

Tennis Australia

Submission

in relation to the

Senate Environment and Communications
Legislation Committee: Inquiry into the
*Broadcasting Services Amendment (Anti-
siphoning) Bill 2012*



April 2012



Executive Summary

Tennis Australia is the national sporting organisation responsible for tennis in Australia. In addition to our role in promoting tennis at all levels for all Australians, Tennis Australia is also the owner and operator of a number of major tennis events, including the Australian Open Grand Slam Tennis tournament conducted annually at Melbourne Park (Australian Open).

As a major national and international sporting event, the Australian Open holds a very important place in the Australian sporting landscape. Tennis Australia acknowledges that it has an obligation to ensure the Australian Open is accessible to as many people as possible, and in this regard, we accept the basic policy considerations that underpin the anti-siphoning scheme as set out in the *Broadcasting Services Act 1992 (Cth)* and associated instruments, despite the fundamentally anti-competitive nature of this scheme. We believe that the Australian Open should be available through Free-to-Air (FTA) television to all Australians.

However, we also believe that the iconic Australian Open is a unique event in comparison to other sporting events included on the anti-siphoning list. Specifically, each Australian Open comprises more than four hundred (400) men's and women's singles and doubles tennis matches that are currently available for broadcast within a relatively short two week time frame. Given the inherent limitations of free-to-air broadcasters, only sixty-five (65) to seventy (70) of these matches are ever broadcast on FTA each year in Australia because it is generally only possible for a FTA broadcaster to televise one match at a time. Usually the matches that are actually telecast on FTA are those matches conducted on centre court (Rod Laver Arena), and consequently, the matches on the four (4) other show courts and up to twenty further outside courts are not telecast at all on FTA. By way of example, there are 128 matches in the first round of the men's and women's singles draw alone, but an FTA broadcaster generally televises only a handful of these matches. As such, a substantial proportion of Australian Open tennis matches are not available to the Australian viewing public, particularly in the first week of the tournament when the majority of matches are played.

Accordingly, Tennis Australia currently owns an extraordinary amount of world class Grand Slam tennis match content that is not ever made available to Australian FTA television audiences. The *Broadcasting Services Amendment (Anti-siphoning) Bill 2012 (Bill)* contemplates this problem through the "designated groups" mechanism, but does not provide a solution. Pay television (Pay TV) and other television platforms would have much greater capacity to broadcast this additional match content (including through "red button" technology that enables more than one match to be watched simultaneously through a given television channel). Tennis Australia submits that both the Bill and the anti-siphoning list proposed in late 2010 (Anti-siphoning List) each require revision to enable Tennis Australia to deal directly with Pay TV and other television providers to ensure that more or most of the Australian Open is available to dedicated tennis fans. In this regard, Tennis Australia submits that the "quota group" mechanisms set out in section 145G of the Bill should be an instrument that is applied to further listed sporting events, and not just to the AFL and NRL regular seasons as currently contemplated. The Australian Open is an iconic sporting event of immense national and international importance. The Australian Open is broadly analogous to



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the AFL and NRL regular seasons because there is much more match content available than the FTA broadcasters are willing to or can possibly televise. Tennis Australia believes that the introduction of the “quota group” mechanism is an important and sensible legislative initiative. However, we do not believe that it is equitable to only permit this mechanism to be applied to two sports and we cannot identify any objective criteria or compelling policy rationale for doing so. Tennis Australia submits that the quota group mechanisms should be expanded more generally to other sports or events that are not currently adequately broadcast by FTA. We believe that the Australian Open is one such event and that this quota group (or a similar) mechanism can be utilised to maximise the fundamental policy of the anti-siphoning scheme – that is, to ensure that the best Australian Open matches can continue to be available to the Australian public on FTA, whilst the remaining matches can be broadcast on Pay TV or other television platforms to a wider Australian audience. This approach would require a minor revision to the proposed Anti-siphoning List so that only certain Australian Open matches are listed on Tier B. This sort of clarification of the Anti-siphoning List to remove part of the Australian Open from Tier B would provide Tennis Australia with the certainty and flexibility it needs to manage, plan for and leverage the grant of Australian Open broadcast rights in the future. In turn, this revenue will enable Tennis Australia to continue to invest heavily in tennis at all levels throughout Australia, and thereby contribute to the ongoing growth of the sport.

