

25 September 2006

The Secretary
Senate Environment, Communications, Information
Technology & the Arts Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Sir

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

Premier Media Group (**PMG**) welcomes the opportunity to provide a submission in relation to the Committee's Inquiry into the Government's proposed media reform legislation.

However, PMG does not propose to address or respond to the broad range of matters covered by the proposed legislation and therefore, this submission focuses primarily on the *Broadcasting Legislation Amendment (Digital Television) Bill 2006 (Digital TV Bill)* and the Explanatory Memorandum for the Digital TV Bill.

As you may be aware, PMG has made many submissions over the years in relation to the operation of the anti-siphoning scheme and the significant adverse impact that it has had on PMG's business. Our most recent submission being in response to the Government's Discussion Paper on Media Reform Options entitled "Meeting the Digital Challenge: Reforming Australia's Media in the Digital Age" in late April 2006 (**April Submission**). PMG reiterates the major points of its April Submission as set out below.

- PMG is opposed to permitting the free-to-air broadcasters to multichannel (including the removal of genre restrictions on the national broadcasters) in the absence of fundamental reform of the anti-siphoning scheme.
- The anti-siphoning scheme has **not** met its original objective because it includes too many sporting events and it has never adequately addressed the problem of hoarding of such events by the free-to-air networks.
- The anti-siphoning list should include only those events which are broadcast live (or near live) and in full on free-to-air television.
- Extensive evidence already exists which supports the immediate removal of many events from the anti-siphoning list, particularly in relation to events which are part of competitions and tournaments which comprise multiple events.

- PMG supports the introduction of a “use it or lose it” scheme to prevent hoarding of anti-siphoning events by the free-to-air broadcasters provided that the operation of such scheme is transparent and enforceable and the criteria for such scheme is clear, precise and primarily concerned with **actual** coverage of events by the free-to-air broadcasters.

Amendments proposed by Digital TV Bill

As stated above, PMG is opposed to the introduction of multi-channelling by the free-to-air broadcasters without fundamental reform of the anti-siphoning scheme. However, as the Government is not minded to entertain the idea of introducing long overdue all-encompassing reform but rather adopt a gradual approach, it is of great importance to PMG and the subscription television industry as a whole to ensure that the proposed amendments in the Digital TV Bill adequately protect our interests in what continues to be a regulatory regime that will continue to favour the commercial interests of the free-to-air broadcasters.

In light of this, there are a number of matters which require further attention and modification in the Digital TV Bill as set out in the following paragraphs.

Proposed definition of “anti-siphoning event” undermines operation of multi-channelling restrictions

The proposed definition for *anti-siphoning event* to be included in subsection 6(1) of the BSA is manifestly inadequate as it does not take into consideration the effect of the operation of subsections 115(1AA) and 115(1B) of the Act. The failure to recognise the effect of these sections is to allow full multi-channelling by the free-to-air broadcasters and to nullify the entire intent of the Digital TV Bill to restrict the way in which multi-channelling of sports events listed on the anti-siphoning list can occur.

We assume that the failure to take into account the operation of these sections must be due to technical oversight because the Government’s stated public intention in the Explanatory Memorandum and elsewhere is to ensure that multi-channelling of events on the anti-siphoning list does not occur as it would “have an adverse impact on the subscription television industry’s capacity to provide sports programming”. Nevertheless, it is imperative that it is made clear in the proposed legislation that an event specified in a notice under subsection 115(1) is an *anti-siphoning event* for the purpose of the Bill notwithstanding the fact that the event is automatically de-listed by reason of subsections 115(1AA) and 115(1B).

Subsection 115(1AA) provides that each event specified in a notice made under subsection 115(1) is automatically removed from that notice 12 weeks prior to the event regardless of whether or not that event has already been acquired by a free-to-broadcaster. Therefore, all events are automatically removed from the notice 12 weeks before they are due to be held unless the Minister intervenes to keep particular events on the anti-siphoning list.

To illustrate the problem, assume that the Australian women's netball team is due to play a test match against Samoa on 31 March 2007 at 7.30pm AEST. Also assume that the ABC acquires the exclusive Australian broadcast rights to this match in November 2006. The following is the sequence which could occur under the Digital TV Bill as currently drafted:

1. The match is clearly captured under paragraph 10.1 of the *Broadcasting Services (Events) Notice (No. 1) 2004 (Notice)*.
2. Under subsection 115(1AA), the match would be automatically removed from the Notice 2016 hours before the event, i.e. on 6 January 2007 at 7.30pm.
3. The ABC decides that the match is not popular enough to be broadcast on the main ABC channel and chooses instead to broadcast it on ABC2 in full.
4. The proposed section 41H would not apply because at the time the event is broadcast, the match is not specified "in a notice under subsection 115(1)" as proposed under the definition of anti-siphoning event to be included in subsection 6(1).

