



SUBMISSION TO TELECOMMUNICATIONS INQUIRY

PRODUCTIVITY COMMISSION

**REVIEW OF TELECOMMUNICATIONS SPECIFIC
COMPETITION REGULATION**

By e-mail - telco@pc.gov.au

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Introduction

We understand that the Productivity Commission has been asked to consider, as part of its current inquiry into Telecommunications Specific Competition Regulation, the implications of current pay TV programming arrangements for the development of telecommunications competition in regional Australia. We also understand the Productivity Commission has been asked to consider whether any additional regulatory measures are needed to facilitate access to pay television programming. As requested by you, we set out below our views on these matters.

Overview of Fox Sports

Fox Sports is a 50:50 joint venture between News Limited and PBL Pay TV Pty Limited, a subsidiary of Publishing and Broadcasting Limited.

Fox Sports' business involves the purchase of subscription television rights to sports programming, the production of television coverage of various sporting events and the integration and compilation of sporting programs into channel form. Fox Sports licenses its *FOX SPORTS* and *FOX SPORTS TWO* channels to Foxtel and Austar and licenses an NRL specific channel *NRL ON OPTUS* to Optus Television. Fox Sports also provides its channels directly to various commercial premises.

Pay TV and Regional Telecommunications

Fox Sports does not agree with submissions made to the Besley Inquiry by the Australian Competition and Consumer Commission (**ACCC**) calling for a special pay TV programming access regime to be introduced in Australia.

The first and most obvious reason for this view is that regional Australia is not, as a whole, being deprived of sports programming. Almost all pay TV sports channels - C7 Sport, ESPN, Sky Racing, *FOX SPORTS* and *FOX SPORTS TWO* - are available through the major regional operator, Austar. As a result of the introduction of pay television, regional and metropolitan Australians now have much greater access to a wider variety of sports on television than ever before.

As a general proposition, Fox Sports does not share the view, which seems to underpin the ACCC's submission, that exclusive pay TV programming arrangements are anti-competitive. In our experience, there are a number of reasons why exclusive arrangements may be entered into and these reasons are not competition focused.

Exclusivity in a television programming context is often used for product differentiation. This is true around the world across pay TV and free-to-air television. Moreover, buyers and sellers of rights will bargain for exclusivity. The price paid for product will often depend on the level and form of exclusivity obtained.

In our view, the *Trade Practices Act 1974 (TPA)* already contains general competition law provisions which are more than adequate to procure and maintain competition in trade and commerce in relation to pay TV programming.

In particular, there are two sections in part IV of the TPA which address relevant competition matters raised by the ACCC as follows:

- Section 46 prohibits a company from misusing market power for the purpose of eliminating or damaging a competitor or preventing market entry or deterring or preventing competitive conduct.
- Section 47 prohibits exclusive dealing which has the purpose or effect of substantially lessening competition in a market.

To the extent that any particular exclusive arrangements are found to be anti-competitive, we believe the general competition law provisions in Part IV of the TPA adequately regulate competition in this area.

Flaws in the suggested access model

We believe the ACCC's proposed access regime does not adequately consider any of the following factors:

1. The pay TV industry is still relatively new and is not fully developed. There are a number of existing operators and other potential new entrants have recently emerged. Increased regulation may stifle growth and competition rather than fostering such progress.
2. Exclusive pay TV arrangements are not inherently anti-competitive, nor should the onus of proof be placed on the operator in relation to these arrangements. There are a number of reasons why these arrangements may be made and consistent with other competition law principles, the onus should be on the regulator to show that they substantially lessen competition. Reversing the onus of proof sets up a framework under which there is an assumption that these arrangements are anti-competitive yet no compelling analysis has been presented which indicates this is the case in the Australian pay TV industry.
3. Pay TV programming should not be treated as a generic product or commodity. Considerable expense and resources are allocated by pay TV programmers to developing, nurturing and promoting individual brands. A channel provider will consider a range of factors which may influence how a channel is distributed - these include the maintenance and enhancement of the brand, efficiency allocation and protection measures taken against the unauthorised distribution of the programming made available. These are legitimate issues, which may influence whether or not a specific program supply arrangement is entered into.
4. New services are still being introduced in regional areas and the "market" is not yet mature. In this sense, it is too early to make claims about overall regional competition issues in the context of programming arrangements.
5. A regulated access regime could substantially reduce the likelihood of continued investment decisions being made in regional areas. This is a point made by Austar in its February 2001 submission.
6. There are a number of pro-competitive effects that can follow from continuing to allow "exclusive" arrangements. In particular, the freedom to make such arrangements may allow companies to invest in infrastructure and to innovate.
7. Specific regulatory issues in Australia such as anti-siphoning.

