

31 March 2015

Manager
Services and Regulation Section
Media Branch
Department of Communications
GPO Box 2154
CANBERRA ACT 2601

By email: dtvreview@communications.gov.au

Dear Sir / Madam

Consultation Paper - Digital Television Regulation

The Coalition of Major Professional and Participation Sports Inc. (**COMPPS**) and its members appreciate the opportunity to make submissions in relation to the Department of Communications' *Consultation Paper on Digital Television Regulation (Consultation Paper)*.

COMPPS and its members also appreciate the opportunity to recently meet with representatives of the Department to discuss the Consultation Paper.

Each of the members of COMPPS owns or controls content that is broadcast on digital television in Australia. Digital television is a popular and valuable way for COMPPS members to showcase their sporting events and related content. Digital television is essential to the ongoing success of each COMPPS member and its sport.

Some of the topics and associated implementation questions in the Consultation Paper raise important issues for COMPPS and its members.

This submission comments on issues in the Consultation Paper that are of current and direct concern to COMPPS and its members. This submission also identifies some other issues COMPPS believes the Department and the Government should address or be mindful of when considering the appropriate policy and legislative framework for television in Australia.



1 COMPPS and COMPPS members

COMPPS consists of the following organisations:

- Australian Football League (**AFL**);
- Australian Rugby Union (**ARU**);
- Cricket Australia (**CA**);
- Football Federation Australia (**FFA**);
- National Rugby League (**NRL**);
- Netball Australia; and
- Tennis Australia.

Each of these organisations is the governing body and custodian of a major professional sport in Australia.

COMPPS members are not-for-profit bodies and are responsible for the long-term development and sustainability of their sport in Australia.

COMPPS members provide a wide range of public benefits through a self-funding business model. A large portion of the revenue of COMPPS members is devoted to enhancing, promoting and developing sport for all Australians both at national and 'grassroots' level.

One of COMPPS' roles is to provide a collective response on behalf of its member sports where their interests are aligned.

2 Sport on television in Australia

The viewing of sport on television, and particularly the sports conducted by COMPPS members, is very popular in Australia.

In 2014 seven of the top 20 most watched programs broadcast on free-to-air television in Australia were sporting events. Six of those events were conducted by COMPPS members.¹ Further, in 2014 all of the top 20 most watched programs broadcast on subscription television in Australia were sporting events involving COMPPS members.²

Given their substantial role in providing hundreds of hours of popular television content each year, COMPPS members are an important participant in any discussion regarding the regulation and future of television in Australia.

3 COMPPS members and media rights

The exploitation and licensing of television and other media rights to the major sporting events and other content controlled or owned by COMPPS members is a fundamental part of the operation, strategy and future of COMPPS members.

¹ The Melbourne Cup was in the top 20 most watched programs on free to air television in 2014 but is not an event undertaken by a COMPPS member.

² Source: MediaCom

These rights are exploited and/or licensed by COMPPS members across a range of platforms including free-to-air television, subscription television, radio, online (including IPTV) and mobile technology.

The revenue derived from the licensing of these rights is a very significant revenue stream for most COMPPS members.

Maintaining and growing television and other media rights revenue is critical to the operation, survival and growth of COMPPS members and the sports they administer. The ability of COMPPS members to deal in their existing rights and to develop new rights will allow COMPPS members to:

- (a) maintain and increase their distributions to stakeholders and clubs (and in turn to athletes), which have high levels of community support and interaction;
- (b) increase investment in the development of their respective sports, including at grassroots level;
- (c) maintain relatively low admission prices for attendees at matches and events, providing all Australians with the opportunity to participate in sports;³
- (d) continue and increase support for important community relations programs;
- (e) continue to invest in facility development where appropriate and for the wider community benefit; and
- (f) continue to operate without significant reliance on Government funding.

The licensing in Australia of television rights to certain sporting events is regulated by the anti-siphoning regime under the *Broadcasting Services Act 1992* (Cth) (**the anti-siphoning regime**). Each COMPPS member owns or controls events on the list of events made under the anti-siphoning regime.

