



**AUSTRALIAN BROADCASTING AUTHORITY'S
INQUIRY INTO THE ANTI-SIPHONING LIST**

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

20 APRIL 2001

EXECUTIVE SUMMARY

1. The intention of the anti-siphoning list is to meet the interests of the Australian viewing public in having free access to major sporting events. The commercial interests of industry sectors are of secondary importance compared to this overriding objective.
2. Discontinuation or reduction of the anti-siphoning list would result in Australians being forced to pay significant amounts to watch events which they have previously been able to see for free, and deprive viewers in regional and remote areas that cannot receive pay TV of the opportunity to watch these events at all.
3. The need for an anti-siphoning regime to protect the interests of viewers remains as strong as ever, given that 4 in 5 Australian households do not subscribe to pay TV and many regional and remote viewers cannot get access to pay TV at all.
4. The list has worked effectively to achieve its policy objective, and continues to attract support from all political parties. Almost every event on the list has been comprehensively broadcast on free-to-air television over the last five years.
5. Most events on the list are broadcast live and in full by free-to-air broadcasters. However, in some cases (particularly multi-round events) broadcasters must make scheduling decisions based on the interests of the majority of viewers. Where live broadcast is not possible or feasible due to the particular practical or commercial circumstances surrounding the acquisition or exercise of the relevant rights, the event may be broadcast on delay or in highlights form.
6. The list does not prevent pay television from acquiring rights not taken up by free-to-air broadcasters or from providing complementary coverage of events televised on free-to-air. In fact, the operation of the list maximises the opportunity of Australian viewers to access the widest possible range of sporting coverage.
7. The most important criterion to determine whether an event should be on the list is the level of public interest in the event. Consistent coverage of events by free-to-air broadcasters is one of several relevant criteria for judging the need to maintain an event on the list, or add a new event.
8. No events which are currently on the list should be removed. 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.
9. The need for the anti-siphoning list will continue beyond 2004. It should be extended for a further ten years to 31 December 2014. This should be done without delay, to allow certainty in long-term rights negotiation.
10. FACTS considers that a number of additional events of demonstrated interest and appeal to Australian viewers should be added to the list to ensure continued free-to-air coverage of these events in the future. These events are:

Summer and Winter Olympic Games
Commonwealth Games

Rugby Super 12's
Australian, World and Pan Pacific Swimming Championships.

11. The legislation has a clear loophole that allows arrangements which are contrary to the legislative intentions underpinning the existence of the list. The anti-siphoning provisions apply only to pay television licensees and not to their related corporations or associates, allowing such entities to acquire rights and effectively avoid the effect of the provisions. The *Broadcasting Services Act* should be amended to remove this loophole.
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1. The legislative purpose behind the anti-siphoning list

Before addressing the particular matters raised in the Ministerial Direction dated 22 December 2000, FACTS believes it is important to consider the purpose for which the anti-siphoning provisions were included in the *Broadcasting Services Act*.

Most importantly, these provisions were not enacted to protect the interests of free-to-air broadcasters. Their purpose is to ensure that the Australian public continues to have access to a broad range of sporting events on television, and that they are not forced to pay to view those events as has occurred elsewhere in the world.

It is this public interest policy which must underpin any examination of the future of the anti-siphoning list.

The Australian viewing public has come to expect a wide range of sports on free-to-air television. Australian viewers' strong interest in sport includes both local and overseas sport. Viewers' interest in sporting events on the anti-siphoning list remains high, and this interest has extended to a number of new events.

Parliament was conscious that market forces had resulted in major sporting events being lost to free-to-air viewers in the United Kingdom and New Zealand, and that the marketing imperatives of pay television services could produce the same result here. In the United Kingdom, viewers wishing to watch the English Premier League (an event specifically created to escape the siphoning rules in the UK and devalue the existing club competition) must pay 22 pounds per month, or almost A\$70.

About four in five Australian households still rely wholly on free-to-air services for televised sporting coverage. Free-to-air television homes outnumber pay television homes in a ratio of 6:1. The majority of Australians still choose not to subscribe to pay television.

