



**AUSTRALIAN BROADCASTING AUTHORITY
INVESTIGATION INTO EVENTS
ON THE ANTI-SIPHONING LIST**

**SUBMISSION FROM THE
FEDERATION OF AUSTRALIAN
COMMERCIAL TELEVISION STATIONS**

27 SEPTEMBER 2001

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EXECUTIVE SUMMARY

- The anti-siphoning list has operated well to protect the public interest in ensuring ongoing free access to major sporting events. It is important that it continues to do so.
 - The policy has operated to preserve the interests of the 75%-80% of Australians who rely on free to air television for entertainment and information. Failure to maintain the anti-siphoning list will force Australians to pay to watch sporting events, which they have previously been able to watch for free.
 - FACTS strongly opposes the ABA's recommendation that the list should only be extended for a period of two years. The Report's justification for a limited extension is flawed. Free to air television will remain the primary source of entertainment (including sport) for the majority of Australians for at least the next ten years. There is no indication that anticipated changes or reviews in the foreseeable future will alter that fact.
 - The list should be extended for a further ten years. This reflects the duration of the current list, the long lead times often involved in sporting rights acquisitions and the lengthy periods for which rights may be acquired.
 - A ten-year period is necessary to ensure certainty when negotiating for future rights and to ensure that pay TV does not acquire exclusive rights to listed events in years beyond the expiry date of the list.
 - There is no less reason for the list today than there was when it was established in 1994. The reliance of the vast majority of Australian on free-to-air television
 - FACTS welcomes the addition of important swimming and soccer events to the list.
 - The Olympic and Commonwealth Games, the Rugby Super 12's and the Australian Swimming Championships should also be added to the list. The criteria for listing specified by the ABA (high level of public interest and consistent broadcast) are well met by each of these events.
 - FACTS opposes the removal of key events from the list. Removal of events from the list disadvantages viewers as it limits the prospect of the event being purchased by free to air in the future. The de-listing process operates to ensure that if an event is not purchased by a free to air broadcaster it may be purchased and shown by pay television. Past experience has shown that all requested events have been delisted.
 - The anti-siphoning rules contain a clear loophole that can be exploited by companies associated with pay television operators. This loophole should be closed as it has the potential to undermine the operation of the rules.
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INTRODUCTION

FACTS would like to take the opportunity to comment on the ABA's report to the Minister for Communications Information Technology and the Arts of 2 June 2001.

FACTS believes the anti-siphoning list has worked well to preserve the interests of the 75%-80% of Australian viewers who choose not to subscribe to pay-TV.

FACTS strongly opposes the ABA's recommendations that the list should only be extended for a period of two years and that key events be taken off the list.

FACTS welcomes the addition of important swimming and soccer events to the list, but is perplexed by the ABA's decision not to apply the same arguments to include the Olympic and Commonwealth Games, the Rugby Super 12's and the Australian Swimming Championships.

In arriving at its recommendations, the ABA's report does not:

- correctly take into account the policy rationale of the anti-siphoning regime;
- consistently apply criteria for inclusion or exclusion on the list; or
- consider the long lead times often involved in sporting rights acquisitions and hence the need to extend the duration of the list by much more than two years.

As a result, the public interest in ensuring free access to major sporting events would be seriously undermined if the ABA's recommendations were adopted.

We are concerned that the ABA's report also contains recommendations that go beyond the Minister's direction that requested the ABA specifically investigate which events should be added to the list, which events should be removed from the list and the duration of the list. The ABA's report considers additional policy issues relevant to anti-siphoning and comments on how it considers the rules should be reviewed in the future. As the regulating body that has been given the responsibility to oversee the operation of the list and the rules, we consider it is inappropriate for the ABA to make recommendations on the policy issues when it has not been directed to do so.

In FACTS view, it is not necessary to consider such issues further at this time. They have been debated extensively over the years and were not part of the Terms of Reference of this review.

FACTS' response to the Report focuses primarily on the issues the Minister identified as the matters that he wished the ABA to consider. However, as the ABA's Report has touched on additional issues we consider it is necessary to make some specific comments in response to these sections of the Report.

The ABA's report does not correctly apply the policy rationale of the anti-siphoning list.

The ABA's Report notes that the Explanatory Memorandum to the Act referred to Australians continuing to "have free access to important events" and that the intention of the list was that subscription broadcasters would provide complementary or more detailed coverage of the events on the list. (page 9/10). As noted in the introduction to the ABA Report, the anti-siphoning list was introduced to cover "events of national importance and cultural significance" (page 8).

