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Broadcasting Services Amendment (Anti-Siphoning) Bill 2004

Morag Donaldson
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Broadcasting Services Amendment (Anti-Siphoning) Bill 2004

Date Introduced: 24 June 2004

House: House of Representatives

Portfolio: Communications, Information Technology and the Arts

Commencement: The day after the Act receives Royal Assent

Purpose

The Bill amends section 115 of the *Broadcasting Services Act 1992* ('the Broadcasting Act') to increase the time when a sporting event protected by the anti-siphoning scheme may become available to pay-TV operators. Currently, a listed event is automatically de-listed 1008 hours (or six weeks) before the event; the Bill seeks to increase the time period to 2016 hours (or 12 weeks).

Background: the anti-siphoning scheme

Section 115 of the Broadcasting Act is the key legislative provision in what is known as the 'anti-siphoning' scheme. The scheme 'protects the access of Australian viewers to events of national importance and cultural significance on free-to-air television' by preventing pay-TV operators from siphoning off television coverage of those events before free-to-air broadcasters have had an opportunity to obtain the broadcasting rights.¹ (Free-to-air television providers include national broadcasters, such as the ABC and SBS, and commercial television broadcasting licensees.)

Subsection 115(1) provides that the Minister for Communications, Information Technology and the Arts ('the Minister') may, by notice published in the *Gazette*, specify 'an event, or events of a kind, the televising of which should, in the opinion of the Minister, be available free to the general public'. Subsection 115(1A) provides that the Minister may amend the notice to specify additional events or events of a kind. The list of events (usually contained in a schedule to the notice) is referred to colloquially as 'the anti-siphoning list'.

The first notice issued by the Minister (the *Broadcasting Services (Events) Notice (No. 1) of 1994*) has recently been superseded by the [Broadcasting Services \(Events\) Notice](#)

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[\(No. 1\) 2004](#), issued on 11 May 2004.² Schedule 1 to the revised notice contains the anti-siphoning list valid until 31 December 2005. It specifies events in the sports of horse racing, Australian Rules football, rugby league football, rugby union football, cricket, soccer, tennis, netball, basketball, golf and motor sports.³

It is important to note that the fact that an event is listed in the notice does not mean that it will be televised free-to-air. It simply means that free-to-air broadcasters are entitled to acquire the rights to televise the event without having to compete with pay-TV operators. The entitlement is subject to subsection 115(1AA) of the Broadcasting Act, which provides for the automatic de-listing of listed events 1008 hours (or six weeks) before the event.⁴ Once an event has been de-listed, pay-TV operators may apply for the rights to televise the event.

The automatic de-listing does not occur if the Minister has published a declaration under subsection 115(1AA) that the event continues to be specified in the notice. Subsection 115(1AB) provides that the Minister may only publish a declaration under subsection 115(1AA) if the Minister 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'.

The Bill amends subsection 115(1AA) to increase the time period for automatic de-listing from 1008 hours (or six weeks) to 2016 hours (or 12 weeks). According to the Minister, the six-week period 'has proved to be insufficient time for pay television operators to acquire the rights, as well as finalise schedules, negotiate advertising contracts and promote the event'.⁵

One final point to note in relation to the anti-siphoning scheme is that if a free-to-air broadcaster acquires the right to televise a listed event, it is not an exclusive right to broadcast the event. If the free-to-air broadcast will reach more than 50 per cent of the population, a pay-TV operator may also acquire a right to broadcast the same event.⁶

Further details about the inception of the anti-siphoning scheme (until 2001) can be found in the [Bills Digest](#) for the *Broadcasting Legislation Amendment Act (No. 2) 2001*.⁷

Basis of policy commitment

According to the Minister's second reading speech for the Bill on 24 June 2004, the anti-siphoning scheme 'remains an important policy objective for the government':

With fewer than one in four households having access to subscription television at this time, the rationale for the anti-siphoning scheme remains valid.