International experience suggests that pay television penetration in even the most mature markets is unlikely to exceed 35%. Recent Australian figures showing a plateau or decrease in subscriber numbers for pay television suggest that penetration rates in Australia may halt at a significantly lower level. Even on the best case scenario, more than 60% of Australians will never subscribe to pay television. Without the protection of the anti-siphoning list, these viewers will be denied access to the sports they have come to consider it is their right to see.

The majority of viewers in regional and remote areas are therefore almost exclusively reliant on free-to-air for access to sporting events. In regional Western Australia no pay services whatsoever are available to the public.

FACTS considers that the anti-siphoning provisions are the most effective way of ensuring that Australians can watch major sporting events on free television. It should also be noted that the rules have facilitated an expanded and complementary service on pay television for those who can afford it (this is discussed further in section 3 of this submission). The regime works effectively in the interests of consumers and continues to attract support from all political parties as well as the viewing public.

FACTS strongly supports the continuation of the anti-siphoning list in the interests of Australian sports viewers. FACTS believes that a number of events should be added to the list to reflect the expectations of viewers and that the timeframe for the list should be extended to 2014.

2. Level of coverage of events on the anti-siphoning list

Attachment 1 summarises the coverage of each listed event by commercial free-to-air broadcasters over the past five years. This shows some minor variations in coverage over the period, but underlines continuing broadcaster commitment to covering these events, as well as continuing strong viewer interest. These figures show that almost every event on the anti-siphoning list has received extensive coverage on free-to-air television over the last five years. This is also consistent with coverage prior to introduction of the list.

In the 2000 calendar year over approximately 1800 hours of sporting coverage of events on the anti-siphoning list were transmitted by commercial broadcasters.

This figure does not include additional coverage of events not on the anti-siphoning list or events which are complementary to listed events. For example, the Ten Network presents comprehensive coverage over 4 days of the Spring Racing Carnival in addition to the Melbourne Cup and Seven broadcast 24 hour coverage of the Sydney 2000 Olympic Games over 16 days. The figure also excludes coverage of listed and unlisted events by the ABC and SBS.

In most cases, coverage of events has been live and in full. In some cases this has not occurred. There are a number of factors affecting the ability of a broadcaster to broadcast full live coverage of an event:

- The anti-siphoning list covers many hours of sporting events. Some of these events involve simultaneous play within one round or on different parts of a course. In many cases, not all of these hours are covered by the host broadcaster (particularly in early rounds of a competition) and are therefore not available for broadcast. This is particularly the case with tennis and golf tournaments. The figures in Attachment 1 reflect that almost all available footage for these events is shown on free-to-air.

For example, at Wimbledon, play at only five of the 20-odd courts is covered, and hence potentially available for broadcast. That means that no more than 15 of more than 60 matches taking place on the first day of the competition can be televised. That is not of concern to most viewers, as the free-to-air coverage concentrates on the leading players, and other matches involving Australian players whilst pay provides complementary coverage for viewers who wish to see more games. (The pattern of coverage of Wimbledon described in more detail in section 3 of this submission).

In the US Masters, only the last ten holes are filmed by the US host broadcaster before the final days, and generally only the leading players are featured.

So while some events may technically involve hundreds of hours of play, a substantial proportion of it may be of little interest to Australian viewers or may not even be available for broadcast. It should also be noted that in a single channel environment the number of hours it is possible to broadcast is in effect limited to the hours during which the event is conducted.

Pay television interests have suggested that there are a total number of 7,000 hours of sport on the anti-siphoning list. The fact is that the actual number of available hours on the list is much less than this. The total number of hours of AFL available in any one year is 563. Of all events on the list, AFL has the highest potential for hours, making it extremely difficult to see from where the balance of the 7,000 hours claimed by pay has been derived.

FACTS considers the figure of 7,000 hours to be grossly inflated. Presumably it purports to include hours of events not even available for coverage and simultaneous rounds of events which it is not possible to broadcast.

The ratio of hours of sport on the list actually broadcast by free-to-air broadcasters to the pay television inflated figure cannot be a meaningful measure of the efficacy of the list in achieving its policy objectives. The figures provided in Attachment 1 demonstrate clearly that they have. The real issue is whether viewers have had access to most events on the list and whether this would continue to occur if the list were reduced in scope or abandoned.

