



**A SUBMISSION**

**TO THE**

**PRODUCTIVITY COMMISSION INQUIRY**

**INTO**

**AUSTRALIA'S BROADCASTING LEGISLATION**

**FOLLOWING PUBLICATION**

**OF THE COMMISSION'S DRAFT REPORT**

**December 1999**

## Summary

This submission focuses exclusively on the anti-siphoning regime currently operating in Australia. The scheme is briefly discussed in section 9.6 of the Productivity Commission's Draft Report of October, 1999 ("Draft Report")

Sports Investments Australia Pty Ltd ("Fox Sports") is an Australian sports programming telecaster which produces two dedicated sports channels for distribution on the Foxtel and Austar pay TV networks, as well as directly distributing those channels to hotels and clubs. Fox Sports is owned 50% by the News Corporation Limited and 50% by a wholly owned subsidiary of Publishing and Broadcasting Limited.

Fox Sports submits that the anti-siphoning regime should be abolished because of the inherent competitive inequality the system has created between free-to-air broadcasters and pay TV broadcasters and also because of the other associated anti-competitive effects. We believe that the costs of these anti-competitive effects outweigh any alleged benefits to the community arising from having the system in place.

If the Productivity Commission does not accept this first submission, then Fox Sports endorses the approach adopted by the Commission in the Draft Report that the scheme be amended so that the scheme only prevents pay TV operators from acquiring the free to air rights to listed events and prevents free-to-air telecasters from acquiring pay TV rights to listed events.

In addition, Fox Sports agrees with the previous submissions of News Limited ("News") and the Australian Subscription Television and Radio Association ("ASTRA") that the list itself should be amended to reduce the number of events covered. In our view, the Productivity Commission should recommend that this occur as a separate, but integral part of any reform to the scheme.

## **1. ABOLISHING THE REGIME**

1.1 In the Draft Report, the Productivity Commission has noted that the anti-siphoning provisions reduce competition in a number of ways. These include:

- the competitive advantage given to free to air broadcasters which can obtain exclusive rights to listed events, something which pay TV operators cannot do unless those events are de-listed;
- the reduction in Pay TV operators' ability to use exclusive coverage of sporting events to attract subscribers.
- the related effect the scheme has on potential advertising revenue available to pay TV operators; and
- the reduction in competition arising from the negotiation of television rights.

1.2 The ACCC, in its submission to the Commission in August this year, also expressed its concern about the significant anti-competitive effects of the scheme. Importantly, the ACCC was of the view that if any perceived social objectives were not being met, then give the inherent anti-competitive nature of the scheme it should be amended to achieve these objectives, or abolished altogether.

1.3 Given these competitive issues, we submit that the entire scheme should be abolished. We refer the Commission to the News and ASTRA submissions in which arguments supporting abolition of the scheme were set out.

In our view, many of the underlying assumptions made when the regime was established in 1994 have not proven to be true and rights holders should be left to freely determine the way in which they sell their television rights.

## **2. THE DUAL RIGHTS APPROACH**

2.1 To the extent that the Productivity Commission is not inclined to recommend the total abolition of the anti-siphoning regime, we submit that the Productivity Commission should recommend that the anti-siphoning scheme be amended along the lines suggested by the Commission in its Draft Report. In particular, the scheme should only prevent pay TV operators from acquiring the free to air rights to listed events but should not prevent them from acquiring the pay TV rights to those events. Equally, free-to-air operators should be able to acquire free-to-air rights to listed events but should not be allowed to acquire pay TV rights to those listed events.

This "dual rights" approach would not impact on the underlying policy of the scheme which is to ensure that there is no migration of events from free to air to pay television due to the fact that the relevant rights have not been made available for acquisition by free to air broadcasters. In fact, it can be argued that such a scheme would be even more beneficial to consumers because it

would maximise the opportunity for listed events to be seen on both pay television and free-to-air television.

- 2.3 In the United Kingdom, under the Broadcasting Act 1996, a subscription or pay per view service is not permitted to broadcast live coverage of a listed event unless rights to that event are made available to a terrestrial free to air service (the BBC, ITV or Channel 4). Equally and on the basis of reciprocity, a terrestrial service is not permitted to broadcast live coverage of a listed event unless rights to that event are made available to a subscription service. The ITC's consent must be obtained for a listed event to be shown on a single channel (either a terrestrial free to air channel or a subscription channel).
- 2.4 The listed events in the UK are not nearly as extensive as in Australia. They are also split into two categories. Events in group A cannot be covered live on an exclusive basis unless certain criteria are met. Group B events cannot be broadcast live on an exclusive basis unless adequate provision has been made for secondary coverage.
- 2.5 The ITC has drawn up a code giving guidance on the broadcasting of listed events. This code is attached for the Productivity Commission's reference as Appendix 1. We would be happy to discuss the UK system with the Commission if required as well as the consequences of adopting a "dual rights" approach in Australia.
- 2.6 We submit that an amendment along the lines suggested in section 2.1 would maintain any perceived social objectives of the legislation and would reduce the anti-competitive consequences of the legislation.

