



## Sport on television: to siphon or not to siphon?

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### Executive summary

- Siphoning refers to the practice used by pay television broadcasters by which they appropriate, or ‘siphon off’ certain events that have been traditionally shown on free-to-air television so that viewers who do not subscribe to their services are unable to view those events.
- Australia’s free-to-air broadcasters lobbied government extensively to ensure that a list of programs which could not be siphoned by pay television was in place to coincide with the introduction of pay television in the mid 1990s. The list detailed events that can not be shown on pay television until telecast rights have first been acquired by a free-to-air broadcaster.
- Pay television operators initially objected to the introduction of an anti siphoning list on the grounds that it would inhibit the development of pay television.
- The list has undergone considerable review since its introduction. This has resulted in some minor changes, but a list, per se, appears to be entrenched firmly as part of the media landscape in Australia.
- Arguments surrounding the maintenance of the list have been consistent. Free-to-air broadcasters claim that the list serves the public interest, and therefore it should be maintained. Pay television operators oppose the list, which they argue serves the interest of free-to-air broadcasters, not the public.
- The diametrically opposing stances of these powerful interest groups have ensured that anti siphoning is not an issue that governments can ignore. At the same time, anti siphoning has proven an issue that governments, despite various efforts at compromise, have not been able to resolve to the total satisfaction of the broadcasters or other participants, including viewing audiences.
- This paper traces the history of the anti siphoning regime in Australia. It discusses its development and explores the arguments for and against its retention, both in past context and in relation to a current government inquiry into the relevance of the scheme in a changing 21st century media environment.

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## Introduction

Free-to-air television services were first introduced in Australia in 1956. The first broadcast of subscription or pay television, however, did not occur until almost 40 years later.<sup>1</sup> But long before pay television became a reality, it was seen as a threat by free-to-air broadcasters, who were particularly alarmed that it would appropriate their most popular programs, such as sport and recent release films, for the exclusive use of those willing and able to pay for the privilege.

The free-to-air broadcasters therefore lobbied various governments to demand that some form of regulation accompanied the introduction of pay television to prevent this ‘siphoning’ from occurring.<sup>2</sup> The efforts of the free-to-air broadcasters were rewarded when the Hawke Government, which oversaw the introduction of pay television, introduced an anti siphoning scheme under which the rights to certain listed events could not be acquired by pay television operators.

This paper traces the history of this anti siphoning regime. It discusses development of the scheme and explores the arguments for and against its retention, both in past context and in relation to a current inquiry into the relevance of the scheme in the changing 21st century media environment.<sup>3</sup>

## How anti siphoning works in Australia

An anti siphoning regime in general prevents certain televised events, which have been listed by government, from being appropriated or ‘siphoned off’ by pay television operators so that only those that subscribe to a pay service are able to view the events. Siphoning is seen therefore as detrimental to free-to-air viewers.

A number of countries in Europe, as well as the United Kingdom, employ anti siphoning schemes (see Appendix A for more detail). Under the Australian anti siphoning scheme, pay television licensees are unable to acquire rights to televise listed events on pay television until rights have first been acquired by the Australian Broadcasting Corporation (ABC), the Special Broadcasting Service (SBS) or commercial free-to-air broadcasters who reach more than 50 per cent of the Australian population.

1. The first commercial free-to-air broadcast occurred in September 1956. Subscription television first broadcast in 1995. Note: the terms ‘pay’ and ‘subscription’ television are interchangeable and refer to the same type of broadcaster.
2. Australian Broadcasting Tribunal (ABT), *Cable and subscription television services for Australia*, vol. 1, Report (Part A), Australian Government Publishing Services (AGPS), Canberra, August 1982, p. 7.4.
3. Note: a number of the references used in the earlier part of this brief are only available in hard copy. Links are provided to sources which are available electronically.

Section 115 of the *Broadcasting Services Act 1992* (the BSA) details the Australian anti siphoning rules.<sup>4</sup> Provisions in section 115 empower the Minister for Broadband, Communications and the Digital Economy to list in a formal notice, (known as the anti siphoning list), the events that must be available on free-to-air television for viewing by the general public.

While the intention of the anti siphoning list is to ensure that important events which have been traditionally available on free-to-air continue to be accessible for free-to-air viewers, the list does not:

- reserve sporting events solely for broadcast by free-to-air television
- compel free-to-air broadcasters to acquire the rights to listed events
- guarantee free-to-air broadcasters exclusive rights to listed events
- compel free-to-air broadcasters to broadcast events to which they hold rights.

There is provision in the rules for the Minister to delist an event on the anti siphoning list if no free-to-air broadcaster displays an interest in acquiring the broadcast rights.<sup>5</sup> Events are automatically delisted if no free-to-air broadcaster expresses such an interest 2016 hours (12 weeks) prior to their staging. This period is considered sufficient to allow pay television broadcasters time to acquire the rights to an event and to promote that event. The automatic delisting period can be terminated if the Minister considers that ‘at least one commercial television broadcasting licensee or national broadcaster has not had a reasonable opportunity to acquire the right to televise the event concerned’.<sup>6</sup>

## The road to an anti siphoning regime

### Pre subscription television: to siphon or not to siphon

In 1982, the Fraser Government asked the Australian Broadcasting Tribunal (ABT) to inquire into the possible social, economic or technical implications that could accompany the introduction of cable and subscription television to Australia.<sup>7</sup> Free-to-air broadcasters argued before the inquiry that siphoning of programs would be an inevitable consequence of a pay television environment and that this would have considerable social costs for

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4. *Broadcasting Services Act 1992* (BSA) viewed 25 November 2009, [http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/901123C9D49C409BCA25755C0014FCC7/\\$file/BroadServ1992Vol1\\_WD02.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/901123C9D49C409BCA25755C0014FCC7/$file/BroadServ1992Vol1_WD02.pdf)

5. Section 115(1B) (2) of the BSA.

6. Section 115(1AB) of the BSA.

7. *Cable and subscription television services for Australia*, op. cit., vol. 2, p. 10.1.

audiences.<sup>8</sup> The only solution to this problem they contended was to introduce an anti siphoning scheme. In opposition, potential subscription television operators told the ABT that such a scheme would prevent them from competing with free-to-air broadcasters to buy programs.<sup>9</sup> Some sporting bodies were also opposed to the introduction of an anti siphoning regime.<sup>10</sup>

The ABT concluded that siphoning could adversely affect programming on existing television services and that this may not be in the public interest.<sup>11</sup> On the other hand, it recognised that decisions about siphoning would need to involve consideration, not only of the rights of the viewing public, but also the rights of various commercial organisations. With regards to sport, these would need to acknowledge, for example, that while sport was enjoyed by the masses, it was also a business. As such, the owners of sports should be able to make the most revenue they could from the sale of broadcast rights to their products.<sup>12</sup>

The ABT recommended that the Government introduce cable and pay television ‘as soon as practicable’, but it was not convinced that there was sufficient evidence that an anti siphoning scheme should be part of the pay television environment.<sup>13</sup> It was, however, a long road from the ABT’s recommendation, to the actual introduction of pay television, and one paved with further inquiries.

The Fraser Government did not act on the ABT recommendation, and in 1983, it was defeated at the polls. Its successor, the Hawke Labor Government, took some time before it too commissioned an inquiry into the social impact of pay television. This was undertaken by the Department of Transport and Communications (DTC) in 1989.<sup>14</sup> Siphoning was again a subject of contention with the two opposing positions previously presented to the ABT in 1982

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8. FACTS submission 188, p. 17 to *Cable and subscription television services for Australia*, op. cit., p. 13.22. Note: FACTS is now called Free TV Australia.
  9. Nilsen Premiere, Submission 85, p. 95 to *Cable and subscription television services for Australia*, op. cit., p. 13.22.
  10. Evidence to the ABT from Mr Southey, representing the Confederation of Australian Sport, p. 1027, as quoted in *Cable and subscription television services for Australia*, op. cit., p. 13.22.
  11. *Cable and subscription television services for Australia*, op. cit., p. 13.18.
  12. This conclusion was reached in the Report by the Committee of Review of the Australian Broadcasting Commission, [Dix Report], *The ABC in review: national broadcasting in the 1980s*, AGPS, Canberra, 1981, pp. 252–256. It should be noted that this review did not discuss subscription television. Rather, it was conducted as an examination of the ABC’s activities, including its operating environment at the time and the likely future environment in which it would operate. The report’s conclusions on changes to the sporting broadcast environment therefore reflect the situation as it existed between the ABC and free-to-air commercial broadcasters in 1981.
  13. *Cable and subscription television services for Australia*, op. cit., p. 13.23.
  14. Department of Transport and Communications, *Future directions for pay television in Australia*, vol. 1 and vol. 2, AGPS, Canberra, 1989.

restated. Complexities associated with introducing anti siphoning, such as how much protection should existing industries be afforded against new or alternative industries, were also reaffirmed.<sup>15</sup>

The DTC suggested that there were two basic approaches to siphoning. The first was simple and easy to administer. Introduce a list of programs that subscription television operators could not acquire. The second option, which conferred no exclusive rights, required complex regulation and breaches could be examined only in retrospect.<sup>16</sup>

The DTC reached no conclusion about whether an anti siphoning regime should be introduced. In contrast, in the same year a House of Representatives committee considered the equity argument in favour of anti siphoning rules was ‘an overriding one’.<sup>17</sup> It recommended the adoption of a system of dual rights under which events would be available both to free-to-air and pay television.<sup>18</sup> In 1991, in yet another consideration of anti siphoning, the Office of Regulation Review (ORR) echoed the earlier ABT view, concluding that a siphoning regime would involve arbitrary judgements and that extensive intervention by government to prevent siphoning was unnecessary.<sup>19</sup>

## Labor and the early pay television era

After weighing the findings of these investigations, the Hawke Government decided to impose an anti siphoning regime on pay television. There are few who would deny that the powerful free-to-air broadcasters, such as Kerry Packer, had some considerable influence on this decision. Indeed, Mark Westfield in his study of pay television in Australia notes that the success of free-to-air broadcasters in denying pay television access to sports programming was ‘the big one’.<sup>20</sup>

Parameters for the anti siphoning regime were established under the *Broadcasting Services Act 1992* (BSA) which conferred the power to introduce an anti siphoning list and to specify events that should be televised free to the public. While the BSA did not define the meaning of

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15. *Future directions for pay television*, op. cit., vol. 1, 1989, p. 126.

16. *Ibid.*, p. 127.

17. House of Representatives Standing Committee on Transport, Communications and Infrastructure (HRSCTCI), *To pay or not to pay? Pay television and other new broadcasting-related services*, AGPS, Canberra, November 1989, p. 57.

18. *Ibid.*

19. Industry Commission, Office of Regulation Review, *Pay TV: why regulate?* April 1991, p. 16, viewed 6 November 2009, [http://www.pc.gov.au/data/assets/pdf\\_file/0005/65642/paytvwhy.pdf](http://www.pc.gov.au/data/assets/pdf_file/0005/65642/paytvwhy.pdf)

20. M Westfield, *The gatekeepers: the global media battle to control Australia's pay TV*, Pluto Press, Annandale, 2000, p. 245.



the word 'event', it appeared that this meant something which happened 'in the real world'—a sporting or cultural event, rather than 'fictional constructs or imagined events'.<sup>21</sup>

When subscription television operators commenced services in 1995, anti siphoning regulation operated in conjunction with a licence condition imposed on their broadcasting licenses.<sup>22</sup>

## The Australian Broadcasting Authority and what to put on the list

### Stakeholder views

Following passage of the BSA, in February 1994 the Government initiated a specific investigation to determine what events would be reserved for free-to-air broadcast.<sup>23</sup> The investigation, conducted by the Australian Broadcasting Authority (ABA), was once more confronted with vastly disparate views.<sup>24</sup> These are summarised below.<sup>25</sup>

### Viewing public

One section of the viewing public was adamant that it did not want to pay to see events previously available for free; some viewers argued strongly that as tax payers' money supported athletes, they should not be charged to view sporting performances. In contrast, other viewers saw advantages in pay television acquiring exclusive rights to events. They were commercial free and often included more timely and comprehensive coverage than free-to-air.<sup>26</sup>

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21. Australian Broadcasting Authority (ABA), *Pay TV 'siphoning' investigation: report to the Minister for Communications and the Arts*, n. p., May 1994, p. 6.
  22. The first operator was the now-defunct Australis Media Group, whose Galaxy service launched in early 1995, but closed in mid 1998. Austar commenced service in August 1995, Optus in September and Foxtel in October of the same year. The licence condition was under Clause 10 (1)(e) of Schedule 2 to the BSA.
  23. *Pay TV 'siphoning' investigation*, op. cit.
  24. Note: the Australian Broadcasting Authority is now known as the Australian Communications and Media Authority following its merger with the Australian Communications Authority in 2005.
  25. Some of the other arguments put to this inquiry included one for the inclusion of cultural events on an anti siphoning list. Opera Australia, for example, was concerned that its ability to negotiate with the ABC would be limited if operas were listed. On the other hand, the Queensland Government argued that performances by institutions which received government funding, such as Opera Australia, should be listed. *Pay TV 'siphoning' investigation*, op. cit., p. 24.
  26. *Pay TV 'siphoning' investigation*, op. cit., p. 15. Note: pay television coverage of sporting events is no longer commercial free. Advertising was initially banned on pay television for a period of five years after its introduction. In mid 1997, it became legal. D Shilbury,

### Free-to-air broadcasters

Once more the overarching argument advanced by free-to-air broadcasters was that siphoning disadvantaged the viewing public. People should not have to pay in the future for events they currently viewed for free, the broadcasters claimed. There was some difference in opinion amongst free-to-air broadcasters, however, about what events should remain free. The ABC considered only those of national significance should be on an anti siphoning list, but commercial broadcasters believed the list should include important state, regional and local events.<sup>27</sup>

### Pay television licensees

Pay television licensees argued overseas experience indicated that siphoning was not the significant problem free-to-air broadcasters claimed. In addition, pay television had proven to be a boon for sports, its coverage was more comprehensive and a greater range of sports could be televised overall.<sup>28</sup> Pay operators wanted the protected list short; the shorter the list, they maintained, the less chance the development of pay television would be hampered.

### Sports organisations

Although their attitude to the anti siphoning list has since changed, in 1994 major sports, such as cricket, rugby league and Australian Rules football were ambivalent about an anti siphoning list. There were a number of reasons for this, not the least of which was that these sports had sold the rights to the broadcast of their competitions for some time. The Australian Cricket Board's point, however, that it was important to achieve 'a fair market price' for its product, regardless of where it originated, indicated that this initial stance could change to reflect the realities of future contract negotiations.<sup>29</sup>

Sports which received limited television coverage, such as surfing and baseball, were not overly enthusiastic about instigating an anti siphoning regime. They saw immediate disadvantages in having to negotiate exclusively with free-to-air broadcasters if their major events were placed on the anti siphoning list. These sports saw pay television as beneficial in raising their profiles and improving their support base.<sup>30</sup>

The Australian Olympic Committee (AOC) was opposed to all Olympic events being included on an anti siphoning list. The AOC wanted to be in control of the rights to the

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H Westerbeek, S Quick and D Funk, *Strategic sport marketing*, Second edn, Allen and Unwin, Crows Nest, Sydney, 2003, p. 222.

27. *Pay TV 'siphoning' investigation*, op. cit., p. 20.

28. *Ibid.*, p. 22.

29. D Gray, 'TV test looms for cricket', *The Sunday Age*, 24 April 1994, reference to the Australian Cricket Board submission to the ABA.

30. *Pay TV 'siphoning' investigation*, op. cit., p. 23.

Games and to sell them off as components rather than have the sole control rest with free-to-air broadcasters.<sup>31</sup>

Such concerns about restriction of competition and the possible disadvantages for sports in maximising financial returns were more clearly stated by Trade Practices Commission (TPC). The TPC saw the denial of rights to broadcast an event as an ‘artificial constraint on competition’ which had the potential to disadvantage pay television operators.<sup>32</sup>

### Options and the list

The ABA presented the Government with four options. The first—a ‘sarcastic’ offering according to Westfield—was to institute a comprehensive list of events as nominated by the free-to-air broadcasters.<sup>33</sup> At first glance, this option appeared to preserve the most viewer access, as it included every rugby league and Australian Rules football match, cricket test and one day international, each match in the tennis grand slam tournaments, the Tour de France, every national and international motor race, the Summer and Winter Olympics and the Commonwealth Games. But it was clearly impossible for the free-to-air services to broadcast all these events without displacing a significant amount of their other programming. So in effect, this ‘comprehensive’ option would inevitably mean either that some events were not broadcast, or only short snippets were shown. The ABA saw the option as anti-competitive, as it would give free-to-air services the right to ‘hobble’ pay television.<sup>34</sup>

A further option suggested by the ABA was to include events on an anti siphoning list if they met certain criteria.<sup>35</sup> Another option was to adopt a watching list of events to be considered for inclusion on a future list as contractual arrangements for the coverage of certain sports expired and information on the numbers of pay television subscribers and the nature of its programming became more apparent.<sup>36</sup>

This latter option was the only one which in some way acknowledged that outcomes in the new pay television environment were uncertain. As one commentator had previously asked in relation to entrenching any anti siphoning approach:

What happens five or six years down the track when 60 per cent, 70 per cent or even 80 per cent of Australian homes with television are hooked into a pay-TV service ... Can the

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31. Ibid.

