Senate Committee Gives a Free Kick to Anti-siphoning Reform

Victoria Wark and Maryann Muggleston provide an update on the status of anti-siphoning reforms.

The Senate is poised to continue debate on the *Broadcasting Services Amendment (Anti-siphoning) Bill 2012* (the ***Bill***) after the Senate Environment and Communications Legislation Committee recently recommended that the Bill be passed. If enacted, the Bill will overhaul the current anti-siphoning regime and will have significant consequences for broadcasters, rights-owners, and content providers of major sporting events in Australia.

A feature of the proposed anti-siphoning regime is the widespread recourse to Ministerial determination exercised by way of legislative instrument

The key proposed changes that will impact industry players include:

- the recurrent recourse to Ministerial determinations which creates a regime that is uncertain. Together, these Ministerial powers give the Government greater control over the scheduling and televising of sporting events;
- the extension of the anti-siphoning regime to content service providers which will impact negotiations for exclusive, online sports content;
- the revision of the 'anti-hoarding' coverage obligations in the form of the 'must offer' rules and the extension of the 'must offer' rules to all anti-siphoning events. These changes, as stated in the Explanatory Memorandum, intend to provide 'every opportunity for full coverage with a preference for free-to-air.' They may, however, affect competitive bidding processes for broadcast rights. The practical operation of the 'must offer' rules will also be dependent on the commercial arrangements between rights holders and broadcasters or program suppliers; and
- the introduction of notification requirements for free-to-air broadcasters and program suppliers which will enable the ACMA to monitor compliance with the new regime.

Background

In November 2010 the Minister for Broadband, Communications and the Digital Economy (the ***Minister***) announced major changes to the current anti-siphoning regime in the *Broadcasting Services Act 1992* (Cth) (the ***BSA***). Shortly after, the Minister published a revised anti-siphoning list, the *Broadcasting Services (Events) Notice (No. 1) 2010* (the ***List***) which revoked and remade the previous anti-siphoning list which had been in operation since 2004.

Since December 2010 the List has been amended 23 times to remove certain sporting events and enable free-to-air broadcasters the opportunity to premiere such events on their digital multi-channels. Following widespread industry consultation, the Government introduced the highly anticipated *Broadcasting Services Amendment (Anti-siphoning) Bill 2012* into the Senate in March 2012. The Bill was immediately referred to the Senate Environment and Communications Legislation Committee (the ***Senate Committee***) which issued its report in May 2012. Subject to two modifications, the Senate Committee recommended that the Bill be passed.

The Explanatory Memorandum to the Bill makes clear that the 'general purpose of the Bill is to ensure that opportunities for free-to-air television coverage of anti-siphoning events are maximised… by [among other things] restricting the acquisition of rights to televise anti-siphoning events by subscription television licensees'.[1] This reflects a similar aim of the current regime, that is, to ensure that 'events of national importance and cultural significance…be received by the public free of charge'.[2] However, the Bill extends the complexity and reach of the current anti-siphoning regime. The key features and impacts of the Bill are outlined below.

Increase in Ministerial discretion

A feature of the proposed anti-siphoning regime is the widespread recourse to Ministerial determination exercised by way of legislative instrument. While the new determinations will ultimately be subject to disallowance in Parliament, the Minister's powers, as currently provided for in the Bill, are unfettered.[3] The Minister's extensive powers include the power to determine:

- what events 'should be available free to the general public' as either a Tier A or Tier B anti-siphoning event.[4] Tier A events will include events of apparent national or international significance (such as the Melbourne Cup and AFL and NRL Grand Finals), while Tier B events will include domestic and international events of less significance, but still worthy of being available to the general public (such as the NRL State of Origin Series and the Olympic Games).[5] Tier A events must be televised with no delay or as short a delay as technically possible, while Tier B events must be televised with either no delay, a delay that is less than 4 hours as specified by the Minister (but not in the case of AFL matches) or a delay of not more than four hours.[6]
- that certain Tier B events of lengthy duration and involving multiple simultaneously occurring contests (such as the Australian Open tennis championships or Commonwealth

1 Explanatory Memorandum, Broadcasting Services Amendment (Anti-siphoning) Bill 2012 (Cth), page 3.

2 Explanatory Memorandum, Broadcasting Services (Subscription Television Broadcasting) Amendment Bill 1992 (Cth).

3 See for example the following sections of the Broadcasting Services Amendment (Anti-siphoning) Bill 2012 (Cth): section 115E(3) (the power to declare exemptions from interim notification requirements); section 145D(3) (the power to declare that the anti-siphoning provisions do not apply to a part of an anti-siphoning event); and section 145ZM(3) (the power to exempt an anti-siphoning event from the requirement to be broadcast on a core channel).