- Contractual factors may affect the ability of a broadcaster to present an event live or in full. For example, in some cases, particular matches may not be broadcast “against the gate” to attract maximum attending audiences. This is a common contractual restriction in relation to most football codes.
- The existence of multiple time zones across Australia commonly affects the live broadcast of certain events. Broadcasters may delay broadcast of an event to enable the telecast to occur at times that are more convenient to most viewers and to ensure consistency of scheduling between States.
- Competing audience interests require broadcasters to make scheduling decisions to meet the needs of the greatest number of viewers at any one time. A sporting event may clash with regularly scheduled programming of appeal to a greater number of viewers. In these cases, the broadcaster must make a decision aimed at serving the greatest viewer demand.
- Some competition elements of lesser viewer interest are broadcast in highlight form, particularly in multi-event competitions. This ensures that viewers are brought up to date with the major aspects of a competition, often as a precursor to more comprehensive coverage of later stages of an event.
- On extremely rare occasions, no free-to-air broadcaster will opt to acquire rights to a listed overseas event. This is normally because of a combination of factors relating to the time-zone in which the event is played, the likely appeal of the event to Australian viewers and the cost of acquiring rights and adequate coverage.

Each such decision is made in the light of current circumstances. Those circumstances can change over time, and it is quite conceivable that at a later date a free-to-air broadcaster may seek to acquire rights to one of these events.

The fact that an event is not acquired or broadcast in a particular year does not necessarily mean that viewers do not have a legitimate expectation or at least hope that the event may be shown on free-to-air television. This public

expectation is one of the criteria which FACTS believes should be considered as relevant to the inclusion of events on the list. The fact remains that the anti-siphoning list is the only mechanism which provides any avenue to satisfy public expectations of this type.

It is also important to note that the anti-siphoning list itself does not require live broadcasts of events. As stated on the ABA website:

“The anti-siphoning provisions deal with the acquisition of rights to events included on the anti-siphoning list, not with the television coverage of those events. The capacity of free-to-air television to broadcast sporting events is limited, given the broad appeal of its programming schedule. The use of the rights acquired by a commercial or national television broadcaster and decisions on whether to broadcast live, delayed, highlights only or to a limited geographical area, are commercial decisions for the licensee to make.”

The original intention of Parliament in introducing the anti-siphoning provisions was to ensure the best possible opportunity for viewers to access significant sporting events for free. Clearly there are limitations on the level of live coverage which can be achieved by free-to-air broadcasters. This should not mean that viewers should be denied all opportunity of accessing all or part of the listed events to the maximum extent possible in all the circumstances.

3. The legislation encourages complementary free-to-air and pay coverage of events

The operation of the anti-siphoning provisions have had the effect of expanding viewer choice and increasing the total number of hours of sport available to the Australian public by encouraging complementary coverage of a range of events. FACTS believes that this outcome is in the best interests of viewers.

The existence of the list is directly responsible for the fact that Australian viewers have unprecedented access to many sporting events. Those viewers who choose to pay for sporting coverage have the benefit of fuller coverage of an event. However, this is not to the detriment of the majority of viewers, who continue to expect to receive their sporting coverage free of charge.

Where it can do so, a pay service enforces exclusive coverage of an event, as a means of driving subscription to the service. This is common practice in international markets and similar intentions have been clearly demonstrated in the past by pay television licensees in Australia. The case of *Foxtel Cable Television Pty Ltd v Nine Network Australia Pty Ltd* involved an attempt by Foxtel to acquire a listed event on an exclusive basis by purporting to offer free-to-air rights on a significantly delayed basis, so that these rights were in effect of no value or interest to viewers. The intention of the arrangement was to avoid the effect of the list and to reserve exclusive rights for Foxtel.

It is only the existence of the anti-siphoning list which prevents exclusive acquisition of rights by pay television from becoming standard industry practice.