Tennis Australia acknowledges that the initial policy reforms to the anti-siphoning scheme were announced by the Minister for Broadband, Communications and the Digital Economy in late 2010. However, Tennis Australia took the decision to reserve its judgement on these policy changes until the legislation giving effect to them was released.

Tennis Australia is pleased to present this submission, and thanks the Committee for the opportunity to make a submission in the current inquiry. Tennis Australia is happy to meet as required to further elaborate on the information contained within this submission at a time convenient to relevant participants.

If you have any queries regarding this submission please do not hesitate to contact me.

Regards,

Tim Browne
Advisor – Office of the CEO
Tennis Australia



Background facts – the Australian Open is different and requires different treatment

Tennis Australia derives significant income from the sale of media rights to the Australian Open. Through arrangements negotiated with Australian and international FTA, Pay TV and radio broadcasters, Tennis Australia generates revenue that enables it to fund and support elite, social and grassroots tennis development throughout Australia. Broadcast rights revenue is integral to Tennis Australia's ongoing investment to the sport of tennis in Australia. As such, any dilution or restriction of Tennis Australia's ability to leverage these rights not only affects Tennis Australia as an entity and the Australian Open as an event, but also materially compromises future growth in our sport and severely limits our ability to promote active engagement and participation in the sport at all levels.

Maintaining an appropriate balance between the commercial and public interest in the broadcasting of sporting events is vital to the ongoing viability and development of tennis at all levels, and to the ongoing success, conduct and longevity of the Australian Open. Over the past five years, a combination of FTA and Pay TV telecasts of the Australian Open has ensured that the Australian public has access to its own grand slam tennis tournament. However, the operation of the anti-siphoning scheme has necessarily meant that Tennis Australia has not been able to deal directly with Pay TV providers, and as such, the Pay TV rights to the Australian Open have been acquired by Pay TV directly from our FTA broadcaster largely without Tennis Australia's input. This arrangement means that Tennis Australia has limited control over the broadcast of the Australian Open on Pay TV, and is unable to maximise broadcast rights fees for the Australian Open (which in turns means less funding is available for grassroots and elite tennis in Australia). An example of the deficiencies of this system occurred in 2010 when, due to a difference of opinion between our FTA broadcaster and Pay TV providers, there was no Pay TV broadcast for the entire 2010 Australian Open. This obviously resulted in substantially fewer 2010 Australian Open matches being televised and made available to the Australian viewing public.

As discussed above, the Australian Open is an iconic event – it is a unique and important part of the Australian and international sporting landscape. The Australian Open comprises over four hundred (400) men's and women's singles and doubles tennis matches that occur within a very short two week period. There are 128 matches in the first round of the men's and women's singles draw alone, but FTA broadcasters only televise a handful of these matches. There are also separate boys and girls Australian Open tournaments, wheelchair events, and a legends event played by former tennis champions. Currently, only sixty-five (65) to seventy (70) of these men's and women's singles and doubles tennis matches are ever broadcast each year on FTA within Australia because of the inherent capacity limitations of FTA platforms. This represents only a very small percentage of matches actually conducted at each Australian Open. Usually the matches that are telecast on FTA are those conducted on centre court (Rod Laver Arena), and the matches on the four (4) other show courts and up to twenty other outside courts are not telecast at all on FTA (particularly in the first week of the tournament when the majority of matches are played). In short, even with multi-channelling, it is not possible for an FTA broadcaster to broadcast the majority of or entire Australian Open.



The Bill contemplates this deficiency through the proposed “designated groups” mechanism. However, this mechanism currently only provides relief to FTA broadcasters from their coverage obligations, and does not address what happens to the surplus television content that exists over and above any “total minimum number of hours” or “daily minimum number of hours” that may be designated for a particular sporting event.

Proposed solution

Tennis Australia understood that one of the main purposes of re-visiting the anti-siphoning list and scheme was to ensure that sporting events or matches that were not being broadcast on FTA were removed from the anti-siphoning list entirely. This concern was identified by the Government itself in the November 2010 review report of the excessive breadth of the list. The report stated that:

*‘The Government accepts these concerns and agrees that the list should be revised to remove the ‘blanket listings’ of sporting events that have not, and will not, be shown on free to air television’.*¹

This is consistent with the Government’s new policy approach and the associated “quota group” mechanisms that allow certain matches from each round of the AFL and NRL home and away seasons to be removed from the Anti-siphoning List. However, Tennis Australia believes that parts of the Australian Open are also suited to such a delisting, and that the blanket listing of the entire Australian Open on the Anti-siphoning List does not serve the interests of the Australian viewing public.