### **3. AMENDING THE LIST**

- 3.1 As has been pointed out in the News and ASTRA submissions, there are vast amounts of sporting material which are "listed events" which are not currently shown on free-to-air television, and historically have not been shown on free-to-air television. At the most, the list should only include a small number of premium events, which are truly of national importance.
- 3.2 In this regard, it is worth noting that Fox Sports has already had to approach the Minister on a number of occasions in 1999 to seek to have events de-listed on the basis that no free to air broadcaster has been interested in acquiring the rights to telecast events on a fair commercial basis. The fact that the de-listing process is being regularly invoked illustrates that the list is too long. As has been pointed out in earlier submissions, as a matter of commercial practicality, because of the cumbersome nature of the de-listing process, it is only used as a last resort.
- 3.3 We note that the list of events which are covered by the UK's equivalent regime is much shorter than the Australian list and covers only those sporting events which are truly of national significance. The list of UK events is included as Appendix 2.

3.4 We submit that as part of any reform recommendation, the list itself should be shortened. If recommendations along the lines in section 2 were accepted, there would be no reason to have such an extensive list in place because coverage of events of national importance on both free-to-air and pay television would be ensured by a different mechanism.

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# Appendix 1

## UNITED KINGDOM CODE ON SPORTS AND OTHER LISTED EVENTS

(Source ITC website)

### Foreword

1. The Broadcasting Act 1996 requires the ITC to draw up, and from time to time review, a code giving guidance on certain matters relating to the televising of sports and other events of national interest which have been listed by the Secretary of State. This Code has been produced by the ITC, after consultation with broadcasters, sports bodies, the holders of sports rights and other interested parties, for the purpose of fulfilling this statutory duty, as defined under Section 104 of the Act.
2. The Act restricts the acquisition by television program providers of exclusive rights to the whole or any part of live television coverage of listed events and the broadcasting on an exclusive basis of such coverage without the previous consent of the ITC (see Part IV of the Act or Appendix 1 of this Code). Under the Act the ITC has powers to impose a financial penalty on its licensees if the restrictions on broadcasting live coverage of listed events have not been observed, if the ITC has been given false information or if material information has been withheld. In the case of the BBC and S4C the ITC must report the matter to the Secretary of State. The ITC will have regard to the provisions of the Code in exercising these powers.
3. 'Listed events' are drawn up by the Secretary of State in accordance with the Act, and the current list is at Appendix 2. The Secretary of State may add events to and delete events from the list at any time, but only after consultation with the BBC, the Welsh Authority, the ITC and the holder of the rights for the event in question. In June 1998 the Secretary of State extended the list to include Group B events on the understanding that they would be treated differently from Group A events. Group A events are those events which cannot be covered live on an exclusive basis unless certain criteria are met. The criteria and matters to be taken into account by the ITC are set out at paragraphs 11-15. Group B events are those events that cannot be broadcast live on an exclusive basis unless adequate provision has been made for secondary coverage. The minimum standard of secondary coverage the ITC will regard as adequate provision is set out at paragraph 16.
4. A separate voluntary code of conduct for sports events has been drawn up by the Major Spectator Sports Division of the Central Council of Physical Recreation in consultation with the Sports Council. The central principle of this voluntary code is to ensure that, assuming interest on the part of broadcasters, television coverage of major sporting events generally, ie not only the listed events, will be available to the general public in live, recorded and/or highlights programs.

## General Provisions and Background

5. For the purpose of the live broadcasting of listed events the Act defines two categories of television programs services: those which are provided free of charge by Channel 3, Channel 4 and the BBC; and all other services. The Secretary of State may by order amend the first category by adding or removing services specified. Any contract for televising live coverage of a listed event which is entered into by a broadcaster must state that the rights are available for showing the event on a service falling within only one of the two categories, ie, separate contracts must exist for each category. A broadcaster providing a service in either category ('the first service') is prohibited from showing exclusively live coverage of the whole or any part of a Group A event without the previous consent of the Commission unless a broadcaster providing a service in the other category ('the second service') has acquired the right to show live coverage of the event or the same part of the event. The area served by the second service must consist of or include the whole, or substantially the whole, of the area served by the first service. The first and second services may be provided by licensees in the same ownership, but between them they must include a broadcaster in each of the two categories described above.
6. The restrictions on Group A events apply only to rights acquired after the commencement of Section 101 of the 1996 Act, ie 1 October 1996. The restrictions on Group B events apply only to rights acquired after the Secretary of State began to consult rights holders about changes to the list i.e. 25 November 1997.
7. An event may be listed because it is of 'national' interest within England, Scotland, Wales or Northern Ireland separately. This is the basis on which the Scottish FA Cup Final, for example, has been listed. The Act allows for those events to be shown only in the relevant part of the UK in which there is likely to be most viewer interest. The reference to Channel 3 in paragraph 5 above, therefore, means individual or groups of regional Channel 3 services, or Channel 3 as a whole.
8. The Act is concerned with providing an opportunity for live coverage to be made available. It is important to emphasise that the Act does not require or guarantee live coverage of listed events, including coverage on Channel 3, Channel 4 and the BBC. Nor does the Act prohibit exclusive live coverage of listed events on these or other services subject to the ITC being satisfied that certain criteria have been met (see paragraphs 11-17).
9. The specific guidance which the ITC is required to give is set out below. The ITC will keep this guidance under review and may amend it in the light of experience.