In FACTS view, the Report has not given proper consideration to these factors in forming its recommendations to the Minister as the following statements in the Report demonstrate:

- the comment that “removing events from the list will better align the list with actual coverage of events and hopefully public expectation.” (P46). This comment displays a failure to focus on Parliament’s stated purpose for the list that is to maximise availability of coverage on free to air television. Removal of events will do nothing to maximise or increase free-to-air coverage. Keeping an event on the list leaves open the option for it to be broadcast free-to-air in the future, without denying the event to pay services in the meantime.
- the comments that a free-to-air highlights coverage cannot constitute the consistent broadcast of an event, leading to the conclusion that events that receive highlights coverage should not be retained on the list. This fails to appreciate the value to viewers of a highlights package particularly where it may be the only coverage available to free to air viewers. Removal of an event from the list will reduce the likelihood that a highlights package is available to free to air viewers. This is particularly pertinent in circumstances where a related entity of a pay TV operator has acquired rights to an event and highlights may be the only rights which are commercially available to a free to air provider.

These matters are discussed in further detail below.

1. DURATION OF THE LIST

The ABA has recognised the need to extend the list beyond its current expiry date of 31 December 2004. However, its Report has only recommended its extension for a further period of two years until the 31 December 2006.

1.1 Precedent for a 10 year duration

In FACTS submission to the ABA in April 2001, we submitted that the list should be extended for a further period of ten years reflecting the duration of the original list from 1994-2004. The Parliament did not provide a sunset period in the legislation in 1994 anticipating that the list would have ongoing importance after 2003 and we consider this remains correct. The initial ten-year period reflected the long lead times often involved in sporting rights acquisitions.

Despite the development of pay television in Australia, only about one in five viewers are willing or able to pay monthly subscription fees for their television. It is clear that the majority of viewers rely heavily on free to air television and will continue to do so. This is reflected in the United Kingdom showing that subscription models are unlikely to deliver more than 30%-35% penetration rate.

There is no less reason for the existence of the list now than there was in 1994 when it was established. Pay television is not available in 4 out of 5 Australian homes. Abolition or restriction of the list will result in increased acquisition of exclusive sporting rights by pay television and force Australians to pay to see their favourite sport. While this may benefit pay television operators, it is not in the interests of the majority of Australians.

1.2 Terms of sporting rights

We consider a ten-year period is necessary to ensure certainty when negotiating for future rights and to ensure that pay TV does not acquire exclusive rights to listed events in years beyond the expiry date of the list. As stated in our submission, many sports rights are negotiated well in advance and for lengthy periods. For example:

- (i) the recent round of Olympics rights were negotiated for 6 years in advance for a period of six years i.e.: negotiated in 1996 to cover the period 2002 -2008,
- (ii) the AFL was recently negotiated for a period of five years; and
- (iii) the NRL was negotiated for a ten-year period.

FACTS is concerned that if it is not clear well before negotiations commence that a particular event is listed for the future, that a formal or informal arrangement may be reached between the rights holder and pay television operator diminishing the ability of the free to air broadcasters to purchase for the benefit of their viewers.

1.3 Rationale for Report's recommendation and why it is flawed

The ABA's reasoning for a two year extension is based on the expectation that in future years there will be structural, regulatory and technological changes which will impact on the broadcasting industry. In particular, the ABA's Report refers to reviews of the simulcast period, multi-channelling and restrictions on subscription services being provided by free to air broadcasters.

FACTS considers that the Report's justification for a limited extension is flawed. It is clear that free to air television will remain the primary source of entertainment including sport over

at least the next ten years. The previous decade has seen considerable changes in the broadcasting industry environment including the introduction of digital television and aggregation in the regions, but free to air remains the dominant source for viewers. There is no indication that anticipated changes or reviews in the future will alter that fact.

The introduction and roll out of digital will not impact on the underlying rationale that the list is to protect access to events of national importance. This can only be delivered by free to air broadcasters. The free to air networks are pursuing a free to air model to ensure delivery of digital to all Australians not just the few who choose to pay for new services. In particular the reviews relating to digital generally, HDTV, and the duration of the simulcast period will not be relevant given that the issue is whether the service is free not whether it is delivered in HDTV and/or SDTV analog and/or digital or both.

Similarly advances in technology and the possible introduction of multi-channelling will not make free to air any less relevant to viewers. In fact, in the future they will potentially enable more sport to be delivered not less. Provided that broadcasters retain reasonable access to sporting rights free to air coverage may increase in the future.

The anti-siphoning list does not have retrospective operation. That is, if a pay TV operator acquires the rights to a listed event for the years after the expiry of the list (eg currently post-2004), any subsequent extension of the list cannot affect the rights already acquired by the pay TV operator.

Accordingly, if the list were to expire in 2006, there is a very real prospect that a pay TV operator would acquire exclusive rights to some of the most significant events on the list for 2007 and beyond, which is now only five years away. As indicated above, the rights negotiations for events such as the AFL and Olympics demonstrate that rights are often acquired more than five years in advance. An extension of 10 years as proposed by FACTS - to 2014 - would ensure protection of events on the list for the free-to-air viewing public into the future.