In some expensive and complex long-form events, it may be in the interests of both free-to-air and pay services to share coverage, as neither can provide live coverage (or even prompt replay) of all matches, and the cost of exclusive rights may be too great for either party. Industry practices since the list was introduced

show that such arrangements are common (eg Wimbeldon, AFL, NRL, Australian Open) and are clearly viewed as advantageous to pay television as a driver of ratings and subscriptions. Vigorous competition between pay operators for available rights evidences their commercial value (for example the recent NRL and AFL rights acquisition process).

The listing of early rounds of multi-stage events serves the legislative intention of the anti-siphoning restrictions even if it is only possible to televise a selection of matches played in early rounds. It does so by ensuring that the mass of viewers are not disadvantaged by pay services acquiring exclusive rights to these matches, and by helping to ensure that free-to-air and pay coverage are in practice complementary.

Experience has shown that free-to-air broadcasters are much more likely to enter into complementary coverage arrangements than pay television broadcasters. When pay services acquire exclusive rights to an event, free-to-air broadcasters are normally shut out, as the pay operators are prepared to pay a steep price for commercial exclusivity as a subscription driver.

Examples of this are the Rugby 12's, where free-to-air broadcasters are only able to purchase selected delayed replay rights, and the recent cricket tour of India, where even highlights packages were priced beyond what a free-to-air broadcaster could justify.

4. Other relevant criteria relevant to the operation of the list

As noted above, the overriding purpose of the anti-siphoning list is to protect the interests of Australian viewers by ensuring that they are not forced to pay to view important sporting events on television.

FACTS recognises that the consistent broadcast by a free-to-air broadcaster is one of several relevant criteria for judging the need to maintain the event on the list, or to add it to the list, but is not the most important. In our view, the most important factor to be taken into account is the public interest.

The overall public benefit of retaining on the list an event in which the public has a demonstrably strong interest must override the commercial interests of any industry sector. The anti-siphoning list does not exist to serve the needs of free-to-air or pay television broadcasters. It is there to serve the legitimate expectations of the Australian viewing public.

FACTS considers that the threshold conditions to be met for removing an event from the list are:

- Public interest in the event is low, or has fallen substantially; and
 - Free-to-air broadcasters have not broadcast the event over the last five years; and
 - The retention of the event on the anti-siphoning list would pose significant operational problems for Pay television operators (which in practice would mean that the de-listing procedures did not work as intended, and could not be amended to do so).
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The level of public interest in an event can be gauged by news coverage of the event in various media, talkback radio commentary, survey findings on consumer attitudes (such as the annual Sweeney Sports Report) and ratings for events which are televised.

These indicators, and others such as anecdotal evidence gathered through viewers' telephone calls to stations demonstrate conclusively that all events currently included on the list should continue to be so and that there is a strong case for inclusion of additional events.

5. There are no grounds for removing any event from the list

FACTS can see no plausible grounds to remove any event from the anti-siphoning list. Keeping an event on the list is the only mechanism which offers at least the possibility that viewers will be able to obtain free coverage. If an event is not acquired by free-to-air broadcasters in a particular year, its retention on the list keeps the option open for it to be broadcast free-to-air in the future, without denying the event to pay services in the meantime. The de-listing procedures have operated effectively to ensure that when an event is not acquired for free-to-air broadcast, pay services have obtained access to it without difficulty.

FACTS is not aware of any instance where pay television operators have been prevented from acquiring the rights to a listed event not acquired by free-to-air television through use of the de-listing procedures.

The recent cricket series in India was an instance where no free-to-air broadcaster chose to acquire full free-to-air rights. This was not because broadcasters perceived a lack of viewer interest, but because of the high cost of the rights, and the difficulty in scheduling the matches satisfactorily because of the time at which they arrived in Australia. Because most matches started around 2pm and finished about 9.30pm, only the morning session could have been transmitted live without displacing prime time programs.

Situations such as these raise difficult issues for commercial broadcasters, who must balance the interests of those viewers who want to watch the relevant event against those who rely on regularly scheduled programming. In cases such as these, difficult choices must be made. It is difficult to justify a decision which would favour a vocal minority over a significant majority.