Copyright has an essential role in the licensing and exploitation of media rights to the major sporting events and other content owned or controlled by COMPPS members. As part of their licensing arrangements COMPPS members own copyright in the broadcasts and recording of their content. Ownership of copyright is important as it allows COMPPS members to license or exploit content across multiple platforms and, where necessary, take enforcement action against unauthorised use.

4 General comments on the Consultation Paper

The Consultation Paper seeks comment on issues relating to the availability of television services, the technical evolution and other aspects of those services and the use of the broadcast spectrum.

As a general principle and subject to the comments in parts 5 and 6 below, COMPPS members are in favour of:

- high quality television services;
- the full and complete delivery of television services throughout Australia including regional and remote areas; and
- the use of efficient and up to date broadcast delivery technology.

³ By way of example, COMPPS estimates that nearly half of all Australians attend at least one sporting event each year.

These types of matters are often addressed in the agreements COMPPS members have with their television broadcast licensees. It is standard for these agreements to mandate that the production of programs must be in high definition (HD), that broadcast coverage must be provided in regional and remote areas (as well as metropolitan areas) and impose obligations on broadcasters to use high quality standards of production and broadcast technology.

COMPPS supports the removal of unnecessary regulatory requirements and encouragement of television licensees to adopt efficient and up to date broadcast delivery technology, provided that these reforms do not adversely impact COMPPS members in any way.

Further, COMPPS urges the Department and Government not to make amendments to important legislative requirements in isolation and without considering inter-related policy and legislative framework, such as copyright law.

5 Specific issues raised in the Consultation Paper

Part 5 of this document sets out COMPPS' response to some of the specific issues and associated implementation questions raised in the Consultation Paper.

In making the comments below COMPPS has sought to restrict its submissions to matters it believes are directly relevant to its members. If it emerges that other issues from the Consultation Paper are also relevant, or if the Department wishes to raise any of the other issues with COMPPS or its members, we are happy to make a supplementary submission.

5.1 The role of the primary channel

The proposal to remove the requirement in the *Broadcasting Services Act* that the so-called 'primary' digital channel must be provided in a standard definition (SD) will have the effect that all digital channels can be provided in HD. This raises an important issue for COMPPS members.

COMPPS members support the high quality broadcasting of their sports. High quality production and broadcasts allows the content of COMPPS members to be presented in an attractive manner to viewers. COMPPS members have consistently been at the cutting edge of television production innovations. The quality of broadcasts of Australian sports has a world class reputation.

However, the issue of whether the primary channel should be SD or HD must not be considered without also addressing the related issue of the anti-siphoning regime.

As noted in the Consultation Paper, the anti-siphoning regime requires listed events to be broadcast on the primary channel. The requirement that the primary channel be SD has been seen by some stakeholders to be an important part of the anti-siphoning regime.

COMPPS members do not believe it is appropriate to address in isolation only one aspect of the anti-siphoning regime without addressing other, well documented concerns about the regime. The removal of the requirement that the primary channel be an SD

channel should be undertaken simultaneously with other long overdue amendments to the anti-siphoning regime.

COMPPS members support the proposed reform in relation to the removal of the requirement that the primary channel be SD if that change is part of the adoption of a suite of other changes to the anti-siphoning regime that COMPPS has previously canvassed with the Department and Government.

5.2 Third party content

COMPPS notes the Government is considering the possibility of regulatory reforms that could allow broadcast service licensees to allow services to be provided substantially or in full by third parties through program supply arrangements and/or a system whereby third parties can rent space on multiplex to transmit their content.

COMPPS and its members are open to considering new business models that would allow both broadcasters and third party content providers, including COMPPS members, to increase potential revenue streams.

COMPPS and its members are interested to see what options may be available, and considering in detail what those options may mean for each of them as content providers.

Ultimately whether any of the options will be pursued by COMPPS members will depend on a number of factors, including the type and viability of business models, the suitability of the new business models for not-for-profit sporting bodies and the strategic and commercial requirements of the sports and the broadcasters.

COMPPS members are available to further discuss the type and nature of possible reforms in relation to third party content with the Government and broadcasters.