If events are siphoned to pay television it may well be very difficult for them to migrate back to free to air television. This will particularly be the case where a rights holder associated with a pay television operator is seeking to recoup payments for international rights and where a pay television operator is prepared to pay a premium for an event to act as a subscription driver.

The renewal of the list for a period of ten years will not disadvantage the pay television operator or its viewers given the mechanism available for de-listing of an event. Past experience has shown that all events requested have been de-listed.

2. Recommended changes to the events on the list

2.1 Removal of events from the list

FACTS submits that by removing events from the list, viewers are disadvantaged in that it limits the prospect of the event being purchased by free to air in the future. In the meantime, the event is not denied to the pay television audience as the de-listing process operates to ensure that if it is not purchased by a free to air it may be purchased and shown by pay television. In no way has Pay TV been inhibited in its ability to acquire rights to these events.

FACTS considers that retention of the events on the list is the most effective way of ensuring the objective of the rules is achieved; that is, maximising events on free to air television.

2.1.1 AFL State of Origin

The ABA recommended that given that the competition was discontinued in 2000 it should be removed from the list. FACTS opposes the removal of this event.

The competition was not held in 2000 due to the Sydney Olympics. It is possible that the competition may be reinstated in future years and the event has been taken into account in the relevant rights acquisition arrangements.. Given this possibility, the event should be retained on the list as it would be a significant event for AFL followers if the AFL decides to reinstate the competition. There is no disadvantage for pay TV operators if the event remains listed but is not held.

2.1.2 Overseas cricket tests and one day matches involving the senior Australian representative

FACTS opposes removal of these events from the list.

As outlined in our April submission, the broadcasters have had difficulties in purchasing rights and showing the events due to the high cost of rights and the difficulty with scheduling the matches satisfactorily because of the delivery time of matches during prime time programming. As explained in our submission, these situations raise difficulties for free to air broadcasters who must balance the interests of cricket viewers and viewers of regularly scheduled programming.

But the presence of these events on the list has in no way disadvantaged viewers or pay television, as evidenced by a number of de-listings that have not been opposed by free to air networks.

Over the past five years, there has been less coverage of overseas cricket than in the preceding years. Removal of these events from the list would not allow for the fact that over the future term of the list, changing priorities of viewers and circumstances may well lead to more live coverage of part and whole games and highlights packages.

2.1.3 Each match in the Men's and Women's Hardcourt Championships

FACTS opposes the ABA's recommendations to remove the Men's and Women's Hardcourt Championships from the anti-siphoning list.

These events have received consistent highlights coverage by Seven since it acquired rights to the event and prior to that were broadcast live and in full on SBS.

The events are of significant interest to the Australian public, involving Australian athletes playing at the elite level.

2.2 Addition of Events to the list

FACTS welcomes the ABA recommendation to add certain events to the list but would like to comment on the failure to adopt other events recommended in FACTS' submission.

FACTS considers the ABA's conclusions in relation to the Olympics, Commonwealth Games, Super 12 Rugby and Australian Swimming Championship are inconsistent with conclusions elsewhere in the report and are not in line with the ABA's stated criteria for listing.

The ABA's Report states a number of criteria, which warrant the inclusion of an event on the list. The following statements encapsulate the ABA's approach:

- the starting point for considering the criteria for inclusion of the events on the list is the continuation of free access for Australians to events of importance (P30)
- regard should also been given to factors such as interest in the sport and extent of viewing of the event or tournament in the past. (P30)
- Any new event should meet a high test for addition to the list. Not only should the event have been consistently broadcast on free-to-air television, it should be of considerable public interest (p46).

However, the ABA's Report does not consistently apply these criteria. For example, the Report concludes that world swimming championships but not the Australian swimming championships should be included on the list, despite the enormous popularity across all events involving the Australian swimming team and the high ratings of the Australian swimming championships.

Moreover, the Report does not support the inclusion of the Olympic or Commonwealth Games despite their enormous popularity and national importance, which clearly satisfy the above criteria. The multiple arguments in support of listing the World and Pan Pacific Swimming Championships are equally applicable to the Olympic and Commonwealth Games – in which swimming is a major sport.

Further discussion in relation to specific events is discussed below.

2.2.1 Olympic and Commonwealth Games

As noted by the ABA in its report, the Sydney 2000 Olympic Games achieved the highest television ratings in Australian history. In the area of sporting endeavour, the Olympic Games are the event of unquestionable primary national importance and cultural significance.

The ABA provides as one of its primary reasons for not recommending the inclusion of the Olympic Games on the anti-siphoning list that "it is not established that the Olympic Games would be siphoned exclusively to pay TV".

