is drafted at the moment, you have to notify within 10 days of the cessation of the rights, so if someone makes a five-year deal and they know the end date when they make the deal they cannot tell ACMA then. They have to wait until the end of the deal and then they have this short 10-day window in which to notify ACMA. If they do not do it within that 10-day window, they can be fined $55,000 a day. That is just silly, really. Why should we not be able to notify the end date of the deal at the time we acquire the rights? That would make sense, otherwise it is just unnecessary red tape.[63]

Committee view

2.47 The Committee considers the proposal in the bill that would require broadcasters to notify the ACMA of rights the broadcaster has acquired within 10 days is a reasonable requirement and understands this would comprise a simple form to complete. That said, the Committee sees merit in allowing broadcasters to inform

60 Explanatory Memorandum, pp 43–44.

61 Explanatory Memorandum, p. 44.

62 Ms Julie Flynn, Chief Executive Officer, Free TV Australia, *Proof Committee Hansard*, 13 April 2012, p. 16.

63 Ms Julie Flynn, Chief Executive Officer, and Ms Clare O'Neil, Director of Legal and Broadcasting Policy, Free TV Australia, *Proof Committee Hansard*, 13 April 2012, pp 17–18.

the ACMA of the expiration date of broadcast rights at the time those rights are acquired (noting that further notification by broadcasters would be required if there was any change to this expiration date). The Committee therefore recommends that the bill be amended accordingly.

Recommendation 2

2.48 The Committee recommends that the bill is amended to enable broadcasters to notify the Australian Communications and Media Authority (ACMA) of the expiration date of broadcast rights at the time those rights are acquired and / or upon any change to the expiration date.

Ministerial discretion

2.49 Throughout the inquiry, various submitters expressed concern about the discretion afforded to the minister to make decisions under the proposed legislation.[64] Telstra's view was indicative of these concerns:

> 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...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.[65]

2.50 FOXTEL emphasised subscription broadcasters' desire for certainty:

> I think what rights holders and broadcasters are looking for here is certainty. I think certainty is a pretty important issue. Discretions, and this number of discretions, create uncertainty which potentially undermines the amount subscription broadcasters are willing to pay for rights, which ultimately reduces the funding which might otherwise flow back to the sporting codes. It also means that sports codes lose control of their rights, as the bill gives the minister the power to determine which events are broadcast on free-to-air television. So, in our view, the minister should have far fewer discretionary powers to choose what is shown and when. Broadcasters of sporting codes really require more certainty to plan their

64 See AFL, *Submission 3*, pp 5–6; ASTRA, *Submission 6*, pp 6–7; ESPN, *Submission 7*, Attachment 1, p. 2; Telstra, *Submission 8*, p. 2; FOXTEL, *Submission 11*, pp 10–11; Cricket Australia, *Submission 13*, pp 2–3; Fox Sports, *Submission 14*, pp 6–7; Viacom International Media Networks Australia and New Zealand, *Submission 15*, p. 3; BBC Worldwide, *Submission 16*, p. 2 and Mr Ian Flatley, *Submission 18*, p. 2.

65 Telstra, *Submission 8*, p. 3.

> businesses. So I implore the committee to recommend a much more certain path forward...[66]

2.51 Whilst concerned about the extent of ministerial discretion proposed by the bill, sporting organisations were keen to ensure that they had flexibility. The AFL wanted flexibility around broadcasting games live;[67] Tennis Australia wanted the flexibility afforded by the quota group mechanism to be applied to tennis;[68] the NRL wanted 'flexibility to be able to negotiate on commercial terms and not have government interference in those broadcast negotiations'[69] and Cricket Australia believed it 'should have the flexibility and the freedom to make sensible decisions' about packaging its broadcast rights.[70]

2.52 The DBCDE acknowledged the need for flexibility in the anti-siphoning regime and indicated the government's intention for this flexibility to create an iterative regulatory process in which industry would be involved.[71] Dr Pelling remarked:

> ...ministerial discretion is at the heart of this, and that basically reflects the fact that it is in the interests of all the parties concerned to have a degree of flexibility around these things. There are a number of provisions in there, all of which deal with fairly specific things about ministerial discretion in other areas, and those are always there to increase flexibility in what is really, as you would be aware from having looked at this, a very complicated regime which deals with a large range of sports events, all of which have different characteristics and so on. The more you put stuff into black-leather legislation—specifically about what people should and should not do—the more you risk coming up against something which you did not anticipate or some future situation about the way a sport is handled or the rights surrounding something...there is always a balance in these things, and all the instruments here will be subject to parliamentary scrutiny.[72]

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66 Mr Richard Freudenstein, Chief Executive Officer, FOXTEL, *Proof Committee Hansard*, 13 April 2012, p. 26–27.

67 Mr Gillon McLachlan, Chief Operating Officer, AFL, *Proof Committee Hansard*, 13 April 2012, p. 11.

68 Mr Tim Browne, Advisor—Office of the Chief Executive Officer, Tennis Australia, *Proof Committee Hansard*, 13 April 2012, p. 4.