As currently drafted the Bill allows the free-to-air broadcasters to circumvent the government's clear intent, which is to ensure that events which are on the anti-siphoning list are not multi-channelled, simply because those events drop off the list under the automatic delisting provisions of the Act (s115(1AA) and 115(1B)).

To fix this clear oversight in the drafting of the Digital TV Bill, PMG proposes that it be made clear that the multi-channelling exceptions allowing the televising of sports events on the anti-siphoning list do not apply because the events are automatically de-listed. If this change does not occur all the proposed multi-channelling restrictions in the Digital TV Bill are of little value.

Further as the proposed legislation currently stands, free-to-air broadcasters will be permitted to multi-channel all events listed under the anti-siphoning scheme on any SDTV multi-channel or HDTV multi-channel regardless of whether or not coverage of such events has been already shown, or simultaneously with coverage, on their primary or core service.

Even if the Minister exercised her discretion to publish in the Gazette, before the events are automatically de-listed 12 weeks prior to the event, a declaration that the events continue to be specified in the notice this would not solve the issue. This is because if the Minister does intervene to keep an event on the anti-siphoning list under subsection 115(1AA), the event will still automatically come off the list one week after the event has occurred by reason of the operation of subsection 115(1B). This again is surely not what the Government intends to occur as it would allow the free-to-air broadcasters to provide delayed coverage of an event that has been automatically de-listed in these circumstances regardless of whether or not such coverage has already be shown, or simultaneously with coverage, on their primary or core service.

Exception for multi-channelling of listed events in a news or current affairs program too broad

The proposed exception for multi-channelling of anti-siphoning events in a news or current affairs program also causes PMG great concern and is only further exacerbated by the uncertainty surrounding the definition of *anti-siphoning event* as highlighted above.

Notwithstanding such uncertainty, PMG is extremely concerned that the proposed exception provides yet another opportunity for the free-to-air broadcasters to further exploit the anti-siphoning scheme to their benefit.

It is well and truly open to the free-to-air broadcasters to manipulate the “news and current affairs” exception as it is currently drafted as its scope is far too broad. There is no justification for it to extend to anything but the inclusion of limited excerpts of anti-siphoning events in either a news bulletin or sports news bulletin.

Further, notwithstanding the explanations behind the intent of the exception on pages 37 and 58 of the Explanatory Memorandum to the Digital TV Bill, the application of the proposed exception to the broad nature of a “current affairs” program as defined in sub-paragraph (c) of the proposed definition is unacceptable for the following reasons:

- There is nothing in the proposed legislation to restrict the number of “current affairs” programs that can be broadcast in a 24 hour period;
- There is nothing in the proposed legislation to restrict the number of excerpts of an anti-siphoning event that can be broadcast in any one program. For instance, the meaning of “significant excerpts” on page 37 of the Explanatory Memorandum requires clarification – does it mean that a program must not include a significant number of insignificant (in terms of duration) excerpts in the one program or does it mean that a program must not include a limited number of significant (in terms of duration) excerpts in the one program?
- The reference to “part” of an event in the relevant sections of the proposed legislation is unlimited. While the Explanatory Memorandum notes that the exception would allow for the televising of parts of an anti-siphoning event within a sports segment, the exception would not cover, and therefore free-to-air broadcasters, would still be allowed to produce a sports highlights program which televised “significant” excerpts from previously un-televised anti-siphoning events, broken only by short commentary segments. This is due to a combination of the fact that “part” is undefined in the proposed legislation and the broad nature of sub-paragraph (c) of the relevant provisions which deal with *Televising part of an anti-siphoning event*. For instance, under the proposed section 41H(3), subparagraph (c) makes no reference to the requirement of whether or not the part has already been broadcast on, or simultaneously with, the primary or core service. This therefore suggests that under this particular provision as with other provisions of the same kind under the proposed legislation it does not matter whether the ‘part’ has been previously or simultaneously broadcast on the primary or

core service for it to be included in a news or current affairs program on a free-to-air broadcaster's multi-channel.