Nowhere else in its report is the likelihood of siphoning listed by the ABA as a relevant criterion for listing an event. The event clearly meets the ABA's criteria (as listed above) and yet the ABA's Report disregards these criteria for the curious reason that "as the event comprises many days of sport covering many different events, listing of the total games might not be appropriate...". The Report does not provide any argument or analysis in support of this view. It ignores the consistently high ratings across all sports shown during the Olympics, the consistent and extensive broadcast and the fact that the variety of sports offered during the two week event is a key reason for its broad appeal.

The ABA's Report quotes an IOC press release and Rule 59 of the Olympic Charter as reassurance that the IOC is unlikely to sell its broadcast rights to pay television interests. However, the fact remains that there is nothing that would prevent this occurring and in fact the economics of presenting such an enormously complex event indicate that pressures to extract maximum revenue by way of broadcasting rights will only increase. Rule 59 of the IOC Charter goes no further than saying that media coverage should "promote the principles

of Olympism". The press release referred to is nothing more than a statement by the former president of the IOC, not a binding statement of intent.

The grant of exclusive broadcasting rights for the Olympic Games has become the principal source of revenue for the International Olympic Commission. The IOC regards the revenue from the granting of those rights as fundamental to the ongoing viability of the Olympics. Given the increasing importance to the IOC of broadcast rights revenue, the pressures to enter into a deal with the highest bidder increase significantly.

The ABA puts forward as a further reason for not listing this event that "mutually beneficial agreements have been entered into by free-to-air and pay TV broadcasters to ensure maximum coverage of the events"(page 42). The ABA omits to note that the beneficial complementary coverage referred to was on C7, a wholly owned subsidiary of the Seven Network. It is hardly surprising that two related corporations may enter into arrangements that are to the benefit of the public and each other. The situation where no such common ownership exists is far less certain and likely to result in a more competitive approach to the exercise of such rights.

The advent of digital technology, giving pay television operators unlimited capacity to carry additional special events channels without disruption to regularly provided channels makes the likelihood of exclusive acquisition of the Olympic Games by pay television in the future extremely likely. Rupert Murdoch has famously described sporting rights as being the "battering ram" of pay TV, an unparalleled subscription driver.

The phenomenal success of the Sydney Olympics provides what should be a most compelling case for future listing of the Games. The Commonwealth Games has a similarly compelling case for inclusion. Both the Olympic and Commonwealth Games are listed on the UK list under the ITC Code on Sports and Other Listed Events. Both events clearly meet the criteria listed above. It is clearly in the public interest that these two events be added to the list, which provides the only guarantee that free-to-air coverage of these major events of national importance will be safeguarded for the viewing public in future years.

2.2.2 *Rugby Super 12's*

The ABA notes in its report that the Super 12's competition has been created by interests associated with pay television as a subscription driver. It is commonly acknowledged by most commentators that the event was created to circumvent the anti-siphoning rules. Indeed it has effectively replaced the former Australian Rugby Union competition that would have been a prime candidate for listing.

News Limited in the UK took a similar approach when it established the English Premier League Soccer to escape the UK anti-siphoning provisions applicable to the pre-eminent soccer competition to that time, the First Division League.

Despite acknowledging that the rights to this event are exclusively controlled by a competing entity, the ABA's Report states that the reason for recommending that the event not be listed is that "the pattern of coverage on free-to-air television ...over the last five years has not been consistent."

This is an argument in support of listing rather than against it. It is precisely because the event is not listed that the Australian public is denied free-to-air coverage of the event on anything other than a restricted and delayed basis.

The Seven Network has repeatedly attempted to obtain live rights to Rugby Super 12's, and is regularly criticised in the media and letters to the editor for its perceived failure to broadcast these matches live, despite the fact that this is clearly outside their control.

The increasing audience interest in this event, demonstrated by strong ratings and record crowd attendances, meets the criteria put forward by the ABA for recommending the listing of swimming and soccer events.

FACTS does not understand why such inconsistent reasoning has been applied to the Super 12's. This approach favours Pay TV interests at the expense of free-to-air television viewers, depriving Super 12 fans without pay TV of the opportunity that followers of other codes have to watch their teams play in full.

On the ABA's criteria stated above of consistent broadcast (to the extent possible) and considerable public interest, the Super 12's should be a prime candidate for listing.

2.2.3 Australian, World and Pan Pacific Swimming Championships

As noted above, FACTS considers that the recommendation that the World Long Course Championships and the Pan Pacific Championships be listed but not the Australian Championship is inconsistent.

In its analysis, the ABA commented that the Australian Swimming Championship often doubles as the selection trials for the major international swimming event of the year, that it attracts the participation of the best swimmers and in 2000 was one of the most top rating sporting events of the year with one broadcast out rating an NRL State of Origin match between NSW and Queensland. FACTS notes that the event rated in the top five events of the year (outside the Olympics) except in Perth. It is an event of clear national importance in the eyes of the viewers and has also been covered in past years. Accordingly, the recommendation not to include this event on the list is inconsistent with the stated criteria and treatment of other events.

