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25 February 2005

The Secretary
Senate Environment, Communications, Information Technology and
the Arts Legislation Committee
Parliament House
CANBERRA ACT 2006

Dear Secretary

Broadcasting Services Amendment (Anti-Siphoning) Bill 2004

Free TV thanks the Committee for the opportunity to appear before it on Monday 21 February 2005. During that appearance Free TV undertook to provide to the Committee:

1. a response to the assertion by Octagon CSI in a letter to the Committee dated 18 February 2005 that it had offered the rights to the 2005 Ashes series to all free-to-air broadcasters in 2001; and
2. legal advice on whether it is necessary for a subscription television licensee to acquire the rights to an event on the anti-siphoning list in order to broadcast that event.

Free TV is happy for this submission to be made a public document, however the attachments containing records of negotiations between each of the relevant Free TV members with the ECB in 2003/04 contain commercially sensitive material. We respectfully request that the Committee treat this material on a confidential basis.

The Octagon letter

Free TV does not represent the ABC or SBS and does not comment on Octagon's assertions in relation to the national broadcasters.

However, on checking their files the commercial broadcasters have made the following findings:

Seven Network

Seven has reviewed its files and has no record of any negotiations with Octagon in 2001 in relation to the 2005 Ashes Tour. However, Seven advises that it believes some informal discussions did take place between Octagon and Seven during 2001. But Seven has no record of a formal offer from Octagon in relation to the rights and Seven did not consider those discussions to represent a definitive or final position by either party, as evidenced by the lengthy subsequent negotiations with the ECB in the second half of 2003.

Nine Network

Nine has reviewed its files and has no record of any negotiations with Octagon in 2001 in relation to the Ashes Tour of 2005.

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Network Ten

Ten has no record or recollection of discussions held during 2001 with Octagon, or the English Cricket Board or its representatives, concerning the 2005 Ashes series.

On that basis we are unable to shed further light on the assertions contained in Octagon's letter to the Committee.

We absolutely reject any suggestion that Free TV Australia or its members have in any way sought to mislead the Committee. We stand by our statement that the formal negotiations over the rights to the 2005 Ashes series took place in 2003/04 **after** the sale of the Pay TV rights to Fox Sports.

We have attached records of negotiations between each of the relevant Free TV members with the ECB in 2003/04 which clearly demonstrate that formal negotiations took place in the second half of 2003 and in early and late 2004, in each case on the basis that the Pay TV rights had already been sold to Fox Sports. This is consistent with evidence to the Committee from Premier Media Group (Fox Sports) that they commenced negotiations for the Pay TV rights in late 2001 and acquired them in May 2002.

These written records contain no reference to any earlier discussions. In fact correspondence from the ECB refers to the "initial approach" in 2003 and early 2004.

The details of the 2003/04 negotiations are supplied to the Committee on a commercial-in-confidence basis.

The timing and conduct of the sale of the Ashes rights to Fox Sports are a clear demonstration of the problems created by the loophole in the Act.

Had the ECB and/or their agent Octagon sought to complete a deal on the sale of the 2005 Ashes series to Foxtel, a "subscription television licensee" as defined in the Act, a completely different process would have applied.

This is because the rules provide that a pay television licensee may not purchase the rights to an event prior to purchase of rights by a free-to-air network or de-listing of the event. This clearly did not occur in relation to the alleged Octagon negotiations in 2001 or prior to a deal being concluded with Fox Sports in 2002.

Evidence given by Mr Jon Marquard to the Committee confirms that the Ashes is by no means the first or only time this loophole has been used. He presented an extensive list of events to which either pay TV or both free and pay rights have been acquired by Fox Sports before these were offered to or acquired by free-to-air broadcasters.

This activity is contrary to the spirit and intention of the anti-siphoning rules. We note that ASTRA Executive Director, Debra Richards, agreed in her evidence to the Committee that the original intention of the Act was that "the sporting bodies would need to negotiate with them [free-to-air broadcasters] in the first instance."

The express intention of the anti-siphoning rules as set out in the Explanatory Memorandum and comments from the then Minister, was to ensure that Australian viewers continued to see major sporting events on television for free. The mechanism chosen to achieve this aim was to prevent subscription broadcasters from acquiring the right to broadcast an event "…unless a national broadcaster or commercial television licensee have acquired that right".

It further adds that "this process should ensure, on equity grounds, that Australians will continue to have free access to important events, it will, however, also allow subscription television broadcasters to negotiate *subsequent* rights to provide complementary, or more detailed coverage of events" (emphasis added).

As explained by the Minister, Michael Lee, "it means that free-to-air broadcasters must have the first opportunity to acquire the rights to broadcast" (Media Release "Major Sporting Events to Remain on Free-to-air Television, The Hon Michael Lee MP, 31 May 1994).

Legal advice

Free TV has obtained legal advice from Ian Robertson of Holding Redlich Lawyers on the question of whether a subscription television licensee must acquire the rights to an event from a pay TV channel provider in order to broadcast them. Mr Robertson is a highly regarded media lawyer and a former member of the Australian Broadcasting Authority. He has extensive experience in negotiating pay TV channel supply agreements and in issues relating to the purpose and administration of anti-siphoning provisions of the *Broadcasting Services Act*.

Mr Robertson's advice expresses the view that "in the situation where subscription television rights in a sporting event are acquired by a subscription television channel provider such as Fox Sports, and the channel is communicated to the public by means of the Foxtel subscription television service, it is unlikely that Foxtel is itself acquiring the rights in the relevant sporting event within the meaning of the Anti-siphoning Licence Condition."

That is, there is a clear loophole in the legislation which allows pay television channel providers to acquire rights to events on the anti-siphoning list which can then be broadcast by Foxtel, without breaching the Act.

On the basis of this conclusion, Mr Robertson also advises that if the Minister maintained an event on the anti-siphoning list past the delisting period, this would not prevent the broadcast of the event by the subscription television licensee because the licensee never acquires the right to the event. That is, there is no safety net that would require the acquisition of the event by a free-to-air broadcaster. We note that in his evidence to the Committee, the Chief General Manager, Broadcasting Division, in the Department of Communications, Information Technology and The Arts, James Cameron said,

"I cannot comment on the mindset of the people who were there at the time, but I think there certainly was an expectation that licensees would have to acquire those events if they wanted to broadcast them".

Unfortunately, it appears that the rules are not operating in the way expected. It would seem that at the time those responsible for the legislation believed that pay TV would operate in a manner similar to free-to-air television in that all content providers would be licensees. The technical distinction between channel providers and licensees was not anticipated.

This is further supported by the fact that the same assumption was made in the first drama expenditure rules for subscription television in the *Broadcasting Service Act*. Originally the rules only applied to licensees, but it was subsequently realised that this did not cover most of the entities actually responsible for the content of the service. That part of the Act was subsequently amended to specifically capture channel providers (original section 102 replaced by Division 2A of part 7).

We urge the Committee to act to close this loophole which was clearly not the intention of the original legislation and threatens the future of free sport on Australian television.

Yours faithfully

JULIE FLYNN
Chief Executive Officer