

Optus submission to the

DBCDE discussion paper

**Sport on television: A review of the anti-siphoning scheme in the
contemporary digital environment (August 2009)**

16 October 2009

1. Executive Summary

- 1.1 Optus is a leading integrated national telecommunications provider, delivering cutting-edge communications, information technology and entertainment services throughout Australia. Our services are used by consumers, businesses, corporate entities and government agencies.
- 1.2 Optus' interest in '*Sport on Television: a review of the anti-siphoning scheme in the contemporary digital environment*' (Discussion Paper) relate to Optus' role as a purchaser of internet and mobile sports rights for our internet and mobile platforms supported through the online Optus Zoo portal, www.optuszoo.com.au.
- 1.3 Optus is also a reseller of Foxtel Digital Subscription TV (STV) services via Optus TV.
- 1.4 In summary, Optus considers that it is an appropriate time for the Government to adopt a significant policy change with a shift in focus from one of protection toward one of inclusiveness and open access.
- 1.5 Specifically, Optus proposes that the current anti siphoning regime be replaced with an access regime that would oblige acquirers of exclusive premium content (including sports content) deemed to have market power in the distribution of that content to provide open access to such content on reasonable terms.
- 1.6 This policy approach would enable STV operators to purchase content that is currently on the anti-siphoning list, but would include a safety net of specified events of 'national importance and cultural significance' for simultaneous broadcast on Free-To-Air (FTA). Such an approach would be consistent with the Government's broader pro-competition and social policy objectives.
- 1.7 If the Government does not adopt such a policy shift, Optus would support a view that the anti siphoning list should be substantially shortened via an objective and transparent process so that only iconic sporting events of national interest, for example the Melbourne Cup, AFL, and NRL football finals etc. remain listed.
- 1.8 Optus is strongly opposed to the extension of the anti siphoning scheme to new media platforms in the current environment where services are complementary and not substitutable to consumer's television viewing habits.
- 1.9 However, while new media platforms can be seen today as a complimentary mechanism for consumers to access content, as technology develops and consumer viewing habits change this may not always be the case.
- 1.10 When new media platforms become substitutable, Optus would support an access regime that would oblige acquirers of exclusive premium content, including sports content, to provide open access to such content on reasonable terms applying to new media platforms.
- 1.11 The access regime would be agnostic to the delivery mechanism, which would reduce Government concerns about issues relating to old or new media.

2. The current anti siphoning regime

- 2.1 The objective underlying the anti siphoning regime is to ensure that events of ‘national importance and cultural significance’ can not be siphoned off exclusively to STV but would remain widely available to all Australians.
- 2.2 While the policy intent of the anti siphoning regime was sound, it has morphed into an unwieldy list of over 1,300 sporting events and restricted the market for sports broadcast rights and the ability of the STV sector to broadcast and consumers to view a broad range of sporting events.
- 2.3 Since the inception of the anti siphoning regime, there has also been a major shift in how Australian consumers engage, watch and interact with content that was traditionally delivered only via FTA networks.
- 2.4 Key examples of this shift include the fact that 33% of Australian households now have subscription television services and the significant improvements to the capacity and speed of mobile and broadband networks to accommodate the delivery of video services.
- 2.5 However, changes in consumer viewing habits are likely to accelerate with the development of new platforms such as the proposed open access National Broadband Network (NBN).
- 2.6 Optus submits that now is an appropriate time for the Government to adopt a significant policy change with a shift in focus from one of protection towards one of inclusiveness and open access.
- 2.7 Specifically, Optus proposes that the current anti siphoning regime be replaced with an access regime that would oblige acquirers of exclusive premium content (including sports content) that are deemed to have market power in the distribution of that content to provide open access to such content on reasonable terms¹.
- 2.8 Optus considers that such reform would improve competitiveness within the STV market which in turn will deliver improvements for consumers by driving improved affordability and accessibility for those services.
- 2.9 Such a policy will be especially important in the context of the roll-out of the NBN which will open up new possibilities for the delivery of content to consumers.
- 2.10 This policy approach would enable STV operators to purchase content that is currently on the anti-siphoning list, but would include a safety net of specified events of ‘national importance and cultural significance’ for simultaneous broadcast on Free-To-Air (FTA). Such an approach would be consistent with the Government’s broader pro-competition and social policy objectives.
- 2.11 If the Government does not adopt such a policy shift, Optus would support a view that the anti siphoning list should be substantially shortened via an objective and transparent process so that only iconic sporting events of

¹ This is similar to the proposed ‘wholesale must-offer’ obligation that has been recently proposed by Ofcom in the UK.

national interest, for example the Melbourne Cup, AFL, and NRL football finals etc. remain listed.