3 OTHER ISSUES

3.1 Associate Provisions

The ABA has rejected FACTS submission that third parties who hold rights have the ability to thwart the operation of the rules.

The ABA's Report cites the example of Fox Sports selling free to air rights to the 500cc Motorbikes (1999-2000) to Ten but providing more limited footage than was available on Fox Sports. The Report does not recognise that the contrived arrangement between Foxtel the pay television licensee, and its associate Fox Sports, have seriously undermined the policy rationale for the anti-siphoning regime. Ten was prepared to give free-to-air viewers maximum coverage but Fox Sports, prevented it from doing so to keep more substantial coverage for Foxtel's viewers. Despite the event being listed, free-to-air viewers were prevented by the actions of pay TV from receiving the same level of coverage of one of Australia's leading international sporting events.

This is not an isolated instance. Fox Sports and other pay television associates are increasingly acquiring rights to listed sporting events and are in a position to dictate the terms on which such events are broadcast.

Where an associate of a pay television licensee is the rights holder, the free to air networks are negotiating with a party that has as one of its primary aims, the exclusive coverage of that sport on pay television. Therefore it is in the interest of such a third party to seek an inflated price for an event to price the free to air networks out of the market to guarantee a rejection of the event and its resulting migration.

In many cases the third party, or its associates, has purchased the rights on the international stage at large prices in competition with other players such as ESPN.

The ABA has also cited the recent cricket tour of South Africa, noting that complaints were received that it was not commercially viable to purchase the rights but that an objection to the subsequent de-listing was not received. This is a misleading example in this context.

In this situation, the Nine network was not prepared to purchase the live rights to the event, in part due to difficulties in scheduling, but was seeking to purchase a highlights package. As the unreasonable offer only related to the highlights package, the network considered there was no basis on which to object to the de-listing.

It appears to be nonsensical that operators such as Fox Sports are able to circumvent the rules by virtue of the fact that the Act licenses the pay television platform and not the individual channels. Fox Sports is the organisation, which is running its business, planning its schedule and securing rights for the channel.

The ABA has also rejected any change on the basis that it would require greater intervention by the ABA to enforce tracing provisions.

FACTS considers this view to be of concern given that the free to air industry is subject to extensive tracing provisions and that the practicalities of the regulation should not go to the question of whether it should be regulated or not.

3.2 Dual Rights and the UK Model

The ABA's Report states that it has looked at the operation of the rules as they are of concern to the pay television industry and the rights holders, even though this fell outside the scope of the Minister's direction.

In reaction to submissions made by pay TV operators, in June FACTS provided a supplementary paper to the ABA Board on the issue of dual rights. A copy of the paper is attached.

The ABA has referred to comments by the pay television operators that the principle of dual rights is already being employed in the case of a number of sports including NRL, AFL and tennis. This is not correct. In each of these cases, there is not a dual rights system. The free to air broadcasters have secured exclusive rights in relation to a portion of the event and complementary coverage is negotiated with pay television.

The ABA has also commented that the rules should not "limit the capacity of pay TV viewers to enjoy more extensive coverage of sport available on dedicated sports services." There is no evidence at all that this is the case. Nor is this the policy objective of the anti-siphoning rules.

In the case of a number of sports including AFL, NRL, tennis, and soccer complementary and more extensive pay coverage is available. The real concern of pay operators is that they are not able to obtain exclusive rights to events in competition with free to air broadcasters. As

outlined in the FACTS April submission, free to air broadcasters seek exclusivity over at least some of a sporting event as essential for viability of the free to air coverage,

The ABA has discussed the UK approach at length.

FACTS is concerned that the ABA has relied upon the stated intention of the UK regime to achieve non-exclusive coverage without looking at the practical effect of the regime.

The ABA gives some consideration to the UK Code on Sports and Other Listed Events. In general, the ABA seems to tend towards a favourable view of the UK model, primarily on the basis that it may deliver dual coverage of listed events on free-to-air and pay television platforms. Unfortunately the ABA's Report does not contain any analysis of the practical outcomes delivered by the UK Code.