5.3 Online services

As noted above, the ability to grant rights to content across multiple platforms — free-to-air television, pay television, online and digital rights — is of fundamental significance to COMPPS members. The granting of rights across multiple platforms is, and will be in the future, an important way for COMPPS members to deliver content and generate revenues.

Each of the COMPPS members currently exploit online and digital rights. COMPPS members have made, and continue to make, significant investments to allow them to exploit their online and digital rights. The licensing of online and digital rights is an increasingly significant part of COMPPS members' revenue. The proportion and importance of revenue from online and digital rights as part of overall media rights revenue is expected to increase in the coming years, however revenue from television broadcast licensing is currently the most significant source of media rights revenue for COMPPS members.

The regulation of online services is a complex and evolving area. The regulation of online services is also very important to the current and future operations and strategies of COMPPS members.

Further, as discussed in more detail below, communications regulation is linked to copyright law. It would be imprudent to amend one area of regulation without fully considering any impact those changes may have in related areas.

COMPPS understands from the Consultation Paper and subsequent discussions with representatives of the Department that the regulation of online services is a developing area and that no changes are likely in the short term. COMPPS notes the Government and Department will undertake further work during 2015 in relation to issues associated with free to air television services being delivered using online platforms.

In circumstances where the nature and extent of any changes to the regulatory framework for online services is not presently clear it is premature for COMPPS and its members to make detailed submissions about the appropriate regulatory framework.

However it is and will remain COMPPS' position that if the Government was to seek to increase or amend the regulation in this area, any new regulations should not have or create any adverse impact on (1) the current arrangements for the exploitation of online rights of COMPPS members, including any arrangements with third party licensees and (2) the exploitation in the future of digital and online rights by COMPPS members.

Given the commercial and strategic significance of online services for each COMPPS member, COMPPS requests that it and its members be regularly consulted and briefed in relation to this issue, including any possible amendments to the existing regulatory framework.

6 Other issues

The Consultation Paper seeks submissions on matters not explicitly addressed in the Consultation Paper that are pertinent to digital television regulation. Set out below are comments on some key concerns for COMPPS members in relation to other aspects of television regulation.

6.1 Urgent need for reform of the anti-siphoning regime

COMPPS and its members have consistently argued that the anti-siphoning regime is unfairly anti-competitive and not necessary to protect the interests of the Australian public having access to iconic sporting matches and events on free-to-air television.

Following lengthy and vigorous discussions between stakeholders (including the Department, free-to-air television broadcasters, subscription television providers, individual sports and COMPPS), in November 2010 the previous Government announced proposed reforms to the anti-siphoning regime. Many of the proposed reforms were an improvement on the existing law. COMPPS members sought to work with the previous Minister's office, the Department and other stakeholders to finalise draft legislation and the related instruments giving effect to those reforms. However, for various reasons, the *Broadcasting Services Amendment (Anti-siphoning) Bill 2012* did not proceed through the previous Commonwealth Parliament.

The Government's *Communications Portfolio Deregulation Roadmap 2014* refers to a commitment to deregulation, and specifically identifies change to anti-siphoning regime as an area for reform. However, to date, there has still not been any legislative changes to the outdated anti-siphoning regime.

The continued failure to undertake substantive changes to the anti-siphoning regime is unfair to COMPPS members. The current system of allowing free-to-air television broadcasters to be the gatekeeper of the television rights of COMPPS members, and addressing practical and commercial issues through ad hoc amendments to the anti-siphoning list via legislative instrument, is uncertain and unsatisfactory. COMPPS is concerned that the anti-siphoning regime will not be changed, or that if any amendments are made they will not satisfactorily address the legitimate and reasonable concerns of COMPPS members.

The position of COMPPS and its members, and their proposal to address this matter, is well known to the Department and the Government. COMPPS and its members urge the Department and the Government to urgently consider reform in this area.

6.2 Communications law and copyright

The law of copyright and television regulation are interrelated and overlap in many areas.

