

conduct from disputes over terms and conditions. Not that these are entirely separate (as I acknowledge that delaying tactics can be anti-competitive). Nevertheless, I believe it is clear that disputes over terms and conditions of access do not lend themselves to speedy resolution through action under Part XIB. Rather, they should ideally be dealt with via the Part XIC processes. If that is correct, then some element of delay is inevitable.

The issue is the price of access to a bottleneck service. There is reason to believe that negotiation of such a price will not be easy. That is why the Parliament has provided for regulatory solutions. But the only way we, the regulator, can set the price is by accepting an access undertaking with prices in it or by arbitrating a dispute. Once an undertaking setting out prices was accepted, it's hard to see there would be much room for negotiation. The

obligation to supply would be on such terms and conditions as are set out in the undertaking. In either case (undertaking or arbitration) the process would take some time. Both processes leave the access provider subject to considerable uncertainty. It may be that the desire to avoid this uncertainty is, in the end, the main motivation for reaching a negotiated outcome.

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## Media Policy and Anti-Siphoning - Part Two

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**Joanne Court of FACTS responds to Brendan Moylan's argument in Part 1 of this series (CLB, Vol 16 No 3 1997) that the anti-siphoning provisions of the Broadcasting Services Act 'operate unfairly in favour of free-to-air broadcasters without providing any consequent benefit for consumers'**

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Brendan Moylan<sup>1</sup> makes much of the alleged 'unfairness'<sup>2</sup> of the current anti-siphoning scheme for pay TV operators but the 'solution' he proposes, for all its superficial attractiveness, would only undermine the central legislative purpose of the scheme. 'Fairness' between competitors must be a subsidiary consideration to the key issue of whether the anti-siphoning provisions<sup>3</sup> effectively ensure continued access to free television coverage of the events judged by the Minister to be events of 'national importance or cultural significance' to Australians. Naturally, self interest is at play in the anti-siphoning debate - on all sides. But ultimately it is only commercial television broadcasters (together with the national broadcasters) that can realise the legislative and public interest objective of the anti-siphoning provisions.

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### ASSESSING EFFECTIVENESS

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According to the Explanatory Memorandum to the *Broadcasting Services Act 1992* ("BSA"), the legislative purpose of the anti-siphoning provisions was to 'ensure, on equity grounds, that Australians will continue to have *free access* to important events'. Siphoning was said to be the:

*'obtaining by a subscription television broadcasting licensee of the rights to broadcast events of national importance and cultural significance that have traditionally been televised*

*by free-to-air broadcasters, such that those events could not be received by the public free of charge.'* [emphasis added]

The only question relevant to the effectiveness of the anti-siphoning provisions and the need for amendments is whether they have ensured continued free access by the Australian public to the events - all sporting events- specified in the section 115 anti-siphoning list ("listed events"). The essence of Moylan's argument is that while the current regime has prevented the siphoning of listed events by pay TV operators, free access to those events has not been delivered by free-to-air television services:

*'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.'*<sup>4</sup>

The real effect of the anti-siphoning provisions, according to Moylan, is to hand control of pay TV rights to listed events to free-to-air television, thereby preventing the 'realisation of the potential of pay TV to provide more complete coverage of listed events'.<sup>5</sup>

The proposed pay TV 'solution' is twofold; removing a number of events from the list, and an amendment to the BSA which would permit pay TV operators to acquire the exclusive pay TV rights to listed events.<sup>6</sup>

But this 'solution' is no solution; it is a Trojan horse.

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### THE COMMERCIAL CONTEXT

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There can be no doubt that pay TV operators would be keen to convert major sporting competitions to pay TV-only events. Live, commercial free (and often exclusive) coverage of major sporting events is a major driver of subscriptions in major pay TV markets worldwide. BSKyB's success in using the Premier League as a subscription-driver in the United Kingdom is the obvious example. For pay TV, sporting coverage is entirely about attracting and retaining subscribers. Any advertising revenue will be entirely incidental. Particularly in the early roll-out years, the acquisition or creation<sup>7</sup> of major sporting events for high non-recoupable fees can be commercially justified as a loss-leader strategy for pay TV.

In contrast, a commercial television network will generally acquire and schedule major sporting events, if they generate enough advertising revenue to pay their way, regardless of any 'branding' value such events may have.