32. Ibid.

33. Westfield, *The gatekeepers*, op. cit., p. 244.

34. *Pay TV ‘siphoning’ investigation*, op. cit., p. 23.

35. The criteria were: events played or staged in Australia; international events that involved significant participation by Australians; events that attracted substantial public interest in Australia; events usually shown on commercial or national broadcasters and events that had broadcast rights that could be traded.

36. *Pay TV ‘siphoning’ investigation*, op. cit., pp. 35–41.

Federal Government still argue that it is worth denying all the extra dollars to cash strapped sporting organisation (who from 1995 won't be allowed to accept any sponsorship deals from tobacco companies) ... in order to preserve the annual Melbourne Cup coverage for as few as 20 per cent of the population who aren't hooked up?<sup>37</sup>

The anti siphoning list announced by the Labor Minister for Communications and the Arts, Michael Lee, on 31 May 1994 was in effect the comprehensive list nominated by the free-to-air broadcasters.<sup>38</sup> The Olympic Games was one notable exception. According to one source, this was because the Chairman of the Sydney Organising Committee for the Olympic Games, Gary Pemberton had asked for the omission to ensure potential sponsorship deals were not jeopardised.<sup>39</sup> A watch list was also announced to accommodate the future changes in contractual arrangements noted in the ABA report. Only sporting events were on these lists, as the Government deemed that events of cultural importance were not subject to exclusive coverage rights.<sup>40</sup>

Media analyst and academic, Jock Given, later commented that what the list lacked in cultural diversity, it made up for in size. In Given's view, '[t]he Big Pineapple and the Big Merino had nothing on the Big Aussie Anti-Siphoning list'.<sup>41</sup>

## Initial challenges

### Australia—West Indies cricket

Most commentators saw the anti siphoning list as a victory for free-to-air broadcasters. From the outset, however, pay television operators challenged that victory. Pay operator Australis Media was the first to do so when less than two months after the list was announced, it claimed to have secured the rights to a number of international sporting events. These events included the Australia–West Indies cricket tests and the Rugby League World Cup in 1995. It

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37. M Wallace, 'Potential profits will decide fate of sport events on pay-TV', *The Canberra Times*, 5 March 1994.

38. These included the Australian Football League Grand Final and State of Origin, the Rugby League Grand Final and State of Origin, Test Cricket involving the senior Australian representative team and the Melbourne Cup. See full list in ABA, *Investigation into the implementation of the anti-hoarding rules*, Issues paper, Australian Broadcasting Authority, Sydney, June 2000, viewed 16 November 2009, [http://www.acma.gov.au/webwr/aba/newspubs/radio\\_tv/investigations/documents/general/ahi\\_ip.pdf](http://www.acma.gov.au/webwr/aba/newspubs/radio_tv/investigations/documents/general/ahi_ip.pdf)

39. Westfield, *The gatekeepers*, op. cit., p. 245.

40. The list was gazetted on 6 July 1994 (the *Broadcasting Services (Events) Notice No.1 of 1994*) and tabled on 23 August 1994. The Minister also announced that the BSA would be amended to prevent free-to-air broadcasters buying the rights to events and then not showing them. These amendments were contained in the Broadcasting Services Amendment Bill 1994.

41. J Given, 'A sporting challenge', *The Australian*, 12 April 2001, p. 6.

appeared Australis had circumvented the anti siphoning regime by acquiring the events in a joint venture with the United States' company Liberty Sports-Prime International before gazettal of the list.

Given that there were less than 180 000 Australian homes with subscription television the Australis deal would have meant that important contests in two popular sports were denied to most viewers.<sup>42</sup> After the Nine Network responded angrily to the deal and the ABA questioned its legitimacy, Australis agreed to negotiate to give free-to-air broadcasters the opportunity to acquire first broadcasting rights. Negotiations faltered and in November 1995, the matter was complicated further when Australis requested that the Government delist the Australia–Pakistan cricket test series that had taken place the month before. In Australis' view, as none of the free-to-air broadcasters had been interested in showing the event live, delisting would allow the games to be seen by viewers, albeit in retrospect.<sup>43</sup>

While compromises were offered by the Government, including allowing the simultaneous telecast on free-to-air and pay networks, the Nine Network refused to move from the position that it was entitled to exclusive rights to the events in question.<sup>44</sup> The impasse threatened telecast of the West Indies cricket series, until another free-to-air network, Ten, agreed to obtain the rights from Nine for a nominal fee. Ironically, around the same time the ABA declared that the timing of the rights purchase had been legitimate, which meant that Australis could have legally continued with its plans to cover the West Indies tour.<sup>45</sup>

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42. Australian Subscription Television Association (ASTRA), Australian pay television trends 2001, prepared by AC Nielsen Media International, viewed 16 November 2009, [http://www.astra.org.au/content/pdf/ASTRA\\_PayTVTrends\\_2001.pdf](http://www.astra.org.au/content/pdf/ASTRA_PayTVTrends_2001.pdf)
  43. A Davies, 'Test to test law on pay TV rights', *The Sydney Morning Herald*, 11 November 1994.
  44. It can be argued that the refusal by Nine to compromise was not solely dependent on this issue. At the time the Prime Minister, Paul Keating, and the Chairman of Nine, Kerry Packer, had reportedly 'fallen out' over another pay television deal made between Telstra and Rupert Murdoch's News Limited. See Westfield, *The gatekeepers*, op. cit., pp. 283–84. This was most likely a contributing factor in the failed negotiations.
  45. S Lewis and M Furness, 'Ten Network bowls Nine in cricket-coverage play', *The Australian Financial Review*, 7 March 1995.

## Super League

In 1993, Kerry Packer, Chairman of Publishing and Broadcasting Limited, purchased the broadcasting rights for rugby league on free-to-air television until 2000 for \$80 million. Pay television rights were included in this deal at no cost. In 1994, Rupert Murdoch's News Limited attempted to obtain the pay television rights, but Packer refused.

This situation sparked the Super League war.

Murdoch decided to establish an alternative rugby league competition with 12 privately owned teams—Super League. The rival competition was prevented from kicking off in 1996 after the Australian Rugby League (ARL) took Super League to the Federal Court. Following an appeal by Super League, the Court allowed the rival competition to take place in 1997.<sup>46</sup>

Crowd attendances and corporate sponsorship were adversely affected by the existence of two competitions in 1997. A compromise agreement between the Australian Rugby League and News Limited was reached to restore a single competition format to be run by the National Rugby League from 1998.

As an alternative rugby league competition, it was thought by some that Super League would have been able to circumvent anti siphoning rules. But the Labor Government made it clear almost from the beginning of the saga that it would act to ensure that the 'best rugby league' would continue to be available free-to-air, regardless of what it was called.<sup>47</sup> In 1995, the Government assured the public that if Super League were to become the premier league competition, it would be added to the anti siphoning list.<sup>48</sup> In 1996, as expectations that a second competition would be inevitable the following year, Super League events were added to the list until 2004.<sup>49</sup>

The Howard Government (1996—2007) was also forced to act to assure the public that rugby league would not migrate to pay television when the rumours of a merger between Super League and the ARL emerged. In November 1997, Minister Richard Alston pre-empted any deal between the two rival factions by announcing that a possible merged competition and any interim arrangements would also be added to the anti siphoning list.<sup>50</sup>

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46. National Museum of Australia, *League of legends: 100 years of rugby league in Australia*, 'Controversy corner', viewed 7 December 2009, [http://www.nma.gov.au/exhibitions/league\\_of\\_legends/controversy\\_corner/](http://www.nma.gov.au/exhibitions/league_of_legends/controversy_corner/)

47. A Davies and J Magnay, 'Footy setback, so Murdoch tees up Supergolf', *The Sydney Morning Herald*, 18 November 1994.

48. M Furness, 'Optus kicks in to kick News out', *The Australian Financial Review*, 23 April 1995.

49. Commonwealth of Australia, *Gazette* no. s 45, 1 February 1996.

50. A Davies, 'Alston rules out pay TV league bid', *The Sydney Morning Herald*, 29 November 1997, p. 3.

## The Howard Government

### Flaws, hoarding and compromise

A year after the election of a Howard Coalition Government in March 1996, the anti siphoning scheme was again in the news when a number of senior politicians, including the Prime Minister, expressed concern over limited free-to-air coverage of cricket.<sup>51</sup> Added to the politicians' concerns, there was widespread public outcry when the Nine Network did not show the first session of the Australia–England cricket test series being played in England. This was resolved by Nine by allowing the ABC to show the relevant test. But this compromise did not solve the basic problem—the free-to-air broadcaster could arbitrarily decide whether to show programs on the anti siphoning list, thereby undermining its stated intention. One commentator remarked also that Nine's concession represented a poisoned chalice for the ABC. It would be the public broadcaster, not the commercial networks that felt viewers' ire 'whenever politicians and the public get upset about not seeing their sport on free-to-air TV'.<sup>52</sup>

When a deal was done between the Seven Network and News Limited in 1997 which meant only highlights of the Australian cricket tour of South Africa were to be shown on free-to-air it appeared anti siphoning had not only been cleverly undermined, it was simply not working.<sup>53</sup> Some redemption appeared at hand when the Nine Network challenged the South African deal in the Federal Court, however. Nine claimed that the contract did not amount to the right to televise an event as required under the legislation. The Court agreed, ruling that the agreement was contrary to the intent of the anti siphoning legislation.<sup>54</sup>

Jock Given saw this decision as a confirmation of the powerful gate keeping role of the free-to-air broadcasters with regards to anti siphoning.<sup>55</sup> Solicitor Stuart Byrne believed the case also 'kicked a nicely executed goal for free-to-air viewers'. On the other hand, Byrne considered a follow up case in the New South Wales Supreme Court kicked a goal 'the other way'.<sup>56</sup> It was decided in this case that a subscription sports service which aired Australian Rules football games was not subject to the restrictions of the anti siphoning list because it

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51. A Davies, 'Pay TV chiefs seek overhaul of sport coverage', *The Sydney Morning Herald*, 10 July 1997.

52. M Knox 'Alston's tougher TV rules to give sports fans a fuller picture', *The Sydney Morning Herald*, 30 June 1999.

53. Full coverage was to be available on pay television.

54. *Nine Network Australia Pty Ltd v Australian Broadcasting Authority*, *Foxtel Cable Television*, [1997] FCA 104 (25 February 1997) viewed 18 December 2009, <http://www.austlii.edu.au/au/cases/cth/FCA/1997/104.html>

55. J Given, 'Making sense of siphoning', *Communications Update*, November 1997, p. 21.

56. S Byrne, 'Pay-TV on a winner: reading down anti-siphoning provisions', *Telemedia*, vol. 2, 1998, p. 49.

could be defined as a narrowcasting service targeted at a special interest group.<sup>57</sup> In Byrne's opinion, while events on the anti siphoning list were included because of their general popularity, regardless of that appeal, pay television operators could package the events to ensure they cleared the anti siphoning hurdle.<sup>58</sup>

## Getting tough on hoarding

In 1999, the Howard Government introduced amendments to the BSA to formalise the precedent set as a result of the South African cricket tour incident. The amendments required broadcasters who did not intend to televise live a substantial portion of the events to which they had live rights, to offer the unused rights for a nominal charge to the ABC and SBS.<sup>59</sup> The ABC and SBS were then bound, under legislative obligations, to televise live the designated events they accepted, or to offer the rights (either in total or in part) to the other national broadcaster.<sup>60</sup> Only if the public broadcasters did not want events, would they then become available to pay television. The provisions were intended to overcome the ineffectiveness of delisting provisions.<sup>61</sup> They were also:

... to provide an 'incentive for free-to-air broadcasters to only acquire live rights to a designated event or events in a series they can actually use', and to discourage the acquisition of live rights to designated events or series occurring during the same period 'where it would be impossible to provide full live coverage of both events or series on the one television channel'.<sup>62</sup>

In contrast to their support for the anti siphoning regime, commercial free-to-air broadcasters were vehemently opposed to these constraints on their broadcasting practices, despite the fact that the intention of these restrictions mirrored those of the anti siphoning list. In arguing also that this anti hoarding requirement would result in commercial uncertainty for broadcasters

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57. See Glossary for explanation of narrowcasting.

58. Byrne, 'Pay-TV on a winner', op. cit.

59. *Broadcasting Services Amendment Act (No 1) 1999*. The provision was inserted under a new Part 10A of the Act.

60. See the ABC and SBS legislation, viewed 3 December 2009, <http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/all/search/2E7F5179D6598E8DCA2574730019A00B> and [http://www.austlii.edu.au/au/legis/cth/consol\\_act/sbsa1991254/](http://www.austlii.edu.au/au/legis/cth/consol_act/sbsa1991254/)

61. ABA, *Investigation into the implementation of the anti-hoarding rules*, Issues Paper, ABA, Sydney June 2000, p. 8, viewed 3 December 2009, [http://www.acma.gov.au/webwr/aba/newspubs/radio\\_tv/investigations/documents/general/ahi\\_i\\_p.pdf](http://www.acma.gov.au/webwr/aba/newspubs/radio_tv/investigations/documents/general/ahi_i_p.pdf)

62. Regulatory Impact Statement, Explanatory Memorandum, p. 10, cited in ABA, *Investigation into the implementation of the anti-hoarding rules*, op. cit.



and affect their scheduling flexibility, the free-to-air representative organisation FACTS failed to recognise the double standards applied in its approach.<sup>63</sup>

Initially, pay television opposed yet another limitation on its operating practices, and the ABC was unhappy that it may not be given sufficient time to reschedule its own programming to accommodate the vagaries of free-to-air decisions.<sup>64</sup>

Following the passage of the anti hoarding amendments, the ABA considered what events should be on an anti hoarding list, but only the 2002 and 2006 FIFA World Cup soccer tournaments were eventually designated under the provisions. Anti hoarding was always going to be of negligible value in the short to medium term, however. This was because it did not operate retrospectively, and the rights to many of the events that could have been potentially designated were already secured for some time when the legislation came into effect.

## Towards a new list

### Resolving rumours

At various times throughout 2000 it was reported that the Howard Government was contemplating abandoning the anti siphoning list when it expired in 2004. The Opposition attempted to capitalise on this uncertainty by suggesting that Australians would know who to blame if they were unable to watch their favourite sports on television.<sup>65</sup> But by December, when the Communications Minister, Richard Alston, directed the ABA to consider revision of the list, it appeared that the Government remained committed to its continuation.<sup>66</sup> After evaluating what events had been aired consistently by free-to-air broadcasters the ABA recommended some culling.<sup>67</sup> At the same time, it proposed the inclusion of certain soccer and swimming events on a new list which could operate for a further five years.<sup>68</sup>

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63. M McGuire, 'FACTS fights sports law', *The Australian*, 25 July 2000. See Glossary for a definition of anti hoarding.

64. K Jackson and M Tapley, *Broadcasting Services Amendment Bill (No. 1) 1999*, Bills digest, no. 58, 1999–2000, Department of the Parliamentary Library, Canberra, 1999, viewed 3 December 2009, <http://www.aph.gov.au/library/pubs/bd/1999-2000/2000bd058.htm>

65. S Smith (Shadow Minister for Communications), *Free to air AFL and NRL assurances insufficient*, media release, 21 December 2000.

66. ABA, *Investigation into events on the anti-siphoning list: report to the Minister for Communications, Information Technology and the Arts*, ABA, Sydney, June 2001, viewed 3 December 2009, [http://www.acma.gov.au/webwr/aba/newspubs/radio\\_tv/investigations/documents/general/anti\\_siphrpt.pdf](http://www.acma.gov.au/webwr/aba/newspubs/radio_tv/investigations/documents/general/anti_siphrpt.pdf)

67. The events were: Australian Football League State of Origin matches, international rugby league matches involving the senior Australian representative team and a non-representative team, the Hong Kong Sevens Rugby tournament, test cricket matches involving the senior

Not surprisingly, the views of major interest groups on the merits of the anti siphoning list, as reflected in the submissions received for the ABA inquiry, had not changed significantly since its introduction.<sup>69</sup>

### Criticism

As part of its major inquiry into broadcasting in 2000, the Productivity Commission (also referred to in this paper as the Commission) reviewed the anti siphoning scheme and concluded that it was exclusionary.<sup>70</sup> The scheme was categorised as giving free-to-air broadcasters ‘a competitive advantage’ over subscription broadcasters and increasing their revenue. Additionally, it disadvantaged sport organisations by decreasing their negotiating power in marketing their products.<sup>71</sup>

In addition, it disturbed the Commission that there were no transparent criteria under which sports were chosen for inclusion on the anti siphoning list. For instance, popular sports such as swimming and athletics were not on the list, while games in the Hong Kong Rugby Union Sevens, which attracted little viewer interest, were listed. Anti hoarding provisions were also problematic, and possibly a product of the extent of the anti siphoning regime, the Commission concluded. So, if the list were shorter, the problem of hoarding would consequently diminish.

