s 22

From: Rainsford, Cathy
Sent: Monday, 21 November 2016 5:57 PM
To: Tobin, Luke
Cc: s 22
Subject: Reform of the anti-siphoning scheme - 21 Nov 2016 - v2.docx [DLM=For-Official-Use-Only]
Attachments: Reform of the anti-siphoning scheme - 21 Nov 2016 - v2.docx

Security Classification:
For Official Use Only

For Official Use Only

Luke,

See attached briefing as requested on anti-siphoning. Apologies for the delay in getting it to you.

Huge thanks to s 22 or pulling this together today.

Regards
Cath

Cathy Rainsford
Assistant Secretary / Media Branch
Department of Communications and the Arts
P +61 6271 1545
s 22
38 Sydney Avenue, Forrest ACT 2603
GPO Box 2154 Canberra ACT 2601

ANTI-SIPHONING SCHEME
POTENTIAL AREAS FOR REFORM

The scheme as it stands

The anti-siphoning scheme provides preferential access to sports rights for commercial television broadcasting licensees and the national broadcasters, preventing subscription television broadcasting licensees from acquiring a right unless a free-to-air broadcaster has done so.

In this way, the scheme dictates the order of acquisition of sports rights by providing free-to-air broadcasters with a 'gatekeeper role' in the process. The aim is to ensure that events of national significance (to date, only major sporting events) remain freely available to the public.

Implemented in 1994, the scheme is a product of an analogue media environment. It equates 'freely available' with traditional free-to-air television, and targets subscription television licensees on the premise that rights acquisition by this (and only this) category of media operator threatens this aim. Online media operators are not regulated in any way. At its core it is a simple scheme in its construction, regulating only one class of players (subscription broadcasters) to ensure rights remain available to another (commercial television).

Critically, this regulation is feasible and simple because the broadcasters are licensed and the scheme itself does not need its own enforcement regime – it is enforced as a condition of licence.

The actual impact of the scheme is difficult to ascertain. Sports bodies in Australia are adept at negotiating lucrative rights deals concurrently with both subscription and free-to-air television, along with online media outlets (namely Telstra but also Optus), irrespective of whether their sports are included on the anti-siphoning list. Nonetheless, the importance ascribed to the scheme in discussions of media reform with stakeholders suggests it continues to have a meaningful impact.

s 47C, s 34(3)

In additional to explicitly benefiting one sector of the media industry (free-to-air television) at the expense of another (subscription television), there are a number of other features of the scheme that have drawn criticism over the years.

- It does not require free-to-air broadcasters to actually acquire the rights to events on the list.
- It does not oblige free-to-air broadcasters to do anything with those rights (to provide live coverage, for example).
- It prevents free-to-air from televising events first, or exclusively, using their digital multichannels.
- It does not prevent free-to-air broadcasters from on-selling any rights acquired.

Basic reform

There are four 'basic' reforms to the current scheme are that can be considered. These involve modest refinements to the operation of the scheme, but do not change in any fundamental way its scope (in terms of which businesses are regulated).

1. Removing the rule that prevents events on the anti-siphoning list from being premiered (or shown exclusively) on free-to-air multichannels, which is antiquated and unnecessary with the completion of digital switchover in 2013.

2. Providing for events to be automatically removed from the list 26 weeks prior to their commencement, rather than the current 12 weeks, to better align with the reality of commercial rights acquisition.

3. Removing the anti-hoarding provisions that can be used to require free-to-air broadcasters to offer unused portions of sports rights to other broadcasters, given these have not been used for over a decade and are unlikely to be in the foreseeable future.

4. Modest reduction in the number of events on the anti-siphoning list (as far as possible, this would be based on evidence such as viewing patterns).

If reductions to the list were to be relatively modest, this 'package' of reforms would be relatively uncontroversial. The need for these changes is relatively clear, and stakeholders generally anticipate reform in these areas. However, they would not constitute a fundamental modernisation of the scheme.

- The acquisition rule at the heart of the scheme – that favours traditional, free-to-air broadcasters over traditional, subscription television broadcasters – would not be changed.
- The scheme will not encompass or deal with new media players.
- The scheme will not guarantee a coverage outcome (whether, and in what format, events are actually shown to the public, noting however there is no evidence that free to air broadcasters purchase rights that they do not show).

Wider reform

Any consideration of reform beyond the basic package should start from a 'first principles' basis. s 47C, s 34(3) s 47C, s 34(3)

1. The anti-siphoning list is too long and should be significantly reduced.

The current anti-siphoning list is long by any measure, and includes events for which no free-to-air television rights are available (i.e. parts of golf tournaments), receive little or no free-to-air television coverage (i.e. many of the matches of the Australian Open tennis tournament), are watched by relatively few Australians (i.e. netball or Davis Cup tennis), or have questionable national relevance (international fixtures played overseas involving no Australians or Australian teams). More radical reform than that contemplated in the Basic Reform section above, could reduce the list to a small number of iconic events.