8. The total lack of consideration by the ACCC of the extent to which free-to-air television services are available in regional areas of Australia. In the area of sports TV programming, the nature and extent of free-to-air television programming has a direct bearing on the interest in and viewership of pay TV programming.

Overseas Experience

We understand that the ACCC model is based on the access regime currently operating in the United States.

Although we have not examined cable TV competition policy in the United States closely, as a general proposition, we believe there is considerable risk in automatically applying principles from the United States to Australia. In the United States, as noted elsewhere in submissions to the Productivity Commission, cable companies developed as a series of distinct geographic monopolies. In Australia, the historical and regulatory situation is different, as are other factors such as social issues and population distribution.

Equally, the state of the market in the United States is much more advanced than Australia, where pay TV has only been operating since the mid 1990s. Cable TV has been available in the United States since the 1950s.

Finally, we note that in the European Community, as recognised by the ACCC, the exclusive right to telecast a sports event is considered natural and in itself does not infringe competition law principles.

Other Issues

The proposed access regime would also be detrimental to pay TV consumers because it could impact on the way in which entities such as Fox Sports purchase and compile sports programs. If an access regime was introduced, one of the results would be to eliminate any "premium" paid by operators for so-called "exclusivity". In turn, this could result in pay TV sports channels being severely limited in or blocked out of the rights market by free-to-air television networks because they would not be able to compete for program rights. This would then inevitably reduce the quality and breadth of sports programming which is currently available to regional consumers. This would be a disastrous result for regional Australia.

As outlined below, any consideration of television related competition issues in Australia also needs to take account of the anti-siphoning regime. Unlike markets identified by the ACCC such as the United Kingdom and the United States, pay TV operators and programmers such as Fox Sports in Australia operate under a distinct competitive disadvantage because of the way in which the anti-siphoning regime works. The anti-competitive nature of this scheme has been recognised both by the ACCC and the Productivity Commission during the recent Broadcasting Inquiry.

Anti-Siphoning

Fox Sports has consistently argued that the anti-siphoning rules protect the Australian free-to-air television networks at the expense of fair competition. We believe it is equally the case that reform of the rules would in certain circumstances assist the development

of other services in regional Australia. In particular, we support the submission of Austar that its capacity to invest in infrastructure, research and development for future services is largely dependent on its ability to attract a critical mass of subscribers to its pay TV service. If the anti-siphoning rules were reformed, then pay TV operators would have more scope to compete with the free-to-air television networks and greater incentives to invest in metropolitan and regional areas.

We also note that whilst proclaiming that any reform of the anti-siphoning rules would result in “commercial oblivion” for the free-to-air television networks, Julie Flynn, Chief Executive of the Federation of Australian Commercial Television Stations, in her recent address to the 2nd Annual Australian Sports Summit held in Sydney, stated that:

“The economics of commercial television depends on program exclusivity.... If the same program is also available without advertising on pay, then well over 20% of the potential audience is lost”.

Without canvassing all issues relating to anti-siphoning (they are more fully covered in ASTRA's and Fox Sports' submissions to the Productivity Commission's Broadcasting Inquiry), the following specific points can be made in relation to the matters currently being considered by the Productivity Commission:

1. The anti-siphoning rules have inhibited the development of the pay TV industry. To the extent that pay TV is considered a broadband service, it follows that regional Australia is disadvantaged by the rules as they currently operate.
2. If the anti-siphoning scheme was amended both by reducing the breadth of the list and so that pay TV operators could acquire exclusive pay TV rights and free-to-air television networks could acquire exclusive FTA rights to listed events, then regional Australia would benefit because more quality programming would be available to pay TV operators. This would result in better pay TV programming, leading to a greater willingness to invest in regional areas and the development of more broadband services.
3. Despite the considerable impediments faced by pay TV, it has successfully delivered to regional Australians more sport and more events than were ever delivered by free-to-air television. Examples of this include cricket tours to the sub-continent, all AFL, NRL and Super 12 rugby union matches and much more in depth coverage of major tennis tournaments. Before pay TV, all regional Australians were not able to view these events. If an access regime was introduced, the costs of producing and delivering these programs may be prohibitive, because the “exclusivity” premium paid under existing arrangements could be eliminated. This could result in TV programming of inferior quality being available to regional and metropolitan consumers.