FACTS considers that there are a number of shortcomings in the operation of the UK model:

- It is bureaucratic and administratively cumbersome. Broadcasters must apply to the ITC for consent to broadcast a listed event exclusively, even where they have been the only broadcaster bidding for the relevant rights. Consent must be sought from the ITC more than three months in advance of the event. In each case, the ITC must conduct an assessment of whether the consent must be granted, including examining the process of rights acquisition by the rights holder. The Code contains an extensive list of factors to be taken into account by the ITC, including the conditions and costs attached to the acquisition of the rights, whether the rights were openly available and whether the rights have been offered in a package which might have been more attractive to one class of broadcasters than another.
- The UK model does not result in the broadcast of events on both free-to-air and pay television. In practice, subscription broadcasters do not bid for the majority of listed events on the basis that the rights for such events are only viable on an exclusive basis. The importance of exclusivity in the economics of sports rights acquisition was emphasised by FACTS in its submission and in a supplementary paper provided to the ABA. The UK experience only goes to emphasise this point. Even where dual rights are supposedly available, they are not taken up. This fact is alluded to in the ABA's statement that "a UK style scheme would reduce the attractiveness of much of the sport on the current list to free-to-air broadcasters".

Since January 2000, when the UK Code was last revised, the ITC has issued consents to exclusive coverage for the following events:

Rugby League Challenge Cup 2000-2002 (BBC) - consent given March 2000

Test Cricket 2000 (Channel 4 and Sky) - consent given April 2000

Wimbledon 2000 (BBC) - consent given May 2000

Grand National 2001 (BBC) - consent given April 2001

Test Cricket 2001 (Channel 4 and Sky) - consent given May 2001

The Derby 2001 (BBC) - consent given May 2001

Wimbledon 2001-2004 (BBC) - consent given May 2001

Ryder Cup 2001-2003 (Sky) - consent given July 2001

Where consent was given for group A events, the broadcaster was the BBC. Where consent was given to Sky for group B events, arrangements were made for highlights on a national free to air broadcaster. Where rights to a Listed Event were acquired prior to the establishment of the list, they are not currently subject to the UK Code.

Debate around the list is similar to that encountered in relation to the Australian system. Pay

television interests and some sports bodies oppose the UK model because it limits the ability of pay television to acquire exclusive rights to listed events.

The ABA states that it “sees merit in arrangements which provide enhanced access for pay TV to sports rights”. This seems at odds with the objectives of the anti-siphoning framework, which is about the interests of the Australian public, not the commercial interests of pay television.

3.3 Impact of rules on stakeholders

On pages 22 and 23 of the report the ABA discusses coverage of Friday night AFL games in Sydney and Brisbane.

This discussion is not at all relevant to the operation of the anti-siphoning regime. This inquiry is concerned with the availability of coverage on free to air television it is not appropriate to be addressing the issue of pay coverage.

Future coverage of AFL is the result of commercial negotiations between all the parties to secure the best possible deal across all platforms and for the AFL itself, having regard to the various commercial interests of the parties.

The report comments that Friday night games will not be available on pay television live but on delay on free to air television. Criticism of this arrangement does not take account the fact that the free to air networks entered into an arrangement that would maximise the amount of overall coverage in any one week, on free to air and as part of that arrangement it was necessary to secure exclusive coverage of some games on free to air. It should also be noted that the AFL has publicly commented that no Brisbane or Sydney games will be scheduled on Friday nights hence removing this issue.

4 CONCLUSION

Key aspects of the ABA’s Report are seriously flawed when assessed against the rationale underpinning the legislation – to ensure that Australian viewers are not forced to pay to watch major sporting events that have traditionally been available on free-to-air television. Key recommendations would in fact seriously undermine this objective if adopted.

In arguing for the extension of the list for just two years the ABA’s Report has ignored the fact that a significant majority of television viewers will continue to watch sport and other forms of entertainment on Free-To-Air television, regardless of continuing changes to the broadcasting environment. It fails to provide certainty for free-to-air viewers that rights to listed events post-2006 will not be secured in the coming year/s exclusively by pay operators.

In addressing the key issues of what should be included and excluded the ABA’s Report has applied contrary and at times inconsistent arguments.

In addition to the ABA’s recommendations regarding soccer and swimming, the following events should be added to the list:

- Olympic and Commonwealth Games
 - Rugby Super 12s
 - Australian Swimming Championships
-

No events should be removed from the list. The delisting mechanisms that enable pay TV access to events on the list to which a free-to-air broadcaster does not acquire the rights, whilst keeping open the possibility that free-to-air coverage may be provided in future years if circumstances change. This serves the policy rationale of the list of maximising the potential free-to-air coverage for viewers. FACTS has particular concerns as set out above in relation to the following events that the ABA has recommended for removal, and strongly opposes their removal:

- each AFL State of Origin match
- overseas cricket test and one day matches involving the senior Australian representative team played outside the United Kingdom
- each match in the Men's and Women's Hardcourt Championships

The ABA's comments and recommendations on matters extraneous to the Terms of Reference as set by the Minister's direction should not be considered as part of this review.

In conclusion, for all of the reasons outlined above FACTS believes it is clearly in the public's interest that the Government should maintain the existing list and extend it for ten years. In relation to new events, the report's recommendations on swimming and soccer should be extended to include the Olympic and Commonwealth Games, Australian Swimming Championships and Rugby Super 12s.

