



**Australian
Broadcasting
Authority**

Investigation into the implementation of the anti-hoarding rules

Issues paper

Australian Broadcasting Authority

Sydney

June 2000

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COMMONWEALTH OF AUSTRALIA

Broadcasting Services Act 1992

AUSTRALIAN BROADCASTING AUTHORITY (INVESTIGATION)

DIRECTION (No. 1 of 2000)

I, RICHARD KENNETH ROBERT ALSTON, Minister for Communications, Information Technology and the Arts, direct the Australian Broadcasting Authority under subsection 171(1) of the *Broadcasting Services Act 1992* (the Act):

- (a) to conduct an investigation into:
 - (i) which events, or series of events, I should consider declaring under section 146C of the Act; and
 - (ii) the offer times which should apply in relation to those events or series of events; and
- (b) in conducting the investigation, to have regard to the policy that an event or series of events should not be declared under section 146C unless:
 - (i) there is a widespread public expectation, based on past practice, that the event or series will be televised live and in full on free-to-air television; or
 - (ii) the event or series has so grown in importance in the public's perception over time that it warrants full live free-to-air coverage; and
- (c) to give a copy of the report on the investigation to me by 31 August 2000.

Dated 2000

RICHARD ALSTON
Minister for Communications,
Information Technology and the Arts

SUMMARY OF INVESTIGATION

The Australian Broadcasting Authority (ABA) is inviting public comment on the implementation of the new anti-hoarding provisions of the *Broadcasting Services Act 1992*. The issues paper is part of the ABA's investigation into the implementation of the new rules covering the use of live rights on free-to-air television.

The main purpose of the new provisions is to maximise the opportunities for full and live free-to-air coverage of major sporting events, particularly sporting events, by encouraging commercial broadcasting licensees and national broadcasters to use any rights acquired by them to live television coverage of such events.

The new rules oblige free-to-air television broadcasters with live rights to designated events and tournaments but who do not intend to use all or part of them, to offer the unused rights to the ABC and SBS. The ABC and SBS must offer unused rights to each other. The 'must offer' rules provide that the minimum offer time will be 30 days before the start of the event or series, unless the Minister is satisfied that it should be closer to the start.

The Minister for Communications, Information Technology and the Arts has directed the ABA to advise him on which events or tournaments should go on a list of events to be covered by the new rules, and the offer times, which should apply. See page 1 for a copy of the direction.

The new rules will apply prospectively to live free-to-air broadcast rights to events, which are acquired by licensees (or their program supplier), or the national broadcasters, after the Minister has declared those events and series and their offer times. The Explanatory Memorandum to the legislation and the second reading speech state that the Ministerial designation power would be used only in limited circumstances.

The Minister has also directed the ABA to have regard to the policy that events should not be covered by the new rules unless there is a widespread public expectation, based on past practice, that the event or series will be televised live and in full on free-to-air television, or the event or series has so grown in importance in the public's perception over time that it warrants full live free-to-air coverage.

Accordingly, the ABA will examine the way in which live rights to major sporting events, particularly those on the anti-siphoning list, have been used in the past and public expectations about the way these events are shown on television.

This paper explains the new 'must offer' legislation, and its relationship with the anti-siphoning regime. It discusses factors influencing the use of live rights to sports events on free-to-air television and the designation of major events, which might appropriately be subject to the 'must offer' regime.

The discussion of the issues in this paper is put forward for consideration and to assist those wishing to make a submission. Consultation with interested stakeholders will inform the ABA's advice to the Minister concerning the events or series of events that might appropriately be covered by the 'must offer' regime, together with the offer times which should apply to those events.

Comment is sought on the following issues

1. What criteria should guide the designation of events or series of events, to be subject to the 'must offer' regime established under Part 10A of the Act?
2. What other factors should be considered when designating events, or series of events, to be subject to the 'must offer' regime?
3. Based on past practice, which sports events, tournaments or competitions does the public expect should be televised live and in full on free-to-air television?
4. Which of these events, series, or event in a series, should be considered for inclusion on the Minister's list of designated events?
5. How should such events be defined for purposes of declaring a designated event?
6. Are there events, or series of events, which have so grown in importance that they warrant full live coverage by free-to-air television?
7. What should be the respective offer times to apply in relation to the events or series of events identified for possible declaration by the Minister?

ABA INVESTIGATION

The ABA undertook some preliminary consultation with the free-to-air networks in April 2000 to assist in preparation of this paper. An advertisement was placed in the *Australian* newspaper of 9 June 2000, inviting submissions to the investigation.

The ABA will now consult with broadcasters, sports rights holders, and major sporting organisations. The ABA must report to the Minister by 31 August 2000.

How to participate in the investigation

ABA web site

This issues paper, and other public documents associated with the investigation will be available on the ABA's web site at <www.aba.gov.au/what/program/index.htm>. The ABA seeks to reduce unnecessary printing and postage costs, but is happy to provide printed copies of documents on request to those without Internet access.

Submissions on the issues paper

Submissions will be public documents and should be provided to the ABA in hard copy and in electronic form to facilitate their posting on the ABA web site. This will allow access for all parties unless the ABA, in its discretion, grants restricted access to the whole or part of the document. There will be an online index of submissions which are only provided in hard copy .

Restricted access

Please indicate if you do not wish to have all or part of your submission made publicly available and include reasons why the ABA should grant restricted access to thematerial.

Where to send your submission

Submissions can be sent as follows:

email

info@aba.gov.au

post

Manager Program Standards
Australian Broadcasting Authority
PO Box Q500
Queen Victoria Building NSW 1230

courier

Level 15, Darling Park
201 Sussex Street
SYDNEY NSW 2000

Closing date for submissions

Submissions must be received by the ABA's Sydney office no later than **5.00 p.m. Friday 30 June 2000**.

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PART 1 – CONTEXT FOR THE INVESTIGATION

1. Anti-siphoning rules

In recognition of the importance of sport in Australian life, sport occupies a key place in schedules of Australian television broadcasters, both free-to-air and pay TV. In the 1998-99 financial year, Australian commercial television stations spent \$183 million on Australian sports programming, the second largest category of program expenditure at 20.4 per cent, after foreign drama at 30.4 per cent.¹ In terms of hours broadcast between 6 a.m. and midnight, sport occupied 17 per cent of Seven Network's schedule, followed by 15 per cent and 12 per cent for Nine and Ten, respectively.² At the same time increasing numbers of sports fans are enjoying sports coverage provided by four dedicated sports channels on pay TV, which in 1999 had a penetration of approximately one million homes.

When pay TV (subscription television) services were first starting in Australia there was concern that there may be a possible migration of major television events from free-to-air to pay TV. Legislative provisions were introduced in the Broadcasting Services Act to ensure that certain television events are not shown exclusively on pay TV to the detriment of free-to-air viewers. The mechanism is known as the 'anti-siphoning' regime. The Explanatory Memorandum to the Bill notes that 'Program siphoning in this context means the obtaining by a subscription TV broadcasting licensee of the rights to broadcast events of national importance and cultural significance that have traditionally been televised by free-to-air broadcasters, such that those events could not be received by the public free of charge'.³

The anti-siphoning provisions contained in section 115 of the Act, empower the Minister for Communications, Information Technology and the Arts to list in a formal notice (known as the anti-siphoning list) events which should be available on free-to-air television for viewing by the general public. The anti-siphoning list covers the period up until 31 December 2004. It is restricted to international and domestic sporting events within 11 categories, although it could include non-sporting events of cultural significance or national importance. The list is summarised in the box on page 6.

There is a condition on all subscription television broadcasting licences, imposed by paragraph (10)(1)(e) of Schedule 2 of the Act, that the right to broadcast listed events can only be acquired by pay TV licensees if broadcast rights are held by commercial television licensees (who have the right to televise the event to more than 50 per cent of the Australian population) or by the ABC or SBS.

