finding that a situation of possible control existed and would therefore not operate in practice to prevent a breach of the control provisions occurring. The judgement sets out a number of these clauses and decides that one such clause does not have the effect intended by its drafter.

Hill J says:

> *"In my view the qualifying requirements clause does not require a contrary conclusion. ... I do not say that it is a sham or that it would be consciously ignored by the parties to the various agreements, but the practical result is that CanWest can, at any stage ensure that options are exercised or debentures converted to ensure that shares in Selli and Donholken are held by persons, who although not controlled by CanWest are known to be sympathetic to that company."*

It seems therefore that the ABA can look behind these "qualifying requirements" and consider the practical and commercial effect of them on the conduct of the parties in determining whether they will prevent a company interest or control arising.

CONCLUSION

The concept of control under the BSA, whether it appears as part of a company interest test or in determining whether a person is in a position to exercise control of a company, licence or newspaper, is to be interpreted broadly. There is no need for an immediately enforceable right to exist nor even any need for any implicit or explicit understanding or arrangement to exist between the person who is in the position and the entity that may be controlled. The primary means by which control questions under the BSA are to be determined is the one elicited by Lockhart J in the *News Corp* case. They are to be determined by practical and commercial considerations, by commercial and economic reality rather than by legal theory.

[Note: An appeal has been lodged against this decision to the Full Federal Court.]

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Media Policy and Anti-siphoning

In the first of a 2 part series on anti-siphoning, Brendan Moylan analyzes the current legislative and policy regime and explains why it is unfair on pay TV operators and in need of substantive reform

After the dust of the media ownership debate has settled, it appears that once again nothing is to be done about the anti-siphoning provisions found in section 115 of the *Broadcasting Services Act* 1992 (Cth) ("BSA"). After a brief flurry of interest at the time of the recent Ashes Tour of England, the issue of how to address the problems inherent in the anti-siphoning provisions of the BSA has been side stepped by a Government which has demonstrated a singular inability to act decisively in the area of media policy. Nonetheless, those problems still exist: section 115 continues to operate unfairly in favour of free-to-air broadcasters without providing any consequent benefit for consumers.

SIPHONING DEFINED

According to the Explanatory Memorandum to the BSA, "siphoning" involves the:

> *"obtaining by a subscription television broadcasting licensee of the rights to broadcast events of national importance and cultural significance that have traditionally be televised by free-to-air broadcasters, such that those events could not be received by the public free of charge".*

In other words, siphoning is the migration of programming from free-to-air television exclusively to pay TV. An "event" can only be "siphoned" where:

(a) the *exclusive* rights to televise that event are acquired by a pay TV operator;

(b) the event is one of "national importance and cultural significance"; and

(c) the event is one which is traditionally shown by free-to-air broadcasters at no charge.

Siphoning is characteristic of events with a short "shelf life": ie, events which have high viewer demand over a short time period, most obviously sporting events[1].

LEGISLATIVE INTENT & MEASURING SUCCESS

At the time section 115 was introduced, the then Minister for Communications and the Arts observed that "for at least 5 years, less than 20% of Australians will have access to pay TV". The Australian Broadcasting Authority ("ABA") has noted on a number of occasions that a significant proportion of the viewing public will choose not to subscribe to pay TV at any time, whether for financial or other reasons. Section 115 was introduced on ostensibly equitable grounds to ensure that non-subscribers continued to have access to events of "national importance and cultural significance" which had been traditionally shown on free-to-air television.

In determining whether the anti-siphoning provisions operate effectively the first question to ask is whether the legislation has prevented pay TV operators from obtaining exclusive rights to events of "national importance and cultural significance" which had been traditionally shown on free-to-air television so that those events are no longer seen on free-to-air television. The second question to ask is at what cost this end has been achieved and whether it could be achieved more efficiently.

RELEVANT PROVISIONS

The principal anti-siphoning provision of the BSA is section 115, which provides:

"The Minister may, by notice published in the Gazette, specify an event, or events of a kind, televising of which should, in the opinion of the Minister, be available to the general public."

Section 115 is complemented by section 99, which makes the holding of a subscription television licence conditional upon the conditions set out in Part 6 of Schedule 2 of the BSA. Clause 10(1)(e) of that Schedule prevents a subscription television licensee acquiring the rights to televise an event specified in a notice issued under section 115(1) unless:

(a) a national broadcaster has the right to televise the event; or

(b) a commercial television network covering greater than 50% of the Australian population has acquired the rights to televise the event.