In view of the imminent potential for rights negotiations for listed events beyond the current term of the list FACTS urges the Minister to act on this issue as a matter of urgency.

FACTS members are available to discuss this submission at the Minister's convenience.

Why “Dual Rights” Would Not Be In The Public Interest

It is essential commercially for free-to-air stations to be able to offer exclusive coverage of sporting events.

Most sporting coverage involves rights fees and production costs, and frequently substantial sporting events are more expensive than most alternative programming (with the obvious exception of high-cost local programs). This is exacerbated by the need to purchase some rights in US dollars. Sporting coverage is often seen as programming that is important for building audience but the high costs can be justified only if the televised sporting event nets the station more revenue than alternative programming. To do so, it must attract a significant proportion of the available television audience, and of the particular demographics sought by advertisers. With sport, the most sought demographic is men, and particularly young men, who are under-represented among viewers of other kinds of television programs.

When sales are approaching potential advertisers and sponsors for an event, the first question they are asked is whether the coverage will be exclusive. While we cannot put dollar figures on these discussions, it is undoubtedly the case that advertisers are prepared to pay a premium for exclusive association of their name with an event.

Dual rights could see a result where Coke sponsored an event on Free-To Air and Pepsi on Pay. Clearly the value of the association is almost totally destroyed by such outcomes, making it extremely difficult to sell airtime and sponsorship well in advance of an event, as advertisers would hold off until they were sure they would not be “ambushed”.

SOCOG spent huge sums last year on its strategies to counteract ambush marketing – one of the clearest demonstrations that exclusive association is absolutely crucial to the value a potential advertiser puts on exclusivity.

If an event is shown simultaneously on free-to-air and Pay television, the audience will obviously be split. Some 20 per cent of television homes now subscribe to Pay. Even a 10 per cent drop in the free-to-air viewing audience would place severe pressure on the financials of sports coverage. This would make many lesser sporting events quite marginal or simply not viable for stations. At the same time, rights costs are unlikely to fall correspondingly, unless the event organisers see free-to-air coverage as essential to their sport. If substantial coverage costs are also involved, even “negative” rights fees (i.e a subsidy from the event organisers) may be insufficient to keep the event on free-to-air television.

In the space of several years, many events on the anti-siphoning list would be likely to disappear from free-to-air television as the result of dual rights. The Productivity Commission’s Review of Broadcasting acknowledged that a dual rights scheme could result in lesser events disappearing from free-to-air television. A recent example was STW-9’s decision not to continue telecasting local Pura Cup Cricket matches this year

Pay television interests have put conflicting public positions on the effects of simultaneous coverage. Fox Sports argued before a Senate Committee in May 2000 that if free-to-air stations were able to broadcast more sporting events live by using digital multi-channel capability, it would become commercially not viable for Pay television to continue to broadcast those events. In the current ABA inquiry, Fox Sports has argued that simultaneous coverage is a fact of life and has not resulted in free-to-air stations dropping coverage of events.

The instances cited by Fox Sports in their submission to the Senate Committee do not support this conclusion at all. The most prominent instances arose from contractual arrangements that have since been renegotiated. Others involved only a few events in a series, or (in a couple of instances) were accepted by a station in return for a greatly reduced rights fee or no fee at all. Each of the instances cited by Fox Sports is discussed below.

Swimming: 2000 and 2001 - Part of Telstra Australian Championship on Fox Sports and the Nine Network

In 2000, all finals of the Olympic trials were shown on both Fox Sports and Nine Network. Nine was unhappy with the arrangement, as exclusivity was needed to satisfy advertisers, and hence negotiated exclusive access to the later days of the event for 2001 and on an ongoing basis at a substantially increased rights fee.

Nine exclusively showed four days of the Championships and Fox Sports showed three days.

NRL: 1998, 1999 & 2000 - Several matches shown simultaneously on Pay-TV and on the Nine Network and its affiliate stations.

The arrangements are that the Nine Network shows two games of each round (chosen by Nine) exclusively while Foxtel is permitted to show other games to ensure comprehensive coverage of each round.

Dual coverage of games is extremely rare. In the opening weeks of the season the NRL scheduled a double header Saturday game which Nine requested coverage of at no additional cost to Nine, In each season only one or two of these matches were shown simultaneously on Pay television

NRL Grand Final: 1999 & 2000 - entire match shown live on Pay TV and Nine Network

This arrangement was negotiated by the NRL (as a result of the Super League negotiations) for 1999 and 2000 and does not apply as of 2001. From 2001 onward, Nine has exclusive rights to the Grand Final. Under the agreement in relation to 1999 and 2000, Foxtel was subject to restrictions on how it showed the Grand Final, designed to retain as much free-to-air exclusivity as possible by. Foxtel had the choice of broadcasting the event on delay or alternatively as a "dirty" feed containing Nine's advertisements or as a "clean" feed containing commercial breaks in exactly the same positions as Nine's commercial breaks (to ensure Foxtel did not distinguish its service from Nine's and draw viewers).