The anti-siphoning list is not a list of sporting events reserved solely for free-to-air television. It does not compel free-to-air broadcasters to acquire the rights to listed events and does not guarantee them exclusive rights to such events. However, it does give them priority over pay TV licensees for the acquisition of rights to listed events.

¹ Australian Broadcasting Authority, 2000, *Broadcasting Financial Results, 1998-99*, Sydney.

² Australian Broadcasting Authority, 1999, *Trends and Issues: Compliance – Australian Content and Children's Television 1998*, Sydney.

³ *Communications Law and Policy in Australia*. Explanatory Memorandum to the Broadcasting Services Bill 1992. 97,041.6. Butterworths, 1991.

The ABA is required to monitor and report on the operation of the anti-siphoning provisions. In order to fulfil the monitoring requirements, in 1994 the ABA implemented a general monitoring regime, by way of a 'standing investigation' into the acquisition of television rights to events covered by the notice.

The ABA is required to report if rights to events on the anti-siphoning list are not made available to free-to-air broadcasters; if the ABA considers that, over time, there has been a sustained reduction in the extent to which free-to-air broadcasters televise listed events; or if the ABA considers there are grounds for the Minister to add to or remove an event from the anti-siphoning list.

Following reports from the ABA the Minister has removed the following events from the anti-siphoning list:

Cricket

- The West Indies cricket test in March and April 1999;
- 1999 Australian cricket tours of Sri Lanka and Zimbabwe;
- The Wills International Cup played in Bangladesh in November 1998;
- 1998 Australian cricket tour of India test, test and one-day matches played in India in March and April 1998;
- 1998 Coca Cola Cricket Cup (Sharjah Trophy) played in the United Arab Emirates in April 1998;
- Australia versus New Zealand one day cricket series played in New Zealand in February 1998; and
- 1994 Australian cricket tour of Pakistan.

Rugby

- 1998, 1999 and 2000 Hong Kong Sevens Rugby Union Tournaments.

With the exception of the Hong Kong Seven's rugby union, delisted events have been of cricket played overseas in countries other than the United Kingdom and free-to-air licensees have not been interested in acquiring the rights. The events were removed from the anti-siphoning list to enable subscription broadcasting licensees to acquire the rights.

Anti-siphoning list

The anti-siphoning list covers the period up until 31 December 2004 and contains sporting events within 11 sports categories. These can be summarised as:

1. Horse racing

- each running of the Melbourne Cup.

2. Australian rules football

- each match in the Australian Football League Premiership competition.
- each match in the Finals Series of the Australian Football League Premiership competition.
- each Australian Football League State of Origin match.

3. Rugby league

- each match in the National Rugby League Premiership competition.
- each match in the National Rugby League Premiership Finals competition.
- each match in the Rugby League State of Origin Series.
- each international rugby league match involving the senior Australian representative team whether played in Australia or overseas.

4. Rugby union

- each international rugby union 'test' match involving the senior Australian representative team whether played in Australia or overseas.
- each match in the Rugby World Cup tournament.
- each match in the Hong Kong Sevens tournament for the years 2001 - 2004.

5. Cricket

- each 'test' cricket match involving the senior Australian representative team whether played in Australia or overseas.
- each one day cricket match (including World Series Cricket matches) involving the senior Australian representative team whether played in Australia or overseas.

- each World Cup one day cricket match.

6. Soccer

- each finals match in the Ericsson Cup competition organised by the National Soccer League.
- each match in the Federation of International Football Associations World Cup Tournament.
- the English Football Association Cup Final.

7. Tennis

- each match in the Australian Open.
- each match in Wimbledon.
- each match in the French Open.
- each match in the United States Open.
- each match in the Australian Men's Hardcourt Championships held in Adelaide.
- each match in the Australian Women's Hardcourt Championships held in Brisbane.
- each match in the adidas International Tennis Tournament (formerly the Peters International tennis tournament).
- each match in each tie in the Davis Cup tennis tournament when an Australian representative team is involved.

8. Netball

- each international netball match involving the senior Australian representative team whether played in Australia or overseas.

9. Basketball

- each match in the Australian National Basketball League playoffs.

10. Golf

- each round of the Australian Masters.
- each round of the Australian Open.
- each round of the United States Masters.
- each round of the United States Open.
- each round of the United States Professional Golf Association Championship.
- each round of the British Open.

11. Motor sports

- each race in the Federation Internationale de l'Automobile Formula 1 World Championship (Grand Prix).
- each race in the International Federation of Motorcycling World 500cc Motorcycle Championship.
- each race in the Australian Touring Car Championship.
- each Bathurst 1000 race.

- each race in the Australian IndyCar Grand Prix.

2. Background to the new ‘must offer’ regime

The anti-siphoning provisions deal with the acquisition of rights to events included on the anti-siphoning list, not with the television coverage of those events. The use of the rights acquired by a commercial or national television broadcaster and decisions on whether to broadcast live, delayed, highlights only or to a limited geographic area, are commercial decisions for the licensee to make.

The delisting process has been effective in addressing situations where free-to-air broadcasters are not interested in acquiring the rights to an event, but deal less effectively with the situation where a free-to-air broadcaster might decide not to televise events in a major tournament or competition to which they have acquired the rights. This decision might be made at short notice and so deprive viewers of full live coverage of the event.

A much publicised example of this occurred in 1997 when the first session of ‘The Ashes’ test being played in England was not televised by the Nine network, who chose not to displace its scheduled prime time programming. Nine offered the first session to the ABC and the SBS, but both declined the offer. On another occasion, when the cricket clashed with Wimbledon, Nine authorised the ABC to broadcast the whole of the third Ashes test while Nine continued coverage of the tennis.

The ‘anti-hoarding’ or ‘must offer’ provisions were developed in response to these circumstances, with the Explanatory Memorandum identifying cricket as an ‘area of concern’. The provisions are intended 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’.⁴ Unlike the anti-siphoning provisions, the anti-hoarding rules are concerned with the use made of live television rights to certain events, by commercial and national broadcasters.

The Explanatory Memorandum notes that the problems with free-to-air coverage do not extend to all of the items on the anti-siphoning list. As discussed below, there are many reasons for delayed coverage of a number of events on the anti-siphoning list and for broadcasters not broadcasting an event or tournament in full.

First introduced into the Senate in July 1998, the ‘must offer’ legislation was referred to the Environment, Communications, Information Technology and Arts Committee. The ABA has referred to submissions made to the Senate’s Inquiry and the committee report, to inform its current investigation.

3. ‘Must offer’ legislation

⁴ Regulatory Impact Statement, *Explanatory Memorandum*, p.10.

The *Broadcasting Services Amendment Act (No.1) 1999* took effect from 23 December 1999. It becomes a new Part 10A of the Broadcasting Services Act. The premise of the new regime is stated in the Regulation Impact Statement accompanying the Explanatory Memorandum:

that free-to-air broadcasters who have taken advantage of their privileged position under the anti-siphoning rules and acquired live rights to a designated event or events should be made to bear the responsibility of that acquisition by providing free-to-air coverage themselves or enabling another national broadcaster to televise those events.

Designated events

The Minister may make a disallowable instrument designating the events or series of events that are covered by the 'must offer' rules. In this way the Minister may declare that a specified event or series of events are *designated* events (s.146C). The term 'series of events' is included to cover tournaments and competitions like 'The Ashes' cricket tests or Wimbledon tennis. The legislation allows the Minister to declare an event which is part of a tournament or broader series of events as a designated event (s.146(3)).

As with the anti-siphoning provisions the Act does not expressly define the meaning of the word 'event' or 'events', nor does it confine the term to sporting events. However, as the provisions were implemented with the stated purpose of improving the operation of the anti-siphoning regime, the focus of the ABA's investigation is on sports events or tournaments, and chiefly those which are included on the Minister's anti-siphoning list.

Offer time

The instrument must also specify an *offer time* for the event or series (s.146C). The offer time is a time that is ascertained in accordance with the declaration. This means that the declaration may state the time itself or may state a formula for calculating that time. The time ascertained will occur before the start of the event or series. It is expected that the Minister would take into account industry practice with respect to program acquisition and scheduling when determining the offer time for particular events or series.