However, after extensive consultation, the government determined that the anti-siphoning scheme did need updating to better reflect the attitudes of Australians and the commercial realities of the sporting and broadcasting sectors.⁸

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As the Minister said earlier at the annual conference of the Australian Subscription Television and Radio Association on 8 April 2004:

For many Australians, knowing that they can switch on their free-to-air television and watch a football grand final or a Test match is as important as having free access to Australian-made drama or a daily news bulletin.⁹

Position of significant interest groups/press commentary

Free-to-air commercial broadcasters

On 7 April 2004, Commercial Television Australia (CTVA) (being the peak industry body representing free-to-air commercial broadcasters) welcomed the government's decision to renew the anti-siphoning list, referring to the fact that 78% of households choose not to pay for sport on television.¹⁰ Its CEO, Julie Flynn, commented on the rationale for the anti-siphoning list, saying:

... since its introduction a decade ago, the rationale for the list has always been to ensure that major sporting events remain available to all Australian viewers for free, with complementary coverage for those who choose to pay.

...

In 2003 major sporting events continued to dominate the top 20 most viewed programs in Australia and today's decision [to renew the list] is recognition of the importance sport on free to air television plays in the lives of many Australians.¹¹

On 24 June 2004, it was reported in *The Australian* that SBS had received more than 1000 calls from viewers wanting to know why SBS was not broadcasting the European Cup (soccer).¹² The European Cup is not included on the anti-siphoning list, even though the event was apparently 'the biggest event in terms of coverage across all Australian media [in mid-June 2004], with more than 8000 mentions'.¹³ SBS must compete with pay-TV operators for the right to broadcast the event, but pay-TV network Foxtel has outbid SBS every year since 1996.¹⁴ SBS does not have the budget to outbid Foxtel.

Pay-TV operators

On 7 April 2004, the Australian Subscription Television and Radio Association (being the peak industry body representing subscription television) expressed disappointment 'that the Government had failed to adopt a "use it or lose it" approach to anti-siphoning that would have maximised live coverage of sport on Australian television'.¹⁵ Its chairman, the Hon Nick Greiner, said:

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The Government's move to extend the automatic de-listing from six weeks to 12 weeks is a step forward, but the overall changes do not address fundamental problems with the scheme.

The new [revised anti-siphoning] list still includes a large range of events which are never covered by the free-to-air television networks. There is no logical reason why they should remain there.¹⁶

Similarly, Mr David Malone, CEO of Premier Media Group (which is jointly owned by Kerry Packer's Publishing & Broadcasting Ltd and Rupert Murdoch's News Corporation) said that the revised list 'didn't go far enough'.¹⁷ Premier Media Group operates Fox Sports. It would like the list to be reviewed more regularly; it would also like the government to introduce a 'use-it-or-lose-it' approach.¹⁸

Foxtel spokesman, Mr Mark Furness, said that the removal of local soccer, basketball, the International Grand Prix (motor cars) and the Hong Kong Sevens Rugby from the list 'was a step forward', but went on to say that 'there are still many sports in the list that are not covered by the [free-to-air] networks'.¹⁹ CEO of Foxtel, Mr Kim Williams, described the changes as 'largely illusory'. He suggested that 'questions of who shows what when it comes to sport should be worked out between free-to-air and subscription service providers. ... Markets work, and governments should have more faith in them'.²⁰ Previously, Mr Williams described the anti-siphoning list as 'abhorrent'.²¹

ALP/Australian Democrat/Greens policy position/commitments (if any)

According to a media release issued on 7 April 2004 by Mr Lindsay Tanner MP, Shadow Minister for Communications, Labor 'broadly supports the Government's long overdue updating of the anti-siphoning list and the adoption of a "use it or lose it" approach'.²² This statement seems to accord with comments made by Mr Tanner on 4 April 2002 in relation to the televising of AFL games in regional areas.²³ However, Labor does question some of the recent changes to the anti-siphoning list, particularly the decision to delete Formula 1 Grand Prix motor car races held overseas from the list.²⁴ In the context of the measures contained in the Bill, Mr Tanner said that Labor 'supports extending the automatic delisting period from six to twelve weeks to allow pay TV providers reasonable time to promote particular events'.²⁵ He said that 'Australian sporting fans must continue to enjoy being able to watch premium sporting events on free to air television'.²⁶