Other Submissions

Fox Sports notes that Cable and Wireless Optus (**CWO**) has recently made a submission to the Productivity Commission regarding the additional matters under reference. Apart from the fact that CWO's submission misreads the question posed by the Government as also extending to metropolitan competition issues rather than just being limited to regional competition issues, Fox Sports believes that CWO's submission

as it relates to Fox Sports contains a number of factual errors or inaccuracies which require clarification as set out below.

1. Firstly, CWO states that a number of sports are exclusively licensed to Fox Sports and “therefore denied to CWO” (para 2.14). In relation to those sports listed:
 - (a) we do not know the event which CWO refers to as “Formula One bikes”;
 - (b) we do not hold rights to the “Australian Indi Cart” race;
 - (c) “Snooker and pool competitions” are not particularised and it is obvious that there are many snooker and pool competitions available to more than one provider;
 - (d) we do not hold exclusive subscription TV rights to all Australian drag car racing;
 - (e) international test and one day cricket is not exclusively available to Fox Sports. Many international cricket series have been telecast by CWO over the past few years and, the up-coming Ashes series is exclusively licensed to C7 Sport which is available on CWO’s Optus Television;
 - (f) CWO states that the National Rugby League and State of Origin Rugby League are exclusively held by Fox Sports. Although this is the case for the 2001 season, CWO was offered non-exclusive rights to these matches by the NRL on the same terms as they were licensed to Fox Sports but elected not to acquire these rights. Instead, CWO elected to take a fully compiled channel from us. In addition, CWO has reserved the right to enter into a non-exclusive arrangement for 2002 and beyond for NRL rights; and
 - (g) Foxtel, and not Fox Sports, has acquired rights to the AFL.
2. CWO suggests that international tests and one-day cricket are exclusively supplied by the Nine Network to Fox Sports. In fact, approximately 2% of all cricket telecast by Fox Sports over the past six years has been licensed to us by Nine or its related entities. Most of our cricket product is sourced from international program providers. There is no output deal in place between Nine and Fox Sports.
3. In paragraph 2.21, Fox Sports, and not Foxtel, has acquired rights to the NRL.
4. In relation to paragraph 2.22, we understand that CWO has reserved its right to acquire a non-exclusive licence of the NRL rights in 2002 and beyond, directly from the NRL.
5. As a general point, in relation to a number of suggestions or statements in CWO’s submission, we disagree that the existence of exclusive programming arrangements have resulted in differences in subscriber numbers as between various pay TV operators. CWO currently is able to and does access programming including premium sports programming which are not licensed to all subscription TV operators. In addition, CWO’s submission does not focus on other factors such

as the amount of marketing that a particular operator undertakes relating to its services.

6. Notwithstanding the issues raised by CWO in paragraphs 2.2ff, it is our experience that many sports rights sellers are primarily influenced by price considerations rather than subscriber numbers when considering the Australian pay TV market. There exists a vigorous market for sports rights and some events which were previously licensed to Fox Sports, are now licensed to C7 Sport. This disproves the arguments set out by CWO in these paragraphs.
7. We do not agree with the analysis of CWO that pay television programming is non-rivalrous. As outlined elsewhere in this submission, a premium is often paid for exclusivity and would not be payable if it was to be supplied non-exclusively. Moreover, exclusivity of programming, of personalities and news stories is a classic feature of the television industry. It is nonsensical to state that the marginal cost of supply is zero without considering all the factors that impact the decision to supply that programming.
8. In paragraph 2.14, CWO states that the sports listed in the Table in that paragraph are “denied to CWO”. This is not the case. Of the 24 sports categories listed, 16 are on the anti-siphoning list and must be available on free-to-air television before they can be telecast on pay television. Of the remaining 8 categories, we are aware that 6 categories receive some form of free-to-air television coverage, meaning that at the most, there are only 2 sports listed, which are exclusive to Fox Sports in the sense that they are not available on television through other means. We also note that the list is selective and does not include the numerous sports events which are exclusively licensed to other sports channels such as ESPN or C7 Sport.



**ADDITIONAL SUBMISSION TO
TELECOMMUNICATIONS INQUIRY**

**In response to
PRODUCTIVITY COMMISSION'S DRAFT REPORT
REVIEW OF TELECOMMUNICATIONS COMPETITION
REGULATION**

By e-mail - telco@pc.gov.au

MAY 2001

In March 2001, Fox Sports prepared a submission in response to the *Issues Paper 2: Additional Matters under reference* dated 8 January 2001 published by the Productivity Commission.

