



1 April 2008

SUBMISSION ON THE REVIEW OF DIGITAL BROADCASTING REGULATION

To the Ministry for Culture and Heritage
PO Box 5364
Wellington
By email: broadcastingregulation@mch.govt.nz

1 Introduction

- 1.1 This submission is made on behalf of the New Zealand Rugby Union Incorporated of 1 Hinemoa Street, Harbour Quays, Wellington ("NZRU").
- 1.2 The NZRU appreciates the opportunity to comment on this important area of regulation, bearing as it does significantly on the delivery of rugby union to its stakeholders in New Zealand.
- 1.3 The NZRU is responsible for the administration of rugby in New Zealand, and in doing so its aims are to:
 - (a) promote, foster and develop rugby throughout New Zealand and the world and to oversee rugby throughout New Zealand;
 - (b) arrange and participate in international, trial and other rugby matches and tours both within New Zealand and overseas;
 - (c) represent New Zealand rugby on the International Rugby Board ("IRB") and to submit any amendments to the laws of the game and the by-laws and regulations of the IRB, to the IRB that the NZRU considers to be in the best interests of New Zealand rugby;
 - (d) form and manage New Zealand representative rugby teams;

- (e) foster rugby matches between our member provincial rugby unions;
- (f) encourage participation in, and support for, rugby by all participants in, and supporters of, the game and at all levels (including by way of example, administrators, players, coaches, referees, match officials and supporters); and
- (g) do all such other things to promote the interests of rugby as the NZRU may determine from time to time.

1.4 The NZRU is an incorporated society, registered under the Incorporated Societies Act 1908. Our members are:

- (a) Affiliated Unions: the 26 provincial rugby unions who administer rugby in defined geographical zones;
- (b) Associate Members: organisations with aligned aims, such as The New Zealand Universities Rugby Football Council (Incorporated), New Zealand Schools' Rugby Council, New Zealand Deaf Rugby Football Union (Incorporated) and The Rugby Museum Society of New Zealand Incorporated;
- (c) Life Members: natural persons elected as life members in recognition of exceptional service rendered to the NZRU and to rugby; and
- (d) the New Zealand Maori Rugby Board Incorporated.

1.5 Further information about the NZRU is available in our annual report.

1.6 The NZRU is also a shareholder in Rugby New Zealand 2011, a joint venture company formed with the Crown and having the operational responsibility for running the Rugby World Cup 2011 in New Zealand.

2. Overview

2.1 The NZRU has reviewed documentation released by the Ministry, and wishes to comment in relation to a number of the questions posed, and issues raised, in the Consultation Paper : Broadcasting and New Digital Media: Future of Content Regulation (“the Consultation Paper”), and Digital Broadcasting: Review of Regulation Volume Two: Discussion Paper (“the Discussion Paper”). In particular, it considers that the following aspects of the review have significant relevance to its operations:

- (a) Proposal for major restructuring of the regulating entity or entities, and the relevant roles and responsibilities. The NZRU considers that current arrangements for the regulation of the broadcasting environment function effectively, and that change should only be embarked upon where it is demonstrably necessary. In organizing its affairs the NZRU, and its broadcasting partners have planned and made investments based on the existing structure;
- (b) New methods of content delivery. The NZRU supports the concept that regulation of broadcast-like content should be consistent, irrespective of the method of delivery, including new technologies.
- (c) Access to Premium Content. The NZRU considers that access to premium content is satisfactorily delivered in the existing broadcast environment, and that there is much to risk from unnecessary interference with the market. With the NZRU relying very heavily on revenue received from the sale of broadcasting rights, this is its principle issue of concern, and a majority of the submission will deal with it.

3. Principles and Objectives (Discussion Paper Question 1.1)

3.1 NZRU is concerned to ensure that *“protecting property rights, to ensure the creation of audio-visual content is encouraged, and content is able to*

be exploited on fair terms" is given sufficient priority. The ability to fully exploit our product is critical to the success, and even the survival, of rugby in New Zealand, where broadcasting revenue makes up approximately 30% of total revenue.