In effect, in the Commission’s view, anti siphoning was anti-competitive and the costs of the scheme to sporting organisations, the broadcasting industry and the community as a whole, exceeded their benefits.<sup>72</sup>

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Australian representative team played outside Australia and the United Kingdom, one day cricket matches involving the senior Australian representative team played outside Australia or the United Kingdom, doubles matches and singles preliminary rounds and quarter finals of the French Open tennis tournament, Australian Men's Hardcourt Tennis Championship, Australian Women's Hardcourt Tennis Championship and semi finals of the Australian National Basketball League playoffs.

68. These events were: international soccer matches involving the senior Australian representative team and the senior representative team of another country, the World Swimming Championships (Long Course) and the Pan Pacific Swimming Championships.
69. The national broadcasters were supportive of the list and wanted it expanded. Commercial free-to-air broadcasters were of a similar opinion. In contrast, the pay operator Foxtel regarded the list as anti-competitive and some sports organisations called for reform of the list or, in the case of the Australian Football League, its abolition, *Investigation into events on the anti-siphoning list*, op. cit.
70. Productivity Commission, *Broadcasting Inquiry Report*, March 2000, p. 444, viewed 27 November 2009, [http://www.pc.gov.au/data/assets/pdf\\_file/0003/26598/broadcst.pdf](http://www.pc.gov.au/data/assets/pdf_file/0003/26598/broadcst.pdf)
71. *Ibid.*, pp. 434–35.
72. *Ibid.*, p. 444.

## Emerging complications

Since 2000, issues such as the introduction of digital television, the multi channelling capacity for broadcasters associated with its introduction and anti siphoning have become increasingly entangled.<sup>73</sup> Many aspects of these issues remain unresolved and are focal points in a current inquiry into anti siphoning which is discussed later in this paper.

For example, multi channelling has been divisive since 2002, when claims were first made that anti siphoning rules would be modified to allow free-to-air networks to deliver sport on digital multi channels. This suggestion was strongly criticised by pay television operators who considered that a less stringent anti siphoning list would not adequately compensate them for the benefits free-to-air broadcasters would gain from multi channelling.<sup>74</sup> The Government denied that it was considering such a 'trade-off'.<sup>75</sup>

Pay television was later prepared to compromise on multi channelling, pledging support in 2004 in return for the Government's agreement to abolish anti siphoning. At that time, however, the commercial free-to-air broadcasters were divided about whether they wanted to multi channel.<sup>76</sup>

## Dual rights option

Rumours about the composition of the list persisted also. The Productivity Commission had suggested in its 2000 report, as had DTC in 1989, that a dual rights system of broadcasting rights may be one option that would satisfy pay and free-to-air broadcasters. Under this option, neither pay television, nor free-to-air broadcasters would be able to acquire exclusive rights to events on a nominated list. Dual rights could also provide viewers with the right balance of access to events.

Pay television operators were enthusiastic about this approach and lobbied the Government to adopt the option. But the Seven, Nine and Ten Networks used persuasive rhetoric in opposition. They argued that the people they labelled 'Howard's battlers', that is, low and middle income families who had supported the Coalition at the 2001 election, would be 'punished' if pay television operators 'swooped' on significant sporting events.<sup>77</sup>

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73. See Glossary for explanation of multi channelling.

74. 'Foxsports takes a swipe at anti-siphoning rules', *The Sydney Morning Herald*, 22 July 2002.

75. 'Digital TV reforms deferred', *The Age*, 24 July 2002.

76. The Nine Network was opposed, possibly because it considered that it would constitute a threat to Foxtel in which Nine's parent company, Kerry Packer's Publishing and Broadcasting Limited, had a large stake. Seven supported the idea and Ten was in favour, but only for a free-to-air subscription-based system.

77. M Price, 'Television networks brawl over sport rights', *The Australian*, 1 May 2002.

While it acknowledged that economic complications could accompany a dual rights system, an Australian Competition and Consumer Commission (ACCC) report published in 2003 similarly supported this option.<sup>78</sup> Arguments put to the ACCC against varying the scheme to accommodate the option were: first, the option may result in audience fragmentation and a consequent loss of revenue for free-to-air broadcasters. Second, that content providers could refuse to deal with free-to-air broadcasters, believing they could gain higher revenues from dealing exclusively with pay television operators. Free-to-air television added to these arguments by noting that the British experience of a dual rights system had resulted in the migration of sport to pay television.<sup>79</sup>

In July 2002, there was some suggestion in the press that the Government was contemplating the dual rights option. It intended to create two separate lists—an A list of premier events for which free-to-air broadcasters would have exclusive rights, and a B list for which free-to-air and pay operators could bid.<sup>80</sup> Nothing came of these rumours as the Government resisted the pressure to contemplate this change. One commentator argued that this was because it would have been ‘politically dangerous in election year’ to consider making people pay to watch sports they had previously seen for free.<sup>81</sup>

## The revised list

In May 2004, prior to the election, the Minister for Communications, Information Technology and the Arts, Daryl Williams, announced the composition of a new anti siphoning list.<sup>82</sup> Notable additions to the list were the Olympic and Commonwealth Games. Events removed from the previous list included the Australian National Basketball League playoffs, the overseas Formula 1 Grand Prix and Motorcycle Grand Prix events, the Australian National Soccer League events, the United States’ Golf Open and the Hong Kong

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78. Australian Competition and Consumer Commission (ACCC), *Emerging market structures in the communications sector: a report to Senator Alston, Minister for Communications, Information Technology and the Arts*, ACCC, Canberra, June 2003, viewed 27 November 2009,

<http://www.accc.gov.au/content/item.phtml?itemId=324108&nodeId=bd7602ed351dadd8c069b69436b45231&fn=Emerging%20market%20structures%20in%20the%20communications%20sector.pdf>

79. Commercial Television Australia Chief Executive, Julie Flynn, quoted in J Schulze, ‘ACCC sees bleak media future without changes’, *The Australian*, 26 June 2003.

80. C Banham, ‘Free-to-air right, siphoning back on the table’, *The Sydney Morning Herald*, 12 July 2002.

81. C Marriner, ‘Williams’s parting shot is a free kick for pay TV’, *The Sydney Morning Herald*, 6 April 2004, p. 5, viewed 25 November 2009,

[http://parlinfo.parlInfo/download/media/pressclp/7V4C6/upload\\_binary/7v4c66.pdf;fileType=application/pdf#search=%22williams's%20parting%20shot%20is%20a%20free%20kick%20for%20pay%20tv%22](http://parlinfo.parlInfo/download/media/pressclp/7V4C6/upload_binary/7v4c66.pdf;fileType=application/pdf#search=%22williams's%20parting%20shot%20is%20a%20free%20kick%20for%20pay%20tv%22)

82. The election was held on 9 October 2004.

Sevens rugby. The new list was to come into effect on 1 January 2006 and continue until 31 December 2010 (see the list later in this section).

Understandably, free-to-air broadcasters welcomed the new list. Pay television was less enthusiastic considering that despite the delisting of some events, the new list still included sports they contended were consistently not broadcast by the free-to-air networks. According to the Australian Subscription Television and Radio Association (ASTRA) Chairman, Nick Greiner, the Government missed the opportunity to provide more live sport on television; it had simply extended a flawed system.<sup>83</sup>

And so it seemed when Williams' successor Senator Helen Coonan was confronted with familiar accusations that the free-to-air broadcasters were failing to air events on the list at acceptable times. In July 2004, a complaint was made to the new minister that Channel Nine had delayed the start of the telecast of the British Open Golf championships from 9 pm to 1 am to screen an old movie. Under agreement with Nine, Fox Sports had been able to show the golf for a certain time, but this telecast could have continued at least until the free-to-air broadcaster commenced its coverage.<sup>84</sup> In Labor spokesperson Lindsay Tanner's view, there was no excuse for the free-to-air broadcaster not to show the event live. Tanner considered either 'use it or lose it' should be the approach.<sup>85</sup>

'Use it or lose' it had increasingly been advocated by pay television possibly as it realised the Government was not prepared to consider dual rights arguments. As Tanner's comments indicated, the Labor Opposition saw merit in the idea and included it as a policy in its election campaigning. The Government, however, was not prepared to commit to 'significant changes' to anti siphoning without first consulting stakeholders.<sup>86</sup> Labor also vowed to reverse a Government decision to delist the soccer World Cup.<sup>87</sup>

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83. 'Games to screen on free-to-air', *The Canberra Times*, 8 April 2004, p. 4, viewed 27 November 2009,

[http://parlinfo.parlInfo/download/media/pressclp/HT5C6/upload\\_binary/ht5c65.pdf;fileType=application/pdf#search=%22anti-siphoning%22](http://parlinfo.parlInfo/download/media/pressclp/HT5C6/upload_binary/ht5c65.pdf;fileType=application/pdf#search=%22anti-siphoning%22)

84. M Price, 'Golf uproar sparks TV sports review', *The Australian*, 21 July 2004, p. 3, viewed 27 November 2009,

[http://parlinfo.parlInfo/download/media/pressclp/UY6D6/upload\\_binary/uy6d67.pdf;fileType=application/pdf#search=%22anti-siphoning%22](http://parlinfo.parlInfo/download/media/pressclp/UY6D6/upload_binary/uy6d67.pdf;fileType=application/pdf#search=%22anti-siphoning%22)

85. Quoted in Price, 'Golf uproar', op. cit.

86. The Liberal Party and The Nationals, *Howard Government, Election 2004 policy: 21st century broadcasting*, 2004, viewed 9 December 2009,

[http://parlinfo.parlInfo/download/library/partypol/NP2E6/upload\\_binary/np2e63.pdf;fileType=application/pdf#search=%22coalition%22](http://parlinfo.parlInfo/download/library/partypol/NP2E6/upload_binary/np2e63.pdf;fileType=application/pdf#search=%22coalition%22)

87. 'Labor pledge on TV sport', *The Age*, 22 September 2004, p. 6, viewed 9 December 2009,

[http://parlinfo.parlInfo/download/media/pressclp/XQU66/upload\\_binary/xqu667.pdf;fileType=application/pdf#search=%22anti-siphoning%22](http://parlinfo.parlInfo/download/media/pressclp/XQU66/upload_binary/xqu667.pdf;fileType=application/pdf#search=%22anti-siphoning%22)

## Current anti-siphoning list

**Anti-siphoning list:** (commencing 1 January 2006 and ending 31 December 2010)

### **Olympic Games**

1.1 Each event held as part of the Olympic Games.

### **Commonwealth Games**

2.1 Each event held as part of the Commonwealth Games.

### **Horse Racing**

3.1 Each running of the Melbourne Cup organised by the Victoria Racing Club.

### **Australian Rules Football**

4.1 Each match in the Australian Football League Premiership competition, including the Finals Series.

### **Rugby League Football**

5.1 Each match in the National Rugby League Premiership competition, including the Finals Series.

5.2 Each match in the National Rugby League State of Origin Series.

5.3 Each international rugby league test match involving the senior Australian representative team selected by the Australian Rugby League, whether played in Australia or overseas.

### **Rugby Union Football**

6.1 Each international test match involving the senior Australian representative team selected by the Australian Rugby Union, whether played in Australia or overseas.

6.2 Each match in the Rugby World Cup tournament.

### **Cricket**

7.1 Each test match involving the senior Australian representative team selected by Cricket Australia played in either Australia or the United Kingdom.

7.2 Each one day cricket match involving the senior Australian representative team selected by Cricket Australia played in Australia or the United Kingdom.

7.3 Each one day cricket match involving the senior Australian representative team selected by Cricket Australia played as part of a series in which at least one match of the series is played in Australia.

7.4 Each World Cup one day cricket match.

### **Soccer**

8.1 The English Football Association Cup final.

8.2 Each match in the Fédération Internationale de Football Association World Cup tournament held in 2006.

8.3 Each match in the Fédération Internationale de Football Association World Cup tournament held in 2010.

### **Tennis**

9.1 Each match in the Australian Open tennis tournament.

9.2 Each match in the Wimbledon (the Lawn Tennis Championships) tournament.

9.3 Each match in the men's and women's singles quarter-finals, semi-finals and finals of the French Open tennis tournament.

9.4 Each match in the men's and women's singles quarter-finals, semi-finals and finals of the United States Open tennis tournament.

9.5 Each match in each tie in the Davis Cup tennis tournament when an Australian representative team is involved.

### **Netball**

10.1 Each international netball match involving the senior Australian representative team selected by the All Australian Netball Association, whether played in Australia or overseas.

### **Golf**

11.1 Each round of the Australian Masters tournament.

11.2 Each round of the Australian Open tournament.

11.3 Each round of the United States Masters tournament.

11.4 Each round of the British Open tournament.

### **Motor Sports**

12.1 Each race in the Fédération Internationale de l'Automobile Formula 1 World Championship (Grand Prix) held in Australia.

12.2 Each race in the Moto GP held in Australia.

12.3 Each race in the V8 Supercar Championship Series (including the Bathurst 1000).

12.4 Each race in the Champ Car World Series (IndyCar) held in Australia.

Source ACMA<sup>88</sup>

## **The Ashes and the Senate**

Coverage of the cricket was again the focus of controversy in a saga that began in 2003 when FoxSports bought the rights to the Ashes 2005 cricket tour. It appeared that this was able to occur as the result of a loophole in legislation which allowed pay television **channels**, as opposed to pay television **broadcasters**, to acquire the rights to events on the anti siphoning

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88. Note: the current list includes the Rudd Government's addition of the 2010 World Cup soccer matches. This will be discussed later in this paper. The list is on the ACMA website, viewed 18 December 2009, [http://www.acma.gov.au/WEB/STANDARD/pc=PC\\_91822](http://www.acma.gov.au/WEB/STANDARD/pc=PC_91822)



list before they were offered to free-to-air broadcasters.<sup>89</sup> Both the Seven and Nine Networks, indicated that they were not interested in acquiring free-to-air rights because the series would be shown on pay television. Seven cited past difficulties experienced associated with the different time zones involved as another major reason for its lack of interest.<sup>90</sup> The Nine Network was also sensitive to past criticism of its programming decisions.<sup>91</sup>

Despite the ABC's concern that it would experience similar programming difficulties as a result of the time difference between England and Australia, the ABC was once more seen as a solution which could counter public outrage reflected in campaigns such as the *West Australian* newspaper's 'Keep the Ashes Free' (the campaign logo is illustrated later in this section). In return for broadcasting the series and to accommodate its usual programming schedule better, the ABC sought government permission to show the first session of play on a digital channel to be launched in March 2005. The Government was unwilling to make this concession, however, and from February 2005, the public broadcaster engaged in negotiations with English cricket authorities to deliver a wholly free television coverage of the series.

The ABC encountered difficulties with English cricket authorities which rejected its initial bid. SBS was then coaxed into negotiating for the Ashes rights, which it eventually won. Surprisingly, the SBS coup was achieved with a modest bid of between one and two million dollars. Reportedly, it was the result of 'gentle prodding' from Prime Minister Howard, a self confessed passionate cricket fan.<sup>92</sup>

The crucial issue in this chapter of the anti siphoning saga was the so called legislative loophole. This became an additional focus for the Senate Committee investigating legislation to amend the anti siphoning scheme to increase its automatic delisting period from six weeks to 12 weeks.<sup>93</sup> The free-to-air broadcaster organisation, Free TV, argued before the

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89. Free TV submission to *Inquiry into the provisions of the Broadcasting Services Amendment (Anti-Siphoning) Bill 2004*, op. cit.