Unfortunately, due to unforeseen time constraints, Fox Sports was unable to present its submission prior to the release by the Productivity Commission of its Telecommunications Regulation Draft Report (***Draft Report***).

This document attaches Fox Sports' initial submission and sets out below our additional comments in response to the Draft Report, in particular Chapter 16 which relates to Pay TV and regional telecommunications.

1. There is a glaring inaccuracy throughout the Draft Report which we assume stems from the February 2001 submission of Cable & Wireless Optus (**CWO**) - Fox Sports complies three pay TV channels - *FOX SPORTS* and *FOX SPORTS TWO* which are licensed to Foxtel and Austar and *NRL on OPTUS* which is licensed to Optus Television.
2. It has long been a feature of the television industry that program supply arrangements confer exclusive rights on particular parties. However, these are not the only factors which affect the supply by Fox Sports of its channels to pay TV operators as discuss further below.
3. We certainly do not agree that the rights to broadcast the three channels produced by Fox Sports are **heavily** influenced by the ownership links and/or exclusive supply agreements that exist between Fox Sports and the pay TV operators.
4. We also do not agree with the implicit suggestion that because there are cross-ownership interests between Fox Sports and Channel Nine, we have exclusive reciprocal programming supply arrangements. Fox Sports works with all free-to-air networks in relation to program supply and production. Table 1 sets out some of the relationships we have developed with the FTA networks over the last six years.

TABLE 1

Free-to-air network	Programming or production arrangement- sport
ABC	NBL Hopman Cup
SBS	English Premier League Scottish FA Cup English FA Cup FA Challenge Cup Toyota Cup Soccer
Channel Nine	Cricket World Cup Athletics US PGA Golf Two Australian Cricket tours of the sub-continent Swimming Tennis
Channel Seven	Super 12 Rugby Bledisloe Cup- Rugby Tri Nations Rugby 2000 Presidents Cup Golf Athletics SA Cricket
Channel Ten	World Superbikes World Series Championship of Golf World Motorcycle Championships Five Nations Rugby

5. In the Draft Report under the heading *Exclusive contracts to supply programming*, the Productivity Commission states that “some channel suppliers are wholly non-exclusive (such as the international sports channel ESPN and Channel Seven’s C7 Sport, while others may provide at least some of their content on a non-exclusive basis”. It is not entirely clear what the Productivity Commission means by this statement. We do not dispute that ESPN and C7 Sport may be offered on a non-exclusive basis to pay TV operators but we would dispute that all programming supply arrangements that those channels may enter into with the rights holders of particular sports are non-exclusive. Further, ESPN is not carried by Foxtel as suggested by Table 16.1 and we are not aware of an ESPN 2 channel operating in Australia.
6. In relation to pay TV rights for sports we believe there are some further inaccuracies in the Draft Report which require clarification.
7. Fox Sports has obtained pay TV rights to the NRL competition for the period 2001 to 2006. However, this does not mean that the NRL will be shown only on Foxtel as suggested by the Productivity Commission in the third paragraph on page 16.10 of the Draft Report. As previously stated in paragraph 1 of this submission, *NRL on Optus* as supplied by Fox Sports will be available on Optus Television for at least the 2001 season. For 2002 and beyond, CWO has reserved the right to enter into a non-exclusive arrangement for NRL rights. CWO’s claim that “there is no guaranteed future rights of supply of the NRL to Optus Television on non-discriminatory terms” is therefore an outrageous mis-characterisation of the actual position. Further, the NRL will also be available on Austar, through Fox Sports.
8. We strongly disagree with any suggestion, which could be inferred in the Draft Report, that vertical integration, extensive cross-ownership of facilities, and programming and exclusive licensing arrangements have had a significant effect on industry structure and competition in Australia. At this stage of the industry’s development we simply do not accept this proposition.
9. Whilst we agree that there may be economies of scope between telecommunications services and pay TV it is simplistic to automatically assume that content is the only key relevant factor. In particular, although we are not a pay TV operator, it is obvious to us as an industry participant that there are a number of other issues which will impact the feasibility of pay TV such as the level and scope of marketing an operator is prepared to maintain, the overall customer relationship, the extent to which free-to-air television services and other entertainment options are available in particular areas and technical issues such as transmission quality and interference.
10. We also believe that the Productivity Commission has taken a fairly general view by stating that in metropolitan pay TV markets “if one network were able to secure privileged access to content, then it may be able to make the other network unviable”. This certainly has not been the case in the sports content arena. One only needs to review the history of sports pay TV in Australia since 1996 in which year Optus Television held exclusive rights to significantly more sports than Foxtel including the AFL, rugby league, domestic cricket, athletics, swimming, Premier League as well as the ESPN service. In 1997, Optus Television held exclusive rights to the Ashes tour. Furthermore, Optus Television currently has access to premium sports programming which is not licensed to other pay TV operators. Television sports rights are continually renewable and there is currently a high degree of competition and change in this area in Australia.