- 3.2 From an NZRU perspective, there would need to be very significant justification for altering a system that is currently meeting its critical needs, justification that appears to be largely absent, or at least vague, in the documents released. Major shortcomings with New Zealand's current system have not been identified and the NZRU does not accept that, simply because certain structures are in place in other countries, they are appropriate for New Zealand, or that they will best meet our unique market conditions.

4. Options for discussion (DPQ 3.2)

- 4.1 The NZRU considers that updating existing arrangements, with restructuring only where necessary to deal with genuine market changes, is the appropriate approach. In large part reliance on general competition policies (and laws) and subsidies to achieve economic and social objectives are considered likely to be sufficient.

5. Regulatory Framework (DPQ 4.1)

- 5.1. If consistency can be achieved across regulations, NZRU sees no particular need for the creation of a single regulator when the current model is performing satisfactorily.
- 5.2. The mixing of diverse roles, e.g. regulation, funding / monitoring Public Service Broadcasting (PSB), spectrum management, content standards, media literacy, appears to create significant risks of conflict. Doubts arise regarding whether a provider of subjectively lesser quality programming can expect to be treated impartially by a regulator that also has responsibility for media literacy, similarly can a pay television (PTV) operator expect to be treated impartially by a regulator that has responsibility for funding PSB?

- 5.3. The NZRU does not consider that any “wholesale regime” supporting new entrants should be required, in the absence of evidence of hoarding or other any competitive behaviour by a dominant player (and even then it questions whether general anti-competitive legislation cannot be relied upon).
- 5.4. There is a suggestion that regulatory confusion could deter investment, but it seems just as likely that greater regulation, particularly when it impacts on the provider’s ability to get return from its investment, would have even greater effect. The size of investments encouraged by regulations envisaged could potentially be at a much lower scale, than those inhibited (local small scale investment at the cost of much larger international investment).
- 5.5. The NZRU supports an extension, and limited convergence, of roles only, with independence being maintained between agencies having different, and potentially conflicting, objectives.

6. Role and Responsibilities (DPQ 4.2)

- 6.1 The NZRU would be concerned if a converged regulator role was to combine purely regulatory functions, such as licensing, with subjective or quality assessments, such as standards, literacy, funding, or PSB monitoring. Any agency involved with the success of PSB should not have an oversight role over non-PSB providers.
- 6.2 The NZRU does not consider that it would be appropriate for a single regulator to have both competition and cultural responsibilities, the one unavoidably being seen to influence the other. If certain social policy agenda are to be pursued by Government entities, as appropriately will be the case, these should be kept completely separate from commercial/competition decisions.

7. Market definition and cross-media ownership (DPQ 4.7)

- 7.1 The NZRU is not aware of any problems of the type referred to arising in New Zealand, and if such problems were to arise it might be expected that they could be dealt with through general competition legislation. Noting the overseas patterns, the NZRU agrees that the focus of Government should be on incentives (to ensure that any significant gaps in the market are filled) and the more general effective operation of competition.

8. PSB in a digital age (DPQ 5.9)

- 8.1 The NZRU does not support requirements for the delivery of publically-funded content through pay platforms. With the media literacy education proposed, delivery of publically funded content should be delivered through normal market forces. Any remaining market failure should then be met by public broadcasting.

9. Advertising (DPQ 5.10)

- 9.1 The NZRU supports the extension of standards regulation to new digital media (approach B), on the basis that regulation should be consistently applied across broadcast-like content, with new media not being advantaged over traditional providers.

10. Availability of Content: Premium Content and Services (DPQ 6.5 – 6.8)

- 10.1 The right for New Zealand Rugby to fully exploit the content it produces, including premium content, is critical to its success. Broadcasting revenue currently represents approximately 30% of total revenue in an exceedingly challenging global financial environment. While the NZRU has a sound financial base, losses in the past two financial years have exceeded \$5,000,000, with an inevitable impact on funding available for rugby operations right down to a provincial level, where a number of Unions are struggling to cover costs.