90. A Peterson, 'Ashes to ashes—death of tradition', *The Daily Telegraph*, 11 November 2004, p. 35, viewed 30 November 2009, [http://parlinfo.parlInfo/download/media/pressclp/77EE6/upload\\_binary/77ee65.pdf;fileType=application/pdf#search=%22ashes%20to%20ashes%20death%20of%20a%20tradition%22](http://parlinfo.parlInfo/download/media/pressclp/77EE6/upload_binary/77ee65.pdf;fileType=application/pdf#search=%22ashes%20to%20ashes%20death%20of%20a%20tradition%22)

91. C Saltau, 'Ashes TV coverage faces axe', *The Age*, 9 November 2004, p. 1, viewed 23 November 2009, [http://parlinfo.parlInfo/download/media/pressclp/N9DE6/upload\\_binary/n9de64.pdf;fileType=application/pdf#search=%22ashes%20tv%20coverage%20faces%20axe%22](http://parlinfo.parlInfo/download/media/pressclp/N9DE6/upload_binary/n9de64.pdf;fileType=application/pdf#search=%22ashes%20tv%20coverage%20faces%20axe%22)

92. S Lewis, 'SBS to televise cricket's holy grail', *The Australian*, 1 March, 2005, p. 1, viewed 18 November 2009, [http://parlinfo.parlInfo/download/media/pressclp/83CF6/upload\\_binary/83cf64.pdf;fileType=application/pdf#search=%22SBS%20to%20televise%20cricket's%20holy%20grail%22](http://parlinfo.parlInfo/download/media/pressclp/83CF6/upload_binary/83cf64.pdf;fileType=application/pdf#search=%22SBS%20to%20televise%20cricket's%20holy%20grail%22)

93. The Committee investigated the Broadcasting Services Amendment (Anti-Siphoning) Bill 2004.



Committee that the loophole had to be closed to ensure that pay television broadcasters were not entitled to televise events on the anti siphoning list simultaneously with the free-to-air broadcast.<sup>94</sup> The loophole was a furphy according to the pay television representative groups ASTRA and Premier Media Group (PMG).<sup>95</sup>

The waters were muddied by the claim from the English and Wales Cricket Board that it had given Australian free-to-air broadcasters ample opportunity to bid for the series before it had approached subscription television.<sup>96</sup> Free-to-air broadcasters were emphatic that they had lost out on the exclusive rights because the loophole allowed FoxSports to sign a deal before they had had sufficient time to make a commitment.<sup>97</sup>

As the Committee noted, this disagreement was not new. It had surfaced during the ABA's 2001 investigation, at which time the ABA had not been convinced 'that the ability of third parties to purchase rights to listed events ahead of free-to-air broadcasters operates to thwart the purpose of the legislation'.<sup>98</sup> ABA had considered, however, that the issue could be revisited in the future if monitoring showed that the role of third parties had become problematic.<sup>99</sup> The Committee appeared to be of the same opinion, and recommended only that the Government consider investigating the loophole.

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94. Free TV, submission 1, p. 3 to *Inquiry into the provisions of the Broadcasting Services Amendment (Anti-Siphoning) Bill 2004*, op. cit.

95. *Inquiry into the provisions of the Broadcasting Services Amendment (Anti-Siphoning) Bill 2004*, op. cit.

96. J Riley, 'Ashes coverage inflames broadcasters', *The Australian*, 24 February 2005, p. 19, viewed 30 November 2009, [http://parlinfo.parlInfo/download/media/pressclp/7NAF6/upload\\_binary/7naf65.pdf;fileType%3Dapplication%2Fpdf](http://parlinfo.parlInfo/download/media/pressclp/7NAF6/upload_binary/7naf65.pdf;fileType%3Dapplication%2Fpdf)

97. 'Calls to close bidding loophole as ABC battles for right to screen Ashes', *The Canberra Times*, 22 February 2005, p. 4, viewed 30 November 2009, [http://parlinfo.parlInfo/download/media/pressclp/CW9F6/upload\\_binary/cw9f62.pdf;fileType%3Dapplication%2Fpdf](http://parlinfo.parlInfo/download/media/pressclp/CW9F6/upload_binary/cw9f62.pdf;fileType%3Dapplication%2Fpdf)

98. *Inquiry into the provisions of the Broadcasting Services Amendment (Anti-Siphoning) Bill 2004*, op. cit.

99. Ibid.

### **The West Australian Ashes campaign logo**



Source: *The West Australian* <sup>100</sup>

With regards to the focus of the Senate inquiry—extension of the automatic delisting period—pay television was generally supportive. Indeed, the pay television association ASTRA had proposed a longer period when the provision was introduced in 2001. While ASTRA was in favour of this change, it argued, as did others, that it did not address fundamental problems with the anti siphoning scheme.<sup>101</sup>

Both the commercial and public free-to-air broadcasters, on the other hand, not surprisingly, were opposed to extending the delisting period. They maintained an extension would only provide more opportunity for subscription broadcasters and also sports rights holders to circumvent anti siphoning rules by prolonging negotiations until events were automatically delisted.

But despite the free-to-air objections pay television won this skirmish. The anti siphoning provisions were amended in April 2005 to extend the automatic delisting period.<sup>102</sup>

### **Media reform and 'use it or lose it'**

From the time of its first election victory in 1996 the Howard Government signalled its intention to overhaul what it saw as antiquated regulation of the media in Australia. But its

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100. As appeared in article by P Casellas, 'Not having the Ashes on free TV just isn't cricket', *The West Australian*, 26 January 2005, p. 5, viewed 27 November 2009,

[http://parlinfo/parlInfo/download/media/pressclp/XE1F6/upload\\_binary/xe1f63.pdf;fileType%3Dapplication%2Fpdf](http://parlinfo/parlInfo/download/media/pressclp/XE1F6/upload_binary/xe1f63.pdf;fileType%3Dapplication%2Fpdf)

101. Investigation into events on the anti-siphoning list, op. cit. quoted in *Inquiry into the provisions of the Broadcasting Services Amendment (Anti-Siphoning) Bill 2004*, op. cit.

102. Section 115(1AA) of the BSA.

first attempts at reform lapsed due to a lack of numbers in the Senate. When the Government won control of both Houses at the 2004 election, the way was finally open to introduce change. During 2005, there was considerable speculation about the precise form the media transformation would take. It appeared, however, that it would not be as radical as first thought. Indeed, it was reported that the Prime Minister did not ‘intend to die in a ditch over media legislation’ and various media groups would have to be prepared to compromise to accommodate the Government’s policy objectives.<sup>103</sup>

How these objectives would apply in the case of the anti siphoning regime was addressed in a speech to the National Press Club in September 2005 by Communications Minister, Helen Coonan. Coonan suggested that it would be ‘foolhardy’ not to look at pruning the anti siphoning list, introducing a ‘use it or lose it’ policy and lifting restrictions on multi channelling as part of a long term objective to move to a more open and competitive media environment. At the same time, Coonan noted some of these changes may be best introduced gradually.<sup>104</sup>

The Government’s March 2006 blueprint for media reform, *Meeting the Digital Challenge*, sought comments in relation to three broad areas: relaxation of cross-media and foreign ownership restrictions, modification to the anti siphoning regime and changes to digital television laws.

*Meeting the Digital Challenge* was accused of being deliberately vague in skirting over key issues such as anti siphoning and by heavily qualifying changes.<sup>105</sup> Nonetheless, it clearly stated a ‘use it or lose it’ option as the Government’s preferred approach to delivering more scrutiny over the presentation of events.<sup>106</sup> The Minister’s earlier suggestion that the list may

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103. M Day, ‘Media braces for a bumpy ride’, *The Australian* 27 January 2005, p. 13, viewed 11 December 2009,  
[http://parlinfo.parlInfo/download/media/pressclp/SV0F6/upload\\_binary/sv0f68.pdf;fileType=application/pdf#search=%22media%20reform%22](http://parlinfo.parlInfo/download/media/pressclp/SV0F6/upload_binary/sv0f68.pdf;fileType=application/pdf#search=%22media%20reform%22)

104. J Porter, ‘Coonan seeks accord on media plans’, *The Sydney Morning Herald*, 1 September 2005, viewed 30 November 2009,  
[http://parlinfo.parlInfo/download/media/pressclp/FI5H6/upload\\_binary/fi5h64.pdf;fileType=application/pdf#search=%22anti-siphoning%22](http://parlinfo.parlInfo/download/media/pressclp/FI5H6/upload_binary/fi5h64.pdf;fileType=application/pdf#search=%22anti-siphoning%22)

105. N Shoebridge, ‘Media rate Coonan’s blueprint a waste of time’, *The Australian Financial Review*, 20 March 2006, p. 41, viewed 4 December 2009,  
[http://parlinfo.parlInfo/download/media/pressclp/D53J6/upload\\_binary/d53j64.pdf;fileType=application/pdf#search=%22anti-siphoning%22](http://parlinfo.parlInfo/download/media/pressclp/D53J6/upload_binary/d53j64.pdf;fileType=application/pdf#search=%22anti-siphoning%22)

106. Department of Communications, Information Technology and the Arts (DCITA), *Meeting the digital challenge: reforming Australia’s media in the digital age*, DCITA, March 2006,  
[http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0006/37572/Media\\_consultation\\_paper\\_Final\\_.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0006/37572/Media_consultation_paper_Final_.pdf)

be pruned was also modified. It was suggested that this occurred because the Prime Minister did not want to take the political risk of taking sports away from the people.<sup>107</sup>

Following a short period for public response, a final reform package of three bills was introduced into the Senate in mid September 2006. Of these, a digital television Bill updated the anti siphoning regime to account for the multi channel environment. This was to ensure that a listed sporting event could not be broadcast on a national or commercial multi channel service, in whole or in part, before it was broadcast on a main simulcast service. The Bill allowed that events could be simultaneously broadcast on a main simulcast service and a multi channel service. An exception was allowed in the case of excerpts of an anti siphoning event included in news or current affairs programs broadcast on a multi channel service. The Bill required the Government to review the anti siphoning scheme before the end of 2009.<sup>108</sup> (This review is discussed later in this paper).

Fundamentally, the media reform package was about removing foreign ownership restrictions and revising cross-media rules to allow cross-media transactions to proceed, however.<sup>109</sup> From the perspective of some in the media, particularly News Limited, these proposals did not go far enough, because they did not deliver full deregulation.<sup>110</sup> Nor were the proposals seen as fully resolving issues surrounding anti siphoning, multi channelling, datacasting and the allocation of a fourth commercial television licence to the satisfaction of certain media players.<sup>111</sup>

Lack of consensus among media companies about issues such as multi channelling and datacasting, could be said to have been the reason the Government took the 'easier option' of only removing cross-media and foreign ownership restrictions. The same lack of consensus had consistently surrounded anti siphoning; the 2006 media reforms were another chapter in

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107. N Shoebidge, 'The no-free-list brigade saddles up', *The Australian Financial Review*, 3 October 2005, p. 24, viewed 4 December 2009, [http://parlinfo/parlInfo/download/media/pressclp/EAHH6/upload\\_binary/eahh65.pdf;fileType=application/pdf#search=%22anti-siphoning%22](http://parlinfo/parlInfo/download/media/pressclp/EAHH6/upload_binary/eahh65.pdf;fileType=application/pdf#search=%22anti-siphoning%22)

108. *Broadcasting Legislation Amendment (Digital Television) Act 2006*, viewed 23 November 2009, <http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/0/5CD78994377E208ACA25722000106A81?OpenDocument>

109. For more discussion of the media reforms see R Jolly, *Media ownership deregulation in the United States and Australia: in the public interest?* Research paper no. 1, 2007–08 Parliamentary Library, Canberra, 2007, viewed 9 December 2009, <http://www.aph.gov.au/library/pubs/rp/2007-08/08rp01.pdf>

110. K Murphy, 'PM denies media timetable', *The Age*, 28 June 2006, p. 5, viewed 4 December 2009, [http://parlinfo/parlInfo/download/media/pressclp/G73K6/upload\\_binary/g73k64.pdf;fileType=application/pdf#search=%22anti-siphoning%22](http://parlinfo/parlInfo/download/media/pressclp/G73K6/upload_binary/g73k64.pdf;fileType=application/pdf#search=%22anti-siphoning%22)

111. See Glossary for definition of datacasting services.

the saga. As the Senate Environment, Communications, Information Technology and the Arts Committee which considered the media reform package restated, anti siphoning had been:

... a constant source of tension between those with interests in subscription television services and the FTA [free-to-air] broadcasters. Subscription television broadcasters argue the anti-siphoning provisions unfairly advantage the FTA broadcasters and that many listed events are not shown at all or shown as a delayed broadcast.<sup>112</sup>

The Government argued that its use it or lose it scheme, would adequately address this long-standing problem.

Pay television operators were less convinced that this would be the case. As late as mid-September 2006 they were still attempting to convince the Government to look at more radical changes. They were especially concerned about the subtleties involved with the definition of 'use' of a broadcasting right. Would use, for instance, only entail the live showing of events or would the concept of use also be satisfied if the broadcast of an event was delayed, and if so, how long would it be possible to delay that telecast.

Subscription broadcasters were convinced that whatever the outcome, it would inevitably be more advantageous to free-to-air operators.<sup>113</sup> Nonetheless, they continued a campaign to make the public more aware of what they saw were the omissions of free-to-air broadcasters, The industry organisation ASTRA distributing packs of playing cards entitled 'A Pack of Abuse: 52 of Free to Airs' Sporting Sins', which it maintained tallied with important sports events on the anti siphoning list that free-to-air networks had failed to telecast.<sup>114</sup> In an unusual show of unity, the three major football codes all supported the pay television stand.

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112. Senate, Standing Committee on Environment, Communications, Information Technology and the Arts, *Inquiry into Broadcasting Services Amendment (Media Ownership) Bill 2006, Broadcasting Legislation Amendment (Digital Television) Bill 2006, Communications Legislation Amendment (Enforcement Powers) Bill 2006 [Provisions], Television Licence Fees Amendment Bill 2006 [Provisions] and discussion paper by the Minister for Communications, Information Technology and the Arts on the two channels of spectrum for new digital services, (media reform package)*, The Senate, Canberra, October 2006, p. 62, [http://www.aph.gov.au/Senate/committee/ecita\\_ctte/completed\\_inquiries/2004-07/cross\\_media/report/report.pdf](http://www.aph.gov.au/Senate/committee/ecita_ctte/completed_inquiries/2004-07/cross_media/report/report.pdf)

113. J Schultze 'Use it or lose it' plan to encourage sport broadcasts', *The Australian*, 18 September 2006, p. 29, viewed 9 December 2009, [http://parlinfo.parlInfo/download/media/pressclp/Q8WK6/upload\\_binary/q8wk64.pdf;fileType=application/pdf#search=%22anti-siphoning%22](http://parlinfo.parlInfo/download/media/pressclp/Q8WK6/upload_binary/q8wk64.pdf;fileType=application/pdf#search=%22anti-siphoning%22) and H Westerman, 'Media revolution arrives', *The Age*, 12 September 2006, p. 3, viewed 9 December 2009, [http://parlinfo.parlInfo/download/media/pressclp/ZBUK6/upload\\_binary/zbuk64.pdf;fileType=application/pdf#search=%22anti-siphoning%22](http://parlinfo.parlInfo/download/media/pressclp/ZBUK6/upload_binary/zbuk64.pdf;fileType=application/pdf#search=%22anti-siphoning%22)

114. H Westerman, 'Play or pay battle heats up over live TV sport', *The Age*, 9 September 2006, p. 3, viewed 9 December 2009, [http://parlinfo.parlInfo/download/media/pressclp/77EL6/upload\\_binary/77el62.pdf;fileType=application/pdf#search=%22anti-siphoning%22](http://parlinfo.parlInfo/download/media/pressclp/77EL6/upload_binary/77el62.pdf;fileType=application/pdf#search=%22anti-siphoning%22)

Free TV on the other hand launched an advertising campaign which claimed pay operators and ‘some big sporting bodies’ were ‘waging war’ on anti siphoning. It urged the public to oppose any changes to existing legislation.<sup>115</sup>

On 18 October 2006, the Government’s media reform package, with some amendments, was passed by Federal Parliament. While the reforms to accommodate multi channelling noted earlier in this paper were enshrined in the legislation, the use it or lose it proposal had no new statutory basis, as the power to implement the measure was present under existing legislation.

The use it or lose it scheme which commenced 1 January 2007, was based on initial monitoring undertaken by ACMA of free-to-air television coverage of events on the anti siphoning list. The scheme set out guidelines which could assist the Government to determine which events should be included on the list and ACMA continued to monitor free-to-air coverage of events between January 2006 and September 2008 to this end.<sup>116</sup> While there were some instances where ACMA was critical of free-to-air coverage during that time, such as the delay in telecast of football matches in certain states, in general the regulator found that the broadcasters provided adequate coverage of events to which they had secured rights.

The Minister’s release of guidelines on how the new scheme would work was greeted with scepticism by the Labor Opposition and free-to-air broadcasters, who warned they did not provide certainty that popular sports would not be siphoned by pay television (a summary of the guidelines is shown below). They considered, for example, that a requirement to broadcast events to 50 per cent of the population put at risk free AFL coverage in states with smaller populations, where viewers could see games involving their local teams rather than a single national game. As usual, pay television put a contrary view, expressing concern that the rules would not be enforced and free-to-air broadcasters would still dictate terms to pay television, sports fans and sports codes. Moreover, if Minister Coonan’s response that free-to-air operators would not lose rights because they failed one guideline was any indication of how the scheme would function, pay television most probably was justified in showing some apprehension.<sup>117</sup>

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115. Schultze, ‘Use it or lose it’, op. cit and Westerman ‘Play or pay battle’, op. cit.