11. We now turn to the curious question of whether content has been withheld and the fervent claim by CWO that it has made several unsuccessful attempts for a considerable period of time to license the Fox Sports channels for broadcast on the CWO network. We do not accept that CWO can attribute this to the fact that such content is being locked up. What CWO fails to point out is that these attempts have been unsuccessful because Fox Sports and CWO have been unable to strike a deal for the supply of these channels on commercial terms which will benefit both parties' long term strategic business interests and objectives.
12. There are several commercial considerations that a channel supplier must take into account before it agrees to supply its channels to third party customers some of which have been identified by the Productivity Commission in its Draft Report. These include the costs of channel preparation and distribution, the relative size of the customer, the price it wishes to pay and its ability to offer minimum subscriber guarantees and other transaction costs / risks such as piracy. If, after considering all these factors, it is not commercially feasible to supply a channel it cannot be said that unwillingness to do so is a result of anti-competitive behaviour. As a new industry, in a heavily regulated environment, we have to carefully consider how we can ensure we are commercially viable on a medium to long term basis. As we have stated in our initial submission, pay TV programming or channels should not be treated as a commodity – Fox Sports pays a premium for exclusive programming and it is also paid a premium for this content which differentiates its channels from those of its competitors.
13. It is also worth noting that Fox Sports regards its competitors as not only the other pay TV sports channels but also each of the free-to-air networks. For so long as we are constrained by the current anti-siphoning scheme, Fox Sports will continue to be disadvantaged relative to the free-to-air networks although we try to fiercely compete with the free-to-air networks when bargaining for rights in respect of most sports product. As we will ultimately also only be successful if people watch our channel, we also compete with other pay TV channels, other recreational pursuits and entertainment options which are available to the public.
14. We are pleased that the Productivity Commission has identified the current anti-siphoning scheme as an area of particular concern in this Inquiry. However, we do not agree that the multi-channelling restrictions placed on the commercial free-to-air networks should be seen as a quid pro quo for the anti-siphoning rules particularly as the anti-siphoning scheme was established long before the introduction of the digital broadcasting legislation and for a number of other reasons.
15. In our initial submission, we touched on our concerns with the current anti-siphoning scheme and referred the Productivity Commission to earlier submissions made by Fox Sports in relation to this issue. We have recently made our most comprehensive submission to date to the Australian Broadcasting Authority's Investigation – Review of the Anti-siphoning list – a copy of our submission is available on ABA's website at www.aba.gov.au. However, in the context of the Productivity Commission's inquiry, we must reiterate our view that the current anti-siphoning scheme restricts the ability of pay TV operators to develop and invest in new services and products. Further, we endorse the Productivity Commission's recommendation that the anti-siphoning list should be tightly restricted to events of high social or cultural significance and that neither pay TV nor free-to-air networks should be allowed to acquire rights to listed events which exclude the other form of broadcasting.
16. In conclusion, we are greatly concerned by the suggestion that content for pay TV should be regulated by the introduction of a new content access regime. We do not

accept that key sports content is controlled in an anti-competitive way which would justify such a heavy-handed approach. In the absence of any evidence, there is no policy justification for such a regime. Regulation along the lines proposed would have unintended serious consequences for entities such as Fox Sports and would adversely affect the way in which we buy rights to sports and provide our channels to more than 1.3 million consumer homes (more than 4 million consumers).

17. We agree with the Commission that it should be cautious about recommending action at this stage because no case has been made out and the industry is at a crucial stage of development. Equally, as the Commission notes, a number of other services may develop which could provide alternative revenue sources to develop to ameliorate the "problem" that the Commission has been asked to consider. Sports TV rights should not be regarded as a commodity- if they were, there would be serious adverse flow on effects for our industry, consumers and sports bodies themselves. This could have significant social and policy implications which have not been considered by the Commission in its draft Report but which would need to be addressed before such a radical course of action were introduced.