The offer time must occur 30 days or more before the start of the event or series unless the Minister is satisfied that the offer time should occur closer to the start of the event or series. As the offer period must be open for at least seven days, the minimum offer period must be one week before the start of the event or series.

'Must offer' rule for licensees

If a commercial television broadcasting licensee acquires a right to provide live television coverage of a designated event or series of events such as a competition or tournament, but does not intend to televise live the whole or a part of the event or series, the licensee must, before the offer time, offer to transfer the right to televise the whole or the part of the event or series, for a nominal charge, to the ABC and the SBS.

Televising the 'whole event'

A licensee is taken to have televised live the whole event or series of events, if all but an 'insubstantial proportion' is televised (s.146E(2)). For example, an 'insubstantial proportion' would be interruptions for commercial breaks, news breaks, program promotions, announcements or brief crosses to other live events. It would not include a regular news program. The ABA would regard a regular news program as a substantial proportion.

‘Must offer’ rule for program suppliers

A commercial television broadcasting licensee’s program supplier will be held to have contravened the anti-hoarding rule under certain circumstances. This happens if the supplier is entitled to confer on the licensee a right to provide live television coverage of a designated event or series, but does not before the offer time, offer to transfer the right to televise the whole or the part of the event or series, for a nominal charge, to the ABC and the SBS. The offer must remain open for acceptance for a minimum period of seven days.

There are three situations in which a person is a *program supplier* of a commercial television broadcasting licensee. These are where the person supplies or may be reasonably expected to supply a commercial television broadcasting licensee with two thirds of its sporting programs; or the person is a related body corporate of the licensee; or where the ABA declares the person to be a program supplier for the purposes of the ‘must offer’ rules (s.146D). The conditions under which program suppliers contravene the anti-hoarding rule are similar to those applying to commercial television broadcasters (s.146F).

National broadcasters

National broadcasters are bound, through obligations established in their respective legislation, to televise live free-to-air coverage of major events, particularly sporting events (s.146L). If the ABC or SBS acquires a right to provide live television coverage of a designated event or series, but does not intend to televise the whole or a part of the event or series, the national broadcaster must, before the offer time, offer to transfer the right to televise the whole or the part of the event or series, for a nominal charge, to the other national broadcaster. The offer must remain open for acceptance for a minimum period of seven days.

Offers to transfer rights

A commercial television broadcasting licensee or a program supplier is taken to have made an offer to transfer live television rights to national broadcasters only if the licensee or program supplier has offered to make an arrangement which *in substance* gives the national broadcaster the rights (s.146G and s.146H). An offer must be in writing (section 146H(2)) and must be given to the managing director of a national broadcaster (section 146H(3)) at or about the same time that a corresponding offer is given to the managing director of the other national broadcaster. The national broadcasters have similar obligations in relation to their rights (s.146M and s.146N). There is a maximum fine of \$220,000 for program suppliers who contravene the anti-hoarding rule.

‘Conditional’ offers

It is the ABA’s view that an offer which is subject to a condition, such as participation or non participation of Australians, would be excluded under the legislation. It is the nature of sport that outcomes are uncertain and decisions concerning the coverage of an event may depend on developments within a competition. For example, if an Australian team does not make it to the finals the broadcaster may decide not to televise the game live. Such an offer may not constitute an offer to make an arrangement which ‘in substance’ gives the rights to televise the event to the national broadcaster. The practical effect of the arrangement also has to be taken into account. Conditional offers would present significant difficulties for the national broadcasters in terms of planning and promoting the changed schedule.

‘Part’ of an event

An offer must be made to transfer the whole or part of a particular designated event or series of events. In considering what portion of an event might constitute an ‘offer of a part’, the practical effect of the arrangement would have to be taken into account (s.146G(2)). The ABA considers this would exclude offers of incomplete or minor portions of events, such as overruns of cricket clashing with the news. Such portions might be unpredictable in terms of the amount of play available, and would be difficult for the national broadcaster to accommodate. A part of an event should be in itself a whole or self-contained section e.g. the first session of the cricket or certain tennis matches. If a licensee intended to broadcast a designated event, so did not offer it, the broadcaster would appear to contravene the rule if it then did not broadcast all of the event due to an unforeseen overrun.

Simultaneous events in a series

The new ‘must offer’ rules provide that when there are two or more events in a designated series, which wholly or partly overlap in time, and the licensee televises live one of them, the licensee is to be taken to have televised live the other overlapping events (s.146K). This would mean, for example, if a licensee has the live rights to the Wimbledon tennis tournament, and televises the match on centre court, the licensee will be taken to have televised all the other matches taking place at the same time as the televised match. The intention of this provision is to ensure that a licensee does not contravene the licence condition concerning anti-hoarding in these circumstances.

Contracts must allow transfer of rights

Contracts entered into by licensees, program suppliers, or national broadcasters to acquire rights to televise live events must authorise the transfer of those rights otherwise the contract will be void (s.146J and s.146P). It should be noted that the ‘must offer’ rules will act prospectively, and therefore will only cover events acquired after they have been declared as designated events by the Minister. In some cases rights are already held well into the future.

Delayed televising in central and western time zone

The amendments also allow the Minister to determine, by disallowable instrument, that specified designated events are eligible for delayed televising in the Central and Western time zones. In practical terms, this will enable a broadcaster with the right to televise an event live, to delay the televising until no later than the equivalent local time had the event been televised live in Sydney (s.146CA).

Contravention of the rule by a licensee

It is a condition of the licence of a commercial television broadcaster that it does not contravene the ‘must offer’ rule (para. 7(1)(h) of Schedule 2). It is also an offence, the maximum penalty for which is \$220,000 (s.139(2)). In addition, the ABA has the power to cancel or suspend the licence if it breaches a licence condition or fails to comply with a notice (s.143).

The ABA can issue a notice directing the commercial television licensee to stop the breach (s.141).

Review of ‘must offer’ provisions

Section 146S provides for a review of the ‘must offer’ provisions within two years after their commencement.

The full ‘must offer’ amendments to the Act are available on the Internet at:

<http://scaleplus.law.gov.au/html/pasteact/0/136/top.htm>

4. Developments with digital television

The *Broadcasting Services Amendment (Digital Television and Datacasting) Bill 2000* was introduced into the Senate on 10 May 2000. It was subsequently referred to the Environment, Communications Information Technology and the Arts Legislation Committee for reporting by 8 June 2000. If introduced in its present form the legislation has implications for the broadcasting of sports programming by free-to-air television networks.

Several amendments, that expand a list of exceptions to the simulcast rule, will allow the use of multi-channelling and digital program-enhancement content. The Bill provides that the use of multi-channelling transmission capacity will be allowed in very limited circumstances. When a designated event (to be distinguished from a ‘must offer’ designated event), which is broadcast live, extends beyond the scheduled finishing time into another scheduled program, the broadcaster may multi-channel the live broadcast and the other program, provided that:

- the delayed finish to the designated event is beyond either the broadcaster’s control, or the control of any person who directly or indirectly supplied the program to the broadcaster (for example, when extra time is added to a day’s play in a test cricket match to make up for rain delays); and
- the other program was scheduled by the broadcaster at least one week before the start of the designated event.

A *designated event* is either a sporting event or an event declared by the ABA by disallowable instrument.⁵ It is intended that this power would be available to be used for important public events, such as live coverage of Centenary of Federation celebrations, as well as sporting events.

New subclauses 6(15)-(19) introduce so-called ‘category B digital program-enhancement content’ which refers to simultaneous live transmission of two overlapping sporting events in the same sport at a particular venue. This category would allow simultaneous live transmission of, for example, two tennis matches in a tournament on different courts in the same centre or complex. But it would not allow simultaneous live transmission of two rugby league matches at different grounds, or swimming and gymnastics at the Olympic Games, even if both occur in adjacent buildings in the same complex, since it would not satisfy the same sport requirement. The transmission of the second sporting event must be live, and simultaneous with the live transmission of the first sporting event.⁶ The ABA will be given the power to determine by

⁵ *Broadcasting Services Amendment (Digital Television and Datacasting) Bill 2000, Explanatory Memorandum*, Item 91 New paragraphs 6(8)(c), (d) and (e) of Schedule 4 Digital program-enhancement content, multi-channelling and electronic program guides.