Rugby League World Cup: 2000 - live on the Nine Network and live on Fox Sports

In relation to this match, Nine paid no rights fee but showed the game simultaneously with Pay TV to maximise viewers' ability to see the game. Coverage was possible on this basis as it was broadcast early in the morning, when very little advertising revenue could have been expected. There was no rights fee for Nine.

French Open: 1999 & 2000 - Matches simultaneously available on FTA and Pay TV

Nine has negotiated an arrangement where it shows a small number of games of the competition in return for a minimum licence fee, while a comprehensive coverage is provided on Fox Sports. Nine does this to keep faith with viewers who have come to expect coverage of all major international tennis on the network.

Australia v South Africa Test 2000 on the Seven Network

Permission was given for this match to be shown simultaneously on Fox Sports as the result of a last minute, one-off arrangement at the request of the ARU due to the fact that Seven was not able to show the match live in all states. The agreement to permit simultaneous coverage was reached very shortly before the actual event, minimising the effect on advertising sales and publicity.

Australian Open Tennis on the Seven Network

Coverage of matches on Seven and C7 is scheduled on a complementary basis. Any duplication which may occur is the result of developments during the course of the tournament. Typically, Seven will cover matches on centre court, on the basis that these are likely to be the matches that most viewers will want to see. However if a match not originally scheduled on Seven seems likely to be of greater interest than the scheduled match (for example an outside chance appears likely to eliminate a seeded player) Seven will either broadcast the whole of the unscheduled match simultaneously with C7 or switch between the two.

AFL Regular Season on the Seven Network

Interest in AFL matches varies widely depending on the market, in which the broadcast takes place and the teams playing. As a result, live matches scheduled on free-to-air vary depending on the market. In any one round a different live match may be scheduled in each of the five Seven Network markets, depending on the assessment of viewer interest. In certain cases, matches are simultaneously broadcast on C7 to provide wider coverage than the market in which the match is of primary interest. Seven considers this to be more in the way of complementary coverage than simultaneous exploitation of rights.

Use of Rights by C7

Seven also considers there is a fundamental difference between the simultaneous broadcast of events on Fox and Seven than on C7 and Seven. The fact that C7 is wholly owned by Seven (and the smaller audience reach of C7 than Fox) means that the effect on the advertising market is entirely different. Seven and C7 are able to approach potential advertisers in a co-operative manner – the potential for advertising revenue is therefore not cannibalised.

Seven has only permitted the simultaneous broadcast of one event on Fox – the South African Rugby Test. As noted above, this was a highly unusual one-off situation, and not something we would ordinarily agree to.

Superbikes (Phillip Island) – 1999-2001; 500cc Motorbikes (Phillip Island) – 1999,2000 on Network Ten

The contractual arrangements for the World 500cc Motorcycle Championships at Phillip Island demonstrate the need for associate provisions in the anti-siphoning regime. They also demonstrate the detriment to free-to-air viewers of any proposal to split the free-to-air and PAY-TV rights.

With this event, Fox Sports acquired the exclusive free-to-air and pay TV rights from an Australian agent of the overseas rights holder, prior to the acquisition of the free-to-air rights by Network Ten. Fox Sports then on-sold the free-to-air rights to Ten on terms that reserved for Fox Sports the right to televise the event live and contemporaneous with Ten's coverage.

That the agent sold all the rights to Fox Sports before offering the rights to a free-to-air broadcaster clearly goes against the intention and spirit of the anti-siphoning provisions.

This resulted in Fox Sports being the host broadcaster for this event. Fox Sports was then in a position to limit the footage from the event that it made available to Network Ten for its coverage, depriving free-to-air viewers of the same coverage as enjoyed by pay TV subscribers.

Having exploited a loophole in the anti-siphoning provisions and dictated the terms upon which the free-to-air rights could be acquired, it is disingenuous for Fox Sports to assert that this event supports their arguments for a dual rights scheme.

Free-to-air viewers would be far better served if Network Ten were the host broadcaster and could provide the fullest possible coverage to free-to-air viewers. By virtue of the loophole with associates of pay tv licensees, Ten was never provided with this opportunity. If it had been, Ten would have needed exclusivity to justify its greater investment as host broadcaster. Free-to-air viewers would then have enjoyed far greater exposure of their sport.

This arrangement clearly demonstrates the importance of associates of pay TV not being able to broker the free-to-air rights and undermines pay TV's arguments that the splitting of rights is in the interests of free-to-air viewers.

Similar arrangements exist, and similar arguments apply in relation to the World Superbike Championships at Phillip Island, save for the fact that this event is not on the anti-siphoning list.
