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Mr Simon Pelling
General Manager
Broadcasting and Digital Switchover
Department of Broadband, Communications and the Digital Economy
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By email: sportontvreview@dbcde.gov.au

Dear Mr Pelling

Submission to the review of the anti-siphoning scheme

The Australian Competition and Consumer Commission welcomes the opportunity to comment on the review of the anti-siphoning scheme following the recent release of the *Sport on Television* discussion paper by DBCDE. The ACCC offers the attached submission for your consideration.

Yours sincerely

Michael Cosgrave
Group General Manager
Communications Group

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

SUBMISSION TO THE REVIEW OF THE ANTI-SIPHONING SCHEME

The Australian Competition and Consumer Commission (ACCC) seeks to enhance the social and economic welfare of the Australian community by fostering competitive, efficient, fair and informed markets in Australia.

The ACCC offers the following comments on the anti-siphoning scheme established under section 115 of the *Broadcasting Services Act 1992* (the Act).

The Explanatory Memorandum to the original legislative provisions for the anti-siphoning scheme notes that the purpose of the scheme is to ensure that events of national importance and cultural significance be received by the public free of charge.¹ To achieve this, the scheme seeks to prevent listed events from being ‘siphoned’ by subscription television broadcasters.

The ACCC is concerned that there is a tension between the purpose of the anti-siphoning scheme and the objects of the Act, which include the provision of ‘a regulatory environment that will facilitate the development of a broadcasting industry in Australia that is efficient, competitive and responsive to audience needs’.²

The anti-siphoning scheme reduces competition between subscription television and free-to-air (FTA) broadcasters. It also has the potential to reduce the amount of premium content that is actually made available to the Australian public. It is important that the costs associated with the anti-siphoning scheme are considered in an assessment of the merits of the scheme. In this regard, the ACCC supports the view put forward by the Productivity Commission in its 2009 *Annual Review on Regulatory Burdens on Business* report.

The ACCC recommends that the number of events on the anti-siphoning scheme be reduced, that the ‘use it or lose it’ guidelines be formalised in legislation and that the anti-siphoning scheme not be extended to new media.

Costs of the anti-siphoning scheme

It can be expected that firms facing vigorous competition will be more responsive to the preferences of consumers than those that do not. Firms in the broadcasting sector are no different.

Under the anti-siphoning scheme, subscription television broadcasters have less ability to obtain the broadcast rights to premium sporting content than FTA broadcasters, which reduces the ability of subscription television broadcasters to attract customers. To the extent that FTA and subscription television broadcasters compete in the same market, this is likely to reduce competition. This consequence is particularly important given that FTA broadcasters are already protected from full

¹ Department of Broadband, Communications and the Digital Economy, *Sport on Television: A review of the anti-siphoning scheme in the contemporary digital environment* (Discussion paper), August 2009, p 5.

² *Broadcasting Services Act 1992* (Cth), part 1, section 3 1(b).

competition through the limited number of FTA licences that are available. Furthermore, the anti-siphoning scheme may also reinforce Foxtel's strong position in the market in which subscription television services are provided because the reduction of available compelling content acts as a barrier to entry for new subscription television providers.

The ACCC is concerned that the anti-siphoning scheme also imposes costs on content producers, primarily sporting bodies. By placing restrictions on the ability of subscription television providers to purchase content, the scheme reduces demand for that content by excluding these providers from the bidding process. This may reduce the revenue that sporting bodies receive for broadcast rights, thereby reducing available funding to develop their sport. The ACCC considers that government regulations should not place restrictions on sporting bodies in their choice of broadcast partner, which may be driven by a desire to maximise audience reach or broadcast revenue or a combination of both.

The ACCC is also concerned that the scheme has the potential to reduce the broadcast of listed events, to the detriment of viewers and sporting bodies. FTA broadcasters have regular programming commitments and have limited capacity available to broadcast listed events. This has led to FTA broadcasters obtaining the rights to an event on the anti-siphoning list but only showing selected parts of the event. The multiple channels of a subscription television provider—including those channels devoted to sport—mean it is better positioned to broadcast some of the longer or multi-round events on the anti-siphoning list. The ACCC notes that allowing the broadcast of listed events on FTA digital multi-channels may address this concern by increasing FTA broadcasters' capacity. However, without other modifications to the scheme, this would exacerbate the adverse effects on competition between FTA and subscription television broadcasters.

The anti-siphoning scheme should be significantly shortened

The ACCC considers that the anti-siphoning list should be substantially shortened both in terms of the number of sports covered and the number of events listed within each particular sport. The list could be shortened by including only the finals of events while still meeting the objectives of the scheme.

The ACCC considers it is likely that much of the content currently listed would be broadcast on FTA television without the anti-siphoning scheme. It is likely that FTA broadcasters will outbid subscription television providers for most premium sports content due to the nature of the two business models' primary revenue source. FTA broadcasters receive most of their revenue from advertising, unlike subscription television broadcasters, which predominantly rely on subscription revenue. Events such as the AFL grand final, which attract very large audiences, are likely to provide FTA broadcasters with advertising revenues in excess of the revenues subscription television broadcasters are likely to achieve from the same right.

The ACCC also notes that broadcast rights are only one source of revenue for sporting bodies. Other sources, including memberships, ticket sales and merchandise, rely heavily on the popularity of the sport. Therefore, there are likely to be incentives for

sporting bodies to sell broadcast rights for sports of wide appeal to a FTA broadcaster that is able to maximise audience reach, reducing the need for regulatory intervention.