On 24 June 2004, Greens' MP Mr Michael Organ said that the Bill 'does nothing to ease the plight of the hundreds of thousands of Australian soccer fans missing out on Euro 2004, arguably the best football competition, which is only being shown on pay-tv'.²⁷ Mr Organ went on to say that the extension of the automatic de-listing period effectively forces 'free-to-air operators to lock in programming decisions three months in advance'.²⁸ He said:

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The Minister claims this will benefit sporting bodies and viewers, but the supporting reasoning clearly shows the real beneficiaries are the pay-tv operators.

If the government wants to get into bed with pay-tv they should come out and say so, instead of pretending the changes in the legislation benefit viewers.²⁹

Main Provisions

Item 1 of Schedule 1 amends subsection 115(1AA) of the Broadcasting Act to replace the figure 1008 [hours] with the figure 2016 [hours].

Item 2 of Schedule 1 appears in an unusual format. There seems to be no comparable provision in Australian legislation. **Item 2** deals with transitional arrangements for events which are scheduled to occur within 12 weeks of the commencement of the amendment contained in **item 1**, but it is not clear if the provision amends section 115 or indeed how (and where) it is to appear in the Broadcasting Act.

Essentially, **sub-item 2(1)** provides that the revised 12-week de-listing period applies to all listed events (including those added to the anti-siphoning list). However, **sub-item 2(2)** applies to events which are scheduled to be de-listed between six and 12 weeks of the commencement of **item 1**. It provides that such events are de-listed on the commencement of **item 1** (that is, on the day after the Act receives Royal Assent).

Concluding Comments

In its report [*Emerging market structures in the communications sector: a report to Senator Alston, Minister for Communications, Information Technology and the Arts*](#) (June 2003), the Australian Competition and Consumer Commission ('the ACCC') stated its concern that:

... by giving [free-to-air] broadcasters almost exclusive rights to the listed programming, the anti-siphoning list has substantial anti-competitive effects and is more intrusive than is necessary to achieve the policy objective of ensuring key sporting events are available to viewers on [free-to-air] television.³⁰

The Bill reduces the anti-competitive effects of the anti-siphoning scheme by doubling the automatic de-listing period. Nonetheless, it seems that the scheme needs to remain inherently anti-competitive in order to protect the interests of:

- the majority of Australians who are keen to watch televised sporting events but who do not have access to pay-TV, and

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- free-to-air television providers whose limited budgets do not enable them to compete on a level playing field with pay-TV operators.

As mentioned earlier in this Digest, it should be noted that even if a free-to-air broadcaster acquires the right to televise a listed event, it is not an exclusive right to broadcast the event. If the free-to-air broadcast will reach more than 50 per cent of the population, a pay-TV operator may also acquire a right to broadcast the same event.

The breadth of the anti-siphoning list itself may be contentious, but it is not the subject of the Bill. Some critics argue that the list is too extensive; that it is impossible for free-to-air television broadcasters to televise all the listed events, and that pay-TV operators should be afforded greater entitlement to bid for the listed events. For example, according to the Australian Subscription Television and Radio Association:

In 2003 the scheme protected more than 6,900 hours of sporting content and it included events which have historically received no coverage or extremely limited coverage by the free-to-air networks. The free-to-air networks broadcast less than 17% of this material live.³¹

According to one newspaper report, Foxtel claims that 85 per cent of the hours of the sports on the list is not televised live by the free-to-air networks, and that 75 per cent is not televised at all. Conversely, the free-to-air networks claim they show 72 per cent of all sport on the list. Apparently both groups can produce audited statements to prove their claims.³²

The anti-siphoning list is not exhaustive. There are many sporting events held in Australia and overseas which are not included on the anti-siphoning list. In principle, pay-TV operators and free-to-air broadcasters have equal access to acquire the rights to broadcast such events, although in reality free-to-air broadcasters may not be able to afford to acquire the rights.