In the case of the Australian Open, the current and proposed future anti-siphoning scheme may actually have the perverse effect of producing a practical outcome that is inconsistent with the very policy considerations that underpin that scheme. Currently, substantially more Australian Open tennis matches are conducted at each event than those select few matches that are actually broadcast on FTA. There are literally hundreds of hours of match content that are available but which are not broadcast within Australia. Tennis Australia submits that if an appropriate quota group mechanism could be devised, more Australian Open matches would be available to the Australian public, and tennis fans could view more Australian Open match content through a Pay TV or other television provider (including through “red button” technology that enables more than one match to be simultaneously watched through a given television channel).

Tennis Australia’s overriding priority is always to ensure that as many Australian residents as possible have access to coverage of the Australian Open, but we also seek to ensure as much tennis content as possible is available to the Australian public – this can be achieved by opening up further Australian Open tennis match content to Australian Pay TV subscribers and viewers on other television platforms. A clarification of the Anti-siphoning List to remove part

¹ “Sport on television: A review of the anti-siphoning scheme in the contemporary digital environment, Review report”, the Department of Broadband, Communications and the Digital Economy, November 2010.



of the Australian Open from Tier B of that list and apply the quota group mechanism to the Australian Open would provide Tennis Australia with the certainty and flexibility it needs to manage, plan for and leverage the grant of Australian Open broadcast rights in the future. Tennis Australia must retain the ability to extract a fair and reasonable financial return for our flagship product. This is important because viewership obviously drives participation and vice versa. It is essential that the value of Tennis Australia's broadcast and new media rights are protected and maximised so that we can generate sufficient income required to invest back in the sport at all levels and thereby continue to fund the growth of elite and grassroots tennis in Australia.

Quota group mechanism and possible characterisations of parts of the Australian Open

As mentioned above, Tennis Australia believes that the proposed Tier B "quota group" mechanisms set out in the Bill provide a possible solution to the issues raised by Tennis Australia (particularly in the first week of the tournament when the majority of matches are played). Tennis Australia believes that the introduction of the quota group mechanism is an important and sensible legislative initiative. However, we do not believe it is equitable to only permit this mechanism to be applied to two sports, and submit that its application should be expanded more generally to other sports that are not currently adequately broadcast by FTA. The Second Reading Speech of the Bill noted that the AFL and NRL required:

'specific arrangements...given the importance of these two competitions on the Australian sporting calendar...In this regard, subscription television broadcasters may negotiate directly with the AFL or NRL in acquiring quota group matches in excess of the quota number'.²

The Australian Open is an iconic national sporting event, and its popularity and importance to the Australian sporting calendar is immense. Australians are transfixed by the Australian Open each January, and the Australian Open dominates television ratings during these two weeks. We cannot understand what the policy rationale might be for allowing the quota group mechanism to apply to only two sports/competitions, and there are no objective and easily discernible criteria for this decision. The "quota group" mechanism and exception to the anti-siphoning scheme should be applied directly to the Australian Open.

The Australian Open is a multi-round competition in the same way that the AFL and NRL are, although our event is unique in that competition rounds occur within a two week period and each round contains a different number of matches. Due to the "knock out" format of a grand slam tennis tournament, the number of matches in each round progressively halves until the final. There are 128 matches in the first round of the men's and women's singles draw alone.

Sections 145G(1) and (2) of the Bill provide that the Minister may, by legislative instrument, determine that specified Tier B anti-siphoning events are Category A or Category B quota

² Senator Jacinta Collins, Second Reading Speech of the *Broadcasting Services Amendment (Anti-siphoning) Bill 2012*, Senate Hansard, Thursday 22 March 2012, p 28.



groups for the purposes of the Act. However, section 145G(8) stipulates that only matches from the AFL Premiership and NRL Premiership competitions may be placed in a quota group. Tennis Australia does not understand why these two sporting events are distinguished from other sports of the same or similar national significance.