## **Definition of 'live'**

10. Section 104 of the Act requires the ITC to specify the circumstances in which the coverage of listed events generally, or of a particular listed event, is, or is not, to be treated as live. In considering this matter the ITC has taken the view that the interests of viewers lie in allowing them to participate in the event as it happens, as far as possible. This suggests that live television coverage of most sports events, including those taking place in different time zones, should be defined as coverage which is simultaneous with the event (ie as the event is happening). However, given the different nature and length of events, no single definition is possible. The following interpretation should allow for necessary flexibility:
- The restrictions on live coverage will apply while the event concerned is in progress.
  - If the event involves separate games or matches, the restrictions will apply while each game or match is in progress.
  - In the case of a single event which is scheduled to last over several days, the restrictions will apply to each day's play, while it is in progress.
  - In the case of an event which consists of defined separate parts which overlap in time (eg the Olympic Games or the FIFA World Cup Finals) and cannot therefore be televised simultaneously in full, the restrictions will apply to each match or competition as if it was a single event.

## **Matters to be taken into account in giving or revoking consent for exclusive coverage**

11. Under Section 104(1)(b) of the Act the ITC is required to provide guidance as to the matters it will take into account in determining whether to grant its consent to a broadcaster in one category (the first service) to provide exclusive live coverage of an event (or part of an event) where no broadcaster in the other category (the second service) has acquired the same rights, or where the area for which the second service is to be provided does not consist of or include the whole, or substantially the whole, of the area for which the first service is provided.
12. In deciding whether to give its consent it may be sufficient for the ITC to establish that the availability of the rights was generally known and no broadcaster in the other category had expressed an interest in their acquisition to the rights holder, or had not bid for the rights. However, the ITC will wish to be satisfied that broadcasters have had a genuine opportunity to acquire the rights on fair and reasonable terms and, in reaching a view, will take account of some or all of the following criteria:
- any invitation to express interest, whether in the form of public advertisement or closed tender, in the acquisition of the rights must have been communicated openly and simultaneously to broadcasters in both categories;



- at the beginning of any negotiation the documentation and/or marketing literature must set out in all material respects the process for negotiating and acquiring the rights and all material terms and conditions, including what rights were available;
  - if the rights to the listed event were included in a package of rights, the package must not have been more attractive to broadcasters in one of the two categories. Preferably, the rights should be capable of being purchased independently of other rights, eg, to highlights, delayed transmissions, other events;
  - the conditions or costs attached to the acquisition of the rights (for example, production costs) must have been clearly stated and must not be preferential to one category of broadcaster;
  - the price sought for the rights must have been fair, reasonable and non-discriminatory as between the two categories of broadcaster. What is a fair price will depend upon the rights being offered and the value of those rights to broadcasters. A wide range of prices is likely to be regarded as fair but when required to make its own judgement on the matter the ITC will have regard to, inter alia:
    - previous fees for the event or similar events;
    - time of day for live coverage of the event;
    - the revenue or audience potential associated with the live transmission of the event (eg, the opportunity to sell advertising and sponsorship; the prospects for subscription income);
    - the period for which rights are offered; and
    - competition in the market place.
13. A genuine opportunity to acquire the rights also requires that broadcasters are given a reasonable time in which to do so. What constitutes a reasonable time will depend upon the circumstances of each case, including the complexity of the negotiations and the production and transmission of the program surrounding the event, and the proximity of the event to the date on which the rights are offered. The time allowed should give all parties a realistic opportunity to negotiate and reach agreement, but should not be unduly protracted, thereby preventing or restricting broadcasters from complying with this Code.
14. The ITC's consent is also required where the area for which the service is to be provided does not consist of or include the whole, or substantially the whole, of the area for which the other service is to be provided. In considering whether to give its consent the ITC will take account of the interests of the viewers in the different areas and the transmission coverage areas of the different broadcasters.