- 2.12 This view concurs with the view advocated by the Australian Subscription Television and Radio Association (ASTRA) in its submission in response to the Discussion Paper that in summary:
- supports reform of the anti siphoning regime that at a minimum would see the size of listed anti siphoning events reduced to align with its intended purpose, to ensure major sporting events are available FTA.
 - notes that the current list contains 1,300 events, with 77% of those not shown on FTA channels;
 - states that the current regulatory environment puts control of sports rights, and therefore sports viewing, in the hands of the FTA sector; and
 - provides evidence that sports fans are frustrated that they cannot see sporting events live, despite receiving both STV and FTA services, while consumers who are ambivalent to sports coverage, consider that there is too much sport on FTA channels and not enough choice of alternate content.

- 2.13 This view is also consistent with the recommendation of the Productivity Commission's August 2009 Research Report, *Annual Review of Regulatory Burdens on Business: social and economic infrastructure services* that stated:

‘the anti siphoning regime imposes regulatory burdens because of the protracted commercial negotiations required in respect of listed events. To address this issue the Australian Government should substantially reduce the anti siphoning list’.²

3. The anti siphoning regime and new media platforms

- 3.1 The role of new media platform is one that Government will need to give careful consideration to in designing its policy responses.
- 3.2 It is clear that today, sport accessed through new media platforms, such as Optus' online Zoo portal, is complementary to consumers' television viewing; not a substitute.
- 3.3 As noted in the Discussion Paper, such content is available on an 'on demand' basis, with customers able to stream or download 'snack sized' bites of content, which in terms of sports content commonly consist of highlights packages and updates on results.
- 3.4 The Discussion Paper also notes that mobile, internet or what is known as 'new media' rights are either negotiated directly with the sports rights holder or via an on selling agreement with a FTA or STV provider.

² Productivity Commission 'Annual Review of Regulatory Burdens on Business: social and economic infrastructure services', August 2009, p 163

- 3.5 An example is Optus' agreement with the Seven Network to live stream Seven's official broadcast of the '2009 Australian Open Tennis' for Optus 3G mobile customers with compatible handsets.
- 3.6 In addition to live streaming, the service provided video highlights, player profiles and news, schedule of play, results, tournament information and downloads including wallpapers and mobile games.
- 3.7 The service was used by our customers to 'complement' their viewing of the event as they travelled to and from work and on their lunch breaks and played an important role in increasing the size of the event's broadcast viewing market.
- 3.8 While it is likely that in coming years Australian consumers will experience and benefit from new and innovative services, such as the greater availability and breadth of mobile TV and IPTV, it remains the case - and will continue to be so for some time to come - that FTA and, to a lesser extent, STV, will remain the overwhelmingly dominant platforms for provision of sporting content in Australia.
- 3.9 Therefore Optus is strongly opposed to the extension of the anti siphoning scheme to new media platforms in the current environment where services are complementary and not substitutable to consumer's television viewing habits.
- 3.10 However, while new media platforms can be seen today as a complimentary mechanism for consumers to access content, as technology develops and consumer viewing habits change this may not always be the case.
- 3.11 Optus would support an access regime that would oblige acquirers of exclusive premium content, including sports content, to provide open access to such content on reasonable terms applying to apply to new media platforms when these new media platforms become substitutable,
- 3.12 The access regime would be agnostic to the delivery mechanism, which would reduce Government concerns about issues relating to old or new media.
- 3.13 If the Government does not adopt an access regime and decides instead to retain the current or a reformed anti-siphoning list then it will need to very carefully assess which platforms that policy would apply to.
- 3.14 This would require the Government to carefully define 'new media' platforms and identify all the potential future delivery mechanism for premium content and assess whether these are like to act as complimentary or substitute services to more traditional TV platforms.
- 3.15 Special consideration will also need to be given to the NBN since it is clear that once it is deployed it will create new competitive dynamics and facilitate a wave of innovation and entrepreneurialism the specifics of which, to a significant extent, are unforeseen.
- 3.16 There is also a risk that current control of exclusive sports and other premium content rights could be leveraged into a position of market dominance that would threaten the emergence of competition in an NBN environment.

- 3.17 This potential scenario has in part been anticipated and potentially mitigated by the proposed extension of Part XIB of the *Trade Practices Act 1974* to include content services. However, as outlined earlier, Optus considers that it is appropriate for the Government to replace the current anti-siphoning regime with an access regime for premium content, including key sporting events.
- 3.18 It is also Optus' view that on many levels the NBN makes the policy case for such a regime more compelling.
- 3.19 The NBN will deliver a fat pipe into all households in Australia, a development which will transform the footprint of the existing major STV player. Under such an environment content could well be used to build a monopoly position not only in the delivery of STV services, but also broadband services.