Finally, even if the exception was amended so that it only applies to news bulletins and sports news bulletins, the matters highlighted in the bullet points above would still require clarification otherwise the free-to-air broadcasters could continue to flagrantly undermine the intent of the scheme.

Review of anti-siphoning provisions

The Digital TV Bill provides that a review of the anti-siphoning provisions will take place after 1 January 2009 and before 31 December 2009 by way of the inclusion of section 115A in the BSA. The Explanatory Memorandum does not offer any explanation as to why the review needs to occur within such a restrictive timeframe and PMG queries why this amendment cannot commence on 1 January 2007 in order to provide the subscription television industry with at least some certainty that a review of the anti-siphoning scheme will occur some time within the next 3 years.

As the Government acknowledged on page 29 of its Discussion Paper regarding Media Reform earlier this year, the Government could bring forward the timing for the relaxation of the restrictions on full multi-channelling by the commercial broadcasters "should there be any significant changes in the lead up to analogue switchover which alters the balance in favour of an earlier adjustment". The Discussion Paper notes that such changes could include technological advances. If there were any significant changes which justified bringing forward the timing for the relaxation of the restrictions on full multi-channelling (including due to technological advances), then so would a review of the operation of the anti-siphoning scheme have to be brought forward. By having the proposed section 115A commence from 1 January 2007, the Government would have greater flexibility to bring forward such review in these circumstances.

Further, PMG is concerned that the proposed review of the anti-siphoning provisions as specified in the proposed section 115A does not go far enough. If the entire operation of the anti-siphoning scheme is to be subject to review, then the anti-hoarding provisions contained in Part 10A of the BSA and the numerous provisions proposed in the Digital TV Bill which are linked to the operation of anti-siphoning scheme should also be subject to review.

End of Simulcast Period must be specified

The Digital TV Bill does not provide for an amended simulcast period which has implications for a number of sections within the Bill. PMG endorses the submissions of FOXTEL and ASTRA in relation to this particular point.

“Use it or Lose it” Scheme

While PMG welcomes the Government’s promise to implement a “use or lose it” scheme from 1 January 2007, in light of the above, PMG is extremely concerned that the Digital TV Bill in its current form is **severely inadequate** to address the continued rorting of the anti-siphoning scheme by the free-to-air broadcasters.

Of major concern is the fact that the “use it or lose it” scheme has not even been addressed in the Digital TV Bill nor has it warranted a reference on page 11 of the Explanatory Memorandum to the Digital TV Bill where options for reform of the anti-siphoning scheme are specified. The Government’s apparent reasoning for such disregard to the “use it or lose it” scheme is indicated in the Explanatory Memorandum to the Bill in that *[t]he “use it or lose it” scheme does not require legislation*. PMG finds this totally unacceptable particularly when the free-to-air broadcasters are being granted clear and certain entitlements to multi-channel under the proposed Bill.

A recent announcement by the Minister for Communications, Information Technology and the Arts on 21 September 2006 indicates *that [i]t is intended that guidelines for “use” and the process for considering events for removal will be finalised well in advance of the 1 January 2007 commencement date*. Again, PMG finds the prospect of introducing unenforceable “guidelines” totally unacceptable as they will only serve to encourage the free-to-air broadcasters to continue to disregard the original objective of the anti-siphoning scheme.

For example, the ABC’s continued disregard for the genre restrictions which currently apply to its multi-channels by broadcasting sport on ABC2 and the Government’s inaction, despite numerous requests from ASTRA, to enforce the conditions under the *Broadcasting Services Act 1992 (BSA)* is a case in point which leaves us with little confidence that the “use it or lose it” guidelines will be treated with anything but indifference by the free-to-air broadcasters and the Government.

Therefore, it is imperative that the proposed “use it or lose it” scheme is given “teeth” with the full force of the law behind it and PMG believes the best way for this to occur is by way of legislative amendment to section 115 of the BSA with the criteria for determining whether an event has been used by a free-to-air broadcaster to be specified by way of regulation.

PMG would be happy to assist the Committee with proposed drafting for such legislative amendments and regulations if required.

PMG would also be pleased to discuss any issues highlighted in this submission further with the Committee if required and requests the opportunity to provide further comment in relation to any amendments to the Digital TV Bill proposed by the Committee following completion of its review of the submissions and Committee hearings in relation to the Inquiry.