116. ACMA produced seven reports which monitored the list. these, viewed 9 December 2009, can be found at: [http://www.acma.gov.au/WEB/STANDARD/pc=PC\\_91821](http://www.acma.gov.au/WEB/STANDARD/pc=PC_91821)

117. J Breusch, ‘Use it or lose it goes live’, *The Australian Financial Review*, 21 December 2006, p. 5, viewed 9 December 2009, [http://parlinfo.parlInfo/download/media/pressclp/DJTL6/upload\\_binary/djtl63.pdf;fileType%3Dapplication%2Fpdf](http://parlinfo.parlInfo/download/media/pressclp/DJTL6/upload_binary/djtl63.pdf;fileType%3Dapplication%2Fpdf)

**‘Use it or lose it’: summary of rules**

**How the new rules will work:**

- Has the event been shown to at least 50 per cent of the population?
- Has the event been shown live or broadcast within an hour of it starting?
- Was a delay in showing the event intended to allow it to be broadcast to a greater audience?
- Other matters relevant to individual circumstances

Source: *The Australian*<sup>118</sup>

Despite the use it or lose it rules, ensuring that free-to-air audiences were able to see popular sport remained problematic in the lead up to the 2007 election. A Seven/Ten Network deal with pay television which ‘carved up’ the telecast of Australian Rules matches for the period from 2007 to 2011, for example, meant that many AFL games were not shown free-to-air or live. Under the agreement, for which Seven and Ten paid \$780 million, AFL Friday night games were telecast live on Fox Sports into New South Wales and Queensland, while Seven provided a delayed telecast for AFL fans in those states.

The AFL benefited from the pay television broadcast of live matches into country New South Wales and Queensland as it was seeking to expand its support base in those areas. In addition, Seven’s campaign to assume ratings supremacy over the Nine Network was boosted by not having to broadcast AFL at prime time into the Sydney and Brisbane markets, where rugby league shown on Nine dominated. Many traditional AFL supporters were disadvantaged by the deal, however, as they were deprived of free-to-air coverage of AFL. Supporters in Perth and Adelaide in particular were required to subscribe to pay television if they wished to see live telecasts of all games played by their teams.

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118. S Maiden, ‘Small states risk losing AFL to pay TV’, *The Australian* 21 December 2006, p. 3, viewed 9 December 2009, [http://parlinfo/parlInfo/download/media/pressclp/9KTL6/upload\\_binary/9ktl63.pdf;fileType=application/pdf#search=%22anti-siphoning%22](http://parlinfo/parlInfo/download/media/pressclp/9KTL6/upload_binary/9ktl63.pdf;fileType=application/pdf#search=%22anti-siphoning%22)



While this arrangement did not breach anti siphoning regulations, it illustrated the ease with which the list could be disregarded for commercial gain. Indeed, it could be argued that Labor's communications spokesman Stephen Conroy accurately summed up the situation when he noted that the deal 'showed contempt for the spirit of the anti siphoning list'.<sup>119</sup>

### **Soccer shenanigans**

The Football Australia agreement signed in 2006 which sold broadcasting rights for Socceroos soccer games to pay television for seven years was yet another chapter in the anti siphoning saga. The soccer deal was said to have convinced many fans to sign subscription television contracts. Substantial audience ratings for the Australian performance in July 2007 against Oman in the Asian Cup seemed to indicate that may have been the case.<sup>120</sup>

Football Australia had no qualms about signing the deal. Nor did it appear disturbed by the fact that its contract with pay television meant that many avid soccer supporters and the public in general would not be able to see World Cup qualifier matches in 2010 and other important games for free.<sup>121</sup>

The Labor Opposition was critical of the Government's failure to add soccer matches of public interest to the anti siphoning list and soccer's international governing body, Fédération Internationale de Football Association (FIFA), also expressed concern the games would not be available on free-to-air television.<sup>122</sup>

## **The Rudd Government: same arguments, but in a different media environment?**

The Rudd Labor Government, elected in November 2007, had pledged while in opposition to retain an anti siphoning list. In early 2008, the Minister for Broadband, Communications and the Digital Economy, Senator Stephen Conroy iterated the commitment, and confirmed the new Government's support for use it or lose it. No mention was made of a further pledge to close the loophole about which free-to-air broadcasters had so often complained, however. In March 2008, in accordance with the legislative requirement in the BSA, Senator Conroy also

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119. M Phillips 'AFL in box seat but fans left standing', *The Australian Financial Review*, 10 February 2007, p. 2, viewed 16 December 2009, [http://parlinfo/parlInfo/download/media/pressclp/006M6/upload\\_binary/006m69.pdf;fileType=application/pdf#search=%22anti%20siphoning%22](http://parlinfo/parlInfo/download/media/pressclp/006M6/upload_binary/006m69.pdf;fileType=application/pdf#search=%22anti%20siphoning%22)

120. B Cubby, 'Roundly beaten: soccer boots big league', *The Sydney Morning Herald*, 19 July 2007, p. 1, viewed 15 December 2009, [http://parlinfo/parlInfo/download/media/pressclp/VNLN6/upload\\_binary/vnl63.pdf;fileType%3Dapplication%2Fpdf](http://parlinfo/parlInfo/download/media/pressclp/VNLN6/upload_binary/vnl63.pdf;fileType%3Dapplication%2Fpdf)

121. Note the finals would be shown free-to-air.

122. Cubby, 'Roundly beaten', op. cit.



committed to an early review of the anti siphoning regime. Despite this commitment, the review process did not commence until late 2009.<sup>123</sup> At that time, the Government released the paper, *Sport on Television* (see discussion of the paper below). The Government promoted the paper as a means through which public debate about the effectiveness and appropriateness of anti siphoning could occur in the context of a contemporary digital television and sports rights environment.<sup>124</sup>

Prior to the release of the review discussion paper, however, the Government alienated pay television operators by suggesting that it may consider easing multi channelling restrictions on free-to-air broadcasters.<sup>125</sup> Despite what could be labelled good intentions, its decision to add Socceroos games to the anti siphoning list from 2014, when the code's current contract with pay television concludes, also antagonised Football Federation Australia which saw no benefit for the sport in this move.<sup>126</sup>

## Productivity Commission: iterating the point

As noted earlier in this paper, the Productivity Commission reviewed the anti siphoning scheme as part of its March 2000 inquiry into broadcasting. The Commission once more considered the anti siphoning regime in its annual review of regulatory burdens on business in 2009. While the 2000 report was critical of the regime, the 2009 assessment was more disparaging. It saw anti siphoning as 'a blunt, burdensome instrument that is unnecessary to meet the objective of ensuring wide community access to sporting broadcasts'.<sup>127</sup>

The Commission considered anti siphoning 'inherently anti-competitive'. It imposed 'a protracted negotiation process on subscription television broadcasters' and prevented them

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123. N Shoebridge, 'Anti siphoning review priority', *The Australian Financial Review*, 20 March 2008, p. 13, viewed 30 November 2009, [http://parlinfo/parlInfo/download/media/pressclp/77YP6/upload\\_binary/77yp62.pdf;fileType=application/pdf#search=%22anti-siphoning%22](http://parlinfo/parlInfo/download/media/pressclp/77YP6/upload_binary/77yp62.pdf;fileType=application/pdf#search=%22anti-siphoning%22)
  124. Department of Broadband, Communications and the Digital Economy, *Sport on television: a review of the anti-siphoning scheme in the contemporary digital environment*, August 2009, viewed 24 November 2009, [http://dpl/Books/2009/DBCDE\\_SportOnTelevisionReview.pdf](http://dpl/Books/2009/DBCDE_SportOnTelevisionReview.pdf)
  125. M Steffens, 'Clash looms over anti siphoning review', *The Sydney Morning Herald*, 20 March 2008, p. 31, viewed 30 November 2009, [http://parlinfo/parlInfo/download/media/pressclp/29YP6/upload\\_binary/29yp62.pdf;fileType=application/pdf#search=%22clash%20looms%20over%20anti%20siphoning%20review%22](http://parlinfo/parlInfo/download/media/pressclp/29YP6/upload_binary/29yp62.pdf;fileType=application/pdf#search=%22clash%20looms%20over%20anti%20siphoning%20review%22)
  126. D Davutovic, 'Roos fees transfer: Minister puts Cup qualifiers on protected list', *The Daily Telegraph*, 8 April 2008, p. 29, viewed 30 November 2009, [http://parlinfo/parlInfo/download/media/pressclp/9L3Q6/upload\\_binary/9l3q62.pdf;fileType=application/pdf#search=%22anti-siphoning%22](http://parlinfo/parlInfo/download/media/pressclp/9L3Q6/upload_binary/9l3q62.pdf;fileType=application/pdf#search=%22anti-siphoning%22)
  127. Productivity Commission, *Annual review of regulatory burdens on business: social and economic infrastructure services*, Research Report, Melbourne, 15 September 2009, <http://www.pc.gov.au/projects/study/regulatoryburdens/social-economic-infrastructure/report>

from using exclusive coverage as a means to attract subscribers.<sup>128</sup> The regime also had negative impacts on sporting bodies, because it reduced the bargaining power of these organisations. In addition, the Commission considered anti siphoning probably distorted the relative price of broadcast rights of listed events relative to that of non-listed events. Thereby, potentially reducing the price received by sporting organisations if their events were listed.<sup>129</sup>

The Commission believed that shortening the list would alleviate some of the problems it had identified; it added that the option to abolish the list should also be explored.<sup>130</sup>

### ***Sport on television inquiry***

The *Sport on Television* discussion paper emphasised that Australians love to watch sport on television. The ten most popular programs on free-to-air television in 2008 were sports programs, as were nine out of ten of the most popular programs on subscription television (see the tables below). By stressing this point the paper appeared to attempt to shift the anti siphoning debate away from what effect it had on sports organisations and broadcasters, to refocus on how it enhanced or detracted from people's viewing experiences. Whether this was the underlying intention of the paper is, however, speculation. Suffice to say that the Government has promoted the paper as a means through which public debate about the effectiveness and appropriateness of anti siphoning could occur in the context of a contemporary digital television and sports rights environment.<sup>131</sup>

*Sport on Television* sought comments on the operation of:

- the anti siphoning scheme in general and whether the scheme should be amended or repealed
- the licence condition on pay television operators restricting access to listed events and whether the condition should be amended or repealed, and
- the restrictions on commercial television broadcasters in relation to listed events on standard definition and high definition multi channels and whether these should be amended or repealed.<sup>132</sup>

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128. Ibid.

129. Ibid.

130. Ibid.

131. *Sport on television*, op. cit.

132. Ibid.

**Sport on Television: most popular sports programs on free-to-air television 2008**

**Table 1: 10 most popular sports programs on free-to-air television in 2008**

Rank	Program	Audience (million viewers)
1	Olympic Games Opening Ceremony	2.824
2	AFL Grand Final	2.491
3	AFL Grand Final Presentations	2.468
4	Australian Open tennis—men's final	2.447
5	The Melbourne Cup	2.272
6	Olympic Games Day 9—prime-time	2.226
7	Olympic Games Day 1—prime-time	2.215
8	Australian Open tennis—Final Presentation	2.207
9	NRL State of Origin III	2.145
10	Olympic Games Day 5—prime-time	2.131

Source: OzTAM

Source: *Sport on Television*<sup>133</sup>

**Table 2: 10 most popular programs on pay television in 2008**

Rank	Program	Audience (thousand viewers)
1	Rugby Union Bledisloe Cup	350
2	World Cup Qualifier: Australia v Qatar	345
3	NRL: Cowboys v. Panthers	338
4	Super 14 final: Crusaders v. Waratahs	333
5	World Cup Qualifier: Australia v. Iraq	330
6	NRL: Cowboys v. Storm	328
7	NRL: Raiders v. Storm	322
8	NRL: Dragons v. Cowboys	320
9	Australia's Next Top Model	320
10	NRL: Sharks v. Sea Eagles	314

Source: OzTAM

Source: *Sport on Television*<sup>134</sup>

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133. Ibid.

## Issues raised

While there is some suggestion, as noted above, that the *Sport on Television* inquiry attempted to refocus the anti siphoning agenda, it clearly was unable to ignore issues consistently raised by broadcasters and sport organisations. The review revisited the 'usual' questions about the purpose of an anti siphoning scheme; what should be included on an anti siphoning list and how long should events remain on the list. Additionally, however, it formally raised issues which have resulted from changes in the scope and nature of television broadcasting. These are generally reflected in the current transition to digital television and the increase in the numbers of people subscribing to pay television.<sup>135</sup> In particular, they are reflected in the emergence of new media options. The new media has, in turn, prompted questions about the appropriateness of the current anti siphoning regime in a rapidly changing broadcast and media landscape.

As noted previously in this paper, the anti siphoning regime prohibits a free-to-air broadcaster from showing a listed event on a multi channel unless that event has previously been shown, or is simultaneously shown on the broadcaster's main channel. The multi channel restriction was introduced when digital television was new to Australia. Given that over 50 per cent of households have converted their main television to digital, however, *Sport on Television* posed the question of whether it was time to reconsider this restriction.<sup>136</sup>

The present anti siphoning scheme affects television broadcasters only. It does not apply to sports coverage on other media platforms, such as the Internet and mobile phones. The paper asked, therefore, if the establishment of the Government's National Broadband Network will:

... prompt telecommunications companies and internet service providers to enter the market with a subscription Internet Protocol television service in a similar manner to that of pay television and attempt to secure exclusive coverage to events.<sup>137</sup>

As the discussion paper noted, there is little evidence to indicate that sporting events are being 'siphoned' to new technology platforms. This is most likely because at present the

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134. Ibid.

135. Note: the issues of multi channelling and new media had been previously raised briefly in the 2009 Productivity Commission report. There were 2.2 million households with pay television in the first quarter 2009.

136. The paper suggests that nearly 50 per cent of households have moved to digital. Latest figures from the Department of Broadband, Communications and the Digital Economy Digital Switchover Taskforce indicate that the figure in September 2009 was 56 per cent. Department of Broadband, Communications and the Digital Economy, (DBCDE) *Digital Tracker: report on quarter 3 July to September 2009*, Digital Switchover Taskforce, DBCDE, 2009, viewed 26 November 2009, [http://www.digitalready.gov.au/media/DigitalTrackerReport\\_Qtr\\_3\\_2009.pdf](http://www.digitalready.gov.au/media/DigitalTrackerReport_Qtr_3_2009.pdf)

137. *Sport on television*, op. cit. See Glossary for definition of Internet Protocol Television (IPTV).

largest audiences can only be achieved through traditional broadcasting platforms. As the technical capability of other platforms improves, this situation may change.

## **Responding to *Sport on Television***

Both sides of the anti siphoning debate presented comprehensive arguments espousing their cases in response to *Sport on Television*. The arguments from all stakeholders, however, were effectively a restatement of those advanced for more than twenty years.

### **Arguments: the main protagonists**

#### Pay television

From mid September 2009 the pay television industry association (ASTRA) website told its visitors:

We believe that you should be able to watch important sporting events live because modern TV should be about choice.

However the current rules mean that old TV stations get first grab at 1,300 sporting events. And traditionally, they have only managed to show 16% of them live.

We want this to change. But we are not seeking to remove a single event that is currently shown on old TV.<sup>138</sup>

ASTRA continued the theme of old and new in its submission to the inquiry, labelling pay television as modern and innovative, and free-to-air television as old, tired and unresponsive to viewer demands. The anti siphoning scheme needed reform because it is 'antiquated, anticompetitive and dramatically limits Australian viewers' choice to watch live sport'.<sup>139</sup> Moreover, it is detrimental to sports codes and grass roots sports competitions.

ASTRA also maintained its argument that the majority of sport on the anti siphoning list is not shown on free-to-air television. According to pay television industry research, many sports fans did not consider that the free-to-air digital channels would improve coverage of sport. In addition, almost 50 per cent of Australians considered that free-to-air television should only have exclusive access to the sporting events they actually intended to

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138. See the Give us a fair go for live sport website, viewed 24 November 2009, <http://www.fairgosport.com.au/>

139. Australian Subscription Television and Radio Association (ASTRA), *ASTRA submission to Sport on Television: a review of the anti-siphoning scheme in the contemporary digital environment*, October 2009, viewed 24 November 2009, [http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0010/121330/Australian\\_Subscription\\_Televisi\\_on\\_-and- Radio\\_Association\\_main\\_submission.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0010/121330/Australian_Subscription_Televisi_on_-and- Radio_Association_main_submission.pdf)

broadcast.<sup>140</sup> ASTRA listed examples of sports events that were not shown or not shown live on free-to-air. Some of these from 2008 and 2009 are shown in the tables below.