OPERATION: THE ACQUISITION OF RIGHTS

It should be stressed that the combined operation of section 115, section 99 and clause 10(1)(e) *do not* prevent a pay TV operator acquiring the rights to televise a listed event. They do, however, prevent a pay TV operator acquiring those rights prior to the acquisition of similar rights by a commercial or national broadcaster. It follows that a subscription broadcast licensee can never acquire exclusive rights to a listed event.

Importantly, however, section 99 prohibits a pay TV operator acquiring the right to televise a listed event "on a subscription television broadcasting service" until a national or commercial broadcaster has acquired the rights to televise the event. In other words, a pay TV operator cannot acquire the right to televise a listed event (even where such rights are limited to televising the event on pay TV) until a national or commercial broadcaster has acquired the right to televise the event.

The anti-siphoning provisions of the BSA provide an incentive for free-to-air broadcasters to acquire all rights (including pay TV rights) to listed events. Those pay TV rights can then be re-sold to pay TV operators, effectively handing control of access to listed events to free-to-air operators. Additionally, it allows free-to-air operators who acquire rights to listed events - and not event organisers - to profit from the sale of pay TV rights to those events.

Provided that subscription broadcast licensees cannot acquire the free-to-air rights to a listed event, there is no reason why those subscription broadcast licensees should be prohibited from bidding for and acquiring the exclusive right to broadcast listed events on pay TV.

DIVERSITY AND PAY TV

The furore over the limited coverage of the Ashes cricket tour of England in 1997 focused attention on the anti-siphoning provisions of the BSA . The Nine Network, which held the rights to televise the tour, argued that it could not shift regular programming to make room for the cricket[2]. Pay TV offers a compromise because multi-channel networks have sufficient channel space to devote to coverage of entire events. The anti-siphoning provisions of the BSA can and have been used to prevent realisation of the potential of pay TV to provide more complete coverage of listed events.

The ABA conducted an initial investigation[3] into which events of "national importance or cultural significance" should be gazetted by the Minister under section 115. In its response, the Federation of Australian Commercial Television Stations ("FACTS") argued that the ABA's "national" focus was inappropriate:

"Many events which are considered important by many Australians may not meet the ABA's criteria of "national importance or cultural significance" This is particularly so of a great many sporting events which have very strong, but regional, or local following."[4]

The irony of this argument - that the great majority of such events are not (and, applying the logic advanced by Nine in its decision not to televise sessions of the Ashes series, could not be) televised by free-to-air operators - appears to have escaped FACTS. FACTS went on to recommend that the Minister include on the list "all events ... which the general viewing public are presently able to view free of charge", arguing that pay TV operators would pay inflated prices for rights to events in order to secure programming[5].

