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Supplementary Submission by Free TV Australia Limited

Supplementary Submission to the Senate
Environment, Communications, Information
Technology and the Arts Committee

Inquiry into the Broadcasting Services
Amendment (Media Ownership) Bill 2006
and related bills

4 October 2006

Use it or lose it regime

- A legislated scheme lacks the flexibility required to deal with complex sports rights negotiations and will inevitably result in events being wrongly delisted.
- Any Ministerial decision to remove an event from the list should be a disallowable instrument.

Allegations of Hoarding

- There is no evidence of hoarding by the free-to-air networks. Last year, free-to-air networks broadcast 1648 hours of listed sport.

Introduction

Free TV Australia Limited (**Free TV**) is the peak body representing all commercial free-to-air television licensees in Australia.

Free TV welcomes the opportunity to make a **supplementary** submission to the Senate Committee's Inquiry into the Broadcasting Services Amendment (Media Ownership) Bill 2006 and related bills.

Free TV limits its comments to rebut the assertions made in the submission and oral evidence provided by the Australian Subscription and Television Radio Association (ASTRA).

Section 1: Use it or lose it regime

- Free TV's position on a use it or lose it scheme is clearly set out in our first submission to the Committee.
- Free-to-air broadcasters do not agree that legislative amendment is required. Sports rights acquisitions and the coverage of sporting events are complex. It is not possible to develop a simple test in legislation that fairly assesses every scenario.
- Each sport has a unique set of contractual arrangements. For instance, the contractual arrangements for Wimbledon and the Australian Open are different. In the case of Wimbledon the rights holder contracts a set number of games per day to the free-to-air broadcaster whereas in the Australian Open the free-to-air broadcaster has access to all games on only 2 courts. AFL, NRL and Rugby Union all have a different set of rules governing the rights negotiation and access by free-to-air broadcasters. It does not make sense to legislate for each individual sport or contractual arrangement.
- The problem is twofold. Either the legislation would be so detailed as to not accommodate future contractual changes or it would be such a blunt instrument that you would lose events off the list that are currently being shown.
- The legislated system being proposed by ASTRA and Foxtel would inevitably see sports wrongly delisted. In their submission to the Committee they called for events to be delisted if they were not shown live, national and in full. Under such an arrangement AFL could come off the list. This is because free-to-air broadcasters show different, local AFL games into the team's home market. The ASTRA proposal would particularly disadvantage viewers in South Australia and Western Australia.
- This is clearly against the interest of the audience – but there would be no opportunity to stop events from being wrongly delisted if the test was legislated.
- If an event is delisted people who currently see the event for free will either miss out or be forced to pay. The current system works in the interests of viewers and should be retained.
- Any Ministerial decision to remove an event from the list should be a disallowable instrument. In arguing for a disallowable instrument, Free TV is not making the case anew for it to be disallowable, just seeking an amendment to s115(3) of the Broadcasting Services Act to correct the reference to s46A of the Acts Interpretation Act. The

Legislative Instruments Act of 2003 amended the Acts Interpretation Act 1901 by substituting the wording for section 46A and inserting new sections 46AA and s46B.

- This is an important decision; a major event like the World Cup Soccer should not be able to slip quietly off the list without any opportunity for Parliamentary review.

Section 2: Allegations of hoarding

- ASTRA has made a number of allegations of hoarding against free-to-air broadcasters over their usage of sports on the antisiphoning list. The Broadcasting Services Act provides that a free-to-air broadcaster contravenes the anti hoarding rule if they have acquired the rights to an event **and** they do not broadcast the event **or** make them available to any other broadcaster.
- Free TV Australia has addressed the general ASTRA claims in its submission to the Senate Committee. Their latest assertions do not stand up to scrutiny and are designed to mislead both the Senate and the Australian viewers.
- As stated in the Explanatory Memorandum to the Broadcasting Services (Subscription Television Broadcasting) Amendment Act 1992, section 115(2) “[the antisiphoning list] should ensure, on equity grounds that Australians will continue to have free access to important events. It will however, allow subscription broadcasters to negotiate subsequent rights to provide complementary or more detailed coverage of the events”.
- It is clear from this wording that the Parliament never intended that ALL of an event must be acquired by a free to air broadcaster. To the contrary it is clear that the antisiphoning rules were designed to give free to air broadcasters the first opportunity to bid for rights and that pay TV operators would be able to bid for complementary rights.
- That is exactly how the market has evolved and today the 75% of Australian viewers who cannot afford or choose not to pay for television are able to see the best games/matches for free and those who are able to pay are able to see a complementary cover on pay TV.
- **Wimbledon.** ASTRA argues that Foxtel, through Foxsports transmits all of the Wimbledon games which it acquires. They also argue that there were 564 matches on the list of which the Nine Network broadcast 55 and 45 live. This is not correct.

The Nine Network acquires exclusive rights to just 6 matches per day. The Nine Network showed 100% of their exclusive matches either in full or in part or passed the rights back.