4 Broadcasting Services Amendment (Anti-siphoning) Bill 2012 (Cth), section 145E.

5 Above note 1, page 14.

6 Above note 3, sections 145B and 145H.

the Minister also retains the discretion to declare that an event continues to be an anti-siphoning event if the Minister is satisfied that a commercial television broadcasting licensee or a national broadcaster has not had a reasonable opportunity to acquire the right to televise the event.[14]

Games) are to be a 'designated group' and subject to a total and daily minimum number of hours of television coverage as well as a 24 hour period in which the free-to-air broadcaster must televise the event.[7] Designated group events must be broadcast with no delay or with a delayed starting time of not more than 24 hours.[8]

- that specific Tier B events, limited at this stage to certain AFL and NRL matches, comprise a 'quota group'. Category A quota groups will be subject to a quota number determined by the Minister. That number constitutes the number of games per round that must be shown of that competition on free-to-air television. The quota number for each round cannot exceed the total number of anti-siphoning events in that quota group or the applicable cap of 4 AFL games per round and 3 NRL games per round.[9] Category B quota groups will be subject to a series of 'associated set conditions' (for example, that one event take place on a Friday night) as well as a quota number. The conditions (which may be 'contingent' and disregarded if the quota number and associated conditions are met) are intended to help assign an event to count towards meeting the quota number.[10] Quota group determinations will only apply to those rights acquired after the registration of the determination on the Register of Legislative Instruments.[11]
- that a free-to-air broadcaster is unconditionally or conditionally exempt from a new requirement to broadcast Tier A anti-siphoning events on its core channel.[12] This power means that the Minister could permit a free-to-air broadcaster to televise an event of national or international significance exclusively on one of its multi-channels (and potentially broadcast more valuable content on its primary channel) without breaching the coverage obligations of the new regime.
- that, for 'the home and away' matches in the AFL and NRL Premiership seasons , the automatic delisting period of 26 weeks (itself extended from 12 weeks under the previous regime) should be extended to up to 52 weeks.[13] However, under the new regime the Minister also retains the discretion to declare that an event continues to be an anti-siphoning event if the Minister is satisfied that a commercial television broadcasting licensee or a national broadcaster has not had a reasonable opportunity to acquire the right to televise the event.[14]

Impact of the increase in Ministerial discretion

Together these powers give the Government greater control over the scheduling and televising of sporting events. For example, the proposed quota mechanism means that the Government will have the ability to determine what constitutes a 'quality' AFL or NRL match to be broadcast on free-to-air television and not the sporting boding who conducts the competition. The number and breadth of these powers potentially creates an uncertain environment in which to negotiate and implement sports rights arrangements. For example, while it is the intention of the Government to list events such as the Olympic Games as 'designated group' events and while the Bill requires the Minister to 'take all reasonable steps' to ensure that NRL and AFL Premiership matches are listed in a quota group, there is no guarantee that such sports will be so determined by the Minister.[15] Indeed, the Senate Committee acknowledged that 'ministerial discretion to make determinations under the Bill introduces uncertainty'.[16] The complexity and uncertainty which flows from an undefined legal setting where no meaningful limitations on Ministerial intervention exist as well as the increased compliance costs borne of the risk of government intervention may affect the competitive bidding process for broadcast rights.

While the Senate Committee noted stakeholder concern about the nature and scope of the Ministerial discretions in the new regime, the Committee concluded that no moderation of these discretions was required and that the Bill should proceed through Parliament largely unamended. Further, the Committee acknowledged the flexibility that the new regime affords rights holders and broadcasters as well as welcomed the Government's intention to involve stakeholders in the development of the legislative instruments referred to in the Bill.[17]

Extension of the regime to content service providers

The Bill also extends the reach of the anti-siphoning regime to content service providers, including IPTV.[18] Under the proposed legislation, a person is prohibited from conferring on a content service provider the right to provide live, exclusive coverage of anti-

The complexity and uncertainty which flows from an undefined legal setting where no meaningful limitations on Ministerial intervention exist as well as the increased compliance costs borne of the risk of government intervention may affect the competitive bidding process for broadcast rights.

7 Above note 3, section 145F.

8 Above note 3, sections 145B(2) and 145H.

9 Above note 1, page 21.

10 Above note 1, page 23.

11 Above note 3, section 145G(6).

12 Above note 3, section 145ZM.

13 Above note 3, section 145E(6)(b)-(d).

14 Above note 3, section 145E(6)(f)-(g).

15 Above note 3, section 145G(9) – (10).

16 Above note 8, paragraph 2.53.

17 Above note 8, paragraphs 2.49- 2.54.

18 Defined to have the same meaning as under Schedule 7 of the *Broadcasting Services Act 1992* (Cth).

The Bill also extends the reach of the anti-siphoning regime to content service providers, including IPTV.

siphoning events which occur in Australia via a content service to end-users in Australia.[19] This restriction only applies to acquisitions of exclusive coverage rights by content providers and will not apply where a national broadcaster or a commercial television broadcasting licensee has acquired the right. It will also not apply to body corporates (such as sporting bodies) which confer such rights on wholly owned subsidiaries.[20]