**Examples of free-to-air television events delayed or not broadcast—2008**

<b>Sport</b>	<b>FTA Channel</b>	<b>Detail</b>
AFL Preliminary Final	Channel Seven and Prime	1 Hour, Sydney, Brisbane, Perth, and regional NSW & QLD 30 mins in Melbourne
NRL Elimination Semi-Final	Channel Nine and WIN	1 Hour Sydney, Brisbane. After Midnight in Melbourne and across regional Victoria
AFL Preliminary Final	Channel Ten	Two Hours in Sydney and Brisbane 30 minutes in Melbourne
NRL Elimination Semi-Final	Channel Nine and WIN	Four Hours Delay in Melbourne and Regional Victoria for Melbourne Storm Fans.
Netball: Australia v New Zealand	Channel Ten and	Four Hours to 11pm

Source: ASTRA submission to *Sport on Television*<sup>141</sup>

**Examples of free-to-air television events delayed or not broadcast—2009**

<b>Sport</b>	<b>FTA Channel</b>	<b>Detail</b>
Oct NRL GF	NINE	Cut off trophy giving ceremony
Wimbledon	Nine	Delayed Australian matches 2 hours to 11.40pm
Netball: Aus v NZ	Ten	Delayed broadcast four hours to 11pm
Netball: Aus v Eng	No coverage	
Netball: Aus v Jamaica	No coverage	

Source: ASTRA submission to *Sport on Television*<sup>142</sup>

140. Auspoll research quoted in ASTRA submission to *Sport on television*, op. cit.

141. ASTRA submission to *Sport on Television*, op. cit.

142. Ibid.

Foxtel also took up the old and new theme, labelling anti siphoning an ‘historical relic’ which does not serve the interests of consumers and stunts broadcasting industry growth.<sup>143</sup> The Foxtel submission criticised the anti siphoning list as a product of a pre digital age. According to Foxtel, it is no longer relevant, there is no rationale for including events on the list, it overly regulates pay television and it ‘puts the old networks in charge of sport rights negotiations’.<sup>144</sup>

Interestingly, the Foxtel submission expended considerable effort in criticising the methodology of the *Sport on Television* paper. It argued that there was little discussion of the use it or lose it policy and that the paper adopts ‘softer’ language when describing the implications of multi channelling by free-to-air for sports rights holders and the pay television sector. There was also insufficient analysis of the relationship between Australians and sport in the paper, in Foxtel’s view.<sup>145</sup>

An Optus submission emphasised the new media aspect, noting that many new media services complemented, rather than replaced viewers’ experience of an event, ‘as they travelled to and from work and on their lunch breaks’.<sup>146</sup> It also played an important role in increasing the size of the broadcast viewing market for an event. As such, Optus was ‘strongly opposed’ to the extension of the anti siphoning scheme to new media platforms.<sup>147</sup>

Similarly, Telstra was of the view:

New media platforms provide new and innovative ways for sports events to reach existing and new fans and so facilitate the Government’s policy objective. Examples of how new media supports rather than substitutes existing consumers’ television consumption of sporting content are video-on-demand highlights, replays of key moments, immediate access to event results, player statistics and other related information. While these are valuable services to the consumers who access them, they do not replace current television offerings.<sup>148</sup>

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143. Foxtel, *Sport on television: a review of the anti-siphoning scheme in the contemporary digital environment: Foxtel submission on discussion paper*, October 16 2009, viewed 25 November 2009,

[http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0009/121320/Foxtel\\_main\\_submission.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0009/121320/Foxtel_main_submission.pdf)

144. Ibid.

145. Ibid.

146. Optus, *Optus submission to the DBCDE discussion paper Sport on television: a review of the anti-siphoning scheme in the contemporary digital environment (August 2009)*, 16 October 2009, viewed 26 November 2009,

[http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0010/121321/Optus\\_main\\_submission.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0010/121321/Optus_main_submission.pdf)

147. Ibid.

148. Telstra Corporation, *Submission to the Department of Broadband, Communications and the Digital Economy, Sport on television: a review of the anti-siphoning scheme in the contemporary digital environment*, 16 October 2009, viewed 26 November 2009,

## Free-to-air television

Free TV, on the other hand, argued in its advertising campaign ‘Keep sport free’ that sport on free-to-air television is ‘too good to lose’.<sup>149</sup> All Australians should have access to free sport on television it maintained, not just the minority who can afford to pay more than \$650 a year for a subscription television package.<sup>150</sup> It continued these lines of argument in its submission to *Sport on Television*, noting that pay television is an added expense for family budgets and that sports channels are not part of the basic subscription package.<sup>151</sup> It argued that there would inevitably be consequences for the viewing public if anti siphoning were abandoned, citing the situation in the United States and New Zealand where ‘sporting events are regularly shown exclusively on pay television’. It noted also that since Test Match cricket was removed from the anti siphoning list in England, audience numbers have declined dramatically.<sup>152</sup>

Free TV has for some time refuted pay television’s claims that it hoards 1300 events, and its submission iterated this position. As almost three quarters of the 1300 events were matches in the Australian Open and Wimbledon tennis tournaments, half of which were not broadcast, it claimed pay television was attempting to mislead people by citing this figure.<sup>153</sup> It argued that the events currently not broadcast due to scheduling and other restrictions would increase significantly if free-to-air broadcasters were to be allowed to make better use of their multi channels. Indeed, it saw the current restriction as contrary to the underlying objectives of the

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[http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0013/121243/Telstra\\_Corporation\\_Limited\\_main\\_submission.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0013/121243/Telstra_Corporation_Limited_main_submission.pdf)

149. Keep Sport Free website, viewed 24 November 2009, <http://www.keepsportfree.com.au/>
150. Free TV chief Executive, Julie Flynn quoted in *Keep sport free on TV*, Free TV media release, 18 September 2009, viewed 24 November 2009, [http://www.keepsportfree.com.au/Media/Media/MED\\_Keep\\_Sport\\_Free.pdf](http://www.keepsportfree.com.au/Media/Media/MED_Keep_Sport_Free.pdf)
151. Free TV, *Submission by Free TV Australia Limited, Sport on television: a review of the anti-siphoning scheme in the contemporary digital environment*, 16 October 2009 viewed 25 November 2009, [http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0015/121236/Free\\_TV\\_Australia\\_main\\_submission.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0015/121236/Free_TV_Australia_main_submission.pdf)
152. The sources for these claims are: D Conn, ‘Sky’s limits leave cricket’s fans in the dark and grass roots cut short’, guardian.co.uk, n.d., <http://www.guardian.co.uk/sport/blog/2009/jul/15/test-cricket-broadcast-rights-sky/print> J Deans, ‘Ashes fever lifts TV ratings as cricket fans tune in to see England v Australia’, guardian.co.uk 20 July 2009, <http://www.guardian.co.uk/media/2009/jul/20/ashes-england-andrew-flintoff> and J Plunkett, ‘Ashes fever lifts TV ratings as cricket fans tune in to see England v Australia’, guardian.co.uk 24 August 2009, <http://www.guardian.co.uk/media/2009/aug/24/ashes-cricket-tv-ratings>, all viewed 25 November 2009, cited in Free TV submission, *Sport on television*, op. cit.
153. M O’Reagan, transcript of interview with Julie Flynn, ‘Sport on TV’, *Sports Factor*, ABC Radio, 20 October 2006, viewed 26 November 2009, <http://abc.gov.au/rn/sportsfactor/stories/2006/1768044.htm>



anti siphoning scheme. This was illustrated by the fact that pay television was able to run multiple channels of Olympics coverage, whereas free-to-air was restricted to coverage on a broadcaster's main channel.<sup>154</sup> The ABC and SBS agreed.<sup>155</sup> The ABC noting that the opportunity for free-to-air broadcasting to multi channel would assist them to contend with the vagaries of sport broadcasting due to weather, extra time or other disruptions.<sup>156</sup>

Both commercial and public free-to-air broadcasters were of the view that the various iterations of new media had the potential to undermine the anti siphoning list. Both groups sought closure of the loophole they saw illustrated in the sale of the 2005 Ashes cricket.<sup>157</sup>

#### Arguments: sports organisations

*Sport on Television* illustrated that the arguments of the free-to-air and pay television operators surrounding anti siphoning were conspicuous by the fact that they had changed little in over twenty years. On the other hand, sporting organisations have changed their views of anti siphoning. Organisations which receive little free-to-air coverage were most concerned in 1994 that their sports were not placed on an anti siphoning list, as they believed it would be detrimental to their development. In 2009, however, they appeared more willing to evaluate anti siphoning from a whole of sport perspective and to conclude overall in favour of either substantially shortening the list or abolishing it. For example, Basketball Australia suggested the list should include only the Olympics and the Commonwealth Games.<sup>158</sup>

In opposition to their previously ambivalent stance on anti siphoning, popular sports such as cricket and rugby league, wanted to see the demise of the list.<sup>159</sup> Cricket Australia cited a number of reasons for this, but principally its stance was motivated by the belief the list restricted the power of its administrators to negotiate the best deal for its product.<sup>160</sup> In

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154. Free TV submission, *Sport on television*, op. cit.

155. SBS, *SBS submission Sport on television: a review of the anti-siphoning scheme in the contemporary digital environment*, October 2009, viewed 26 November 2009, [http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0015/122640/SBS\\_main\\_submission.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0015/122640/SBS_main_submission.pdf)

156. ABC, *2009 Review of the anti-siphoning scheme*, 23 October 2009, viewed 25 November 2009, [http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0007/121768/Australian\\_Broadcasting\\_Corporation\\_main\\_submission.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0007/121768/Australian_Broadcasting_Corporation_main_submission.pdf)

157. Free TV and ABC submissions to *Sport on Television*, op. cit.

158. Basketball Australia, *Basketball Australia response to request for submission on the review of the anti-siphoning scheme*, 15 October 2009, viewed 26 November 2009, [http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0010/121231/Basketball\\_Australia\\_main\\_submission.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0010/121231/Basketball_Australia_main_submission.pdf)

159. See footnote 29 and the section 'The Australian Broadcasting Authority and what to put on the list'.

160. Cricket Australia, *Sport on television: a review of the anti-siphoning scheme in the contemporary digital environment: Cricket Australia's response to the issues for comment*, 16 October 2009,

support of its argument, Cricket Australia contended removing the Ashes from the British anti siphoning list had resulted in increased revenue for cricket from the sale of rights to the series. This additional revenue had then been used to support the grass roots game.<sup>161</sup> This argument was of course in direct opposition to the free-to-air focus on audience loss for the Ashes, which also resulted from the move. The Australian Rugby League (ARL) agreed with Cricket Australia's approach to anti siphoning. It claimed that the existence of an anti siphoning list had had a major negative impact on ARL revenues, and any expansion of the scheme would have equally adverse implications for the provision of grass roots programs.<sup>162</sup>

In general, sporting groups appeared less than supportive of the free-to-air broadcasters and agreed with pay television that free-to-air operators should not be allowed to multi channel prior to the switch off of analogue broadcasts. In addition, sports groups identified the opportunities the rise of new media presented for them to repackage and redistribute their products. They agreed with the view that new media coverage complemented traditional sports broadcasting.

### Arguments: the other players

The ACCC and others called for the use it or lose it scheme to be formalised in legislation.<sup>163</sup> In the ACCC's view, the anti siphoning regime was at cross purposes with the objectives of

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[http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0012/121233/Cricket\\_Australia\\_main\\_submission.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0012/121233/Cricket_Australia_main_submission.pdf) /

161. Deloitte LLP, *The impact of broadcasting on sports in the UK: an independent economic study*, 20 July 2009, quoted in Cricket Australia submission to *Sport on television*, op. cit., viewed 26 November 2009, [http://www.culture.gov.uk/images/publications/BSKYB-Free-to-air-ports\\_Broadcasting\\_Final\\_Report.pdf](http://www.culture.gov.uk/images/publications/BSKYB-Free-to-air-ports_Broadcasting_Final_Report.pdf)
162. National Rugby League and Australian Rugby League, *Rugby League submission to sport on television: a review of the anti-siphoning scheme in the contemporary digital environment*, October 2009, viewed 26 November 2009, [http://www.dbcde.gov.au/television/antisiphoning\\_and\\_antihoarding/sport\\_on\\_television\\_review\\_of\\_the\\_anti-siphoning\\_scheme\\_discussion\\_paper/sport\\_on\\_television\\_review\\_submission?121150\\_result\\_page=261](http://www.dbcde.gov.au/television/antisiphoning_and_antihoarding/sport_on_television_review_of_the_anti-siphoning_scheme_discussion_paper/sport_on_television_review_submission?121150_result_page=261)
163. ACCC, *Submission to the review of the anti siphoning scheme*, viewed 26 November 2009, [http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0017/121229/Australian\\_Competition\\_and\\_Consumer\\_Commission\\_main\\_submission.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0017/121229/Australian_Competition_and_Consumer_Commission_main_submission.pdf) and *Sport on Television: a review of the anti-siphoning scheme in the contemporary digital environment—main submission of Premier Media Group Pty Limited (PMG)*, 16 October 2009, viewed 26 November 2009, [http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0017/121238/Premier\\_Media\\_Group\\_main\\_submission.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0017/121238/Premier_Media_Group_main_submission.pdf) and Tennis Australia, *Submission to Sport on Television: a review of the anti-siphoning scheme in the contemporary digital environment*, October 2009, viewed 26 November 2009, [http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0014/121325/Tennis\\_Australia\\_main\\_submission.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0014/121325/Tennis_Australia_main_submission.pdf)

the BSA which are to provide an environment that both facilitates the development of broadcasting and is responsive to audience needs.

Apart from a number of public submissions which were in favour of the retention of the anti siphoning regime, one of the few stakeholder submissions in support was from Australia's professional golfing association.<sup>164</sup>

### **One commentator's view of the anti siphoning regime**



Source: *The Age* <sup>165</sup>

### **Crawford Report**

Anti siphoning was also discussed in the report of the Independent Sports Panel. This report (the Crawford Report) was released by the Government on the 18 November 2009. In the context of investing in sport and improving revenue for low profile sports in particular the Crawford Report suggested that the Government reconsider the operation of the anti siphoning regime. The Independent Sports Panel view reflected the arguments most sports organisations had presented to the *Sport on Television* inquiry—that anti siphoning limited

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164. Professional Golfers Association of Australia, *Sport on television: a review of the anti-siphoning scheme*, 16 October 2009, viewed 26 November 2009, [http://www.dbcde.gov.au/\\_data/assets/pdf\\_file/0018/121239/Professional Golfers Association of Australia Limited main submission.pdf](http://www.dbcde.gov.au/_data/assets/pdf_file/0018/121239/Professional_Golfers_Association_of_Australia_Limited_main_submission.pdf)

165. Cartoon in H Mitchell, 'Siphoning stifles TV sport', *The Age*, 3 September 2009, p. 2, viewed 26 November 2009, [http://parlinfo.parlinfo/download/media/pressclp/TNKU6/upload\\_binary/tku60.pdf;fileType=application/pdf#search=%22anti-siphoning%22](http://parlinfo.parlinfo/download/media/pressclp/TNKU6/upload_binary/tku60.pdf;fileType=application/pdf#search=%22anti-siphoning%22)

earning potential for sports and reduced the quantity and quality of sports coverage on television.<sup>166</sup>

In the opinion of the Panel, free-to-air television networks' decisions to buy and show sports that are popular with the users of their service reinforced the popularity of those sports. Revenue generated, in turn could be reinvested to make those sports 'more attractive, more marketable and more profitable'.<sup>167</sup>

## Conclusion: to siphon or not to siphon?

### Commercial equity

Social equity arguments are often used to justify the imposition of anti siphoning rules. One commentator argues, however, that while social equity is a 'noble sentiment', in reality it unfairly disadvantages certain commercial media groups. The argument being that under an anti siphoning regime pay operators and sports rights holders are singled out for restrictions,

... while retailers in other fields are free to make commercial decisions. Certainly governments do not dictate to Woolworths where to establish the next supermarket. While it is understandable that politicians would seek to protect access to the Melbourne Cup for all, it does raise a dilemma as to what is in the national interest and what is a national sacred cow.

In reality, the Victorian Racing Club [VCR] is unlikely to want to sell the Melbourne Cup exclusively to a Pay TV enterprise until it is assured of maximum exposure across the country. Thus the VRC is certain to exercise commercial criteria anyhow. It will be an interesting debate should Pay TV offer a much higher rights fee than a free-to-air channel. If by regulation, the VRC is precluded from selling to the highest bidder, perhaps it could ask the government to make up the difference.