The fall-back option of acquiring rights to a daily one hour highlights package, to be scheduled at 10.30pm was explored by the Nine Network, but did not eventuate because of the price and limitations on scheduling sought to be imposed on Nine. This underlines the commercial reality that rights acquisition tends to be all or nothing for free-to-air broadcasters.

Even though free-to-air television news bulletins were restricted to a few moments coverage of each day's play, the Indian cricket tour generated huge public interest in Australia. Unless Test cricket and one-day cricket matches in India and other countries remain on the anti-siphoning list, free-to-air broadcasters are unlikely to have the opportunity to bid for those rights.

6. Some sporting events should be added to the list

FACTS believes that a number of additional events should be added to the anti-siphoning list. These events have wide public appeal and have been consistently broadcast on free-to-air television over the last five years. The suggested events for addition are:

6.1 The Summer and Winter Olympic Games

These are currently on an informal Ministerial “watch list”. They should be added to the anti-siphoning list to ensure that viewers continue to have access to the very high level of free-to-air coverage beyond the expiry of current rights agreements. The pattern of free-to-air coverage over the past five years was as follows:

Games of the XXVI Olympiad - Atlanta 1996

The Seven Network telecast a total of 318 hours of events from Atlanta in a combination of live, delayed and highlights packages in order to accommodate time zone differences.

The Opening and Closing ceremonies were live into all markets

XVIII Winter Olympic Games - Nagano 1998

Seven broadcast a total of 110 hours of coverage of the Nagano Games. Coverage was in highlights and delayed form to accommodate time zone differences.

There were some live crosses to Japan during daytime hours to cover medal events involving Australians.

Games of the XXVII Olympiad - Sydney 2000

The Seven Network broadcast 24 hour coverage over the 16 days of the Games. Telecasts comprised a combination of live, highlights and delayed coverage plus repeated events amounting to a total of 398 hours plus associated pre Olympic events (for example, the torch relay).

Australians watched an average total of 48 hours of Olympic coverage over the duration of the Games (around three hours each per day). Individual ratings figures reached as high as 57.4, with a network market share of 93.3%, the highest television ratings ever achieved in Australian history. These numbers exclude the many hours and millions of spectators who viewed the Games at Olympic Live sites throughout Sydney showing pictures provided by the Seven Network.

Over 10 million Australians watched the Seven Network’s live broadcast of the Opening Ceremony.

6.2 The Commonwealth Games

Along with the Olympic Games, these are currently on an informal Ministerial “watch list”. The Commonwealth Games attract significant public interest in that they involve the participation of Australian athletes at international level. should be added to the anti-siphoning list to ensure that viewers continue to have access to the very high level of free-to-air coverage beyond the expiry of current rights agreements.

The 1998 Commonwealth Games in Kuala Lumpur were broadcast extensively on the Nine Network over 12 days in a mix of live, delayed and highlights packages. Nine broadcast a total of 131 hours of coverage of the 1998 Games.

6.3 The Rugby Super 12s

The Seven Network has consistently broadcast delayed coverage of this event since its inception in 1997, but has been precluded from obtaining live rights (and in some cases highlights packages) by the third party rights holder.

This competition was devised by News Limited as a pay television event precisely to avoid the effect of the anti-siphoning list which applied to existing international rugby tournaments. A similar mechanism was successfully used by Murdoch interests in the United Kingdom, where the establishment of the English Premier League competition was undertaken to avoid anti-siphoning rules in that jurisdiction which applied to the existing club competition.

Despite the severe restrictions placed on rights acquisition by free-to-air broadcasters for his event, Seven’s coverage has consistently attracted significant viewer interest. Crowd attendances have also increased over the years of the competition, demonstrating strong public interest.

There is a clear case for adding this event to the anti-siphoning list, not the least of which is that corporations should not be encouraged to step around the intention of the anti-siphoning rules by creating new competitions designed to replace existing ones and force viewers to pay to watch them.

Rugby Super 12’s have received the following free to air coverage:

Rugby Super 12 - 1997

Seven was unable to acquire live telecast rights to any matches and could not start its telecast until after Fox Sports had finished on air, a delay of over 2 hours. A weekly highlights package was aired all states except South Australia. Fox played the first four highlights packages, and then switched over to full game replays. Seven’s rights to full game replays were restricted to delayed coverage of Australian teams playing in Australia on a Saturday night. NSW, Qld (and latterly South Australia) played these full game replays.