Strong and enforceable intellectual property laws are of fundamental importance to the licensing and enforcement of the valuable rights of COMPPS members. COMPPS and its members would be concerned if any amendments to television and communication regulations had unintended consequences on intellectual property laws (and vice versa).

Further, COMPPS would be concerned if many of the recommendations of the Australian Law Reform Commission (**ALRC**) report regarding copyright and the digital economy (**ALRC Report**) were to be supported or adopted, whether as part of the current review of television regulation or otherwise. COMPPS was and remains concerned many of the recommendations in the ALRC Report are not justified and/or may adversely impact its members.

COMPPS' position on the issues addressed in the ALRC Report has already been addressed in previous submissions made by COMPPS to the ALRC.⁴ COMPPS does not wish to re-state in this document all of the submissions it has previously made, however it is important to again reiterate the firm opposition of COMPPS and its members to the modification of Australian copyright law to introduce a broad 'fair use' exception which would operate with a non-exhaustive list of 'fairness factors'. COMPPS does not support the introduction of a fair use exception.⁵ COMPPS believes any such amendment to copyright law will undermine and adversely impact the licensing and value of the media rights and other content rights of COMPPS members. For example, if the current time shifting exemptions were to be removed and replaced with a broad fair use exemption it would create uncertainty and adversely impact the exploitation of media rights by COMPPS members.

⁴ See COMPPS' submissions to the ALRC inquiry dated 30 November 2012 and 31 July 2013. AFL, Cricket Australia and NRL also made separate submissions to the inquiry.

⁵ COMPPS and its members also oppose the ALRC's recommendation that, if a fair use exception is not introduced, any new fair dealing exceptions of the kind proposed by the ALRC be introduced into the Copyright Act.

The ALRC Report also made a number of recommendations in relation to the application of copyright law to, and the regulation of technology used to, communicate content relating to COMPPS members.⁶ Again, the position of COMPPS and its members has not changed from the position set out in its previous submissions to the ALRC.

6.3 Retransmission regime

COMPPS is aware of recent suggestions that the Government may amend the retransmission provisions in the *Copyright Act* and *Broadcasting Services Act 1992* (Cth) (**retransmission regime**).⁷

As copyright owners and licensors, the retransmission regime is very important to COMPPS members. COMPPS is concerned that changes in this area can immediately and materially adversely impact on its members.

For the record and as previously documented, COMPPS confirms that:

- (a) it does not support changes to the retransmission regime; and
- (b) it strongly opposes the suggestions previously raised in the ALRC Report that the statutory licensing scheme for the retransmission of free to air broadcasts apply to transmissions over the internet and the removal of the 'internet exclusion' from this scheme.

7 Concluding comments

COMPPS welcomes and supports the Department's ongoing consideration of television regulation.

When considering the matters raised in the Consultation Paper COMPPS urges the Department and Government to be mindful of the interest of COMPPS members as providers of valuable content.

COMPPS members strongly support the highest standards of production in the broadcast of its sporting competitions and events. However, COMPPS requests that the Department and the Government give serious consideration to only proceeding with the recommendation to remove the SD requirement for the primary channel as part of the implementation of the other changes to the anti-siphoning regime that COMPPS has previously raised. All aspects of the unsatisfactory anti-siphoning laws should be addressed as part of the current review, rather than only making a change to one of the key components of that regime.

COMPPS also urges the Government and Department consider and be mindful of other issues associated or connected with the regulation of television in Australia, including the adverse impact that changes to retransmission regime will have on COMPPS members and the interrelationship between intellectual property law and communications regulation.

⁶ The ALRC Report recommended the Government consider aspects of the retransmission regime for free to air television broadcasts (either to repeal the regime entirely or to allow retransmission via the internet) and that the existing distinction between broadcast copyright and copyright in other communications (i.e. - internet transmissions) be considered by the Government.

⁷ Australian Financial Review, 17 March 2015

Representatives of COMPPS and its members are available to meet with the Department or provide additional information or submissions regarding these matters.

For further information please contact:

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Yours sincerely

A handwritten signature in black ink, appearing to read 'Malcolm Speed', written in a cursive style.

Malcolm Speed
Executive Director