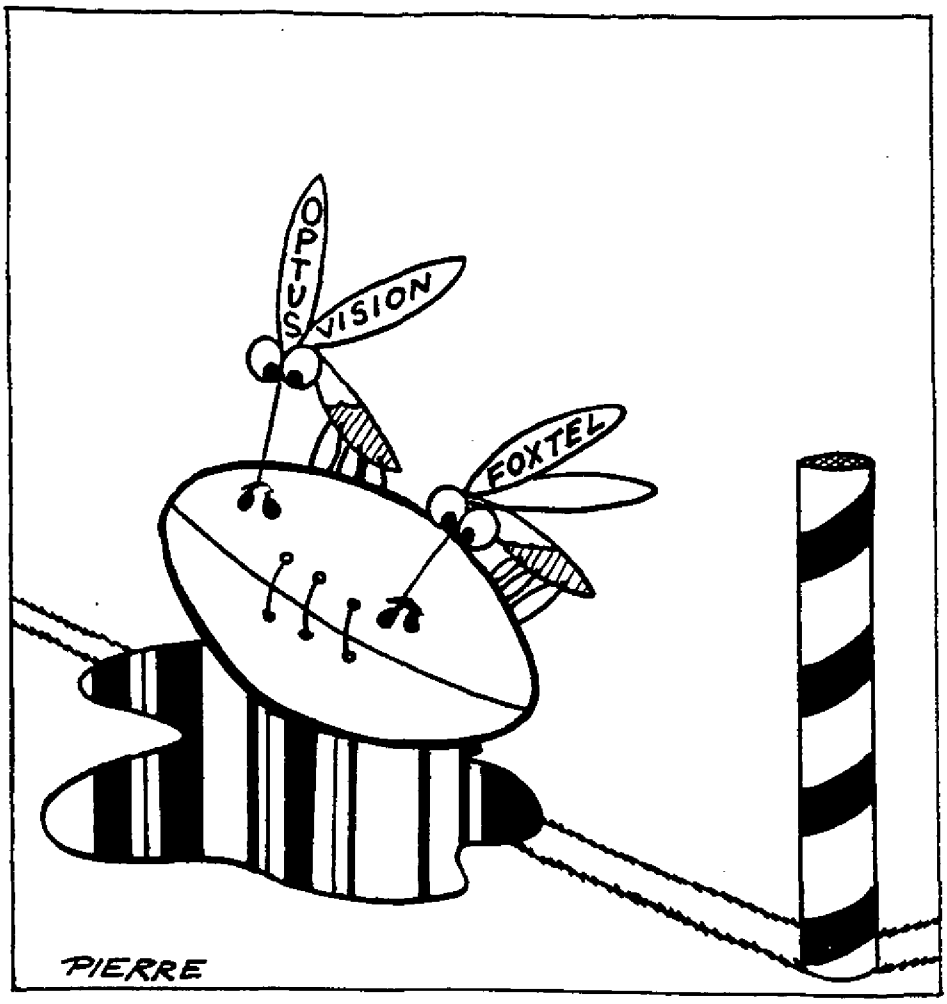
COMPOSITION OF THE LIST

In its 1994 report on its investigation into the possible composition of the anti-siphoning list, the ABA noted that "apart from a few major sports, all other sporting bodies and the [then Trade Practices Commission] oppose the FACTS position"[6]. The Australian Football League, for example, submitted that legislative restrictions on AFL coverage were "unwarranted and unnecessary", pointing out that its "current contract with the Seven Network ... combined with market forces and public demand will ensure that major AFL events will remain on free-to-air television"[7]. The Australian Cricket Board wanted to retain the ability to "canvass the wider market including pay television" in the event it considered that "it was not possible to achieve a fair market price from terrestrial broadcasters"[8]. In its response to the ABA's Investigation Paper, the Confederation of Australian Sports (the peak umbrella body for national sporting organisations) submitted that "arguments which imply that Australian sports coverage already works in the public interest would be difficult to justify"[9]. FACTS appears to have been as interested in protecting events organisers against themselves as it was at protecting the ability of the general public to continue to view certain events.

The ABA developed four options for the anti-siphoning list which it presented to the Minister. They ranged from a comprehensive list (similar to that advocated by FACTS) to a "watch" list (which contained no events but rather proposed continuous monitoring which might trigger the listing of certain events in the future). In its report, the ABA argued that the comprehensive FACTS list was likely to limit the ability of pay TV to deliver diverse coverage of events, noting the "limited capacity of free-to-air broadcasters to provide complete coverage of events to which they hold ... rights"[10]. Further, the ABA argued, a comprehensive list such as that advocated by FACTS "could be considered anti-competitive as it gives the power to commercial television to 'hobble' pay TV by restricting their exclusive access to virtually all current sports"[11]. Despite such objections, and despite the ABA's recommendations that a compromise position be adopted, the list finally gazetted by the Minister for Communications and the Arts on 6 July 1994 was in substantially the form suggested by FACTS[12].

REMOVING EVENTS FROM THE LIST

In response to concerns that free-to-air broadcasters would "hoard" rights,



section 115 of the BSA was amended to provide for removal of events from the list:

(a) automatically after a period of 168 hours (7 days) from the time of the event ; and

(b) at the discretion of the Minister.

The Explanatory Memorandum accompanying the relevant amendments to the BSA suggested that the Minister could exercise his discretion to remove events from the list where commercial broadcasters had been given a "real opportunity" to acquire the relevant rights but had chosen not to do so, or where the rights to an event were acquired by a commercial television licensee who then failed to televise the event or televised only an unreasonably small proportion of the event.

Unfortunately, and because of the nature of the listed events (in particular the short term appeal of such events), the amendments to the BSA which allow for the removal of listed events have had no practical effect. Automatic removal under section 115(1B) of the BSA is effectively useless: none of the events contained in the anti-siphoning list are likely to be watched 7 days after they have concluded[13].