Sport programming is commercially attractive because of the substantial male audience it attracts, and the advertiser and sponsor interest in that audience. Most sport is scheduled outside prime-time hours and, significantly, is very expensive compared to other kinds of programming

broadcast at those times. The revenue margins on sport are narrow, and a relatively small decline in the sport audience could make many sporting events commercially unattractive to the commercial networks.

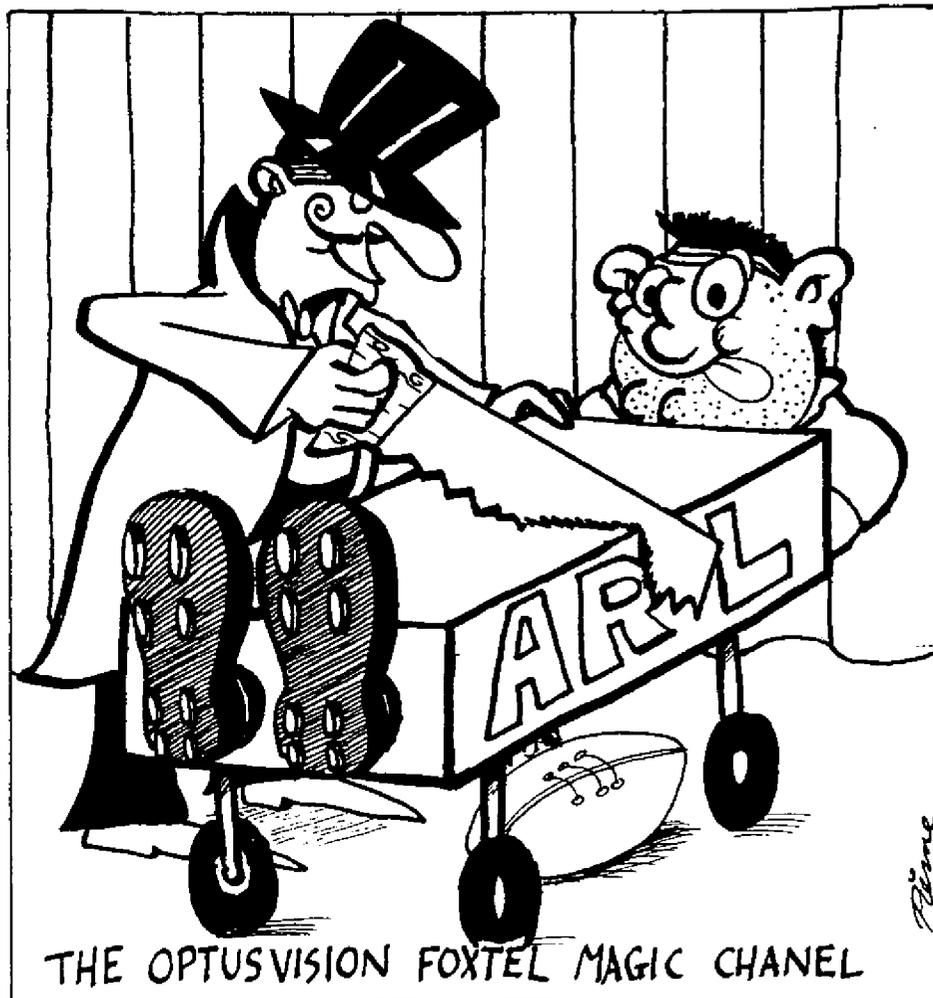
Crucial to the assessment of the pay TV arguments is the fact that it is principally the 'exclusivity' of television coverage of a major event, and the mass audience which it attracts, which gives the event its commercial value. Exclusivity attracts audiences, advertisers and sponsors, and sufficiently high revenue to justify the scheduling of the event. The ability of free-to-air television to obtain exclusive all-television rights, or limited exclusive rights, to listed events is a key factor in the effectiveness of the current anti-siphoning provisions.

The splitting of rights proposal - allowing pay TV operators to directly obtain exclusive pay TV rights - means that the free-to-air networks would not be able to provide exclusive television coverage of events. Even at current pay TV penetration levels, duplicated coverage of a major listed event would divert a significant proportion of the sport audience from free-to-air TV to pay TV. As pay TV becomes more established, it will be able to divert even more of the audience. When audiences, advertising fees and sponsor interest declines, and the commercial free-to-air networks reduce their sports coverage, as they inevitably would, the obvious losers will be the majority of the population that do not subscribe to pay TV.