Furthermore, the notion that particular sporting events possess a special national cachet is questionable. To single out the AFL Grand Final or the NSW Rugby League Grand Final, neither constitute[s] a national event. Indeed in one context, both events manifest the sporting divide between the States. There is some argument in the case of Test cricket, but it is doubtful Australia v Sri Lanka evokes the same passions as do the Ashes series.<sup>168</sup>

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166. Independent Sports Panel, *The future of sport in Australia*, (the Crawford Report), Commonwealth of Australia, Canberra, 2009, viewed 1 December 2009, [http://www.sportpanel.org.au/internet/sportpanel/publishing.nsf/Content/758D8954C2A74E11CA257672000140A7/\\$File/Crawford\\_Report.pdf](http://www.sportpanel.org.au/internet/sportpanel/publishing.nsf/Content/758D8954C2A74E11CA257672000140A7/$File/Crawford_Report.pdf)

167. Ibid.

168. R Sutton, 'The flawed philosophy of anti-siphoning', *Communications Bulletin*, vol.14, no.1, Winter 1994, viewed 1 December 2009, <http://www.camla.org.au/clb/CLB%20-%20Volume%2014,%20Issue%201.pdf>

The question Sutton essentially asks is why it is imperative that government should intervene to ensure that a service is provided in this particular instance, and not in other cases. This leads to the question: if government sees some sort of moral obligation to intervene to ensure that those who cannot afford, or do not choose to subscribe to pay television are able to view events, why does it not do something for those who cannot afford to buy a television set in the first place, or a radio or mobile phone for that matter?

Other arguments against anti siphoning encapsulate a property rights dimension. The issue being whether it should remain the exclusive right of those who produce an event to control how, when and by whom that event is televised. Three of Australia's football codes were of the opinion in 2006 that it was indeed their right to decide who televised their games, and not that of any government.<sup>169</sup> Understandably, this view is about the codes wanting to maximise the returns they can make from selling television rights. From this perspective, as a number of sports have argued, the existence of an anti siphoning scheme influences their bargaining position and unfairly advantages free-to-air broadcasters in relation to their dealings with sporting organisations. The football codes have maintained it is vital for sports to be able to achieve this balance between exposure and revenue so they are able to invest at the grass roots level.<sup>170</sup> This view has been supported by a number of studies and reports, including the recent Crawford report.

Pay television arguments provide a complementary dimension to the property rights perspective. The anti siphoning list imposes a significant burden on subscription broadcasters as a result of their having to negotiate with their competitors for the right to broadcast sports. These negotiations are more complex, drawn out and burdensome than if subscription broadcasters could negotiate directly with the underlying rights holder.<sup>171</sup>

The arguments against anti siphoning in Australia add that the scheme should be abandoned because it has not achieved what it set out to do. The purpose of the Australian anti siphoning legislation was to protect consumers, but all it has meant is that the interests of free-to-air broadcasters prevail. What has occurred in essence is that free-to-air networks are the gatekeepers of access. Consequently, consumer choice is diminished.<sup>172</sup> As one sports commentator phrases it, 'populist garbage legislation' remains in place which supposedly

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169. S Lienert, 'Codes united in view', *The Daily Telegraph*, 22 September 2006, p. 7, viewed 1 December 2009, [http://parlinfo.parlInfo/download/media/pressclp/7XXK6/upload\\_binary/7xxk64.pdf;fileType=application/pdf#search=%22codes%20united%20in%20view%22](http://parlinfo.parlInfo/download/media/pressclp/7XXK6/upload_binary/7xxk64.pdf;fileType=application/pdf#search=%22codes%20united%20in%20view%22).

170. Australian Rugby Union submission 2008, pp. 12–13, Australian Rugby League and National Rugby League submission 2008, p. 13, Productivity Commission, *Annual review 2009*, op. cit.

171. ASTRA, submission 37 to Productivity Commission, *Annual review 2009*, op. cit.

172. Ibid.

protects viewers' rights. In reality, the legislation protects free-to-air broadcasters from competition and allows them to 'cherry pick' what they allow the public to see.<sup>173</sup>

It has also been argued that the multi channelling issue illustrates the hypocrisy of the commercial free-to-air broadcasters. This point of view sees their only agenda being to ensure the maintenance of their dominant broadcasting position; not concern with the public interest. Giving them multi channelling rights to listed sports would not necessarily mean that the public sees more sports, but it would ensure that pay television presents less of a threat to that position. One observer comments in relation to the free-to-air petition for the right to show sports on their multi channels, that they have argued since the 1990s that maintaining an anti siphoning list was crucial to the fabric of the nation. They now want the list abolished—for them only.<sup>174</sup>

## Public interest and national identity

The arguments used in favour of maintaining an anti siphoning list have centred around two interconnecting issues—serving the public interest and creating and maintaining national identity. From this perspective, it is in the public interest for all people to be able to see the important events that reflect Australia's national identity. The public interest is imperfectly served if important sporting events migrate to pay television. Hence, governments impose licence conditions and regulations on free-to-air broadcasters which oblige those broadcasters to act in the public interest.

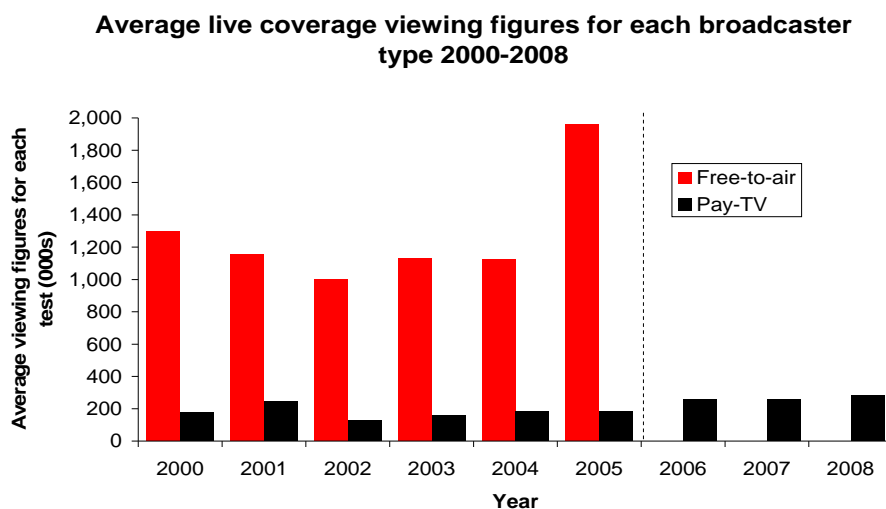
Proof that allowing a competitive market to operate with regards to events of national importance will mean that these events are inaccessible, is often illustrated by the example of live coverage of English cricket team home matches in recent times. Prior to 2005, these games were available on free-to-air and pay television. Since that time, they have been shown only on pay television. A significant audience decline has resulted (see the table below and the section on the United Kingdom in Appendix A).

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173. G Parker, 'Free-to-air networks', op. cit.

174. TV networks don't deserve free ride', *The Australian Financial Review*, 1 September 2009, p. 62, viewed 1 December 2009, [http://parlinfo.parlInfo/download/media/pressclp/1UJU6/upload\\_binary/1uju60.pdf;fileType=application/pdf#search=%22anti-siphoning%22](http://parlinfo.parlInfo/download/media/pressclp/1UJU6/upload_binary/1uju60.pdf;fileType=application/pdf#search=%22anti-siphoning%22)

## Average viewing figures for live test match cricket in England, 2000-08



Source: Frontier and Futures Sport & Entertainment<sup>175</sup>

It is claimed also that maintaining an anti siphoning list in the public interest does not impede pay television operators as significantly as these operators claim. Their profit margins demonstrate this to be the case.<sup>176</sup> For example, while it must be acknowledged that Foxtel did take until 2006 to make a profit, its business has grown substantially since then. In the year ended 30 June 2009, despite the global financial crisis, its revenue was \$1.84 billion, an 11 per cent increase on the previous year.<sup>177</sup>

Sport has traditionally been the promotional vehicle for national pride and the Australian collective identity. What it means to be Australian, it is often said, has been forged, not only on the battlefields of war, but also on the sports battlefields. It follows that it would be ‘un

175. Frontier Economics, *The impact of listed events on the viewing and funding of sports: A Report Prepared for the chair and review panel*, April 2009, viewed 15 December 2009,

<http://74.125.93.132/search?q=cache:IOuRuwEiai0J:www.culture.gov.uk/images/publications/FE-DCMS-Impactoflistedevents.doc+the+impact+of+braodcasting+on+sports+in+the+uk&cd=2&hl=en&ct=clnk&gl=au>

176. Submission by Free TV Australia Limited to Department of Broadband, Communications and the Digital Economy, *National Broadband Network: regulatory reform for 21st century broadband discussion paper*, 3 June 2009, viewed 14 December 2009,

[http://www.freetv.com.au/media/Submissions/20090009\\_SUB\\_NBN\\_Discussion\\_Paper\\_June\\_2009.pdf](http://www.freetv.com.au/media/Submissions/20090009_SUB_NBN_Discussion_Paper_June_2009.pdf)

177. Foxtel, *Foxtel announces solid subscriber and financial growth in a tough environment*, media release, 13 August 2009, viewed 14 December 2009, <http://www.foxtel.com.au/about-foxtel/communications/foxtel-announces-solid-subscriber-and-financial-growth-in-a-21656.htm>



Australian' if some people were not able to view events that define the Australian identity. In effect, such a situation would offend the Australian sense of a 'fair go' for all. There would appear to be a number of flaws in this 'sport as national identity' argument. For example, how can the various football codes on the anti siphoning list promote national identity when they are fundamentally divisive?<sup>178</sup> It remains that the perception sport and national identity are inevitably intertwined is part of the national consciousness. It would be bold, and perhaps foolhardy to be seen to be depriving the less fortunate from continuing to share in that consciousness and identity.

In effect, the arguments for anti siphoning culminate in the conclusion that it is a public good; the benefits it achieves for all Australians outweigh any benefits that broadcasters may derive as a result of its demise. The SBS submission to *Sport on Television* summarises the view well:

The anti-siphoning list is not about balancing the interests of competing broadcasters [or other players] it is about preserving access to key sporting events for the Australian public.<sup>179</sup>

The commercial free-to-air broadcasters have exploited the public interest argument for many years. However, as noted earlier in this paper, their recent demand for rights to show listed sports on their digital multi channels, to which not all Australians currently have access, has seriously damaged their credentials as defenders of the public interest.<sup>180</sup>

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178. There are a number of other arguments about sport and identity, such as those which discuss the gendered and often violent image of identity created by sports (especially a number of sports on the anti siphoning list) that can be seen as inappropriate to be promoted in the 21st century. Many publications discuss these themes, for example, B Wenn, *Violence in sport*, Australian Institute of Criminology, Canberra, 1989, viewed 18 December 2009, <http://www.aic.gov.au/publications/previous%20series/vt/1-9/vt04.aspx> and M Messner and D Sabo, eds, *Sport, men, and the gender order: critical feminist perspectives.*: Human Kinetics Books, Illinois, 1990.

179. SBS submission to *Sport on Television*, op. cit.

180. As noted in footnote 135, approximately 56 per cent of homes now have converted to digital. As such, there remains a significant number of Australians who do not have access to sport telecast on multi channels. Arguably, these would, in the main, be those who could least afford to purchase the set top box needed to view digital programs. Clearly, to allow the free-to-air broadcasters to multi channel listed sport at the present time would disadvantage these people, and not work in the overall public interest. Note: the Government has committed to making funding progressively available, in conjunction with the switch off of analogue signals throughout Australia, to those considered least able to purchase a set top box. Under the Household Assistance Scheme, the Government is providing in-home assistance to eligible households in the Mildura, regional South Australia, regional Victoria and regional Queensland television licence areas. At no cost to eligible households the Government will provide for the supply, installation and demonstrate of a high definition set top box to households where at least one resident is receiving a maximum rate Age Pension, Disability Support Pension, Carer



In addition, pay television considers that research recently undertaken on its behalf for the *Sport on Television* inquiry makes it clear that free-to-air claims that the anti siphoning list represents what the public wants are no longer legitimate. This research indicated that only 21 per cent of the population is passionate about sport and wants to watch it live on television. Similarly, 78 per cent of Australians think there is enough or too much sport on television and 65 per cent think that anti siphoning is bad for sport.<sup>181</sup> According to pay television operators, these findings explode 'the myth that all Australians want sport to dominate their TV viewing and that changes to the anti-siphoning list would cause widespread backlash'.<sup>182</sup>

While the pay television research responses do make a point, it must also be noted that sports on the anti siphoning list frequently appear in the top twenty ratings list on free-to-air television, as do sports not on the list, such as Twenty20 cricket. It is far from conclusive therefore that only a minority of Australians are passionate about sports.<sup>183</sup> It is equally inconclusive that there would not be a backlash if these sports were unavailable to the current majority of viewers. Submissions to the *Sport on Television* inquiry were divided in their support for anti siphoning. Some believed it would be unAustralian to deprive people of the simple pleasure of watching sport or the joy of seeing amazing sporting achievements.<sup>184</sup> Others disagreed with how the current list operated, but remained committed to watching sport.<sup>185</sup> The public views in fact mirrored those of the main protagonists, and in a number of cases, appear to have restated the free-to-air/pay television arguments.

There has been constant criticism also that government maintains the anti siphoning list because it is unwilling to face electoral consequences which may follow if families are made to pay for what some have labelled is their most passionate leisure pursuit; one which they

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payment, Department of Veterans' Affairs (DVA) service pension or the DVA income support supplement payment.

181. ASTRA, *Attitudes to sport on TV and anti-siphoning law*, media release, 29 October 2009, viewed 27 January 2010, <http://assets.astra.org.au.s3.amazonaws.com/f759260b3c7f447b2c5bfc8c64c0f90e/091026SportonTVResearch.pdf>

182. Ibid.

183. According to ratings of top 20 programs as compiled by OzTAM, viewed 27 January 2010, <http://www.oztam.com.au/Archives.aspx?Year=2009>

184. For example, submissions by Alexander Curry and Elizabeth Henderson, available by following reference at main submissions page for *Sport on Television*, op. cit., viewed 27 January 2010, [http://www.dbcde.gov.au/television/antisiphoning\\_and\\_antihoarding/sport\\_on\\_television\\_review\\_of\\_the\\_anti-siphoning\\_scheme\\_discussion\\_paper/submissions\\_to\\_the\\_sport\\_on\\_television\\_review?result\\_121137\\_result\\_page=1](http://www.dbcde.gov.au/television/antisiphoning_and_antihoarding/sport_on_television_review_of_the_anti-siphoning_scheme_discussion_paper/submissions_to_the_sport_on_television_review?result_121137_result_page=1)

185. For example Alan Boyd, main submissions page *Sport on Television*, op. cit.

have been able to watch all their lives for nothing.<sup>186</sup> There is a considerable degree of journalistic rhetoric in these claims and some cynicism about the extent to which all government actions can be linked to electoral considerations. No doubt governments of both persuasions have considered the possible electoral consequences associated with the anti siphoning issue for many years. At the same time, it appears that all have been genuinely aware of the need to consider the public interest in making sports programs that reflect the Australian national identity available to all viewers. It has been convenient to date for governments that the most powerful broadcasters have chosen to echo the public interest argument. Their lapses with regard to that interest have mostly been able to have been satisfactorily resolved by governments also. The current free-to-air campaign for multi channelling rights illustrates however, as have past incidents noted earlier in this paper, that judgement about what is in the public interest cannot be the prerogative of commercial interests of any persuasion.

The media environment is now very different from the one in which anti siphoning was introduced. It is time to consider therefore whether there should be a new approach that can better serve the public interest, provide everyone with a 'fair go' and reflect national identity. For example, the idea pay television is the province of an elite few who can afford to subscribe is not as convincing as it once was. While for the moment free-to-air television dominates, over thirty per cent of Australian homes subscribe to pay, and this figure increases with each year.<sup>187</sup> So is there a level of penetration at which it is not feasible, but also contrary to the best interests of audiences to retain anti siphoning? Niche markets that pay television has targeted in the past also have the potential to become important for free-to-air broadcasters as the conversion to digital television progresses. Fragmented viewing markets, rather than one mass audience are the norm of the future. Does this mean that the idea that any program or any sport can reflect a national interest becomes irrelevant at some point?

The media environment will be further enhanced by the establishment of a national broadband network. The recent announcement by Google that it intends to compete for the rights to sports and entertainment events and that it has purchased the rights to the Twenty20 Indian Premier League cricket competition illustrates just one aspect of how viewing experiences will change in the near future.<sup>188</sup> Google intends 'to transform YouTube from a

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186. H Mitchell, 'The anti-siphoning list won't get any shorter', *The Sydney Morning Herald*, 3 September 2009, p. 28, viewed 26 November 2009, [http://parlinfo.parlInfo/download/media/pressclp/UPKU6/upload\\_binary/upku60.pdf;fileType%3Dapplication%2Fpdf](http://parlinfo.parlInfo/download/media/pressclp/UPKU6/upload_binary/upku60.pdf;fileType%3Dapplication%2Fpdf)

187. ACMA, *Communication report 2007–08*, ACMA, 2008, viewed 27 January 2010, [http://www.acma.gov.au/WEB/STANDARD/pc=PC\\_311541](http://www.acma.gov.au/WEB/STANDARD/pc=PC_311541) and *Communication report 2008–09*, ACMA, 2009, viewed 27 January 2010, [http://www.acma.gov.au/webwr/assets/main/lib311252/08-09\\_comms\\_report.pdf](http://www.acma.gov.au/webwr/assets/main/lib311252/08-09_comms_report.pdf).