⁶ *Broadcasting Services Amendment (Digital Television and Datacasting) Bill 2000, Explanatory Memorandum*, new subclauses 6(15)-(19).

disallowable instrument whether two or more specified sporting events involve the same sport or not.

Both the ABA program-enhancement ‘same sport’ declarations and the multi-channel *designated event* declarations are separate, and distinct from, the Ministerial power to declare designated events or series of events under the ‘must offer’ rules.

The ABA notes that the proposed provisions which allow limited multi-channelling will address one of the difficulties associated with the televising of sports events. Coverage of sport such as cricket may be curtailed or interrupted to allow for the televising of scheduled programs such as news bulletins. Subject to the rate of take-up of digital television reception devices the proposed amendment should complement the operation of the ‘must offer’ rules, during the simulcast period for digital television transmission.

The simulcast exception program enhancement provision illustrates the potential of digital television to increase the viewers’ involvement in and enjoyment of televised sport, for example with detailed tournament information. Sports fans are increasingly accessing this sort of information on the Internet and digital television and datacasting will expand these opportunities.

PART 2 – ISSUES FOR THE INVESTIGATION

5. Criteria for designating an event or series of events to be subject to the ‘must offer’ regime

A threshold issue for the ABA’s investigation is the consideration of criteria for the declaration of events under section 146. These criteria will guide the ABA in identifying events which might appropriately be subject to the ‘must offer’ regime, and for providing options for the Minister’s consideration.

Relevant factors are articulated in the policy contained in the Explanatory Memorandum and set out in the Minister’s direction to the ABA.

[A]n event or series of events should not be declared under section 146C unless

- (a) there is a widespread public expectation, based on past practice, that the event or series will be televised live and in full on free-to-air television; or
- (b) the event or series has so grown in importance in the public’s perception over time that it warrants full live free-to-air coverage.

Widespread public expectation

Public expectation concerning coverage of various events or tournaments involves a number of elements – the community interest in the event or series, and levels of viewing of the event or series in the past. As interest in sport exhibits regional variations, so will public expectations of television coverage. A number of provisions in the legislation recognise that broadcasting practice and audience demand may operate differently in different parts of Australia. Should ‘widespread’ public expectation in relation to sports coverage thus be gauged at the state level? Or should

‘widespread’ expectation be interpreted on a national level, so that only events which audiences Australia-wide view as important are considered for the ‘must offer’ regime?

There are various measures of community attitudes to television sports, including surveys and ratings data. A recent national survey of the sports people watch on television, conducted for the Productivity Commission’s Broadcasting Inquiry, found the top five sports watched on television were cricket (watched by 48 per cent of those polled), Australian Rules Football (45 per cent), tennis (38 per cent), motor car racing and rugby league (both 33 per cent), and soccer and swimming (both 32 per cent).⁷ In 1999, the top five sports to watch for heavy television viewers, as measured by A C Nielsen, were Australian Rules (43 per cent), cricket (40 per cent), swimming (38 per cent), tennis (37 per cent) and rugby league (35 per cent).⁸ While all these sports might be judged to be of interest nationally, expectations of television coverage might differ depending on television scheduling and patterns of viewing around the country. This is well illustrated in the case of major domestic football tournaments which generate high interest as television events, but the various codes have distinct regional followings.

Participation by Australians in an international event or tournament will increase the importance of an event to viewers. An international cricket series involving the home team will usually be greater interest than one between two foreign teams. Interest can vary, however, depending on the origin of the opposing team. For example, ‘The Ashes’ cricket test played against the British team is traditionally more important than a test played in other regions of the world, and expectations of free-to-air television coverage are higher. Some international tournaments such as Wimbledon and the FIFA Soccer World Cup attract large audiences regardless of Australian participation, as global sports events.

Past practice

To a large extent public expectation of television sports coverage will be moulded by past viewing experiences. This is recognised in the policy statement, which refers to ‘widespread public expectation, based on past practice’. It is also reasonable from a public policy viewpoint that the requirement to offer rights to a major event for a nominal charge to another broadcaster should be imposed only when the alternative would be a loss of access by general audiences to previously available full live free-to-air coverage.

In the case of events which are growing in importance it is more difficult to judge whether there is an expectation of full live free-to-air coverage and the extent of the demand. In these circumstances other measures may be needed in addition to data about past television coverage and ratings achieved.

Relationship with anti-siphoning list

It could be argued that only events already on the anti-siphoning list should be considered for declaration under section 146C. Events on the anti-siphoning list have been identified by the Minister as warranting priority in terms of acquisition of rights to ensure their continued access to general viewing audiences. Being subject to the ‘must offer’ regime increases the possibility of live coverage of all of the event on free-to-air television.

⁷ *The Sweeney Sports Report 1999*, Productivity Commission 2000, *Broadcasting*, Report no. 11, AusInfo, Canberra.

⁸ A C Nielsen, *Trends in TV 2000*, p.13

It is unlikely that all events on the anti-siphoning list would be considered for the anti-hoarding list, some of which capture fairly broad categories of sports. Furthermore, it is accepted practice that some events and competitions on the list are not televised live and in full.

The ‘must offer’ rules can only operate if a free-to-air broadcaster has the live rights to a designated event. There is less certainty if the event is not on the anti-siphoning list. Whether sports events not on the anti-siphoning list should be excluded from consideration for the ‘must offer’ rules is an issue for the investigation. It may be that an unlisted event has grown in importance in the public perception so that it now warrants consideration for full live coverage on free-to-air television. Such an event should be considered in the ABA’s investigation.

The ABA notes that it has not been asked to report on the operation of the anti-siphoning list in this investigation.

Issue:

What criteria should guide the designation of events or series of events, to be subject to the ‘must offer’ regime established under Part 10A of the Broadcasting Services Act?

6. Other factors relevant to designating events under section 146C

There are a number of additional issues which may influence the implementation of the ‘must offer’ rules. Consideration of these issues will assist the ABA to identify those events which should appropriately be covered by the new requirements.

Timing and duration of events and competitions

The negotiation of rights for international events will often occur a number of years in advance, when the exact date and timing of the events may be uncertain. This may later cause difficulties if there is a clash with another event or other popular programming. In the case of a designated event, such clashes are likely to become apparent in sufficient time to comply with the ‘must offer’ requirement.

Other decisions concerning the scheduling of a sports event or tournament might be made much closer to the start of play, or during play, for example, depending on whether the match involves an Australian or play is decisive to the outcome of the event, or there has been an over run due to rain. In many instances last minute changes to sports coverage is in the viewers’ interest. Designating an event on the anti-hoarding list will limit the flexibility to curtail or interrupt coverage, as offers to designated events must be made no less than 30 days before the commencement of the event. A designated offer time of seven days would not address this issue in most cases.

Acceptance by national broadcasters of offers of events

The effective operation of the ‘must offer’ regime will depend on the ability of the ABC and SBS to accept transfers of rights to full and live coverage. Whether or not the national broadcasters,

especially the ABC, accept the offer of rights will be strongly influenced by scheduling considerations and perceived viewer reaction to changes to established program schedules. The profile of the sport, the part of the event being offered and the time available for rescheduling of programs will be relevant.

There may be practical difficulties associated with the acceptance by the national broadcasters of rights offers for certain events. These include the transmission costs associated with covering the event, and transmitting the signal especially if the event is played overseas. The prominence of advertising or sponsorship associated with an event or tournament may conflict with the ABC's editorial policies limiting references to commercial products. Both national broadcasters may be constrained from broadcasting a designated event or portion of an event if the use of the rights carries contractual commitments concerning sponsorship references or certain levels of advertising. Whether such factors can inform considerations about which events should be covered by the 'must offer' rules is unclear. It may be that they are some of a range of factors, which the national broadcasters consider if and when a designated event or part of an event is offered to them.

