

Productivity Commission  
Broadcasting Inquiry

**SUPPLEMENTARY SUBMISSION BY WATTLE PARK PARTNERS TO  
THE PRODUCTIVITY COMMISSION INQUIRY INTO BROADCASTING**

**CONSUMER ACCESS TO SPORTS PROGRAMS**

1. This supplementary submission responds to the Productivity Commission's draft Report on Broadcasting released for public comment on 22 October 1999. It deals solely with the issue of consumer access to sports programs where the Commission said at section 9.6 of its Report :

Noting the Parliament's objective is to ensure major sporting events are available on free to air television, the Commission is inclined to recommend that neither free to air nor subscription broadcasters be permitted to negotiate contracts that exclude the other form of broadcasting. The Commission would welcome further discussion on this issue at the draft report hearings.<sup>1</sup>

2. Wattle Park Partners did not comment on the so-called "siphoning" provisions at s.115 of *Broadcasting Services Act 1992* (BSAct) in its original Submission. This Submission is considered necessary to provide the Commission with relevant background to the formulation of the rules and to correct some of the impressions created by submissions from other parties.

---

<sup>1</sup> Productivity Commission "Broadcasting - Draft Report", 22 October 1999.

3. This Submission argues that there are demonstrated social and cultural justifications for retention of some form of siphoning list. Some events are of such significance in everyday Australian life as to be public goods that must remain available free of charge on access and equity grounds. However the Submission notes that the list as currently compiled is excessive and should be reviewed with a view to reduction of its scope to include only those events of "national importance and cultural significance". It proposes general criteria to establish whether or not an event should be listed. It also proposes pro-competitive provisions to prevent manipulation of broadcasting rights between free to air and Pay TV and options to improve consumer access.

#### **BACKGROUND TO THE SIPHONING RULES**

4. The managing director of Wattle Park Partners, Chris North, was the senior broadcasting adviser (as Principal Adviser, Broadcasting Policy and as First Assistant Secretary, Broadcasting Policy Division) at the time of incorporation of s.115 that deals with "siphoning" into the BSAAct in 1992 and subsequently when the "anti-siphoning" list was promulgated in 1994. WPP is therefore well placed to comment on the origins of the provisions and their appropriateness then and now.

5. The siphoning provisions were always intended to give effect to social and cultural policies, not economic policies. The cultural policy objective sought to foster an Australian sense of place and identity by ensuring continued access for all Australians to cultural icons that they valued most highly. The social equity objective sought to ensure that those that had traditionally enjoyed listed events free of charge would continue to do so and that those least able to afford them would continue to have access.

6. Section 115 therefore had its genesis in a genuine commitment by key politicians to preserve the principle that sporting and other events "... of national importance and cultural significance ..." <sup>2</sup> should be available to the public free of charge. There was strong support for this principle from a wide cross-section of the Caucus of the Labor Party and the Opposition parties at the time. The debate was led in Cabinet by two key economic Ministers, the former Communications Minister, Michael Duffy, and the Industry Minister John Button.

7. Duffy and Button, avid Essendon and Geelong supporters, were particularly concerned to ensure that their beloved sport, Aussie Rules, did not suffer the fate of many sports overseas. Ministers cited many examples in baseball, basketball, boxing and NFL in the USA where key matches were siphoned off to subscription services to generate excess economic rents at the expense of the general viewing public. In the UK in particular they were most concerned that News Corp under the guidance of BSkyB's CEO, Sam Chisholm, had recently established a breakaway "Premier League" soccer competition in order to drive up subscriptions for its satellite Pay TV service (BSkyB). The outcome was that soccer supporters were forced to either abandon or change the nature of their sporting allegiances and to pay much higher prices for access to their sport. Fragmentation of the sport destroyed the traditional soccer league in the UK. The supporters and society generally continue to suffer through dislocation, loss and cost.

---

<sup>2</sup> The words used in the initial *Explanatory Memorandum* to the *Broadcasting Services Bill 1992* at p.63 and to the *Broadcasting Services (Subscription Television Broadcasting) Amendment Bill 1992* at p.10

8. A similar outcome has occurred more recently in Australia with the creation by News Corp of the Super League that resulted in the demise of the traditional game of rugby league and the disenfranchisement and alienation of its supporters. Australian cultural icons including local and regional clubs with long standing traditions have been destroyed. Their role in providing social cohesion and a sense of local identity has been irrevocably lost. There is now almost no live coverage of rugby league on free to air television. Delayed and edited telecasts are used with most live games only available on the Fox Sports Pay TV channels. In each case the change has caused significant social dislocation for the financial benefit of a few, the longer term effects of which are still unclear. The concerns of Duffy and Button were justified.