188. L Sinclair, 'Google enters fight for sports broadcast rights', *The Australian*, 21 January 2010, p. 5, viewed 27 January 2010, [http://parlinfo.parlInfo/download/media/pressclp/FROV6/upload\\_binary/frov60.pdf;fileType=a](http://parlinfo.parlInfo/download/media/pressclp/FROV6/upload_binary/frov60.pdf;fileType=a)

video search engine and repository for home-made videos to a global internet and mobile TV channel'.<sup>189</sup> The future will be one where people will be able to choose to see sport broadcast in its 'full glory' on television or 'just dive online and watch it'. Does the existence of an anti siphoning list seem incongruous in such an environment? Or does the fundamental issue still apply—everyone, regardless of their ability to pay for new media gadgetry, should be entitled to see certain iconic sporting events?

It is likely that the anti siphoning issue will once more prove too complicated to resolve in the short term, for one reason the media environment is indeed diversifying and evolving quickly, as the Google example illustrates. In such an environment, what constitutes the public interest will not be easily identifiable. Additionally, as in the past, any government decision on anti siphoning will be contentious. There will be winners and losers and numerous interpretations about who fits into which category.

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[pplication/pdf#search=%22google%20enters%20fight%20for%20sports%20BROADCAST%20Rights%22](#)

189. Ibid.

## Appendix A

### Overseas experience of anti siphoning

#### Europe

An anti siphoning regime applies across the European Economic Community. This has been in place since 1989 when the Television Without Frontiers Directive (TWFD) was introduced.<sup>190</sup> The objective of the TWFD was to provide framework conditions under which European member states were to deliver free access to television coverage of sporting and cultural events of major importance to their citizens (see appropriate section of the TWFD below).

The TWFD has been updated by the Audiovisual and Media Services Directive (AMSD) which applies from 19 December 2009 in all member states. The AMSD preserves the core principles of the TWFD and adapts them to the new media environment.

#### **Television Without Frontiers Directive**

##### Article 3a

Each Member State may take measures in accordance with Community law to ensure that broadcasters under its jurisdiction do not broadcast on an exclusive basis events which are regarded by that Member State as being of major importance for society in such a way as to deprive a substantial proportion of the public in that Member State of the possibility of following such events via live coverage or deferred coverage on free television. If it does so, the Member State concerned shall draw up a list of designated events, national or non-national, which it considers to be of major importance for society. It shall do so in a clear and transparent manner in due and effective time. In so doing the Member State concerned shall also determine whether these events should be available via whole or partial live coverage, or where necessary or appropriate for objective reasons in the public interest, whole or partial deferred coverage.<sup>191</sup>

Under the European system, each state produces a list of events it considers are of sporting or cultural significance. These events must be broadcast unencrypted, even if exclusive rights have been bought by pay television broadcasters. Each state must ensure that broadcasters under their jurisdiction respect the lists of other member states.

Lists are approved by the Commission of European Communities. Individual events are added to lists if they satisfy at least two of a number of criteria which have been designated as indicators of the importance of events for society. These are that the event:

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190. The information in this section is sourced from the European Commission audiovisual and media policies website, viewed 15 December 2009, [http://ec.europa.eu/avpolicy/index\\_en.htm](http://ec.europa.eu/avpolicy/index_en.htm)

191. See the Article 3a, viewed 15 December 2009, at: [http://ec.europa.eu/avpolicy/reg/tvwf/events/index\\_en.htm](http://ec.europa.eu/avpolicy/reg/tvwf/events/index_en.htm)

- has a special general resonance; it is not simply of significance to those who ordinarily follow the sport or activity
- is recognised as one of distinct cultural importance and contributes to cultural identity
- involves the national team, and
- has traditionally been broadcast on free-to-air television, and has commanded large television audiences.

The following countries have a designated list of events: Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Italy and the United Kingdom.<sup>192</sup> Examples of events that are listed by countries include the participation of their national teams in international competitions, such as the Fédération Internationale de Football Association (FIFA) World Cup); domestic competition finals, such as the Football Association Challenge Cup (FA Cup) final) and world tournaments, such as the Olympic Games. Other listed events include the Tour de France, major domestic horse races and cultural events, such as the Queen Elisabeth Music Competition in Belgium and the San Remo Italian Music Festival.

## United Kingdom

As a member of the European Community the United Kingdom administers an anti siphoning list that functions in conjunction with the Television Without Frontiers Directive as noted above. The *Broadcasting Act 1996* empowers the Secretary of State to list an event that is deemed to be of national interest within England, Scotland, Wales or Northern Ireland separately.<sup>193</sup> The scheme is administered by the Office of Communications (Ofcom).

Under the scheme, events are designated as Group A and Group B and broadcasters are classified as qualifying, or other broadcasters. Qualifying broadcasters provide channels that are available without payment to at least 95 per cent of the United Kingdom population.<sup>194</sup> The United Kingdom is the only European state which divides its listed events into categories.

The rights to listed events—live rights in the case of Group A events (for example, the Olympics, FIFA World Cup, Wimbledon and European Football Championship) or highlights in the case of Group B events (for example, Cricket Test Matches, Six Nations Rugby or Commonwealth Games) must be offered to qualifying broadcasters. Qualifying broadcasters

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192. See lists in Department for Culture, Media and Sport, *Free-to-air events review: consultation*, July 2009, viewed 15 December 2009, [http://www.culture.gov.uk/freetoair/consultation/documents/free\\_to\\_air\\_consultation.pdf](http://www.culture.gov.uk/freetoair/consultation/documents/free_to_air_consultation.pdf)

193. See relevant section of the Act (Part IV) viewed 15 December 2009, at: [http://www.opsi.gov.uk/Acts/acts1996/ukpga\\_19960055\\_en\\_11#pt4](http://www.opsi.gov.uk/Acts/acts1996/ukpga_19960055_en_11#pt4)

194. Currently, these are BBC1, BBC2, ITV1, Channel 4 and Channel 5.

are not obliged to bid for these rights, however, so it is possible that listed events are not shown by a qualifying broadcaster.<sup>195</sup>

The United Kingdom has recently completed consultations as part of a review of free-to-air events listings. This took place from April to July 2009.<sup>196</sup>

### Operation of the scheme for Group A events

Generally, live coverage rights for Group A events must be made available to broadcasters on all platforms. Ofcom can give consent for exclusive coverage of Group A events only if it is satisfied:

- the availability of the rights was generally known
- all broadcasters had a genuine opportunity to acquire the rights on fair and reasonable terms at a price that was non-discriminatory between categories, and
- a non-qualifying broadcaster had not bid for, or expressed an interest in acquisition of the rights.<sup>197</sup>

### Operation of the scheme for Group B events

Group B events may not be broadcast live exclusively unless adequate provision has been made for secondary coverage by a qualifying broadcaster. Secondary coverage includes edited highlights or delayed coverage of at least 10 per cent of the event, or 10 per cent of the day's play where the event takes place over several days.

Live radio commentary of the event must also have been acquired by a radio station with national coverage or an organisation providing a sports service to radio stations which form a national (or near national) network.

Where no qualifying broadcaster is interested in providing adequate secondary coverage, Ofcom can give its consent to exclusive live coverage, without secondary coverage under the same criteria applied to Group A events.

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195. See the Ofcom Code, viewed 15 December 2009, at:  
[http://www.ofcom.org.uk/tv/ifi/codes/code\\_sprt\\_lstd\\_evts/ofcom\\_code\\_on\\_sport.pdf](http://www.ofcom.org.uk/tv/ifi/codes/code_sprt_lstd_evts/ofcom_code_on_sport.pdf)

196. Department for Culture, Media and Sport, *Free-to-air events review*, op. cit.

197. For example, if the BBC acquired the rights to a Group A event, but no subscription broadcaster expressed an interest or bid for the rights, the BBC could apply to Ofcom to cover the event exclusively.

### United Kingdom: listed sporting events

Group A events	Group B events
The Olympic Games	England's home cricket test matches and Cricket World Cup matches
Football World Cup and European Championship Finals Tournaments	The final stages of the Cricket World Cup
The FA Cup Final and Scottish FA Cup Final (in Scotland)	Home nation matches in the Six Nations Championship
The Grand National	All other matches in the Rugby World Cup
The Derby	Non-finals play in the Wimbledon Tennis Championship
Wimbledon Tennis Finals	The Commonwealth Games
Rugby World Cup Final	World Athletics Championships
Rugby League Challenge Cup Final	The Ryder Cup
	Open Golf Championship

Source: Frontier Economics<sup>198</sup>

### United States

Cable subscription television was established in the United States in the early 1950s and by the 1960s, its expansion led to concerns that programs would be siphoned from free-to-air networks.<sup>199</sup> Sporting events, it was believed, were in particular danger of being siphoned.<sup>200</sup> In 1968, the Federal Communications Commission (FCC) first imposed restrictions intended to prevent siphoning, and in 1975 it issued rules which regulated the broadcast of certain events.

Under these rules, specific events, which had been telecast on free-to-air television during any one year of a previous period of five years, were eligible for broadcast on subscription or cable television. Non specific sports events, which were divided into four major categories of pre season and season home and away games, were available for broadcast on pay television:

198. Frontier Economics, *The impact of listed events on the viewing and funding of sports*, op. cit.

199. M Agnes Siedlecki, 'Sports anti-siphoning rules for pay cable television: a public right to free TV?', *Indiana law Journal*, vol., 53, no. 821, 1977-78, viewed 15 December 2009, [http://heinonline.org/HOL/Page?handle=hein.journals/indana53&div=46&g\\_sent=1&collection=journals](http://heinonline.org/HOL/Page?handle=hein.journals/indana53&div=46&g_sent=1&collection=journals)

200. Siedlecki in I Horowitz, *The legal issues in business: implications of Home Box Office for sports broadcasts*, 23 *Antitrust Bull.* 743, 753, 1978, as quoted by J Perrine, 'Constitutional Law Challenges to Anti-Siphoning Laws in the United States and Australia', *Sports Administration*, vol. 3, 2001, viewed 15 December 2009, [http://www.business.curtin.edu.au/files/Constit\\_Challenges\\_James\\_Perrine1.pdf](http://www.business.curtin.edu.au/files/Constit_Challenges_James_Perrine1.pdf)



- if fewer than 25 per cent of the events in a given category were broadcast live over conventional television during that season among the preceding five years in which the most events in that category were telecast, then the number of events available would be the remaining events not telecast
- if, however, 25 per cent or more of the events in a given category were broadcast live during the season, then only 50 per cent of the remaining events may be made available to pay television, and
- any reduction in the number of free-to-air broadcasts telecasts required proportionate reduction in the number of events available to pay television.<sup>201</sup>

The validity of the FCC anti-siphoning rules was legally challenged by the pay television industry.<sup>202</sup> The United States Court of Appeals deciding in the case that the ‘rules exceeded the FCC’s jurisdiction over cable television.’ They were also found to be arbitrary and capricious and unconstitutional under the First Amendment to the United States’ Constitution.<sup>203</sup>

In response to an increase in the number of cable networks and further concerns about the amount of sport programs available on pay television in 1992 the American Congress ordered the FCC to conduct a study into the carriage of local, regional, and national sports programming by free-to-air stations, cable programming networks and pay-per-view services.<sup>204</sup> The FCC found that while the number of sports events shown on cable television had dramatically increased since 1980, this had not been accompanied by a similar decrease in the number of sports events shown on free-to-air television.<sup>205</sup> The FCC concluded also that the cost of subscribing to subscription television ‘was not likely to be burdensome for the average consumer’.<sup>206</sup> It therefore believed there was no case for government intervention in the sports programming market at the time.

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201. Horowitz, in Perrine, op. cit.

202. Siedlecki, op. cit.

203. *Home Box Office v FCC*, 567 F.2d at 49 as quoted by Perrine, op. cit. The First Amendment to the United States’ Constitution states: ‘Congress shall make no law ... abridging the freedom of speech, or the press.’

204. This was under the (United States) *Cable Television Consumer Protection and Competition Act 1992*, Pub. L. No. 102–385, 106 Stat. 1460 (codified at 47 U.S.C. 521 (Supp. V 1993)), as cited by P Cox, *Flag on the play? The siphoning effect on sports television*, University of Indiana, 1995, viewed 15 December 2009, <http://www.law.indiana.edu/fclj/pubs/v47/no3/cox.html#FN8>

205. Perrine, op. cit.

206. The Federal Communications Commission (FCC) final anti siphoning report and B Goodman, ‘The Sports Broadcasting Act: as anachronistic as the Dumont Network?’ *Seton Hall Journal of Sport Law*, no. 469, 1995, pp. 504-05 both as quoted in Perrine, op. cit.



In 2001, United States' lawyer, James Perrine, argued that despite the absence of an anti siphoning scheme regulation in the future the idea may be reconsidered in response to technological innovations. Perrine noted also that the FCC has said it will not hesitate to act, 'consistent with its statutory authority' if a significant threat to access to sports programs develops.<sup>207</sup> There appears to be no indication however, that the FCC is planning to re consider anti siphoning at present.

## New Zealand

New Zealand currently has no anti siphoning regime in place. A review of regulation as it applied to digital broadcasting initiated by the Labour Government and undertaken in 2008 by the Ministry for Culture and Heritage revealed that broadcasting rights issues were of concern to many New Zealanders.<sup>208</sup> At the same time, pay broadcasters, particularly Sky TV, and sports organisations, such as the New Zealand Rugby Union, were strongly opposed to the introduction of any form of anti siphoning or anti hoarding.<sup>209</sup> The 2008 review recommended that potential options to ensure greater free-to-air access to sporting events should be investigated. It remained cautious in its support however, adding that those options should only have minor impacts on the commercial revenue available to sporting bodies and the enhanced future participation in sport.<sup>210</sup>

Following Labour's loss at the 2008 election, the new National Party Government undertook its own analysis of the anti siphoning issue and concluded 'there was strong competition in the broadcasting sector, which [was] seen to safeguard consumer interests and remove the need for reform'.<sup>211</sup> It decided not to proceed further with a review of the broadcasting environment.<sup>212</sup>

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207. The FCC interim report on anti siphoning as quoted in Perrine, op. cit.

208. Ministry for Culture and Heritage, *Digital broadcasting: review of regulation*, vol 2, New Zealand Government, January 2008.

209. New Zealand Rugby Union, *Submission on the review of digital broadcasting regulation*, April 2008, viewed 15 December 2009, <http://www.mch.govt.nz/publications/digital-tv/submissions/NZRugbyUnion.pdf>

210. Ministry for Culture and Heritage, *Digital broadcasting*, op. cit.

211. Media Access Australia, *NZ cancels digital broadcasting regulatory review*, 2 June 2009, viewed 15 December 2009, [http://www.mediaaccess.org.au/index.php?view=article&id=501%3Anz-cancels-digital-broadcasting-regulatory-review&option=com\\_content&Itemid=19](http://www.mediaaccess.org.au/index.php?view=article&id=501%3Anz-cancels-digital-broadcasting-regulatory-review&option=com_content&Itemid=19)

212. A Sennitt, *NZ Government pulls plug on digital broadcasting review*, 12 April, 2009, Media Review website, viewed 15 December 2009, <http://blogs.rnw.nl/medianetwork/nz-government-pulls-plug-on-digital-broadcasting-review>

## Glossary

**Anti hoarding:** under Part10A of the *Broadcasting Services Act 1992*, commercial television licensees who acquire the right to televise a designated event, but who do not propose to use that right fully, are required to offer the unused portion to the ABC and SBS for a nominal charge within a specified offer time. The national broadcasters must also offer unused portions of rights to each other.

**Datacasting:** a datacasting service is defined in section 6(1) of the *Broadcasting Services Act 1992* as a service which delivers content in the form of text, data, speech, music or other sounds, visual images or in any other form; or in any combination of forms to persons having equipment appropriate for receiving that content. The service must use the broadcasting services bands which are the designated parts of the radiofrequency spectrum referred to the Australian Communications and Media Authority for planning under section 31 of the *Radiocommunications Act 1992*.

**Internet Protocol Television (IPTV):** television content received through technologies used for computer networks. IPTV is often provided in conjunction with Video on Demand and may be bundled with other Internet services such as Web access.

**Narrowcasting:** sections 17 and 18 of the *Broadcasting Services Act 1992* define narrowcasting services as broadcasting services whose reception is limited by: being targeted to special interest groups; intended only for limited locations; provided during a limited period of time; because they provide programs of limited appeal; or for some other reason. Narrowcasting services operate under a broadcasting class licence regime, with minimum levels of regulation. Subscription narrowcasting services differ from open narrowcasting services in that they are made available only on payment of subscription fees.

**Multi channelling:** multi channelling makes use of digital spectrum for the broadcast of several different channels simultaneously. Spectrum refers to the range of frequencies available for over the air transmission.

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