



Foxtel siphoning deal ruled not cricket

Foxtel Cable Television Pty Limited v Nine Network Australia Pty Ltd and Australian Broadcasting Authority, Federal Court of Australia, No NG144 of 1997, Sydney (heard in Perth), 26 March 1997, before Justices Wilcox, Lee and RD Nicholson.

The Full Federal Court has upheld the right of the public to receive important events on free-to-air television by rejecting an attempt by a cable operator to avoid the anti-siphoning provisions of the Broadcasting Services Act 1992 (the Act), by use of a contractual device.

The anti-siphoning provisions

The 'anti-siphoning provisions' are contained in two parts of the Act. Section 115 allows the Minister to specify in the Gazette events which, in his opinion, should be available free to the public. 'Events' are not restricted to sporting events. Unless the Minister publishes a declaration to the contrary, an event is taken to be removed from the notice 168 hours (7 days) after the end of the event. Part 6 of Schedule 2 of the Act imposes a condition (10(1)(e)) on subscription television licensees that they *will not* acquire the right to televise a s115 event on a subscription service *unless* either a national broadcaster (the ABC or SBS) or a commercial broadcaster with coverage of more than 50% of the Australian population has the right to televise the event.

The agreement with Seven

News Limited (News) acquired the Australian free-to-air and pay TV broadcast rights for the Australian Cricket Team's tour of South Africa, which included Test and World Cup

one day matches to be held between February and April of 1997. These events had been included in a s 115 notice published in July 1994 by the then Minister for Communications and the Arts, Michael Lee.

A News executive, Tom Mockridge, made a written offer of the free-to-air rights to the Nine Network's David Leckie in October 1996. He also indicated that News intended to offer the pay rights to Fox Sports and/or Foxtel. Mr Leckie responded by offering a substantial fee for the free-to-air rights. After a series of discussions between the two men, Nine's offer was rejected on 15 December. Five days later, after becoming aware that Fox Sports and/or Foxtel was likely to televise the matches, Mr Leckie wrote to the Australian Broadcasting Authority (the ABA) questioning whether this constituted a breach of condition 10(1)(e)(ii).

The right to televise the event in this context means the right to televise it as it happens, or as soon as is technically feasible.

On 24 December, News made an agreement with the Seven Network Limited (Seven) granting it the free-to-air rights to the matches on a delayed telecast basis. Initially, Seven was not to telecast a match earlier than three months after the end of a one day match or test. Later, as a

result of Nine's complaint to the ABA, the period was reduced to 168 hours. Seven was also given the exclusive rights to telecast free-to-air a one-hour highlights program each day. On 6 January, News made agreements with Foxtel Management Pty Ltd for exclusive pay TV rights to the Test matches and with Fox Sports Pty Ltd for exclusive pay TV rights to the one-day matches. Foxtel Management later assigned its rights to Foxtel Cable Television Pty Ltd.

Seven made it clear to the ABA that it had no intention of broadcasting the matches, one Seven representative noting that 'a full delayed telecast would be like watching paint dry for the audience since the results of the matches would already be known'.

Surprisingly, the ABA concluded that the steps taken by News involved no legal problem, arguing in a report to the present Minister, Senator Richard Alston, 'The provision in Seven's contract of a condition preventing it from exercising its rights to delayed coverage of the events goes to the issue of broadcast, not to the acquisition of rights...it is not relevant to the issue of compliance with [condition 10(1)(e)]'.

Not surprisingly, Nine sought a review of the decision in the Federal Court.

Court rejects attempted circumvention of the Act



The initial application was heard in February by Justice Lockhart, who rejected Foxtel Cable's arguments in favour of the ABA decision. Justice Lockhart found that it would be contrary to the anti-siphoning provisions if a notified event could not be seen by free-to-air viewers earlier than seven days after the game had finished, while it was available on pay TV in the meantime. He did not accept that the right to televise highlights was substantially the same as the right to broadcast the match itself and concluded that Foxtel Cable was therefore in breach of the provisions. He ordered the ABA decision to be set aside and Nine's complaint to be remitted to the ABA for further consideration.

Foxtel Cable appealed the decision. The Full Court confined itself to the issue of whether a commercial television station could be said to have the right to televise the event if:

- it has only the right to televise it after a delay of three months or even 168 hours; or
- it only has the right to televise a one hour highlights program for each day of the event.

The Full Court accepted that condition 10(1)(e)(ii) was concerned with a commercial television licensee's right to televise a declared event, rather than whether or not it actually does so. However, it found that the ABA made a fundamental error in its characterisation of the delay provision, because its effect was 'to deny Seven the *right* to televise the matches within three months (later one week). ...[therefore] Seven never acquired the right to televise any of the matches during the period they were on the list of declared events. It was denied the right to televise, regardless of its wishes just as effectively as if nothing had been said in its agreement

with News about the televising of matches, as distinct from highlights'.

The Court rejected argument from Foxtel Cable's counsel that the agreement gave the 'right to televise' each match, agreeing with Lockhart J that the delayed right could not properly be described as 'the right to televise *the event*' and noting that 'events' are selected because the Minister is 'of the opinion that many people will wish to feel part of them, by seeing them as they occur; not by later seeing a television record of them'. The right to televise the event in this context means the right to televise it as it happens, or as soon as is technically feasible. It found support for this interpretation in the explanatory memorandum, which said 'the policy objective... is to prevent Pay-TV licensees acquiring the exclusive rights to broadcast important events that should be available free to the public on free-to-air... services'. To hold that it was sufficient that there be a right to televise after seven days (or to televise one hour highlights) would make a nonsense of a provision designed to give this type of access to the public.

The Court also described as 'naive' the assumption that decisions regarding the televising of a particular event would necessarily be made with reference only to market forces.

Short shrift was given to argument that the purpose of the anti-siphoning provisions was to provide a 'headstart period' for negotiating rights by commercial television licensees, thus ensuring that market forces prevail in the acquisition of television rights. The Court noted that the provisions did not impose limitations on agreements

or negotiations, but did restrict subscription services from televising an event.

The Court also described as 'naive' the assumption that decisions regarding the televising of a particular event would necessarily be made with reference only to market forces. As it noted, 'The Australian television industry is dominated by companies having a variety of media interests. A company's attitude to the televising of [an] event might well be influenced by other interests of that, or a related company. This may be the reason why News refused Nine's offer in the present case but made an agreement with Seven that returned a much smaller fee. But for [a variation occurring at the time of the initial hearing] the agreement would have given the Foxtel companies, which [are] part-owned by News, total freedom from competition in respect of the televising of the matches. That result would have defeated the purpose of the anti-siphoning provisions'.

Conclusion

When considering subscription television, it had been clear to Parliament that something had to be done to ensure that the Australian public continued to have free-to-air access to major events. Realising the public would find unacceptable a scenario where a pay service might acquire an exclusive right to televise a major sporting event, the provisions were included in the Act to encourage free-to-air transmissions by removing incentives for a pay service to lock away the exclusive rights. Luckily for the public, the drafting of the provisions proved resilient enough to withstand what can only be described as an audacious and ingenious attempt at circumvention. □

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