- 10.2 The NZRU notes that *"content management rights have been highlighted as a key area of concern by stakeholders"*, but it is unclear who those stakeholders are, and what their particular concerns might be. That certain industry participants might consider regulatory intervention to be in their interests should not, in the NZRU's submission, be considered a legitimate reason to act.
- 10.3 *"A number of industry players are of the view that exclusive content rights deals are creating a critical bottleneck for investment"*. Again it is unclear who these industry players are, or what the basis of their views might be. The NZRU's experience is that no "bottleneck" of a type that might seriously impede delivery of content to viewers exists in New Zealand, and that exclusive content rights have created an environment where a broadcaster has been able to invest heavily in its sport.
- 10.4 *"Some stakeholders believe anti-siphoning rules would be desirable to protect events of national significance"*. The NZRU is not aware of events of national significance, or more particularly the ability for them to be viewed, being "under threat". Such events, particularly major sporting events, are broadcast widely in New Zealand and to suggest that, because an event is broadcast on PTV, it is not widely available ignores the realities of the broadcast environment in New Zealand (see 10.6).
- 10.5 The NZRU strongly agrees with the suggestion that *"introduction of anti-siphoning laws would undeservedly punish certain parties, such as Sky and the sports sector, who have made considerable investment in New Zealand sports through rights acquisition"*.
- 10.6 *"Broadcasters' attempts to secure exclusive rights to content can have the potential to disadvantage the wider audience by limiting the availability of content considered to be of public value"*. While this statement might theoretically be true, it is not the NZRU's experience in New Zealand, where:
- (a) rugby broadcasts are very widely available;
 - (b) Sky Television ("Sky") has very high subscriber numbers;

- (c) the number of rugby matches broadcast has dramatically increased since agreements were entered into with Sky, from 38 in 1995 (including 5 live), to over 200 in 2007¹;
- (d) research exists showing high match viewership “out of home”, for instance in sports clubs, commercial premises, and with friends/neighbours;
- (e) Sky’s digital service has significant geographical reach, to the point where in a number of isolated areas FTA channels have to be, and are, delivered on the Sky digital platform.

10.7 The NZRU is not aware of any evidence of broadcasters “hoarding” rights in New Zealand. By way of contrast it is noted that the opposite seems to be happening in Australia where it is the FTA broadcasters, given preferential access to content through anti-siphoning legislation, who are reportedly securing rights and then not making content available.

In any case, it is considered that such behaviour would only be possible where a provider has a dominant position, and it could be expected that normal competition laws would provide a remedy.

10.8 The NZRU is not aware of any evidence that access to Sky’s electronic programme guide is being restricted, or made available on onerous or unfair terms.

10.9 Any suggestion that long term supply arrangements should be restricted is viewed with concern by the NZRU. Long term arrangements are exactly what sporting codes require in order to provide the funding certainty necessary for forward planning. It is noted also that such certainty is also what allows the broadcaster requires to plan and make investments.

10.10 In Europe the Television Without Frontiers directive encourages lists of events considered to too important to be broadcast exclusively on PTV to be drawn up. The NZRU is of the view however that it is simplistic to target major events alone, particularly in a market the size of New Zealand. Here Sky benefits significantly from the rights to major test matches that it has

¹ Figures provided by Sky.

invested it. On the other hand however it is also committed to broadcasting large amounts of domestic rugby which may not have the same exposure (and certainly did not have prior to 1995) without the exclusive rights deal. Undoubtedly it is the highest profile events that drive value considerations to a significant extent however, and the value of the package without them would be seriously compromised.

- 10.11 It should also be noted that while the discussion document implies that free to air television (FTA) cannot compete in the marketplace for major events against PTV, that is clearly not the case in New Zealand, where Mediaworks (TV3) held the rights for the 2007 Rugby World Cup. Other examples where FTA has participated in New Zealand rugby rights include replay rights held previously by Mediaworks, and the joint bid by Sky and Television New Zealand for the broadcasting rights to the IRB Sevens World Series.

It is relevant to note however that on occasions in the past where the NZRU has had extra matches (outside of rights committed to Sky) to sell, the FTA broadcasters did not place the same value on attaining those rights as did Sky, and in some cases, had no interest in purchasing the rights at all. Even replay rights held by Mediaworks were devalued towards the end of their agreement, when broadcasts were pushed later into evening schedules.