THE NINE NETWORK CASE

In early 1997 the Australian mens cricket team toured South Africa. News Corporation Limited ("News") acquired the right to broadcast matches played by the Australian team while on that tour. News initially offered the free-to-air rights to the series to the Nine Network but the parties were unable to agree on terms. News then concluded an agreement with the Seven Network Limited ("Seven") under which Seven was granted the exclusive Australian free-to-air television rights to the tour matches. Importantly, however, Seven was precluded from commencing its telecast of any match earlier than 7 days[14] from the conclusion of the relevant match. Further, Seven was under no obligation to telecast any part of any match in respect of which it held rights. News then sold the exclusive pay TV rights to the series to FOXTEL. No restrictions were placed on FOXTEL's ability to broadcast the matches.

The practical effect of the arrangements between News, Seven and FOXTEL was to give FOXTEL exclusive live rights to the tour while Seven had the rights to televise a highlights package and a delayed telecast.

Nine argued to the ABA that the arrangements between News, Seven and FOXTEL contravened section 115. The critical issue was whether Seven, in acquiring delayed and highlight rights, had acquired "the right to televise" the tour within the meaning of clause 10(1)(e) of the BSA. After an investigation, the ABA concluded that Seven had acquired the rights to televise the event within the meaning of clause 10(1)(e).

Arguing that the ABA had misconstrued the operation of the licence condition contained within clause 10(1)(e), Nine challenged the ABA's finding under the *Administrative Decisions (Judicial Review)* Act 1977 (Cth). Nine contended that FOXTEL was only entitled to acquire rights equivalent to or less than the rights acquired by Seven. In response, FOXTEL argued that the reference to the "right to televise" in clause 10(1)(e) was a reference to a bare entitlement to televise the event and said nothing about when that right was to be exercised. Justice Lockhart found for Nine, holding that:

> *"The rights acquired by the subscription licensee must, in order to satisfy condition 10(1)(e), be rights not greater than the rights of the free-to-air broadcaster to televise the event."*[15]

His Honour held that the right to televise highlights of a cricket match is not substantially the same as the right to broadcast the match itself. On appeal, the Full Federal Court upheld Justice Lockart's finding.

The effect of the decision in the *Nine Network* case is to reinforce the ability of free-to-air broadcasters to act as arbiters of which events will or will not be shown on pay TV. Taken to its logical conclusion (and bearing in mind the fact that removal of events from the list in the Minister's discretion is unlikely to occur before an event's "use by date"), Justice Lockhart's decision means that free-to-air broadcasters can prevent events being shown on pay TV even where they choose not to acquire the rights to televise that event themselves.

PROPOSED AMENDMENTS

It has recently been proposed[16] that the BSA be amended to allow pay TV operators to acquire the exclusive right to broadcast listed events on subscription broadcast services while preventing them from acquiring all rights (in particular free-to-air rights) to listed events. With no significant sporting events currently being contested the pressure to amend the legislation appears to have dissipated.

DIGITAL TELEVISION

A related issue which deserves brief mention is the allocation of digital licences. Currently the ABA has expressed support for the proposal to allocate digital terrestrial television licences to the existing free-to-air broadcasters at no cost. While, ostensibly, free-to-air operators promise to deliver high definition television, the introduction of digital television will also allow them to deliver more channels over the same bandwidth they currently use to deliver a single channel. This would free up hours of broadcast time for the coverage of listed events that would otherwise clash with popular programming which, to date, free-to-air broadcasters have shown a reluctance to displace in favour of listed events.

The cynical view is that free-to-air broadcasters are content to let the government ignore the issue of amendments to the anti-siphoning provisions of the BSA on the basis that arguments that they do not currently show all of a listed event will ultimately be defeated by the use of multiple channels.

CONCLUSION

The anti-siphoning provisions of the BSA have prevented pay TV operators from acquiring exclusive rights to listed events, and, conversely, have allowed free-to-air operators to continue to acquire rights to those listed events. In this respect, then, the anti-siphoning provisions of the BSA have succeeded in preventing the deprivation of programming. The cost of this success has, however, been felt most acutely by pay TV operators (who are beholden to free-to-air broadcasters for rights to listed events), events organisers (who miss out on profits from the sale of rights to pay TV operators) and consumers (who are denied more extensive coverage of listed events).