Issue:

What other factors should be considered when designating events, or series of events, to be subject to the 'must offer' regime?

7. Use of live rights on free-to-air television

In line with the policy set out in the Minister's direction, a primary aim of the ABA's investigation is to identify major sports events which the public expects to be able to watch live and in full on commercial television or the national broadcasters.

Within a broad appeal programming schedule there is a limited capacity to accommodate every match or round of every event of some sports categories to which free-to-air broadcasters have live rights. Given the commercial investment involved in the acquisition of live rights by free-to-air broadcasters, sports rights are generally utilised and events are screened. This does not mean that in all cases the coverage is live and in full. Complex arrangements for the coverage of major sports have developed over the years, and many of the events and tournaments captured by the anti-siphoning list receive delayed and highlight coverage. Pay TV provides extensive coverage of many of these events, which complements that of free-to-air broadcasters.

The following summary is provided to assist submitters in their consideration of the issues and in identifying events which might appropriately be subject to a 'must offer' rule.

The Melbourne Cup: is traditionally an important annual television event, televised live because of its national significance.

Football: Scheduling of these matches varies between States depending on the popularity of the code, the competing teams, restrictions because of the protection of gate for live matches, time zone delays and other scheduling considerations. Pay TV provides access to a wider coverage of football competitions.

AFL fans are accustomed to seeing one to three matches per week of the qualifying rounds of domestic football competitions on free-to-air television (Seven network currently). The finals rounds and grand finals are covered live and in full in States which follow AFL: Victoria, New South Wales, South Australia and Western Australia.

The NRL competition has its largest following in New South Wales and Queensland, with two or three matches being televised each week as delayed coverage. The finals rounds of the rugby league generally receive delayed coverage, with the exception of the grand final, which is broadcast live in all capitals. The State of Origin is broadcast live in those States which follow league.

The ABC broadcasts a club rugby union game live on Saturday afternoons. The Seven network provides coverage of international rugby games and the Super 12's competition. In those States where rugby union is the minority code coverage tends to be delayed. Broadcasters with live rights to international football competitions generally broadcast the games live in late night time slots.

Cricket: Coverage of cricket, especially test match series played in the United Kingdom, can pose particular scheduling challenges for free-to-air broadcasters. This is due to the large number of hours available for broadcast, especially during a five day test, and the time at which early sessions of tournaments are played. A complete days play will last a total of seven hours. As happened in 1997 with 'The Ashes' series, the first session of international matches can conflict with scheduled evening programming. The lack of coverage of the first session can be very controversial with cricket fans. One Day International cricket can be subject to the same scheduling problems as tests.

Free-to-air viewers have access to considerable amounts of live cricket played in Australia, although the duration of some matches or series cannot always be easily accommodated in free-to-air schedules. While One Day Internationals take account of the demands of television, coverage of representative cricket can be curtailed or interrupted when play continues into news programs. Examples of this include cricket played in the Central and Western time zones. Restrictions to protect the gate can sometimes prevent the live broadcast of matches in Melbourne and Sydney.

Tennis: Tennis tournaments are characterised by a large number of matches, which take place simultaneously on a number of courts, and are played over a number of days. The legislation recognises that non-centre court matches might not be broadcast, counting these matches as being covered when they overlap in time with matches, such as on centre court, which are televised live. Free-to-air viewers have access to varying amounts of coverage of international tournaments such as Wimbledon, the French Open and United States Open. The overnight night timing of international matches cannot always be accommodated without clashing with prime time programming, and factors such as the participation of Australians may have an impact on the nature of the coverage. There is extensive live coverage of Wimbledon and the US Open, and the finals of the French Open on free-to-air services. Pay TV provides increasing live coverage of these types of events. For example, the early rounds of the French Open are covered by pay TV, with very limited highlights coverage on commercial television.

Major Australian tournaments such as the Australian Open and the Adidas International tend to be covered live or with a short delay. However, to accommodate other scheduled programming at the start or end of play, some matches may not be covered in full. Tournaments of lesser interest such as the Australian Women's Hardcourt Championship are more likely to receive delayed or highlights coverage.

Golf: Coverage of international golf tournaments is selective in a number of ways. Only a small number of the high-profile players will be televised, and the first couple of hours or first 10 holes may not be covered. In US tournaments this pattern of coverage is dictated by established arrangements between the US commercial networks and cable channels. Viewers may access many hours of international and domestic golf tournaments live direct from the links, but the broadcasts might not technically be full coverage.

Motor races: Overseas-originated motor car races are an example of sports events which are televised in full, with mainly live coverage of major Grand Prix events. The World 500cc Motor Cycle Championship races generally receive late night same day replay. Domestic motor car races, such as the Australian Touring Car Championships start at different times throughout the day but are packaged together and broadcast in a regular slot at night. This might amount to a delay of 30 minutes or up to four hours from the live start time. There is live coverage of the Australian Grand Prix around Australia, while the Bathurst 1000 motor races are televised live in the Eastern States and delayed to account for time zone differences.

Basketball: Sports such as basketball which have not traditionally been major television events or for which there are regional variations in interest, tend to receive delayed and highlights coverage. The Australian National Basketball League playoffs in the past has been covered live but in line with perceived audience demand, now has delayed coverage in three States.

Netball: Coverage of the World Netball Championships is provided in all States but is generally not live. However, when the Australian netball team played New Zealand, the timing of the match was arranged to allow for a live broadcast in Australia. This reflected the interest in the match and the possibilities provided by the New Zealand – Australia time zone difference.

Time zone delays: Time zone differences can effect the broadcast of sport in a number of ways depending on the nature of the event, its start time, and perceived audience interest. Some events which are live on the east coast will be delayed in the Central and Western time zones by the amount of difference with the other time zone, to bring them in line with other scheduled programs. Queensland may also receive delayed coverage of east coast events from NSW or Victoria when day light saving is a factor. The legislation allows delayed broadcast of designated events in the Central and Western time zones by Ministerial instrument. The delayed broadcast of any designated event would depend on past practice and public expectations. Consideration of possible delayed broadcast of designated events is not included in the ABA's investigation.

8. Interest in major sports events

The top rating sports events for the five capital cities from the 1999 Nielsen Sports Report are presented below. The analysis is indicative only, as the number of events within a category and the timing of television coverage will affect the relative ranking of various sports⁹. Some events, such as 'The Ashes' cricket test, are not staged each year, and are not included in the 1999 report.

Regional differences are most noticeable in relation to football, with interest in a number of important rugby league games a main feature in Sydney and Brisbane. In other cities AFL rates highly. Together with major football games, cricket and the Pan Pacific Swimming Championships, held in Sydney, were of major interest nationally. As illustrated by the tables, sports events which deliver large audiences to broadcasters such as the AFL Grand Finals, One Day cricket, State of Origin rugby league, and Wimbledon tend to be televised live.

⁹ The ranking of events is based on total people in the 1999 potential audience for each city.