### **FREE ACCESS TO THE MAJORITY OF LISTED EVENTS IS ACHIEVED**

The Australian sport-loving public, even those that believe 'too much sport is never enough', are well served by Australian free-to-air television. FACTS believes that there is far more sporting coverage on Australian free-to-air television than on free-to-air services in any other comparable country. Sport is currently a very important part of each commercial television broadcaster's format. In 1996, commercial television broadcasters devoted around 12% of all broadcast hours to sport - as much as they did to all kinds of drama, and second only to news and current affairs.<sup>8</sup>

The combined operation of section 115, section 99 and clause 10(1)(e) of Part 6 of Schedule 2 of the BSA has successfully



ensured that sporting events specified in the anti-siphoning list have not been siphoned to pay TV and that Australian sports fans have had continued free television access to the great majority of those events.

The argument that the operation of section 115 fails to provide any benefit to consumers (including the benefit of more extensive coverage of listed events) is not supported by the evidence. Data collected by the Australian Broadcasting Authority<sup>9</sup> and FACTS reveals the inaccuracy of the assertion that the section 115 list contains many events which are not actually seen on free-to-air television.

Free-to-air television rights for each of the listed events have been acquired by either the commercial television networks or the national broadcasters since the list came into effect, with only few exceptions including the international test and one day-day cricket series in Pakistan and Sri Lanka in 1994 (which was de-listed by the Minister) and the 1995 Australian Men's Hardcourt Tennis Championship.<sup>10</sup> Not only are the rights to listed events acquired by commercial television broadcasters, they are utilised. The whole or the essential

substance of listed events for which commercial television broadcasters acquire rights are broadcast by them, and the great majority are broadcast live.

In three reports to the Minister since the list commenced<sup>11</sup>, the Australian Broadcasting Authority has determined that the coverage of listed sporting events by free-to-air television is both comprehensive and timely. In the 12 months commencing July 1995, commercial television broadcasters broadcast 1,413 hours of listed events and 1,015 hours (or 79%) of those events were broadcast live. Recent political discussion of the effectiveness of the anti-siphoning provisions was sparked by the Nine Network's non-broadcast of the first session of this year's Ashes cricket tests. Yet the coverage of international cricket on free-to-air television is extensive. From July 1994 to June 1996 there were 718 hours of international cricket matches broadcast. Eighty-six percent of these sport event hours were broadcast live. The high level of broadcast (and particularly live broadcast) of listed events by commercial TV services has continued in the period since the ABA published its last report on the operation of the anti-siphoning provisions.

The ABA has also found that delayed coverage of listed sporting events is generally no more than a few hours from the actual time of the event.<sup>12</sup> There are many reasons for delayed coverage of listed events and for free-to-air broadcasters not broadcasting the whole of an event including time zone difference for international events, contractual restrictions on live broadcast (designed to maximise attendance at local events)<sup>13</sup> and, most importantly, audience demand.

Pay TV interests have been critical of the comprehensiveness of the anti-siphoning list and in particular the inclusion on the list of 'each and every match' of multi-match events (such as the AFL, Rugby League and Wimbledon).

Although free-to air television may not be able to cover every single match of every listed multi-match event, it is an exaggeration to say that free-to-air television can broadcast 'only a fraction'<sup>14</sup> of these events.

The coverage of some of the most popular events is much more extensive than would first appear. AFL is a good example. Single football rounds are generally spread over several days enabling the broadcast of a number of matches on free-to-air television. The extensive coverage of football rounds would not be discernable to the individual viewer as commercial networks frequently broadcast different matches to different markets. AFL viewers in Sydney have live coverage of Sydney Swans matches played in Sydney, and usually live coverage of Sydney Swan matches played in other cities, and it is common for Adelaide, Brisbane and Perth viewers to have live coverage of their team's matches - live coverage which may not be available in Melbourne or in other major markets.

Furthermore the amount of coverage must be considered qualitatively, as well as quantitatively; the most significant parts of listed events - major matches, semi-final, finals, grand finals, centre court matches etc are broadcast for the benefit of the majority of Australians who would not be interested in the balance of the event.