Rugby Super 12 - 1998

Seven was unable to acquire live telecast rights to any matches and could not start its telecast until after Fox Sports had finished on air, a delay of over 2 hours. There was no highlights package produced, and Seven's full game replays were again restricted. Seven's rights to full game replays were restricted to Australian teams playing in Australia on a Saturday night.

Rugby Super 12 - 1999

Seven unable to acquire live telecast rights to any matches and could not start its telecast until after Fox Sports had finished on air, a delay of over 2 hours. The highlights package was again produced and aired in all markets. Seven's rights to full game replays were restricted to Australian teams playing in Australian on a Saturday night. Seven broadcast 28 hours of full game replays and 14 hours of highlights.

Rugby Super 12 - 2000

Seven was not able to acquire live telecast rights to any matches and could not start its telecast until after Fox Sports had finished on air. The highlights package was again produced and aired in all markets. Seven's rights to full game replays were restricted to Australian teams playing in Australian on a Saturday night. Seven intends to broadcast 36 hours of full game replays and 14 hours of highlights packages.

Rugby Super 12 - 2001

Seven was unable to acquire live telecast rights to any matches and could not start its telecast until after Fox Sports had finished on air. The highlights package was again produced and aired in all markets. Seven's rights to full game replays were eased and it can now play Friday, Saturday or Sunday games, but again only those played in Australia and after Fox Sports has finished their telecasts. Seven broadcast a total of 24 hours of full game replays and 15 hours of highlights packages.

6.4 The Australian Swimming Championships, World Swimming Championships and Pan Pacific Swimming Championships

Public interest in these events has been consistently high over recent years as the free-to-air coverage and high ratings of the events demonstrate. In 1999 and in 2000, swimming events rated in the top five most popular programs on free to air television (excluding the Olympics coverage).

Swimming events over recent years have consistently attracted a large number of viewers with the 1996 Australian Swimming Championships being watched by 300,000 to 600,000 viewers per session and rising to over a million viewers in a session for the World Championships in 1998, the Pan Pacific Championships in 1999 and the Australian Swimming Championships in 2000. Over two million viewers watched each of five sessions of the Pan Pacific Championships in 1999 and six sessions of the Australian Swimming Championships in 2000.

Australian Swimming Championships

The Nine Network broadcast highlights packages daily for each day of competition (eight to nine days) in 1996, 1997, 1998 and 1999. In 2000 Nine broadcast eight days of live and replay coverage in prime time.

World Swimming Championships

The Seven Network broadcast the Long Course World Swimming Championships in 1998 from Perth.

For each day of the swimming competition, Seven broadcast a combination of highlights and live coverage (outside of Sydney and Melbourne the live coverage was delayed due to time differences including day light saving). Seven in Perth also provided a live broadcast of the last two days of competition and the Opening Ceremony.

Pan Pacific Championships

The Championship was held in 1997 in Japan and in Sydney in 1999. Nine broadcast highlights of the Championship 1997 and live with replays in 1999.

7. The list should continue for a further ten years

FACTS is strongly of the view that the anti-siphoning list should be extended for a further ten years.

Sporting rights are customarily negotiated for lengthy periods, for as long as ten years. To allow the necessary certainty in long-term rights negotiation, the list should be extended to 2014.

By providing no sunset period in the legislation Parliament clearly anticipated that the need for the list would be ongoing. In supporting the initial 10 year period determined by the then Minister, Parliament did not foreshadow that this need would disappear by 2004. Its clear view was that the need for these provisions should be reassessed once pay services were more established.

Seven years on, only one fifth of viewers are now pay service subscribers, and many regional and remote viewers have no access to any pay service. It is clear that most viewers still rely on free-to-air services for televised sporting coverage, and may continue to do so indefinitely. The justification for establishing the list in the first place continues to exist equally as strongly as in 1994.