69 Ms Nicky Seaby, Strategy and Government Relations Manager, NRL, *Proof Committee Hansard*, 13 April 2012, p. 5.

70 Mrs Stephanie Beltrame, General Manager, Media Rights, Cricket Australia, *Proof Committee Hansard*, 13 April 2012, p. 6.

71 Dr Simon Pelling, First Assistant Secretary, Broadcasting and Digital Switchover Group, DBCDE, *Proof Committee Hansard*, 13 April 2012, p. 39.

72 Dr Simon Pelling, First Assistant Secretary, Broadcasting and Digital Switchover Group, DBCDE, *Proof Committee Hansard*, 13 April 2012, p. 39.

Committee view

2.53 The Committee acknowledges that while ministerial discretion to make determinations under the bill introduces uncertainty it also affords flexibility, and that flexibility in the anti-siphoning regime was sought by various stakeholders during the course of the inquiry.

2.54 The Committee welcomes statements by the department that it is the government's intention that stakeholders will be involved in the development of legislative instruments to the bill. The Committee urges the government, sporting organisations, broadcasters and program suppliers to engage in these processes in a meaningful and collaborative fashion.

Review of the new anti-siphoning regime

2.55 Submitters were supportive of the proposed statutory review of the new anti-siphoning scheme although there was some debate about the proposed timing of this review.

2.56 Sporting organisations, such as the NRL, AFL and Tennis Australia, were supportive of the new anti-siphoning scheme being reviewed by no later than 31 December 2014.[73] Mr McLachlan of the AFL stated:

> We certainly would not want to see it any later than 2014. The discussion started in 2009, roughly, and, given the pace of the evolution of the digital environment, we do not think it should be any later than 2014.[74]

2.57 Ms Nicky Seaby of the NRL commented:

> I think the review needs to be considered in the context of other changes, such as the convergence review. It may be that this legislation is almost redundant, depending on what the outcome of the convergence review is and changes to that legislation. From our perspective, we would not like to see that review date pushed out too far. We would want to be relooking at this legislation in the context of any broader changes to broadcasting legislation that might be implemented in the coming years.[75]

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73 Mr Gillon McLachlan, Chief Operating Officer, AFL, *Proof Committee Hansard*, 13 April 2012, p. 13; Mr Tim Browne, Advisor—Office of the Chief Executive Officer, Tennis Australia, *Proof Committee Hansard*, 13 April 2012, p. 13 and Ms Nicky Seaby, Strategy and Government Relations Manager, NRL, *Proof Committee Hansard*, 13 April 2012, p. 12.

74 Mr Gillon McLachlan, Chief Operating Officer, AFL, *Proof Committee Hansard*, 13 April 2012, p. 13.

75 Ms Nicky Seaby, Strategy and Government Relations Manager, NRL, *Proof Committee Hansard*, 13 April 2012, p. 12.

2.58 Similarly, subscription television broadcasters offered their firm support for the proposed review of the scheme by 31 December 2014[76] and shared the NRL's view that the review could include consideration of 'other factors in the market place' for example the National Broadband Network (NBN).[77]

2.59 Free TV Australia had a different view and wanted to see the new anti-siphoning regime reviewed later. Ms Flynn argued:

> Some of us are a little bit exhausted by this constant reviewing, reviewing, reviewing. It has taken us two years—I agree with the previous people who gave evidence, the sporting bodies. But what is the point of introducing something and reviewing it 12 months later? The basic structures are not going to change. Yes, there will be different ways of delivering content—we are all aware of that—but, as I said earlier, the relevance of the list remains the same today.[78]

2.60 In response to the debate about the timing of the proposed review of the new anti-siphoning scheme, DBCDE offered the following explanation:

> When the policy was being developed a date was chosen which allowed the legislation to operate for a reasonable period and that allowed us to, within a reasonable period after its operation, assess whether the things that we had done had any unintended consequences or caused the industry any particular difficulties. There is no particular magic in the date that I am aware of. It is not tied to any particular set of events or anything like that. It is just that it is...a suitable period for deciding whether the bill is doing its job.[79]

Committee view

2.61 The Committee shares DBCDE's view that the timing of the statutory review proposed to occur before 31 December 2014 offers an appropriate length of time for the new anti-siphoning regime to operate so that its impact and effectiveness can be assessed.

2.62 Overall, the Committee supports the new anti-siphoning regime proposed in the bill which will continue to enable the Australian television-viewing public to enjoy important sporting events on free-to-air television.

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76 Ms Petra Buchanan, Chief Executive Officer, ASTRA, *Proof Committee Hansard*, 13 April 2012, p. 25.

77 Ms Petra Buchanan, Chief Executive Officer, ASTRA, *Proof Committee Hansard*, 13 April 2012, p. 29.

78 Ms Julie Flynn, Chief Executive Officer, Free TV Australia, *Proof Committee Hansard*, 13 April 2012, p. 19.

79 Dr Simon Pelling, First Assistant Secretary, Broadcasting and Digital Switchover Group, DBCDE, *Proof Committee Hansard*, 13 April 2012, p. 43.

Recommendation 3

2.63 The Committee recommends, subject to the preceding recommendations, that the bill be passed.

Senator Doug Cameron
Chair