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### **ENSURING COMPLEMENTARY AND MORE OVERALL SPORTING COVERAGE**

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The comprehensive anti-siphoning list and the inability of free-to-air television to broadcast every match of a multi-match

(or multi-session) event does not mean that those matches are unavailable to the avid sports fan. For commercial and contractual reasons, the rights to broadcast those matches (or those sessions) not broadcast on free-to-air television are usually granted to pay TV operators either by the rights owner or by the authorised free-to-air television broadcaster.

There are virtually no matches that the AFL has made available on a live basis that are not covered on either free-to air television or pay TV. Major games unavailable for live broadcast are shown on a delayed basis as soon as they are available. Similarly, the rights to Wimbledon matches not broadcast on free-to-air television are made available to pay TV and, in the case of the recent Ashes series, Optus Vision was licensed to broadcast the first session of play, so no cricket lover with the ability to pay and with access to the Optus Vision service was denied the opportunity to watch all sessions of play.

Superficially, it may seem excessive to deny pay TV exclusive rights to any match in an AFL or ARL round, but in practice the comprehensive list approach is the most effective way of sharing coverage between free-to-air and pay TV by ensuring that pay TV coverage of the event complements (rather than duplicates) free-to-air coverage. In this way, pay TV does, in fact, get what amounts to exclusive live coverage of certain matches in events such as AFL, ARL, SuperLeague and Wimbledon, but without the damaging commercial consequence of diverting and fragmenting the free-to-air television audience.

The anti-siphoning provisions do deny pay TV the opportunity 'to provide more complete coverage of listed events'<sup>15</sup> but they effectively ensure more 'complete coverage' on television overall, for the benefit of television viewers. This public benefit outweighs any 'unfairness' to pay TV.

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### **CONTROLLING SPORTING RIGHTS**

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The argument that the anti-siphoning provisions of the BSA effectively hands control of access to listed events to free-to-air operators ignores or downplays the commercial clout of the owner of the sporting rights and the extent to which companies such as News Limited, who are associated with pay TV operators,

acquire the rights to sporting events and control the licensing and exercise of those rights.

The operation of the anti-siphoning provisions ensure that subscription television broadcasting licensees cannot obtain exclusive rights to entire events on the list. It does not necessarily follow that commercial television broadcasters obtain both free-to-air and pay TV rights to events. Generally they do not, although in the case of some major Australian sports (eg the AFL) commercial networks have acquired exclusive all television rights (ie free-to-air and pay TV rights).

Where a commercial TV network has exclusive all-television rights, it cannot do what it likes with the pay TV rights. Those rights are normally granted only on the condition that the commercial network provides specified coverage to an Australian pay TV operator. Furthermore, it would make no commercial sense to acquire pay rights, and then fail to pass on the rights to broadcast at least those events it was not showing, to the extent to which it was permitted by the rights holder.

It is significant that the anti-siphoning provisions do not prevent a company related to or associated with a subscription television broadcasting licensee from acquiring exclusive television rights. The commercial television industry considers this, and the uncertainty concerning the mechanism for the listing of new events (including those of the same kind as existing listed events) as the major defects of the anti-siphoning scheme in need of remedy. These deficiencies, particularly when they operate together, provide pay TV interests with opportunities to by-pass the anti-siphoning provisions and to render them ineffective.

News Limited's approach to the exercise of its exclusive rights to the cricket tests in South Africa earlier this year clearly demonstrates how rights would be shared between free-to-air and pay television in the absence of the anti-siphoning provisions: free-to-air broadcasters would, at best, receive rights to highlights of those events.

Under the agreement between News Limited and Seven Network Limited, Seven acquired the exclusive free-to-air television rights to broadcast the three Test matches and seven one day matches, together with the exclusive free-to-air television rights to highlights on each day of the matches. But it was a condition of

the agreement that Seven must not commence its broadcast of any match earlier than three months (later reduced to seven days) after the end of the relevant match, meaning that Seven could not broadcast the matches live or within a time that made commercial sense. Foxtel was then granted 'exclusive live television rights (against free-to-air and pay TV) in the Territory [Australia] for each Test'<sup>16</sup>. A similar agreement was made with Fox Sports for the one day matches.