Further, the need for an extensive anti-siphoning scheme to ensure events of national and cultural significance are broadcast on FTA television is brought into question by the increasing penetration of subscription television.³ Sport is a strong driver of the take-up of subscription television, which suggests that sports fans are more likely to have subscription television than the general population. Therefore, if listed events were to be siphoned by subscription television, any negative effects resulting from a reduction of premium content shown on FTA television would be reduced.

Strengthening the ‘use it or lose it’ provisions

The ‘use it or lose it’ guidelines were developed to provide criteria for considering whether a listed event would remain on the anti-siphoning list.

The arrangements set out in the guidelines have the potential to minimise the costs of the anti-siphoning scheme by progressively removing events from the list that are not given adequate coverage by FTA broadcasters. This may improve the coverage of events, benefiting television viewers and the sporting bodies, as well as increase competition between subscription and FTA broadcasters. The ACCC notes that the ‘use it or lose it’ guidelines are not currently in use.

The ACCC considers that the guidelines should be strengthened to include a clear presumption that a listed event that does not meet the ‘use it or lose it’ criteria will be automatically delisted, unless the Minister determines otherwise. The arrangements should also be formalised in legislation. The criteria for determining the removal of an event should be as objective as possible. The regulatory agency responsible for overseeing the ‘use it or lose it’ provisions would need to be given powers to monitor and enforce the arrangements to ensure events that fail to meet the criteria are removed from the anti-siphoning list in a timely manner.

Strengthened ‘use it or lose it’ provisions will provide a practical discipline on the length of the anti-siphoning list, reducing the negative impact of the list on competition and the coverage of premium sporting events.

The anti-siphoning scheme should not be extended to new media

The discussion paper sought views on the effect of new media sports programming on the anti-siphoning scheme.⁴

The delivery of content over broadband (such as IPTV) and to mobile handsets is still in its infancy. Experience to date suggests IPTV is currently constrained by broadband speeds, backhaul and data caps. As a result, IPTV is not a major content delivery platform in Australia at this stage. Additionally, the uptake of mobile TV is

³ Australian Communications and Media Authority, *Digital Television in Australian Homes, 2007*, p 6.

⁴ Department of Broadband, Communications and the Digital Economy, *Sport on Television: A review of the anti-siphoning scheme in the contemporary digital environment* (Discussion paper), August 2009, p 25.

constrained by technology such as small screen sizes and relatively short battery life. Therefore, content shown on the platform is usually limited to short clips and highlights. With these constraints, new media platforms cannot be considered a substitute for FTA or subscription television. Rather, these platforms appear to be complements to the viewing of sport on traditional media platforms.

The discussion paper recognised there is ‘little evidence that sporting events are being exclusively ‘siphoned’ to new technology platforms’.⁵ The ACCC supports this view. Extending the anti-siphoning scheme to these new platforms is therefore not only unnecessary but may stifle their development by reducing access to premium content.

It is important to note that extending the anti-siphoning scheme to new sectors will limit those sectors’ potential for development. The ACCC notes that new media, including IPTV, may be a significant driver of demand for communications services, particularly in an NBN environment. Extending the anti-siphoning scheme to new media may therefore stifle the development of that sector.

The ACCC further notes that new media has the potential to provide content in line with the anti-siphoning scheme’s overarching objective of ensuring free public access to culturally significant events, depending on the development of business models to support new media platforms.

Other issues

In its 2003 report on *Emerging Market Structures in the Communications Sector*, the ACCC recommended a ‘dual rights’ scheme be implemented whereby rights to events on the anti-siphoning list would be made available to both FTA and subscription television platforms on a non-exclusive basis.⁶ Further consideration would need to be given to the potential benefits and implications of a dual rights scheme for content producers as well as FTA and subscription television providers, in light of the current media environment, before such a scheme was introduced.

The ACCC’s recommendations

The ACCC considers that the anti-siphoning scheme, in its current form, is more burdensome than necessary to achieve its objective of ensuring events of cultural significance or national importance are available to the public free of charge. The scheme should be amended so that it achieves its objectives with the minimum consequent distortions to competition.

The ACCC recommendations are as follows:

- The anti-siphoning list should be substantially shortened both in terms of the number of sports covered and the number of events listed within a particular sport.

⁵ Department of Broadband, Communications and the Digital Economy, *Sport on Television: A review of the anti-siphoning scheme in the contemporary digital environment* (Discussion paper), August 2009, p 23.

⁶ ACCC, *Emerging Market Structures in the Communications Sector*, June 2003, pp 74-76.

- ‘Use it or lose it’ provisions should be formalised in legislation and strengthened to include a clear presumption that events that do not receive adequate coverage will be automatically delisted, unless the Minister determines otherwise.
- The scheme should not be extended to new media – it is important that regulation does not stifle the innovation of the new media sector.
- Once the list is substantially shortened, FTA broadcasters should be permitted to show content on their digital multi-channels. This will provide additional capacity for FTA broadcasters to provide a wider range of sports coverage, resulting in greater consumer choice.
- The scheme should be reviewed within five years, to ensure it remains effective and well targeted.

Conclusion

Competition in all industries is important to promote efficient pricing and consumer choice. Therefore, government regulation should be targeted at the specific policy objectives and distortions to competition should be minimised. In the broadcasting sector, promoting competition between traditional FTA and subscription television platforms, as well as new media platforms, will help ensure Australians have the opportunity to view a wide range of programs, including sports events of national and cultural significance. In the short term, competition can be promoted by significantly shortening the anti-siphoning list and strengthening the ‘use it or lose it’ provisions.