Introduction of the 'Must Offer' obligations

Another important feature of the new regime is the revision of the 'anti-hoarding' coverage obligations for free-to-air broadcasters. Under the current anti-siphoning scheme, the Minister determines which anti-siphoning events will be subject to the anti-hoarding regime. By contrast, the Bill proposes that *all* anti-siphoning events will automatically be subject to the 'must offer' obligations. The proposed 'must offer' obligations will operate as an exception to the coverage obligation of free-to-air broadcasters. The exception will apply if commercial television broadcasting licensees, national broadcasters or their program suppliers have offered to transfer the right to televise the event to other commercial television broadcasting licensees, national broadcasters, or their program suppliers 120 days before the start of the event.[21] If this offer is not accepted, the free-to-air broadcasters or their program suppliers must offer to transfer the right to televise the event to each subscription television broadcasting licensee 90 days before the start of the event.[22] The offer to subscription television broadcasting licensees must remain open until immediately before the start of the event. In all cases, offers must be made for nominal consideration of $1.

The stated intention of the 'must offer' regime is to prevent 'unwanted rights lying fallow and provides every opportunity for full coverage with a preference for free-to-air'.[23] However, the operation of the 'must offer' regime is dependent upon the nature of the rights held by free-to-air broadcasters and program suppliers. For example, as noted in the Explanatory Memorandum to the Bill, if a rights deal prevents free-to-air broadcasters or program suppliers from assigning or sub-licensing their rights, the 'must offer' rules will have no practical application.[24]

Introduction of notification requirements

Finally, the new regime also introduces notification requirements for free-to-air broadcasters and program suppliers which would replace the interim notification requirements discussed below. Under the new regime, commercial television licensees, national broadcasters and program suppliers must notify the ACMA within 10 business days after they acquire or cease to hold the right to televise live an anti-siphoning event.[25] Compliance with these requirements would be a condition of a commercial television broadcasting licence, while for program suppliers, the notification provisions would be civil penalty provisions. The Senate Committee has recommended that the Bill be amended to enable broadcasters to notify the ACMA of the expiration date of broadcast rights at the time those rights are acquired and/or upon any change to that date.[26]

Review mechanism

The Bill retains a provision under which the anti-siphoning regime must be reviewed before 31 December 2014. Although the recent Convergence Review did not specifically consider the anti-siphoning regime, the final report did recommend a full review of the anti-siphoning scheme within five years.

Commencement

The Bill is subject to a complex commencement regime. The coverage obligations (and the corresponding 'must offer' rules) will not apply to rights acquired between 25 November 2010 and the commencement date of the legislation if the event is scheduled to start 150 days (or more) after that commencement date.[27] In addition, the 2012-2016 AFL Premiership competition (with the exception of the grand finals of those years which will be listed as Tier A events) will not be the subject of the anti-siphoning regime.[28] Further, NRL Premiership matches (other than finals) may only be designated Tier B events by the Minister from 1 January 2013.[29] Within 10 days after the Bill receives Royal Assent, commercial television broadcasting licensees and national broadcasters must notify the ACMA of the rights (and their attributes) that they currently hold.[30]

if a rights deal prevents free-to-air broadcasters or program suppliers from assigning or sub-licensing their rights, the 'must offer' rules will have no practical application.[24]

Next steps

In its current form, the Bill proposes significant and complex changes to the current anti-siphoning regime that will impact industry participants. At this stage, it is not clear whether the Government will formally respond to the Senate Committee's recommended (minor) amendments to the Bill or move the Bill in its current or an amended form through to the House of Representatives. The approach of the cross benchers and Opposition in relation to the Bill is unknown.

Victoria Wark is a Senior Associate and Maryann Muggleston is a lawyer in the Technology, Media and Telecommunications Practice Group at Allens. The opinions presented in this article are personal to the authors and do not represent the views or interests of any organisation.

---

19 Above note 3, section 145ZO.

20 Above note 3, section 145ZO(6).

21 Above note 3, sections 145H(3)(a), 145J(3)(a), 145N(3)(a), 145P(3)(a), 145L and 145R.

22 Above note 3, sections 145H(3)(b), 145J(3)(b), 145N(3)(b), 145P(3)(b), 145M and 145S.

23 Second reading speech for the Broadcasting Services Amendment (Anti-siphoning) Bill 2012, Senator Jacinta Collins (22 March 2012) page 2571.

24 Above note 1, page 29.

25 Above note 3, sections 145ZQ - 145ZU.

26 Above note 8, Recommendation 2, paragraph 2.48

27 Above note 3, item 28(1) and (2).

28 Above note 3, item 28(5); above note 1 page 49.

29 Above note 3, section 145G(10).

30 Above note 3, sections 115B(1) and 115C(1). This requirement will extend to Program Suppliers on the commencement of sections 145ZR and 145ZT.