As the Full Federal Court states, it is obvious that the steps taken by News were intended to circumvent the anti-siphoning provisions of the Act.<sup>17</sup> The Court upheld the decision of Lockhart J at first instance that, in order to satisfy licence condition 10(1)(e), the rights acquired by the subscription broadcasting licensee must be no greater than the rights of the free-to-air broadcaster to televise the event and that, in effect, the words 'the right to televise an event' in the licence condition mean the right to televise the event live.<sup>18</sup> The Federal Court stated that 'It would make a nonsense of a provision designed to ensure public access to "important events that should be available free to the public on free-to-air television services" to hold that it was sufficient there be a right to televise the event after seven days'. The Court then added that a right limited to the broadcast of daily highlights cannot be said to be a right to televise the event.<sup>19</sup>

Brendan Moylan contends that the effect of the recent Nine Network case was the reinforcement of 'the ability of free-to-air broadcasters to act as arbiters of which events will or will not be shown on pay TV'.<sup>20</sup> Yet the *real* substantive effect of Lockhart J's and the Full Federal Court's decision in that case was to prevent deep-pocketed pay TV interests acquiring and then retaining exclusive live television

coverage of listed events by offering free-to-air television only delayed or highlights rights - thereby defeating the 'free access' purpose of the anti-siphoning provisions.

## CONCLUSION

When measured against the Government's original public policy and legislative objective, the anti-siphoning provisions can be judged as effective - there is no problem with the extent of the free television access to the listed sporting events and so no 'solution' is required. The only threat to the future effectiveness of the anti-siphoning scheme arise from the deficiencies referred to above - and amendments to close those loopholes are necessary.

The argument that the purpose of the anti-siphoning provisions could be achieved more efficiently and fairly, with a less comprehensive anti-siphoning list and a sectoral demarcation of available television rights, is fundamentally flawed by the assumption that siphoning *necessarily* requires the acquisition by pay TV of the exclusive television rights to listed events.

The commercial realities and incentives are such that siphoning can be achieved more gradually, but just as effectively, by the 'solution' proposed.

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1. Moylan, B. "Media Policy and Anti-siphoning", *Communications Law Bulletin*, Vol 16 No 3 1997, pp16-18.

2. Allegations of unfairness by pay TV interests are undermined by the fact that the anti-siphoning rules were known in advance of any investment by any of the pay TV operators. They

came into the industry with their eyes open.

3. The principal anti-siphoning provision in the *Broadcasting Services Act 1992* is section 115. It operates in conjunction with section 99 and clause 10(1)(e) of Part 6 of Schedule 2 of the BSA. Brendan Moylan's article discussed the relevant provisions at pp16-17.

4. Moylan, op.cit. p19.

5. Id. p17.

6. Id. p19.

7. eg. SuperLeague or the Rugby Union Super 12 Competition.

8. Neisen, *TV Trends 1996*, p11.

9. Australian Broadcasting Authority, *Anti-Siphoning - The Availability, Acquisition and Use of Broadcast Rights*, Report to the Minister for Communication and the Arts, July 1995; Second report to the Minister for Communications and the Arts, December 1995; Third report to the Minister for Communications and the Arts, June 1996.

10. Id. July 1995, p9, December 1995, pp 6-7, June 1996, p5. Additionally, the 1995 Australian Women's Hardcourt Championship event was not held, so no television rights were acquired (ABA, July 1995, p9). In the past year the free-to-air rights to the Hong Kong Rugby Union Sevens Tournament have not been acquired and there are currently a number of events the subject of negotiation.

11. *Supra*, Note 9.

12. ABA, op.cit, July 1995, Notes to Table 4. Subsequent reports found the extensiveness and hours of coverage were retained at the previous levels. ABA, op.cit., December 1995, p1. ABA, op.cit., July 1996, p6.

13. For example, AFL coverage in Melbourne is subject to contractual restrictions imposed by the AFL which do not permit live telecasting of Melbourne games.

14. Moylan, op.cit. p19

15. Id. p 17

16. As quoted in *Foxtel Cable Television Pty Limited v. Nine Network Australia Pty Limited and Australian Broadcasting Authority* [1997] 185 FCA (26 March 1997) p6.

17. Id. pp6-7.

18. *Nine Network Australia Pty Limited v Australian Broadcasting Authority* (1997) 143 ALR 8 at p16.

19. *Foxtel Cable v Nine Network*, op.cit. pp11-12.

20. Moylan, op.cit. p18.