SYDNEY [ACNielsen 1999: Total potential audience is 4,045,000. Data is in 000s]

Rank	EVENT	NET	LIVE/DEL	ALL PPL	%
1	R.LEAGUE GRAND FNL	NINE	LIVE	1280	32
2	R.LEAGUE 3RD ST OF ORIG	NINE	LIVE	1141	28
3	R.LEAGUE 2ND ST OF ORIG	NINE	LIVE	1108	27
4	CRKT:WC 1999	NINE	LIVE	893	22
5	R.LEAGUE 1ST ST OF ORIG	NINE	LIVE	886	22
6	SWIM:PANPACS 99 DAY 5	NINE	LIVE	841	21
7	SWIM:PANPACS 99 DAY 4	NINE	LIVE	838	21
8	SWIM:PANPACS 99 DAY 2	NINE	LIVE	811	20
9	SWIM:PANPACS 99 DAY 3	NINE	LIVE	802	20
10	SWIM:PANPACS 99 DAY 6	NINE	LIVE	795	20
11	SWIM:PANPACS 99 DAY 1	NINE	LIVE	723	18
12	R.LEAGUE:ANZAC TEST	NINE	LIVE	715	18
13	R.LEAGUE (1) PREL/FNL	NINE	LIVE	700	17
14	CRKT: AUST v SRI LANK (1)	NINE	DELAY	660	16
15	CRKT: AUST v SRI LANK (4)	NINE	LIVE	655	16
16	R.LEAGUE: (2) SEMI/FNL	NINE	LIVE	650	16
17	SWIM:PANPACS 99 DAY 7	NINE	DELAY	642	16
18	CRKT:AUST v ENG (3)	NINE	LIVE	640	16
19	CRKT:AUST v ENG FNL (2)	NINE	LIVE	605	15
20	CRKT:AUST v ENG FNL (1)	NINE	DELAY	601	15

MELBOURNE [ACNielsen 1999: Total potential audience is 3,707,000. Data is in 000s]

Rank	EVENT	NET	LIVE/DEL	ALL PPL	%
1	AFL: GRAND FINAL	SEVEN	LIVE	1102	30
2	CRKT: WC 1999	NINE	LIVE	933	25
3	AFL: PREL FINAL	SEVEN	LIVE	701	19
4	SWIM:PANPACS 99 DAY 5	NINE	LIVE	695	19
5	CRKT:AUST v ENG (3)	NINE	LIVE	688	19
6	AFL SUNDAY	SEVEN	LIVE	662	18
7	CRKT:AUST v SRI LANK (1)	NINE	LIVE	653	18
8	CRKT:AUST v ENG (4)	NINE	LIVE	643	17
9	SWIM:PANPACS 99 DAY 4	NINE	LIVE	637	17
10	CRKT: WC 1999 (2) SEMI/FNL	NINE	LIVE	634	17
11	SWIM:PANPACS 99 DAY 6	NINE	LIVE	628	17
12	INTNL RULES:AUS V IRE-1	SEVEN	DELAY	621	17
13	CRKT:AUST v SRI LANK (4)	NINE	LIVE	586	16
14	CRKT: AUST v ENG FNL (1)	NINE	LIVE	571	15
15	SWIM:PANPACS 99 DAY 7	NINE	LIVE	568	15
16	AFL SUNDAY	NINE	LIVE	563	15
17	TENNIS:WIMBLEDON	NINE	LIVE	559	15
18	CRKT: AUST v SRI LANK (3)	NINE	LIVE	559	15
19	SWIM:PANPACS 99 DAY 3	NINE	LIVE	554	15
20	SWIM:PANPACS 99 DAY 2	NINE	LIVE	549	15

BRISBANE [ACNielsen 1999: Total potential audience is 2,261,000. Data is in 000s]

Rank	EVENT	NET	LIVE/DEL	ALL PPL	%
1	R.LEAGUE 3RD ST OF ORIG	NINE	LIVE	720	32
2	R.LEAGUE 2ND ST OF ORIG	NINE	LIVE	704	31
3	R.LEAGUE 1ST ST OF ORIG	NINE	LIVE	613	27
4	R.LEAGUE GRAND FNL	NINE	LIVE	548	24
5	SWIM:PANPACS 99 DAY 4	NINE	LIVE	512	23
6	CRKT: WC 1999	NINE	LIVE	506	22
7	SWIM:PANPACS 99 DAY 5	NINE	LIVE	501	22
8	SWIM:PANPACS 99 DAY 3	NINE	LIVE	498	22
9	SWIM:PANPACS 99 DAY 2	NINE	LIVE	461	20
10	R.LEAGUE:ANZAC TEST	NINE	LIVE	411	18
11	SWIM:PANPACS 99 DAY 1	NINE	LIVE	393	17
12	CRKT:AUST v ENG (4)	NINE	LIVE	386	17
13	CRKT:AUST v ENG (3)	NINE	LIVE	383	17
14	CRKT:AUST v SRI LANK (1)	NINE	LIVE	379	17
15	SWIM:PANPACS 99 DAY 6	NINE	LIVE	377	17
16	SWIM:PANPACS 99 DAY 7	NINE	LIVE	373	16
17	R.LEAGUE:QTR/FNL 4	NINE	DELAY	366	16
18	CRKT:AUST v SRI LANK (4)	NINE	LIVE	362	16
19	R.LEAGUE:TRI NATION	NINE	LIVE	354	16
20	CRKT:AUST v SRI LANK (3)	NINE	LIVE	347	15

ADELAIDE [ACNielsen 1999: Total potential audience is 1,247,000. Data is in 000s]

Rank	EVENT	NET	LIVE/DEL	ALL PPL	%
1	CRKT: WC 1999	NINE	LIVE	327	26
2	AFL: GRAND FNL	SEVEN	LIVE	313	25
3	AFL: SUNDAY	SEVEN	LIVE	298	24
4	AFL: SATURDAY	SEVEN	LIVE	288	23
5	AFL: FRIDAY	SEVEN	LIVE	288	23
6	CRKT:AUST v ENG (4)	NINE	LIVE	283	23
7	AFL: SUNDAY	SEVEN	LIVE	282	23
8	SWIM:PANPAC 99 DAY 5	NINE	LIVE	282	23
9	CRKT:AUST v ENG (3)	NINE	LIVE	279	22
10	AFL: SATURDAY	SEVEN	LIVE	277	22
11	CRKT:AUST v SRI LANKA (1)	NINE	LIVE	275	22
12	CRKT:AUST v SRI LANKA (4)	NINE	LIVE	275	22
13	AFL: SUNDAY	SEVEN	LIVE	260	21
14	AFL: SATURDAY	SEVEN	LIVE	259	21
15	AFL: QUALIFYING SATURDAY	SEVEN	LIVE	253	20
16	AFL:PREL/NL	SEVEN	LIVE	250	20
17	AFL:ANSETT CUP GRAND FNL	SEVEN	LIVE	249	20
18	AFL:SUNDAY	SEVEN	LIVE	248	20
19	CRKT: AUST v SRI LANK (3)	NINE	LIVE	248	20
20	SWIM:PANPAC 99 DAY 4	NINE	LIVE	246	20

PERTH [ACNielsen 1999: Total potential audience is 1,438,000. Data is in 000s]

Rank	EVENT	NET	LIVE/DEL	ALL PPL	%
1	AFL:QUALIFYING FRIDAY	SEVEN	LIVE	332	23
2	AFL:SUNDAY	SEVEN	LIVE	300	21
3	AFL:SUNDAY	SEVEN	LIVE	287	19
4	AFL: SUNDAY	SEVEN	LIVE	282	19
5	AFL: SUNDAY	SEVEN	LIVE	281	19
6	AFL GRAND FNL	SEVEN	LIVE	276	19
7	AFL: FRIDAY	SEVEN	LIVE	270	19
8	AFL: FRIDAY	SEVEN	LIVE	266	18
9	CRKT: WC 1999	NINE	LIVE	264	18
10	TELETHON	SEVEN	LIVE	253	18
11	AFL: SUNDAY	SEVEN	LIVE	249	17
12	AFL: SUNDAY	SEVEN	LIVE	245	17
13	AFL: SATURDAY	SEVEN	LIVE	243	17
14	AFL: SEMI/FNL	SEVEN	LIVE	235	16
15	AFL: SUNDAY	SEVEN	LIVE	235	16
16	AFL: SATURDAY	SEVEN	DELAY	229	16
17	AFL:SUNDAY	SEVEN	LIVE	225	16
18	AFL: SATURDAY	SEVEN	LIVE	223	16
19	AFL: SATURDAY	SEVEN	LIVE	223	16
20	CRKT: WC 1999	NINE	LIVE	219	15

9. Specifying designated events

Based on past practice, Australian viewers do not expect all major sports to be covered live and in full on free-to-air television. This includes many of the events and tournaments covered by the Minister's anti-siphoning list. The task of the investigation is to identify those sports which the public does expect should be available live and in full on commercial television or the national broadcasters, and which might appropriately be declared a designated event.