Accordingly, Tennis Australia submits that the quota group mechanism could readily be applied to the Australian Open to enable Pay TV and other television providers to acquire the rights from Tennis Australia to televise a select category of Australian Open matches. As such, section 145G(8) of the Bill would need to be deleted or amended. We believe this proposal would be consistent with the policy objectives of the anti-siphoning scheme. The fundamental policy of the anti-siphoning scheme could be protected using the 'Category B quota group' provisions to ensure appropriate "associated set conditions" are in place that guarantee the most popular Australian Open matches and players continue to be available on FTA. The 'Category B quota group' provisions clearly contemplate providing the Minister with ample flexibility so as to ensure appropriate FTA coverage of relevant sporting events continues.³ This approach would require a minor revision to the proposed Anti-siphoning List so that only certain Australian Open matches are listed on Tier B. Given the proposed application of section 145F(4) of the Bill, this may mean the Australian Open cannot be included as a "designated group".

There are several ways that Australian Open matches could be divided into different categories. For example, the Anti-siphoning List or an application of the quota group mechanism could distinguish Australian Open matches and guarantee FTA broadcast of certain matches on the following different basis:

- the number of match hours. Currently, FTA cannot broadcast all, or even most, of the Australian Open, so it is conceivable that the anti-siphoning scheme could guarantee FTA a certain minimum number of hours of coverage, and then permit Tennis Australia to deal directly with Pay TV or other television providers to ensure the remainder of the tournament is broadcast to Australian viewers through other platforms. Through the "designated group" mechanism the draft Bill and associated instruments already proposes that the minimum number of hours of the Australian Open required to be telecast is 100 hours, so it is already contemplated that specifying a number of hours is an appropriate legislative response. Tennis Australia would like to discuss the appropriate minimum number of hours required to ensure the Australian public can view an acceptable proportion of Australian Open matches on FTA;
- the particular arena in which a match is played. Given Tennis Australia's desire to maximise attendance and viewership throughout Australia and the world, the best Australian and international players are invariably scheduled on centre court (Rod Laver Arena), which is also our primary broadcast court. As such, these matches could conceivably be guaranteed FTA matches;

³ Explanatory Memorandum, *Broadcasting Services Amendment (Anti-Siphoning) Bill 2012*, paragraphs 127-135.



- ticketed vs. non-ticketed arenas. Only the larger arenas (Rod Laver Arena and Hisense Arena) are currently ticketed stadiums, and for the reasons outlined above, the best matches and best players are scheduled on these two main show courts. However, as noted above, FTA broadcasters generally only televise the centre court matches (Rod Laver Arena), although they may “drop in” from time to time on other arenas if there are unscheduled delays or breaks, or if an interesting match is taking place on other arenas. As such, Tennis Australia does not recommend this option; and
- player seeding. Generally speaking, the higher seeded players are scheduled to play on the larger arenas (Rod Laver Arena and Hisense Arena). However, distinguishing matches on the basis of seeding could be problematic because a number of high seeds may play on outside courts throughout the tournament due to the sheer volume of matches that are conducted as part of a Grand Slam tennis tournament. As such, Tennis Australia does not recommend this option.

Further specific comments regarding the Bill

Tennis Australia offers the following further comments in relation to the proposed drafting of the Bill:

- (1) The definition of “live” in section 145A should be revisited. The inherent value of sports broadcasting rights is in their live transmission. If a sporting event warrants listing on the Anti-siphoning List, the Australian public is entitled to view that event as close to live as possible, especially given the prevalence and scope of modern media which provide instantaneous match results and statistics. As such, this legislative definition of “live” should be much closer to actually “live” – we suggest a delay of no more than 1 or 2 hours.
- (2) The so called “must offer” provisions in the Bill are concerning because they take control of the grant of broadcasting rights to sporting events away from the sporting organisations that own them. Tennis Australia does not object to the principle underpinning the “must offer” scheme, but we do maintain that the sporting organisations themselves (not FTA broadcasters) should retain control of, or be meaningfully involved in, the process of granting broadcast rights to their sporting events. In the event that a FTA broadcaster elects not to televise a listed event, the sporting organisation that owns that event should have the opportunity to deal directly with Pay TV and FTA providers to ensure that, given the possible short timeframe, their event is televised and available to Australian television audiences. This “must-offer” scheme is also potentially inconsistent with the contracts agreed between sporting organisations and FTA broadcasters (including assignment and subcontracting clauses).