- 10.12 The Television Without Frontiers directive also promotes universal access to the reporting of current events on a non-commercial basis, but this is already a reality in New Zealand due to "fair dealing" arrangements between broadcasters.
- 10.13 With regard to the situation in Australia referenced in the Discussion Paper, it has already been noted that anti-siphoning legislation does not necessarily guarantee access to major sporting events. Additionally the number of households having access to PTV in New Zealand is higher, with 45% of New Zealand homes having Sky, and there is clear evidence that large numbers of New Zealanders access major sporting events in a more communal environment, outside the home. These comparisons

together are significant for the NZRU, and may be a factor in rugby struggling to grow in Australia, as evidenced by a reported Australian Rugby Union (ARU) loss for 2007 of approximately \$AUD8.5M. The situation can only be imagined if the ARU did not share in the combined revenue of its partners in the SANZAR joint venture, where New Zealand and South Africa do not have similar legislative regimes. Already South Africa has decided to sell some of its matches post 2010 to broadcasters independently of SANZAR, raising the possibility that the ARU will need to rely more heavily on its own broadcasting returns in the future, returns that will be limited if the highest value matches must be broadcast FTA.

In any event, it is noted in the discussion paper that the trend towards anti-siphoning is on the wane in Australia.

10.14 *"The possibility of abuse of a dominant position through the sale or acquisition of exclusive and/or bundled rights is also an issue that many regulators are reviewing closely".* The NZRU understands these to be issues that are dealt with by general competition legislation, and does not see why a specific broadcasting framework needs also to be set up. More particularly, the NZRU is not aware of any such abuse occurring in New Zealand, or even being alleged.

10.15 *"In Europe, most markets allow the collective selling of rights by sports (notably football) leagues, deeming it to be in the national interest".* The statement is even truer for New Zealand Rugby.

The splitting of rights into several contestable packages may be possible in European football, but the scale of the competitions in New Zealand, and their audiences, would make this a very much less workable proposition here. The NZRU is of the view that, in order to achieve the necessary "critical mass" to be a high value proposition for a broadcaster, it needs to bundle not only its own offerings, but also the matches under the control of SANZAR. Even with that degree of bundling it is difficult to generate sufficient funds in the current market (as evidenced by the NZRU financial result for 2007). Any regulation impacting on the NZRU's ability to best sell its property rights would potentially be dire.

It is noted however that in practice a split does already exist, with New Zealand broadcasting rights to any Rugby World Cup being sold separately by Rugby World Cup Ltd, rather than by the NZRU. In 2007 this resulted in Mediaworks obtaining the exclusive rights.

10.16 With regard to the options proposed at page 36 of the discussion paper, it is noted that approach A refers to reviews of whether exclusive rights leads to anti-competitive behaviour, and whether major rights vendors should face any regulations over the bundling of rights platforms. Respectfully, either these reviews are necessary or they are not. If they are then Approaches B and C should not be considered until such reviews have taken place.

10.17 With regard to Approaches B and C, it is noted that several elements suggested there are already present in the New Zealand broadcast environment:

- (a) The Sky platform already carries FTA channels;
- (b) A "fair play" agreement already exists between broadcasters with regard to news reporting;
- (c) Some premium content is already replayed on a delayed basis FTA; and
- (d) FTA channels already have access to electronic programme guides on the Sky platform.

11. Conclusion

11.1 The NZRU considers that whilst regulations may need updating to reflect technological advances, the need for significant structural change and regulation of content is overstated.

11.2 The NZRU considers in particular that there is no demonstrated need for regulation regarding availability of content in the New Zealand broadcast environment. New Zealanders overall are delivered very good access to

major events and, even if some level of restriction was shown to be present, this is more than made up for by the greatly improved availability of other content, and the legitimate benefit accruing to rights holders.

11.3 Whatever the ideologies involved in the argument, the reality is that New Zealand Rugby relies for its survival on its ability to fully exploit the broadcast rights in its own sport.

11.4 The NZRU is ready and available to provide further information on any of the issues raised in this submission, and/or to make presentations in person if the Ministry considers that would be of benefit.



Steve Tew
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