9. The advice to the Government from the Department at the time was that there was merit in some form of limited list of protected events that met the test of being of "... national importance and cultural significance ...". After extensive consultation with community organisations and sporting bodies the list that was put forward with widespread support comprised :

- Summer Olympic Games
- Commonwealth Games
- Australian Cricket Test Matches and One day Cricket International games
- Melbourne Cup
- Australian Football League competition matches
- Australian Open Tennis
- Rugby League competition matches.

This core group of sporting fixtures has been common to every suggested list of protected events that has been promulgated by any regulatory or other body, underscoring their importance to Australian social and cultural life.

10. The Australian Broadcasting Authority in its 1994 Report to the Minister on its Pay TV "Siphoning" Investigation accepted after extensive investigation the need for some form of siphoning list to ensure in the public interest that important events remained available free to consumers, primarily on access and equity grounds. It put forward three options for consideration by the Minister:

- a long list as advocated by the broadcasters
- a short list that included the most popular sports to Australians as evidenced by their popularity, and
- a "compromise" list that was designed to "... meet the competitive objects of the Act and achieve(s) the access principles advocated for it ..."<sup>3</sup>

Every Option put forward by the ABA included the key events identified by the Department as requiring protection. The compromise list at Option 3 in the ABA Report added elements of soccer, basketball, netball, tennis, golf and motor sport where Australian teams or individuals were participants.

11. Unfortunately the list that was finally promulgated in April 1994 was unnecessarily excessive<sup>4</sup>. It was regarded in Government circles as an over-reaction to intensive lobbying by one or two vested interests at the time. Its extreme nature was always going to risk calling the provisions into disrepute, thereby jeopardising the legitimate public interest protections underlying the initial recommendations. A more circumspect, considered and appropriate list that met the legislative objectives would have better stood the test of time and not attracted criticism.

---

<sup>3</sup> Australian Broadcasting Authority "Pay TV Siphoning Investigation - Report to the Minister for Communications and the Arts", 13 May 1994

<sup>4</sup> Copy of the 1994 list that remains current is at [Attachment A](#).

12. It is ironic that some sporting bodies that previously advocated protection of their sport for those same idealistic, social and cultural reasons postulated by the Government now seek to remove the rules that were designed to protect the interests of their supporters. It is important to establish whether the motives of those seeking removal of the siphoning provisions are driven by altruism or the profits available from monopoly rents.

### **THE NATURE OF SPORTING RIGHTS**

13. It is not surprising that Pay TV interests and some associated sporting bodies are advocating the abolition of the siphoning list or revised arrangements where free to air broadcasters could not purchase exclusive or pay rights. This is a predictable position given their commercial interests. Indeed Rupert Murdoch has described sporting rights as being the "battering ram" of Pay TV services around the globe<sup>5</sup>.

14. Exclusivity of sporting or any other broadcasting rights is fundamental to their value and to competition in the broadcasting industry. Without exclusivity there would be no product differentiation between the commercial television services. All would gravitate towards a comfortable middle ground that risks limiting consumer choice and eroding quality.

15. In the case of the Olympic Games, for example, the granting of exclusive broadcasting rights has become the principal source of revenue for the International Olympic movement. The IOC regards the revenue derived from the granting of those rights as fundamental to the ongoing viability of the Olympics. In the case of the Sydney 2000 Olympics for example, SOCOG will produce 60% of its budget revenues from the value of rights and sponsorships.

---

<sup>5</sup> Campbell Cowie and Mark Williams "The Economics of Broadcasting Rights" (1997) 21 *Telecommunications Policy* 619 at 620

16. In addition to exclusivity, live sporting rights are particularly important to broadcasters because they are time critical. Cowie and Williams describe this aspect well:

“Although sport and movies are very important to pay TV, in this paper we focus on sport because market power issues appear more serious. In particular, a movie is a durable good which can be viewed in a number of ‘windows’, where the price of the following window constrains the price of the preceding window, and where recycled ‘archive’ movies compete with current offerings. By contrast, sport is an instantly perishable good, where the competition at any particular time (eg, Sunday 2.00pm) comprises only those other sporting events played live at that time which are regarded as a reasonable substitute by the consumer. Thus, although movies are also key inputs to pay TV, the perishability of live sport as compared to the durability of movies suggests that market power considerations may be greater in sporting markets.”<sup>6</sup>

17. Particular sporting codes are not substitutable commodities for most consumers. This is particularly the case in relation to the renowned devotion of AFL supporters. If an AFL game is not available to an AFL supporter on television it is unlikely that he/she will sit down to watch a game of rugby league or rugby union as an alternative. Hence, if these sporting telecasts (that have been quantified as of most importance to the greatest number of viewing Australians) are not available on free to air television, consumers will have no choice but to purchase a “bundled” package of Pay TV services. These will cost a connection fee of \$200 and in excess of \$60 per month, with possibly a further \$10-15 per month if the games are included on the Fox Sports 2 premium channel as is the case for many rugby league games. If consumers do not pay or cannot afford to pay these large (even excessive) amounts they will be deprived of access to their sporting code.