It is also important that only the event or series which requires the protection of a declaration under section 146C is designated. The circumstances in which live rights to very popular sports events and competitions are not used in full by a free-to-air broadcaster will be fairly exceptional. As described above, the incidents that prompted the development of the 'must offer' provisions involved overseas tournaments. These events are more likely to be played at times which clash with established prime time evening schedules in Australia. Declaring such events as designated events on the anti-hoarding list will increase the possibility of all the event or tournament being broadcast live on free-to-air television.

The 'must offer' requirement can apply to a single event, a series of events or an event in a series. This allows Minister to make quite specific declarations under section 146C(2) to ensure that the legislation is implemented in a very targeted manner. Whereas some of the events on the anti-siphoning list are defined fairly broadly, they might need to be more narrowly defined for the purposes of inclusion on the anti-hoarding list.

For example, the three cricket 'events' on the anti-siphoning list cover three categories of cricket competition. These are

- each 'test' cricket match involving the senior Australian representative team whether played in Australia or overseas;

- each one day cricket match (including World Series Cricket matches) involving the senior Australian representative team whether played in Australia or overseas; and
- each World Cup one day cricket match.

Multiple competitions and matches are included within these three categories, played at various times throughout the year and in different countries. A number of these competitions have been delisted and not shown at all on free-to-air television. Based on past practice, expectations for full live coverage might extend to a narrower range of events. For example, these might be:

- each 'test' cricket series involving the senior Australian representative team played in Australia;
- each 'test' cricket series involving the senior Australian representative team played in England; and
- each one day international cricket match involving the senior Australian representative team played in Australia.

In recognition of a previous clash between cricket and Wimbledon, the tournament might be considered for inclusion on the anti-hoarding list. Whether the whole tournament should be designated or some specified matches, such as the finals round might be an issue.

Issues:

Based on past practice, which sports events, tournaments or competitions does the public expect should be televised live and in full on free-to-air television?

Which of these events, series, or event in a series, should be considered for inclusion on the Minister's list of designated events?

How should such events be defined for purposes of declaring a designated event?

10. Events which have grown in importance in public perception over time

Events which may be considered for the anti-hoarding list include those which have grown in importance in the public's perception so that they now warrant full live coverage by free-to-air television. Accordingly, the ABA's investigation has to take account of events or series which could fall into this category.

The commercial value of very popular sports events to television advertisers tends to be reflected in coverage on free-to-air television. However, in the case of sports which have in the past been shown on the ABC or SBS, an increase in popularity of the sport might not result in increased opportunities for full live television coverage. If the rights to competitions or tournaments are acquired by commercial broadcasters and matches clash with scheduled programs of wider appeal, then all games may not be shown or they may receive delayed or highlights coverage.

Other games may be shown on pay TV, given its much greater capacity to provide extensive sports coverage.

Soccer is an example of a sport that in recent years has grown in popularity in Australia and commercial and pay TV licensees have shown increased interest in soccer rights. Both the live free-to-air and pay TV rights to the National Soccer League have been purchased by the Seven network. The bulk of these programs appear on Seven's C7 channel. A weekly highlights package is currently sub-licensed to the ABC and this also enables them to cover the NSL finals live. Pay TV (FoxSports) has recently acquired the live broadcast rights to the 2000 European Cup Championships finals which was not on the anti-siphoning list. SBS held the rights from 1984 – 1996 and in that period coverage increased from televising only the final in 1984, to 30 hours in the 1988 and 1992 (the finals, other matches and highlights) to 110 hours in 1996 (consisting of all 31 matches televised live, one hour of highlights, and one other additional game in full).

The Federation of International Football Associations (FIFA) World Cup is regarded as the most important international sporting event, and Australians have shown increasing interest in SBS's television coverage. SBS has held the free-to-air broadcast rights for the World Cup soccer since 1990. It broadcast the World Cup series in 1990, 1994 and again in 1998. In 1994 the Minister included the tournament on the anti-siphoning list, signifying that it was an event that should be available on free-to-air television for general viewing. SBS has provided comprehensive coverage of the event, televising the 64 matches mostly live and in full.

It is unlikely that such comprehensive coverage of the World Cup tournament could be accommodated on a commercial network. Given the large number of games and the potential clash with prime time programs during the 2002 series, direct coverage of many qualifying matches might be difficult.

Should a commercial broadcaster acquire the rights to the FIFA World Cup there is a real possibility of selective free-to-air coverage of the event. The Minister has declared the World Cup is a designated event, and it will be subject to the 'must offer' regime.¹⁰ Accordingly, if a commercial network acquires this competition, games of lesser audience interest may be offered to one of the national broadcasters, and free-to-air audiences will continue to have access to the tournament as a whole.

Issue:

Are there events, or series of events, which have so grown in importance that they warrant full live coverage by free-to-air television?

11. Designation of appropriate offer times

¹⁰ On 17 May 2000 Senator Alston declared the FIFA World Cup Soccer tournaments to be held in 2002 and 2006 as a designated series of events under section 146C with an offer time of 90 days. *Broadcasting Services (Designated Series of Events) Declaration No. 1 of 2000*. Commonwealth of Australia, *Special Gazette*, No. S 257, Wednesday, 17 May 2000.

In addition to declaring designated events and series of events the Minister must also declare an *offer time* in relation to each declaration. The new rules provide this period is a minimum of 30 days before the start of the event or series of events. However, the Minister may, if he is satisfied, find that the offer time should be closer to the start of the event. Given the necessary seven days for the offer to be open prior to the start of the event, seven days is the shortest offer time possible.

An offer period of at least 30 days recognises the time required by the national broadcasters to arrange for the broadcast of the event, to notify audiences about the change to the regular schedule and promote the new sports program. The need to plan applies to single events as much as to a series of events, although accommodating the latter might take more time. If the competition is being played overseas and the national broadcaster has to arrange to cover the event, 30 days might be very tight. Staff of the national broadcaster may have to travel to the ground, perhaps deal with advertising/signage, and arrange for transmission or provide commentary. In these circumstances, an offer time longer than 30 days may be more appropriate.

Planning might be less complex if the national broadcaster is provided with a clean feed, the duration of play is relatively short and is limited to one day, and/or a designated event is played in Australia. However, the likelihood of the national broadcasters accepting offers of rights to designated events may be enhanced if they have the maximum possible time to accommodate the broadcast. The onus is on commercial broadcasters and other rights holders to identify those situations for which a shorter offer time is necessary, and the events and offer times which should apply.

Issue:

What should be the respective offer times to apply in relation to the events or series identified for possible declaration by the Minister?

Attachment:

Relevant provisions of the *Broadcasting Services Act 1992*
Part 10A—Anti-hoarding rules

SECT 146C

Designated events and designated series of events

(1) The Minister may, by writing, declare that a specified event is a *designated event* for the purposes of this Part.

Note: For specification by class, see subsection 46(2) of the *Acts Interpretation Act 1901*.

(2) The Minister may, by writing, declare that a specified series of events is a *designated series of events* for the purposes of this Part.

Note: For specification by class, see subsection 46(2) of the *Acts Interpretation Act 1901*.

(3) To avoid doubt, the Minister may declare an event to be a designated event under subsection (1) even if the event is part of a series of events.

(4) A declaration under subsection (1) or (2) must also provide that a time that:

(a) is ascertained in accordance with the declaration; and

(b) occurs before the start of the event, or the series of events, as the case may be;

is the *offer time* in relation to the event or the series of events, as the case requires, for the purposes of this Part.

(5) The offer time in relation to an event or series of events must occur 30 days or more before the start of the event or the series of events, as the case may be, unless the Minister is satisfied that the offer time should occur closer to the start of the event or series of events, as the case requires.

(6) A declaration under this section has effect accordingly.

(7) A declaration under this section is a disallowable instrument for the purposes of section 46A of the *Acts Interpretation Act 1901*.

