

# Shifting the Goal Posts: Anti-Siphoning Report and Reforms Announced

Sophie Dawson, Anita Cade and Marlia Saunders outline proposed amendments to the anti-siphoning scheme.

"Anti-siphoning", it's a topic that gets the hearts of the key players in sports broadcasting racing as quickly as any event on the anti-siphoning list. Each of the stakeholders put their best arguments forward on the subject last year, and we've all been eagerly awaiting the results. The umpire has now spoken.

On 25 November 2010, Senator Stephen Conroy released the Government's report on the review of the anti-siphoning scheme, "Sport on Television: A review of the anti-siphoning scheme in the contemporary digital environment" (the **Report**) and announced a suite of proposed reforms to the current anti-siphoning scheme.

To no-one's surprise, the scheme will be maintained. However, there are a number of changes which appear to be aimed at making the scheme more relevant to the digital environment, as well as making it more competitive.

The key proposed changes to the scheme include:

- the introduction of a two-tier anti-siphoning list, with different requirements attaching to the different tiers;
- some additions and deletions to the current anti-siphoning list;
- the introduction of "must offer" obligations; and
- the extension of anti-siphoning restrictions to new media providers.

We consider below the current anti-siphoning scheme, the concerns about it and the proposed reforms.

## Current anti-siphoning scheme

The Commonwealth Government introduced anti-siphoning laws in 1994 to prevent exclusive broadcast rights for events of "national importance" and "cultural significance" from being sold to pay-television broadcasters, therefore restricting who may be able to watch them.

Under section 115 of the Broadcasting Services Act 1992 (Cth) (the **BSA**), the Minister may specify events which should be televised to the general public for free, which form the "anti-siphoning list". The requirements of the terms "national importance" and "cultural significance" are not actually specified in the legislation, and selecting the events to be included on the list is a matter for the Minister.

The regime operates by way of a licence condition imposed on subscription broadcasting television licensees and on commercial television licensees who are providing digital multi-channel services, preventing them from acquiring rights to listed events until free-to-air broadcasters have first had an reasonable opportunity to purchase them.

Events on the anti-siphoning list are automatically de-listed 12 weeks before the event to allow pay-television operators to purchase the rights to events that free-to-air broadcasters did not acquire. The Minister may override this where he takes the view that free-to-air broadcasters have not yet had an adequate opportunity to acquire the rights.

The current anti-siphoning list covers a vast array of sporting events, and is due to expire on 31 December 2010.

## Submissions by stakeholders

In the Report, the Government found there was a need to balance concerns about the anti-siphoning scheme advanced in submissions by pay-television providers and sporting bodies with the policy objective of ensuring free access to key sporting events (which was reiterated in submissions made on behalf of the free-to-air television networks and various members of the public).

On the one hand, it was argued that sports broadcasting is pivotal in the business models of both free-to-air and pay television, and the anti-siphoning scheme generates an anti-competitive environment in the market for sports rights, giving free-to-air broadcasters an unfair advantage. It was also argued that it creates uncertainty for pay-television providers as to the rights they will be able to acquire, and prevents them from being able to effectively promote any rights they eventually do obtain due to short lead times. Further, revenues from broadcast rights are said to be an important component of sporting organisations' revenues, enabling them to invest in the development of sports in Australia, and it was submitted that the anti-siphoning list restricts their ability to obtain a fair market value from the sale of broadcast rights.

On the other hand, the popularity of televised sport in Australian society and culture was also recognised. It was submitted that sport plays an important role in supporting health outcomes and enhancing physical and mental wellbeing. Free TV Australia noted that although pay television penetration has increased recently, a majority of Australian households do not have a pay-television service.

## Proposed reform

The Government has foreshadowed a number of reforms.

### Two-tiered list

It proposes to introduce two tiers of events on the anti-siphoning list:

- **Tier A** will include "nationally iconic" events such as the Melbourne Cup, the AFL and NRL Grand Finals, the Rugby Union World Cup Final, various cricket test and international matches involving Australia, FIFA World Cup finals and matches involving Australia, Australian Open tennis finals, F1 Grand Prix and Moto GP races and the Bathurst 1000 V8 Supercars race.
- **Tier B** will include the Summer and Winter Olympics Games, a minimum number of regular AFL and NRL, State of Origin matches, rugby league and rugby union test matches and Rugby Union World Cup matches involving Australia, regular Australian Open tennis matches, Wimbledon tennis finals, golf rounds for the Australian Open, Australian Masters and United States Masters, netball test matches and World Championship finals matches involving Australia, FIFA World Cup matches and qualifiers, the English Football Association Cup Final and V8 Supercars Championship Series races.

### New additions and removals

The Government proposes to make some amendments to the current list. Notable additions to the anti-siphoning list include certain Twenty20 cricket matches and FIFA World Cup qualifiers involving the Socceroos.

A number of sports have been removed from the list, including 4 of 8 AFL matches and 5 of 8 NRL matches per round, which are currently shown exclusively on pay TV, and non-Australian games of the Rugby Union World Cup. This will permit pay-television broadcasters to bid directly for these events.

There is uncertainty as to which AFL and NRL matches will be included on the list, as the mechanism for selecting these is yet to be determined. The Government had indicated it is concerned to ensure that the quality of the games to be shown on free-to-air television is protected.