---

<sup>6</sup> Cowie and Williams, 620.

### AFL BROADCASTING RIGHTS

18. The AFL implies in its submission to the Commission that it has been disadvantaged by the siphoning rules. Even a cursory examination of its market position demonstrates that the reverse is the case.

19. The Australian Football League is more highly paid and more widely available than any other sporting code in Australia. It is an extremely profitable big business. Some of the most powerful and influential people in Australian business and politics seek public office within its administration.

20. The AFL acknowledges in its submission that broadcasting rights provide its largest source of revenue. The AFL is currently paid \$35 million per annum for the rights to broadcast its events. Whereas the Australian Rugby Union only receives \$8 million and the prime tennis (Australian Open, NSW Open and the Colonial Classic only \$4 million (see table at Attachment A) . The broadcasting rights to the biggest event in Australian sporting history, the Sydney 2000 Olympic Games, realised only \$70 million for the exclusive and live broadcasting rights.

21. The AFL receives more extensive coverage in total than any other code across Australia. Out of a total of 202 AFL games, comprising 15 pre-season Ansett Cup and 187 Premiership competition games, coverage for the 1999 season by the 5 mainland capital city free to air broadcasters was as follows<sup>7</sup>:

Live Broadcasts	805
Turnaround Broadcasts	144
Replay Broadcasts	305
Total	1254

<sup>7</sup> Each live broadcast in each capital city counts as one broadcast, so a game broadcast in each of five capital cities counts as five broadcasts.



In Darwin and other regional centres, coverage for the 1999 season by free to air broadcasters was as follows:

Live Broadcasts	470
Turnaround Broadcasts	165
Replay Broadcasts	303
Total	938

These figures do not include extensive coverage through pay television and other AFL related television programs sporting.

22. By contrast, of the 220 rugby league games played in the 1999 season only 52 games were broadcast free to air across Australia with the remaining games shared 50:50 between pay television operators Optus and Foxtel. All games broadcast free to air are replays except for some of the finals which are broadcast live.

23. Rugby union also receives less extensive coverage than AFL. Out of the 25 games for which rights have been obtained in 1999, the following broadcasts were made.

Live Broadcasts	26
Turnaround Broadcasts	1
Replay Broadcasts	65
Total	92

24. A recent national survey of Australians' sporting interests by Brian Sweeney and Associates identified the AFL as the winter sport. It has treble the audience of rugby league and outdraws summer cricket as a spectator sport. The AFL is a form of entertainment, relaxation and emotional outlet has no substitute for its supporters. Its administrators should not therefore be permitted to extract monopoly rents from its loyal followers by selling the most attractive rights to Pay TV operators at the expense of free to air coverage. The AFL governing body is already receiving double the fees of any other sport in Australia for its broadcast rights. It is not unreasonable to surmise that the push to remove the AFL from the anti-siphoning list is motivated by a desire to further maximise revenues by forcing its supporters to pay to watch their chosen sport.

25. It is misleading for the AFL to imply in its submission that it played a major role in the \$1.4 billion invested in stadia infrastructure in mainland capital cities. Indeed financial contributions by the AFL to the largest investments in that total, Stadium Australia in Sydney at a cost of \$625 million and Colonial Stadium in Melbourne at a cost of \$460 million, were negligible. The principal purpose of each stadium was by no means first and foremost to provide a venue for the AFL.

26. Similarly the picture painted by the AFL of its role in the community is no rosier than other sporting bodies or broadcasters, many of whom make a much larger contribution of time, effort and funds to support worthy causes. It is also in their commercial interest to be good corporate citizens.

### ACCESS ISSUES

27. It is also important to recognise that the regulatory intent of the anti-siphoning list can be subverted. A major conflict may arise when a Pay TV operator is in partnership with a free to air broadcaster. In that circumstance the parties can act in concert to ensure exclusive acquisition of both free to air and Pay TV rights. If they have a significant web presence they can also secure the Internet rights.

28. This outcome is more likely and more anti-competitive when those parties also control access to the carriage services necessary to deliver the Pay TV and Internet services such as the Hybrid Fibre Coaxial (HFC) cable networks or the satellite Pay TV platforms. In this circumstance those parties exert enormous market power and are likely to dominate the market as they are the only ones that can guarantee to a sporting rights holder that their sport will receive maximum exposure in free, pay and Internet mediums as well as enjoy the benefits of cross promotion on each<sup>8</sup>.

29. This circumstance also creates a significant barrier to entry as, should a third party acquire the Pay TV rights, its "gatekeeper" competitors could deny market access, thereby destroying the commercial value of those rights.