SECT 146D

Program suppliers

(1) This section sets out the 3 situations in which a person is a *program supplier* of a commercial television broadcasting licensee for the purposes of this Part.

Agreements

(2) A person is a *program supplier* of a commercial television broadcasting licensee for the purposes of this Part if:

- (a) the person has an agreement to supply the licensee with programs that can be televised by the licensee; and
- (b) the person supplies, or may reasonably be expected to supply, the licensee with at least two-thirds of:
 - (i) all the sporting programs that are, or are to be, televised by the licensee during the period when the agreement is in force; or
 - (ii) all the prescribed programs that are, or are to be, televised by the licensee during the period when the agreement is in force;

whether or not the programs are, or are to be, supplied under the agreement.

Related body corporate

(3) A person is a *program supplier* of a commercial television broadcasting licensee for the purposes of this Part if the person:

- (a) is a related body corporate of the licensee; and
- (b) supplies, or proposes to supply, the licensee with any of:
 - (i) the sporting programs that are, or are to be, televised by the licensee; or
 - (ii) the prescribed programs that are, or are to be, televised by the licensee.

ABA declaration

(4) If:

- (a) apart from this subsection, a person is not a program supplier of a commercial television broadcasting licensee; and
- (b) the person supplies, or proposes to supply, the licensee with any of:
 - (i) the sporting programs that are, or are to be, televised by the licensee; or
 - (ii) the prescribed programs that are, or are to be, televised by the licensee; and
- (c) having regard to the following matters, the ABA is satisfied that the person should be treated as a program supplier of the licensee:
 - (i) the purpose underlying this Part;
 - (ii) whether the relationship between the person and the licensee was entered into or maintained for the sole or dominant purpose of avoiding the application of any provision of this Part;

(iii) any other relevant matters;

the ABA may, by writing, declare that the person is a *program supplier* of the licensee for the purposes of this Part.

(5) A declaration under subsection (4) has effect accordingly.

(6) The ABA must arrange for a copy of a declaration under subsection (4) to be:

- (a) given to the person and licensee concerned; and
- (b) published in the *Gazette*.

SECT 146E

Anti-hoarding rule—licensees

(1) A commercial television broadcasting licensee *contravenes the anti-hoarding rule* if:

- (a) the licensee has a right to televise live, in the licence area for the licence, the whole of a designated event or the whole of a designated series of events; and
- (b) the licensee acquired the right when the event was a designated event, or the series was a designated series of events, as the case may be; and
- (c) either:
 - (i) the licensee did not televise live in that area any part of the event or series; or
 - (ii) the licensee televised live in that area some, but not all, of the event or series; and
- (d) neither the licensee nor the licensee's program supplier, before the offer time for the event or series, offered to transfer to each national broadcaster, in accordance with sections 146G and 146H, the right to televise live in the corresponding coverage area:
 - (i) if subparagraph (c)(i) applies—the whole of the event or series; or
 - (ii) if subparagraph (c)(ii) applies—the remainder of the event or series.

Note 1: For compliance by licensees, see clause 7 of Schedule 2.

Note 2: For delayed televising in the Central-Western time zones, see section 146KA.

(2) For the purposes of subsection (1), a licensee is taken to have televised live the whole of an event, or the whole of a series of events, if the licensee televises live all but an insubstantial proportion of the event or series, as the case may be.

Note: For example, interruptions by way of commercial breaks, news breaks, program promotions, announcements or brief crosses to other live events would amount to an insubstantial proportion of the event or series being televised.

(3) If a commercial television broadcasting licensee has a right to televise live a substantial proportion of a designated event, this section has effect, in relation to the licensee, as if that proportion were a designated event in its own right.

(4) If a commercial television broadcasting licensee has a right to televise live a substantial proportion of a designated series of events, this section has effect, in relation to the licensee, as if that proportion were a designated series of events in its own right.

SECT 146F**Anti-hoarding rule—program suppliers**

(1) A commercial television broadcasting licensee's program supplier must not intentionally or recklessly contravene the anti-hoarding rule.

Penalty: 2,000 penalty units.

(2) A commercial television broadcasting licensee's program supplier *contravenes the anti-hoarding rule* if:

- (a) the program supplier is entitled to confer on the licensee (the *first licensee*) a right to televise live, in the licence area for the licence, the whole of a designated event or the whole of a designated series of events; and
- (b) the program supplier acquired the entitlement when the event was a designated event, or the series was a designated series of events, as the case may be; and
- (c) either:
 - (i) the program supplier did not confer on the first licensee, or on another commercial television broadcasting licensee whose licence area is the same as that of the first licensee, the right to televise live in that area any part of the event or series; or
 - (ii) the program supplier conferred on the first licensee, or on another commercial television broadcasting licensee whose licence area is the same as that of the first licensee, the right to televise live in that area some, but not all, of the event or series; and
- (d) the program supplier did not, before the offer time for the event or series, offer to transfer to each national broadcaster, in accordance with sections 146G and 146H, the right to televise live in the corresponding coverage area:
 - (i) if subparagraph (c)(i) applies—the whole of the event or series; or
 - (ii) if subparagraph (c)(ii) applies—the remainder of the event or series.

(3) If a commercial television broadcasting licensee's program supplier is entitled to confer on the licensee a right to televise live a substantial proportion of a designated event, this section has effect, in relation to the program supplier, as if that proportion were a designated event in its own right.

(4) If a commercial television broadcasting licensee's program supplier is entitled to confer on the licensee a right to televise live a substantial proportion of a designated series of events, this section has effect, in relation to the program supplier, as if that proportion were a designated series of events in its own right.

(5) This section has no effect to the extent (if any) to which it purports to authorise the acquisition of property if that acquisition:

- (a) is otherwise than on just terms; and
- (b) would be invalid because of paragraph 51(xxxi) of the Constitution.

(6) In this section:

acquisition of property has the same meaning as in paragraph 51(xxxi) of the Constitution.

just terms has the same meaning as in paragraph 51(xxxi) of the Constitution.

SECT 146L

Anti-hoarding rule-national broadcasters

(1) A national broadcaster must not contravene the anti-hoarding rule.

(2) A national broadcaster contravenes the anti-hoarding rule if:

- (a) the national broadcaster has a right to televise live, in a coverage area, the whole of a designated event, or the whole of a designated series of events; and
- (b) the national broadcaster acquired the right when the event was a designated event, or the series was a designated series of events, as the case may be; and
- (c) either:
 - (i) the national broadcaster did not televise live in that area any part of the event or series; or
 - (ii) the national broadcaster televised live in that area some, but not all, of the event or series; and
- (d) the national broadcaster did not, before the offer time for the event or series of events, offer to transfer to the other national broadcaster, in accordance with sections 146M and 146N, the right to televise live in that area:
 - (i) if subparagraph (c)(i) applies—the whole of the event or series; or
 - (ii) if subparagraph (c)(ii) applies—the remainder of the event or series.

Note: For delayed televising in the Central-Western time zones, see section 146R.

(3) For the purposes of subsection (2), a national broadcaster is taken to have televised live the whole of an event, or the whole of a series of events, if the national broadcaster televises live all but an insubstantial proportion of the event or series, as the case may be.

Note 1: For example, in the case of the ABC, interruptions by way of news breaks, program promotions, announcements or brief crosses to other live events would amount to an insubstantial proportion of the event or series being televised.

Note 2: For example, in the case of the SBS, interruptions by way of commercial breaks, news breaks, program promotions, announcements or brief crosses to other live events would amount to an insubstantial proportion of the event or series being televised.

(4) If a national broadcaster has a right to televise live a substantial proportion of a designated event, this section has effect, in relation to the national broadcaster, as if that proportion were a designated event in its own right.

(5) If a national broadcaster has a right to televise live a substantial proportion of a designated series of events, this section has effect, in relation to the national broadcaster, as if that proportion were a designated series of events in its own right.

(6) This section does not apply to a right acquired by a national broadcaster because of the operation of Division 2 or this Division.