The type of siphoning at which the BSA is aimed can only occur where:

(a) the siphoned event is televised on free-to-air television; and

(b) a subscription television licensee is able to acquire exclusive rights to the event so that free-to-air broadcasters are precluded from obtaining rights to televise the event.

The first element goes to the composition of the list. The section 115 list contains many events which are not actually seen on free-to-air television, and, additionally, free-to-air television can only broadcast a fraction of these events. It is impossible to "siphon" an event from free-to-air television if the event shown is not shown on free-to-air television, and consequently there can be no justification for the list including events which are not shown on free-to-air television.

The second element goes to the nature of rights acquired. Events can only be "siphoned" if the rights obtained by a pay-TV operator are exclusive and preclude free-to-air broadcasters acquiring rights to televise the event. Accordingly, in order to be effective the rules need only prevent a subscription television operator acquiring the free-to-air rights to an event.

The solution would appear to be to amend section 115 so that subscription television licensees are prohibited from acquiring free-to-air rights to events but entitled to acquire the exclusive pay TV rights to those events. Perhaps free-to-air broadcasters could similarly be restricted from acquiring pay TV rights.

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1. Communications Law Centre, *Program Siphoning and Pay TV: Submission to the Australian Broadcasting Authority*, March 1994, p 3.

2. See for example: Bradley, A., "It just isn't cricket when TV players deprive sports fans", *The Australian*, 6 June 1997; MacDonald, J., "Nine's decision has cricket fans stumped", *The Australian*, 5 June 1997; Carlton, J., "Nine hits a bum note", *The Sydney Morning Herald*, 7 June 1997. Channel Nine argued it could not disturb existing programming: Smith, M., "Live TV coverage will be a test of our nerves again", *The Sydney Morning Herald*, 4 June 1997, and offered the first session to the ABC and SBS (although it refused to offer them to community broadcaster, Channel 31: Wright, T., "Channel 9 says community TV fails Ashes test", *The Sydney Morning Herald*, 10 June 1997), subsequently expressing surprise when they refused (see the comments of Nine executive Mr David Leckie in Oliver, R., "Pay-Less TV", *The Sydney Morning Herald*, (the Guide), 16 June 1997). The ABC pointed out it too had existing viewers to consider and questioned Nine's motives (Wright, T., "Auntie holds out on test", *The Sydney Morning Herald*, 12 June 1997). Nine had adopted a similar position in 1994 during the previous Ashes tour of England: Kidman, M., "How'zat? Live cricket will be on pay-TV only", *The Sydney Morning Herald*, 29 January 1997.

3. See the ABA's *Pay Television "Siphoning" Investigation Information Paper*, 1994, and *Report to the Minister for Communications and the Arts: Pay TV Siphoning Investigation*, 13 May 1994.

4. Submission of the Federation of Australian Commercial Television Stations in response to the ABA's Investigation Paper, 29 March 1994.

5. Ibid. This argument implies, of course, that free-to-air broadcasters obtain rights at less than market price and that event organisers miss out on additional profits they might otherwise realise from the sale of rights to pay TV operators.

6. Op cit n 4, p 32.

7. Submission by the Australian Football League in response to the ABA's Investigation Paper, 25 March 1994.

8. Submission by the Australian Cricket Board in response to the ABA's Investigation Paper, 8 April 1994.

9. Submission by the Confederation of Australian Sports in response to the ABA's Investigation Paper, 25 March 1994.

10. Op cit n 4, p 33.

11. Ibid.

12. Davies, A., "Real Winners are Commercial Stations", *The Sydney Morning Herald*, 1 June 1994: *"Don't be fooled by the Government line that it has protected the public interest in reserving the list of programs for free-to-air television. The real winners from yesterday's decision on pay TV with commercial networks, and in particular, Mr Kerry Packer's Nine Network, which specialises in sport. The list goes much further than the favoured Option 3 of the [ABA]."*

13. See Lockhart J in *Nine Network Australia* Pty Limited v Australian Broadcasting Authority (1997) 143 ALR 8 at 16.

14. The period was initially set at 3 months but was shortened by agreement between the parties.

15. Ibid at 16.

16. Martin, C., "Alston to change law in row over Ashes". *The Australian Financial Review*, 4 June 1997, p 5; Davies, A., "New Law to no-ball incomplete Ashes TV", *The Sydney Morning Herald*, 4 June 1997, p 3; Martin, C., "TV Cricket has Alston", *The Australian Financial Review*, 5 June 1997, p 9.