15. Consent will normally be given for the full period for which rights are acquired in recognition of the fact that the price paid will, inter alia, reflect the duration of the rights. However, the ITC will revoke its consent if the broadcaster to whom the consent has been given requests it, or if the consent has been given on the basis of false or misleading information. Additionally, the ITC will consider revoking its consent if it appears that rights have been acquired for an extended period in order to circumvent the spirit of the Act. In determining what is an extended period the ITC will have regard to precedents for this and similar events, including the periods for which rights are granted to non-UK broadcasters for overseas transmissions.
16. For those events listed in Group B in Appendix 2, the ITC will give its consent to exclusive live coverage of an event by a broadcaster in one category (the first service) if adequate provision has been made for secondary coverage by a broadcaster in the other category (the second service). The minimum which the ITC will consider to be adequate is where the second service has acquired rights for the provision of edited highlights or delayed coverage amounting to at least 10% of the scheduled duration of the event (or the play in the event taking place on any day), subject to a minimum of 30 minutes for an event (or the play in the event on any day) lasting an hour or more, whichever is the greater. For these purposes, where an event has a number of different components taking place concurrently the scheduled duration of the event is defined as the time elapsed between the scheduled beginning of the first component of the event taking place on any day and the scheduled finish of the last component of the event on that day. The second service must have editorial control over the content and scheduling of the edited highlights or delayed coverage except that a restriction may be imposed that the second service shall not begin broadcasting the edited highlights or delayed coverage until a period has elapsed following the scheduled conclusion of the event (or the play in the event on any day). The maximum period which may be set is as follows:

<b>For an event scheduled to finish:</b>	<b>Maximum delay:</b>
After midnight and up to 8.00am	Edited highlights or delayed coverage to start not later than 10.00am.
Between 8.00am and 8.30pm	Up to 2 hours.
Between 8.30pm and 10.00pm	Edited highlights or delayed coverage to start not later than 10.30pm.
Between 10.00pm and midnight	Up to 30 minutes.

In addition to the above, the right to provide live radio commentary on the event must 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.

17. The situation may arise where a second service is unable or unwilling to provide adequate secondary coverage or any secondary coverage at all. The ITC will then consider whether to give its consent to exclusive live coverage and the same or similar criteria as set out in paragraphs 11-15 will apply.

### **Circumstances in which sanctions might not be imposed**

18. Section 104 also requires the ITC to give guidance on the matters which it will take into account in deciding whether it is unreasonable to expect a television program provider to comply with the restrictions on broadcasting live coverage of listed events and therefore whether sanctions should be imposed if the restrictions are not observed. Given the long lead times which are generally available for offering, selling and acquiring the rights, the ITC believes that there are very few circumstances in which it would be reasonable for a broadcaster to proceed with exclusive coverage without the ITC's consent. A broadcaster who proceeds to broadcast a listed event live without the ITC's consent and where this is not in compliance with Section 101(1) will need to convince the ITC that the period between the rights becoming available and the event taking place was too short for this consent to be obtained or that he believed he had complied but that belief was based on false information. In the latter situation, however, the ITC will need to be convinced that the broadcaster had taken all reasonable steps to satisfy himself that another broadcaster had acquired the rights.

### **Procedures for seeking consent**

19. A request for the ITC's consent for exclusive live coverage of a listed event must be made in writing to the ITC's Secretary and be accompanied by full reasons and justification for the request and all relevant supporting information. Requests should be made well in advance (wherever possible, no less than three months) of the event taking place to give the ITC sufficient time to consider whether consent should be given. As a first step in considering the request the ITC will normally issue a public notice inviting any broadcasters in the other category from the one to which the applicant belongs, or rights holders and other interested parties to comment on the request. Depending on the response and on the ITC's own investigations into the matter, the applicant may be asked to supply additional information in writing and/or to attend a meeting with ITC staff.
20. The ITC will respond as quickly as possible to any request. The ITC will publish its decisions and its reasons, but, in doing so, will have regard to the legitimate interest of the parties in the protection of confidentiality.

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# APPENDIX 2

## LISTED SPORTING EVENTS IN THE UK COVERED BY THE CODE

### GROUP A

- The Olympic Games
- The FIFA World Cup Finals Tournament
- The FA Cup Final
- The Scottish FA Cup Final (in Scotland)
- The Grand National
- The Derby
- The Wimbledon Tennis Finals
- The European Football Championship Finals Tournament
- The Rugby League Challenge Cup Final
- The Rugby World Cup Final

### GROUP B

- Cricket Test Matches played in England
- Non-Finals play in the Wimbledon Tournament
- All Other Matches in the Rugby World Cup Finals Tournament
- Five Nations Rugby Tournament Matches Involving Home Countries
- The Commonwealth Games
- The World Athletics Championship
- The Cricket World Cup – the Final, Semi-finals and Matches Involving Home Nations' Teams
- The Ryder Cup
- The Open Golf Championship