2. Audio visual coverage of the remaining events on a shortened anti-siphoning list should be:
   Live
   Free
   Broadcast quality.

If certain sports are worthy of regulatory 'protection', the ordinary person is likely to expect them to be televised live (or near to it, depending on the event), free (or at least with no ongoing content charges) and broadcast quality (something equivalent to what consumers have come to expect from television).

3. The rights to such events should not migrate exclusively to pay-based media platforms.

This is a principle of access. If rights are to be locked behind a pay-wall, where consumers are required to pay on a transactional or subscription basis to view certain sports, this should only occur where rights are also available on a free platform (without ongoing charges), or where the rights to such events have at least been offered to providers of free services.

How to achieve this reform

Fundamental reform to the scheme will be complex and very difficult.

There is no capacity to extend the current anti-siphoning scheme to regulate the acquisition of rights to anti-siphoning events by new media entities. This is because new media entities (like Telstra, Apple, Netflix or Amazon) do not hold subscription television broadcasting licences, and hence can be regulated by a broadcasting licence condition. New legislative options would need to be considered, which typically will not have the same point of regulation, or scope, as the current scheme.

s 47C, s 34(3)

Rights dealings are governed by contracts (which have terms which are not disclosed to Government). These involve complex interactions of what rights are purchased and the conditions attached to that purchase. It is not possible to regulate every permutation for every sporting code.

The following describes some of the key issues and decision points

Level playing field or preferential treatment for free-to-air television

It will be important to clearly formulate the public policy outcome that is being sought. If the assumption is that what should be preserved is a 'traditional' free to air viewing experience of sport (broadcast television, in the home, simply switch on and view on the big screen) a new scheme could focus on preserving, as a minimum, preferential treatment of free to air television broadcasters in terms of access to rights. Alternatively, if policy objectives are determined which have broader definitions of 'free' and 'universally available' then a more equal treatment of different media technologies could be pursued. The Government would need to be comfortable with the desired high level outcomes (for example, live, free and broadcasting quality) being delivered over other platforms and user equipment (for example, would it be acceptable for Foxtel to deliver a sports channel free to view, but over satellite which requires the householder to obtain a satellite dish and receivers).

Regulating coverage or regulating rights

The qualities of live, free and broadcast quality are essentially coverage and access outcomes (what is shown on screens, and what it costs to access coverage on those screens), rather than what rights are acquired by broadcasters or media companies. Any regulatory scheme that targets the acquisition or conferral or offer of media rights (as per the current anti-siphoning scheme or any variant of it), will not easily deal with what ends up being the consumer product (how coverage looks on a screen or how it is accessed). Regulation of these sort of outcomes would be better

achieved through specific obligations on the entity that acquires the rights, stipulating minimum standards they must achieve in their retail offer.

Acquisition, conferral or offer

There are three broad ways of regulating broadcast rights:

- Regulations limiting or restricting **acquisition of rights** – as per the current anti-siphoning scheme, regulating the acquiring party (i.e. a broadcaster).
- Regulations limiting or restricting the **conferral of rights** – regulating the party conferring the rights to a media entity (i.e. a sports body).
- Regulations requiring or otherwise dealing with the **offer of rights** – regulating the way in which rights are offered to media entities.

Importantly, if a new scheme is to regulate new media, it will not be possible to extend the current anti-siphoning scheme. A new scheme will be required. The closest model to the current scheme would be a restriction on the 'conferral' of rights (in other words, restricting what a sports body can do with their rights unless they have first been acquired by a free-to-air broadcaster or otherwise freely available platform). Regulating the offer of rights (requiring that rights must have at least been made available to a 'free platform' before they can be acquired by a pay-based platform, or simultaneously with being acquired by such a platform) would be an alternative with less impact on affected parties.

The way forward

In the coming weeks the Department will develop a more detailed paper s 47C, s 34(3) s 47C, s 34(3) The drafting of this paper would be assisted by s 47C, s 34(3) of the following:

- The principles articulated for any new scheme: no exclusive migration of rights to pay-based platforms, with the principles of access to be live, free, broadcast quality. Note that each of the terms 'live', 'free' and 'broadcast quality' raises its own set of definitional issues (for example, there is no simple or generally accepted definition of broadcast quality).

- Whether the new scheme should continue to 'tip the regulatory scales' in favour of the terrestrial, free-to-air broadcasting platform, or treat other technologies equally provided they meet the stipulated principles.

- Whether the preferred coverage and access outcomes (live, free and broadcast quality) are to be stipulated / mandated for media companies acquiring rights to these events, or left up to the market.

- Whether the scheme should be extended to new media providers, or be contained to the existing traditional platforms.

- Whether a new scheme should allow pay-based platforms to acquire certain types of rights (i.e. non-exclusive rights) without restriction, or whether pay-based platforms should have to wait until certain pre-conditions had been met (that rights have been acquired by a free-to-air broadcaster, conferred to a free-to-air broadcaster, or at least offered to free-to-air broadcasters).