All other matches are available to pay TV. The Nine Network is obliged under the contract to inform the pay TV operator as soon as they have chosen their games and passes back any games that are not shown due to matches running over, rain delays or other matters.

In the last Wimbledon tournament 7 such matches were passed back to pay TV.

The pay TV operator is also free to show the Nine Network games on delay. Independent analysis reveals that Foxtel showed 104 games either live, delayed or in highlight form and of those 33 were games previously shown by the Nine Network

leaving just 71 games broadcast exclusively by Foxtel. Independent analysis shows they broadcast just 15% of the matches available to them. It should also be noted that pay TV does its calculations based on the total number of matches in the Wimbledon tournament despite the fact that half of those matches are not covered by the host broadcaster.

There is no "hoarding" of rights by free-to-air broadcasters.

- **Winter Olympics 2006.** When the Seven Network acquired the rights to the Winter Olympics in Torino, they were on the open market. They were not subject to the antisiphoning rules.

Network Seven provided a total of 60 hours of coverage across the event. In addition to this extensive coverage of event Network Seven also broadcast more than 20 additional hours of edited highlights packages. The Opening and closing ceremonies were broadcast live as was the women's aerials where Alissa Camplin was competing. Those events were also reshowed on delay at a more accessible time for viewers. Network Seven scheduled broadcast of events to provide coverage at the time when the largest number of people would be able to view them rather than in the middle of the night when most Australians are asleep.

- **Commonwealth Games.** The Nine Network broadcast extensive coverage of the Commonwealth Games. Moreover it onsold rights to pay TV which was able to provide 7 channels of Commonwealth Games coverage. The Nine Network also passed on mobile television rights to Telstra.

There was no "hoarding" of rights.

- **Rugby Union.** The Seven Network broadcast the Wallabies matches live in Sydney and Melbourne and on delay in other states. Foxsports had live rights for all three tests and showed the matches lives and in full.

The Seven Network broadcast the Bledisloe cup live in New South Wales and Queensland. In Victoria and South Australia it was broadcast on delay; pay TV broadcast the event live in those States and nationally.

There was no "hoarding" of rights by free-to-air broadcasters. The list worked exactly as intended with the live rights to the Victorian broadcast being acquired by pay TV.

Delisting this event could not improve coverage. All it would do is reduce or extinguish existing free-to-air coverage.

- **National Rugby League (NRL).** The NRL Grand Final was broadcast live by Network Nine in all Eastern States and on delay in Adelaide and Perth consistent with contractual terms and based on an assessment of viewer preferences.
- **Australian Rules Football.** The AFL Grand Final was shown live in every state in Australia; there was no time zone delay.

Network TEN, the host free-to-air broadcaster used 100% of the rights to the Finals series. Ninety-three per cent of the finals were shown live, on an AFL mandated delay against the gate, or in one case on a time zone delay.

Two Friday night finals games were delayed until 10.35pm in NSW and QLD as neither city had a home team in these finals. This allowed viewers to watch an NRL Final that was simultaneously being shown live and then watch the AFL final. In both cases, pay TV was given the right to show the games live so viewers had the best of both worlds. This scenario again demonstrates how well the antisiphoning rules are working.

- **The Australian Open Tennis.** While there are a total of 411 games in the tournament, only 230 of these games are made available for broadcast by the rights holder. The rights holder chooses to have only 6 courts actually filmed during the tournament. The other courts are not available for broadcast by any broadcaster because they are simply not covered.

The Seven Network has the rights to show all matches in the tournament subject to footage being available to it. However, it has exclusive rights to matches on only two major courts, being Rod Laver and Vodafone Arenas.

Seven has no rights to sub-licence to pay TV. Pay TV contracts directly with the sporting body. Fox Sports acquires the rights to show every match in the tournament. Its only restriction is that it may not show live coverage of the matches on Rod Laver and Vodafone Arena acquired by the Seven Network. However it may show these matches on delay and every other game in the tournament is available live to pay TV.

Despite having the ability to offer multiple programming streams, they show only a fraction of what is available to them. Similar to the figures in relation to Wimbledon, we estimate that Fox Sports shows about 15% of the total number of games already available to them.

The Seven Network begins its broadcast at 11.00am each day and keeps their coverage going through till the early hours of the morning with a break for the news and current affairs programs in the early evening. This year, the Seven Network showed over 157 hours of coverage over the two week tournament. 81 games received dedicated coverage, with many more covered in highlights. Australian viewers are able to see the best matches for free and pay TV is able to provide a complementary coverage – exactly as the antisiphoning rules intended.

Again there is no “hoarding” of rights by free-to-air broadcasters.

- **The French Open Tennis.** The early rounds of the French Open were removed from the antisiphoning list in 2004. It is correct that there has been no free to air coverage of the finals. But the event has been covered by pay TV.

Again there is no “hoarding” of the event.