Increasingly and as demonstrated by a number of recent examples such as Super 12's and AFL, sporting rights will be controlled by international companies having close links with Australian pay television operators. While viewers clearly continue to expect to see major events on free-to-air services, this may not happen unless there is legislative intervention.

Provided that broadcasters retain reasonable access to sporting rights, free-to-air coverage of sport may actually increase in the years ahead. Subject to the regulatory environment, digital television technology does afford the possibility

that broadcasters could offer enhanced coverage of listed events for free. This is currently permitted for sporting events overlapping with news.

8 Alternative approaches would not satisfy the legislative intentions

Over the years, alternatives to the current anti-siphoning list have been proposed, usually by pay television interests. The most common alternatives are pruned-back versions of the list (typically restricted to final rounds of a few major events) or an approach that would allow free-to-air broadcasters to acquire only free-to-air rights and pay broadcasters to acquire only pay rights to events ("parallel or dual rights"). Each of these approaches would result (directly and indirectly) in the loss of much free-to-air coverage of currently listed events.

A shortened list, which was also restricted to the final rounds of multi-stage events, would clearly result in much less comprehensive coverage of currently listed events by free-to-air stations. At best, viewers could expect delayed coverage of selected events in preliminary rounds, or highlights coverage. Even this would be unlikely unless sporting bodies required free-to-air coverage (which is unlikely with overseas events, but possible with major local events). Most viewers would clearly be worse off under this approach.

Pay television interests have argued that additional windows for sporting rights could be created by mandating a system where a broadcaster was unable to acquire broadcast rights to an event on an exclusive basis.

The argument put forward in support of this proposition is that allowing free-to-air broadcasters to acquire only free-to-air rights and pay broadcasters to acquire only pay rights to events would be simpler and fairer. In practice, viewers would be disadvantaged by this approach.

In many cases, the economics of broadcasting demand the acquisition of exclusive rights to an event in some cases. This exclusivity can be critical to the commercial value of free-to-air coverage of sport and therefore to the commercial viability of showing the event on free-to-air television. Advertisers and sponsors expect exclusivity. If the audience is divided between identical sporting coverage on free-to-air and pay TV, the free-to-air station's ability to attract and preserve commercial sponsorship and advertising will be severely affected.

The result would be that free-to-air viewers losing access to much sporting coverage currently available to them and would therefore be forced to pay to view events they have hitherto been able to enjoy free of charge.

If legislation were to prevent rights-holders from selling pay rights to free-to-air broadcasters, it would obviously benefit pay operators, but at considerable cost in public interest and competition policy terms. The short-term result would be frequent conflicting coverage and therefore a diminution of the range of coverage currently available (e.g. match of the day, centre court match at Wimbledon), while the longer-term result would be a sharp contraction in free-to-air sports coverage and a high cost to the public to view events previously available for free.

Most importantly, the reason behind the list, to ensure maximum public access to sporting events on the list free of charge, would not be served by such an initiative.

9. Loopholes in the legislation

The anti-siphoning provisions contain a clear loophole giving rise to a serious shortcoming in the effectiveness of the list to achieve its stated aim.

The licence condition applies only to subscription broadcasting licensees. It does not prevent the related companies or associates of such licensees from acquiring the exclusive rights to a listed event. Once these rights have been acquired, the rights holder can control the terms on which the rights are offered to the free-to-air broadcasters. The rights holder can impose terms which limit the amount, timing or scope of the coverage by free-to-air broadcasters, and the commercial viability of acquiring those rights on offer.

If the rights on offer are rejected by free-to-air broadcasters, a pay television licensee may then apply to have the event de-listed, effectively circumventing the intent of the legislation.

The absence of any legislative provision affecting the activities of associates or related corporations of a licensee clearly undermines the efficacy of the list. FACTS believes that this deficiency in the anti-siphoning provisions require immediate rectification and calls on the ABA to recommend the necessary changes to the legislation in its report to the Minister.

Free-to-air broadcasters are subject to strict tracing and associate provisions in Schedule 1 to the *Broadcasting Services Act*. There are no sound policy reasons why similar provisions do not extend to pay TV licensees in relation to the anti-siphoning licence condition, particularly given the complex corporate structures involving pay TV entities.