An interesting corollary to the anti-siphoning scheme is the fact that the broadcast rights provide a significant boost to a sport's finances. For example, broadcast rights contribute about \$100 million a year to the AFL (or about 60 per cent of its revenue).³³ The importance of this issue is underscored by the fact that the Minister consulted with some of the major sport bodies before publishing the revised anti-siphoning list in May 2004. As a National Rugby League spokesman said: 'Sports have to make money to provide the sport in the first place and that requires free-to-air exposure. Major sports won't survive on pay [TV] exposure alone. ... Ours is a mass market and relies heavily on sponsorship'.³⁴

It is not clear how, or indeed if, doubling the automatic de-listing period affects these types of issues which lie at the heart of the anti-siphoning scheme. It may be necessary to wait and see.

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Endnotes

- 1 The Hon Daryl Williams, Minister for Communications, Information Technology and the Arts, ‘Amendments to the Anti-siphoning scheme’, *News release*, Number 41/04, 7 April 2004, available electronically at: http://www.dcita.gov.au/Printer_Friendly/0,,0_1-2_10-4_118167-LIVE_1,00.html.
- 2 Available electronically at: <http://scaleplus.law.gov.au/html/instruments/0/23/pdf/2004052701.pdf>.
- 3 The anti-siphoning list has been further revised for events taking place between 1 January 2006 and 31 December 2010. It is contained in Schedule 2 to the *Broadcasting Services (Events) Notice (No. 1) of 2004*. See the Hon Daryl Williams, Minister for Communications, Information Technology and the Arts, ‘Amendments to the Anti-siphoning scheme’, *News release*, Number 41/04, 7 April 2004, and is available electronically at: http://www.dcita.gov.au/Printer_Friendly/0,,0_1-2_10-4_118167-LIVE_1,00.html. By way of comparison with the current list of events, the revised list for events 2006–2010 does not include each AFL State of Origin match; matches involving the senior Australian representative team (other than test matches); each match in the (rugby union) Hong Kong Sevens Tournament (although each match in the Rugby World Cup is now listed); test matches involving the Australian cricket team (unless the match is played in Australia or in the United Kingdom); each finals match in the Ericsson Cup soccer competition; each match in the French Open and US Open tennis tournaments (only singles quarter-finals, semi-finals and finals matches are included); each match in the AAPT Championships (Adelaide), the Uncle Toby’s Hardcourts (Brisbane) or the Adidas International tennis tournaments; any basketball games; the US Open golf tournament or the US Professional Golf Association (PGA) Championship; and each race in the *Federation Internationale de l’Automobile* Formula 1 Championship (Grand Prix) or in the Moto GP (500cc motorbikes) held outside Australia. However, the revised list includes the Olympic Games and the Commonwealth Games.
- 4 The Bill seeks to double this time period to 2016 hours (or 12 weeks).
- 5 The Hon Daryl Williams, Minister for Communications, Information Technology and the Arts, ‘Amendments to the Anti-siphoning scheme’, *News release*, Number 41/04, 7 April 2004, available electronically at: http://www.dcita.gov.au/Printer_Friendly/0,,0_1-2_10-4_118167-LIVE_1,00.html.
- 6 Section 99 and clause 10(1)(e) in Part 6 of Schedule 2 to the Broadcasting Act. Specifically, clause 10(1)(e) provides that each subscription television broadcasting licence is subject to the condition that:
 - (e) the licensee will not acquire the right to televise, on a subscription television broadcasting service, an event that is specified in a notice under subsection 115(1) unless:
 - (i) a national broadcaster has the right to televise the event on its broadcasting service; or
 - (ii) the television broadcasting services of commercial television broadcasting

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licensees who have the right to televise the event cover a total of more than 50% of the Australian population;