### Coverage requirements and “must-offer” obligations

The Report notes that the current anti-siphoning scheme does not specify what level, form or frequency of coverage needs to be given by free-to-air broadcasters when they acquire the rights to events contained on the anti-siphoning list. Whether the events are broadcast live and in full is a commercial matter for the broadcaster when determining their schedule. Similarly, the scheme currently does not require free-to-air broadcasters to on-sell rights that they do not intend to use except in limited circumstances described below.

These coverage issues are currently dealt with under the “anti-hoarding” rules and the “use it or lose it” guidelines, as follows:

- **Anti-hoarding rules:** The “anti-hoarding” provisions under the BSA require commercial free-to-air television licensees who acquire the rights to a “designated” event but who do not propose to fully use that right to offer the unused portion to the ABC and SBS for a nominal charge. Each of ABC and SBS must also offer the unused portions of rights to each other.

Importantly, however, events on the anti-siphoning list are not automatically “designated events” for the purpose of the anti-hoarding rules. They will only be designated events if so declared by the Minister. Only the 2002 and 2006 FIFA World Cup tournaments have been designated under these provisions, meaning that to date these provisions have had extremely limited use.

- **Use it or lose it guidelines:** The “use it or lose it” guidelines, introduced by the previous Government in 2007, provided that the Australian Communications and Media Authority (ACMA) would monitor free-to-air broadcasts of events on the list, and if an event was not appropriately covered (ie televised live or near live to at least 50 per cent of the population nationally and at least half the event was televised) then it would be removed from the list. However, these guidelines were not enshrined in legislation, and no events have in fact been removed from the anti-siphoning list since the rule was introduced, despite ACMA identifying a number of listed events which it considered did not receive adequate coverage by free-to-air networks which acquired those rights.

In response to numerous submissions (including by pay-television providers and sporting bodies) that only events which are broadcast live, in full and nationally on free-to-air television should be protected under the anti-siphoning scheme, the Government has proposed to introduce additional obligations on free-to-air broadcasters which acquire the rights to listed events. Such broadcasters will need to:

- show “Tier A” events live and in full on their main channel; and
- show “Tier B” events in full, on no more than a four hour delay and on their main channel or a digital multi-channel.

The four hour delay is provided to allow for different time zones, audience preferences and multi-round, simultaneous events. Now that the take up of digital television has increased significantly, the Government was of the view that these events should be permitted to be broadcast on digital multi-channels to enable more live sport to be shown.

If a broadcaster does not propose to televise the event in the manner required, then the broadcaster must allow another free-to-air broadcaster to acquire the rights, or if no other free-to-air broadcaster wishes to take up the rights, then offer them to a pay-television broadcaster.

This step should address some of the concerns expressed by stakeholders. However, there is no detail available at this stage about the proposed rule (dubbed the “must-offer” obligations), how it will interact with the anti-hoarding provisions and the “use it or lose it” guidelines nor how the rule will be monitored and enforced.

### Extension to automatic de-listing period

The Government’s reforms will extend the automatic de-listing period for events on the anti-siphoning list from 12 to 26 weeks, to provide pay-television providers with additional lead time to enter into arrangements with sporting bodies to purchase any rights not acquired by free-to-air networks. Seasonal tournaments such as AFL and NRL will have a longer de-listing period of 52 weeks.

### Impact on new media (including IPTV)

The Government proposes to extend the anti-siphoning provisions to new media providers, such as IPTV and other online service providers, to prevent them from acquiring exclusive rights to listed events. The Government contends that, although new media coverage of sporting events is currently complementary to the coverage by free-to-air and pay-television broadcasters, as a “precautionary measure”, new media should be treated in the same way as pay television.

The position taken by the Government appears to be based on the presumption that new media offerings will always be a “user pays” model, as it is concerned that if sporting content migrates to new media, events may no longer be freely available to be viewed by the general public. However, this may not necessarily be the case. For example, the BigPond Sport channels available via the Telstra T-Box do not currently incur subscription or pay-per-view charges, although the customer must purchase the set top box and have a BigPond broadband plan in order to access them.

The approach proposed by the Government will not prevent the continuation of current practices whereby sporting bodies grant simultaneous rights to broadcasters operating on different platforms. This means that new media providers may be granted supplementary rights to show listed events at the same time as free-to-air television networks.

### Private member’s bill

Just prior to the release of the Report, Senator Bob Brown introduced into Parliament a private member’s bill, the Anti-Siphoning Bill 2010 (Cth). The Bill proposes to remove the expiry date for the current anti-siphoning list of 31 December 2010, and to provide that a new anti-siphoning list cannot take effect until 6 sitting days of each House of Parliament have elapsed. The effect of these changes would be that the current list would remain in effect until it is replaced, rather than automatically expiring on 31 December, in order to give Parliament a chance to consider any alternative list.

The Bill was not referred to in the Government’s Report, but the Government’s indication that it will implement changes to the anti-siphoning list “shortly” and that they can take effect by 1 January 2011 suggests that there may be no immediate need for the Bill.

### Conclusion

The BSA will now be amended. The Government has indicated that amending legislation will be drafted over the coming months. The key players will be likely to keep their eyes on the ball in an attempt to ensure that the detail of the drafting positively reflects the aspects of the proposed changes that are beneficial to them.

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