---

<sup>8</sup> The initial Submission to the Productivity Commission by Wattle Park Partners and a supplementary Submission dealing with the converging multimedia and communications market provide more detail on this aspect.

30. Regarding improved access to existing services, the introduction of digital terrestrial television (DTV) and the provisions relating to enhanced services present an opportunity for consumers to be given better and more extensive coverage of identified events of national importance and cultural significance by free to air broadcasters. Digital television will enable broadcasters to provide up to four channels of programming in Standard Definition (SDTV) format. Where a broadcaster holds exclusive rights to a listed event that may have multiple broadcasting opportunities (e.g. several games of rugby league on a Sunday afternoon) a requirement could be imposed that more than one game is broadcast simultaneously if the game is not to be televised in high definition (HDTV) format. This would enhance the core service and provide consumers with a better amenity than is available to them under the analogue system where there is insufficient spectrum capacity to broadcast more than a single game.

### CONCLUSIONS

31. The social and cultural policy objectives that gave rise to the anti-siphoning provisions at s.115 of the BSAAct still pertain. The provisions ensure that events of national importance and cultural significance continue to make a positive contribution to the nation's cultural and social fabric by remaining universally available to Australians free of charge. The Parliament has not wavered from those principles since the legislation was enacted.

32. Subsequent market activity has demonstrated the importance of the anti-siphoning list to protect a public interest. Removal of the legislative safeguards would, in some instances, result in many Australians being forced to pay for access to broadcasts of their favoured sporting and other events that can be a significant aspect of their daily lives and personal identity. Other less fortunate Australians would be denied access altogether because of their inability to pay.

33. The provisions should, therefore, remain in place. However some adjustments to events included on the list should be considered.

34. As discussed earlier, the core sports that have been included on every list developed to date are :

- Olympic Games
- Commonwealth Games
- Australian Cricket Test Matches and One day Cricket International games
- Melbourne Cup
- Australian Football League competition matches
- Australian Open Tennis
- Rugby League competition matches.

This is because it can be clearly established that these events are of major social and cultural significance in the daily lives of many Australians. There are several events on the Notice No.1 of 1994 that do not meet this fundamental criterion.

#### ***Recommendation 1***

It is recommended that the anti siphoning list established by *Broadcasting Services (events) Notice No.1 of 1994* be retained but reviewed against a set of quantitative criteria and adjusted accordingly by removal of those that do not meet those criteria. The criteria should include :

- a history of coverage by a free to air broadcaster
- a reasonable threshold level of participation by Australians (possibly derived from ratings)
- an articulated Australian cultural or social role for the event
- demonstrated national importance or cultural significance.

***Recommendation 2***

It is recommended that pro-competitive provisions be established that address the circumstance where a free to air broadcaster and a pay TV operator enter into co-operative arrangements to acquire and manipulate free to air and Pay TV rights. This is particularly important where those same parties also control gateway access to Pay TV infrastructure.

***Recommendation 3***

It is recommended that, with the introduction of digital terrestrial television, where a broadcaster holds exclusive rights to a listed event that has simultaneous multiple broadcasting opportunities (e.g. several games of rugby league on a Sunday afternoon) a requirement be imposed that more than one game is broadcast simultaneously when the broadcaster is operating in SDTV mode.

***Recommendation 4***

It is recommended that provisions for exclusivity of both free to air and Pay TV rights be retained. Exclusivity of program material is the cornerstone on which competition between broadcasters is built. Removal of exclusivity, particularly for live coverage, would dramatically reduce the value of sporting rights, undermine the economics of major Australian sports and threaten their commercial viability.

26 January 2000

## ATTACHMENT "A"

## Sports Broadcast Rights Comparison

Year	AFL		Rugby Union	1 Tennis	
	FTA	Pay	FTA \$ USD	FTA & Pay	
	FTA \$ AUD	Pay \$ AUD		NSW Open Colonial Classic Australian Open \$ AUD	Davis Cup Featuring Australian Team \$ AUD
1993	10,500,000	2,000,000			
1994	11,500,000	2,500,000		4,000,000	<p><b>1.1 Home Ties</b></p> <p>First Round 76,865 Second Round 115,297 Semi Final 153,731 Final 307,461</p> <p><b>1.2 Away Ties</b></p> <p>Exclusivity Fee 37,075 First Round/ Play Off 37,075 Second Round 37,075 Semi Final 37,075 Final 37,075</p>
1995	13,100,000	3,000,000		4,000,000	
1996	13,500,000	3,250,000	4,000,000	4,000,000 + CPI	
1997	14,000,000	4,500,000	5,000,000	4,000,000 + CPI	
1998	14,500,000	6,000,000	6,000,000	4,000,000 + CPI	
1999	23,000,000	11,000,000	6,000,000	4,000,000 + CPI	
2000	21,000,500	12,000,000	7,000,000		
2001	20,000,000	13,000,000			