- 7 Kim Jackson and Mark Tapley 'Broadcasting Legislation Amendment Bill (No. 2) 2001', *Bills Digest*, No. 169, Department of the Parliamentary Library, Canberra, 2000-01, available electronically at: <http://www.aph.gov.au/library/pubs/bd/2000-01/01BD169.htm>.
- 8 The Hon Daryl Williams, Minister for Communications, Information Technology and the Arts, 'Second reading speech: Broadcasting Services Amendment (Anti-Siphoning) Bill 2004', House of Representatives, *Debates*, 24 June 2004, p. 30 561.
- 9 Sally Jackson, 'Free-to-air ahead on siphoning', *The Australian*, 8 April 2004, p. 19.
- 10 Since 10 June 2004, CTVA has been renamed 'Free TV Australia'. See http://www.ctva.com.au/documents/Industry_Briefing_Media_Release_100604.pdf
- 11 Commercial Television Australia, 'Win for Free TV Sports Fans', *Media Release*, 7 April 2004, available electronically at: http://www.ctva.com.au/documents/Antisiphoning_070404.pdf.
- 12 Lara Sinclair and Sally Jackson, 'Fans want free-to-air Euro Cup', *The Australian*, 24 June 2004, p. 23.
- 13 See endnote 12.
- 14 See endnote 12.
- 15 Australian Subscription Television and Radio Association, 'Viewers the losers as sports anti-siphoning changes announced', *Media release*, 7 April 2004, available electronically at: http://www.astra.org.au/content/pdf/MediaReleases/ASTRA_MediaReleaseantisiphoning7April04.pdf.
- 16 See endnote 15.
- 17 Neil Shoebridge, 'How to fuel a growth in pay television', *Australian Financial Review*, 28 June 2004, p. 13.
- 18 See endnote 17.
- 19 Wendy Frew, 'Foxtel's digital rollout strikes snag', *Sydney Morning Herald*, 12 April 2004, p. 36.
- 20 Mark Day, 'Williams' departure leaves policy leadership vacuum', *The Australian*, 8 April 2004, p. 24.
- 21 See endnote 17.
- 22 Lindsay Tanner MP, Shadow Minister for Communications, 'Sports Broadcasting Changes', *Media Release*, 7 April 2004, available electronically at: <http://www.alp.org.au/media/0404/20007231.html>.
- 23 Lindsay Tanner MP, Shadow Minister for Communications, 'Alston Must Act on Anti-Siphoning', *Media Statement*, 4 April 2002, available electronically at: <http://www.alp.org.au/print.html?link=/media/0402/20000559.html>.
- 24 See endnote 3.

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- 25 See endnote 22.
- 26 See endnote 22.
- 27 Michael Organ MP, 'New Anti-Siphoning Laws No Help to Soccer Fans', *Media release*, 24 June 2004, available electronically at:
<http://www.greens.org.au/mediacentre/mediareleases/michaelorganmp/24062>.
- 28 See endnote 27.
- 29 See endnote 27.
- 30 ACCC, *Emerging market structures in the communications sector: a report to Senator Alston, Minister for Communications, Information Technology and the Arts*, June 2003, p.72, available electronically at:
<http://www.accc.gov.au/content/item.phtml?itemId=324108&nodeId=file3f2dbf1f2754e&fn=Emerging%20market%20structures%20in%20the%20communications%20sector.pdf>.
- 31 ASTRA, 'Viewers Denied Live State of Origin Coverage', *Media release*, 27 May 2004, available electronically at:
http://www.astra.org.au/content/pdf/MediaReleases/ASTRA_27May04_stateoforigin.pdf.
- 32 Neil Shoebridge, 'Rise in DVDs hits pay TV where it hurts', *Australian Financial Review*, 8 March 2004, p. 51.
- 33 See endnote 12.
- 34 Toni O'Loughlin, 'Major sports unite to free up TV bonds', *Australian Financial Review*, 23 February 2004, p. 3. See also Simon Yeaman and Alison Rehn, 'The game plan', *The [Adelaide] Advertiser*, 4 February 2004, p. 19.

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