



**A SUBMISSION**

**TO**

**GOVERNMENT IN RESPONSE TO THE REPORT OF  
THE AUSTRALIAN COMPETITION & CONSUMER  
COMMISSION**

**ON**

**EMERGING MARKETS IN THE COMMUNICATIONS  
SECTOR**

**July 2003**

## 1. Overview

- 1.1. Sports Investments Australia Pty Limited (**SIA**) welcomes the opportunity to respond to the report of the Australian Competition & Consumer Commission (**ACCC**) on *Emerging Market Structures in the Communications Sector*, June 2003 (**Report**). SIA produces two subscription television sports channels, *FOX Sports One* and *FOX Sports Two* (**Channels**). These Channels are distributed by the major subscription television operators in Australia and certain re-sellers of those operators. The Channels are also directly licensed to commercial outlets.
- 1.2. Given the nature of SIA's business, this submission focuses primarily on the anti-siphoning scheme currently operating in Australia. However, SIA also comments briefly on a number of other matters in the Report which are of major concern to SIA. In addition, there are a number of other matters raised in the Report which are not addressed in this submission as they do not specifically nor directly relate to SIA.
- 1.3. SIA strongly believes that the anti-competitive nature of the anti-siphoning scheme is and has been detrimental to sports bodies, consumers and the growth and potential future development of the Australian subscription television industry. SIA believes that reform of the scheme based on numerous assessments of its anti-competitive effects is long overdue. In SIA's view, there is no need for an ongoing anti-siphoning list in Australia because there is absolutely no evidence that major sports events would disappear from free-to-air television in the absence of regulation. Sports bodies are critically interested in ensuring and delivering free-to air television coverage of their events where possible. At the same time, free-to-air television will always seek to telecast major sports events because they deliver large audiences. In these circumstances, there is no need for the scheme and it should be abolished.
- 1.4. However, if the government is mindful to have some form of ongoing anti-siphoning scheme, SIA strongly urges the government to reform the current system by:
  - a. Reducing the number of "events" which are protected under the list; and
  - b. Introducing "dual rights" which would serve the interests of sports fans by promoting the likelihood of national coverage of major sporting events.

SIA sets out the reasons why these reforms are needed in the following paragraphs and explains what reform would mean in practice.

## 2. The current anti-siphoning scheme

- 2.1. The current scheme is flawed in a number of major areas. First and foremost, the scheme includes too many types of sports events. There are 40 different sporting tournaments/events within 11 categories listed and it is philosophically hard to reconcile such an extensive list with the underlying premise that events should only be listed if they are of national importance and cultural significance.
- 2.2. Secondly, the list is flawed because whole tournaments or competitions are listed under the scheme. For example, every match of every round of the National Rugby League competition is a separate "event" under the current scheme as is every match in each of the grand slam tennis tournaments. These matches and tournaments have never historically received full free-to-air television coverage.
- 2.3. The current list also includes events which cannot justifiably be said to be events of national importance or cultural significance – for instance, each match of the Hong Kong Sevens Rugby tournament is listed and so are non Australian pool matches at events such as the Cricket World Cup. In March 2003, this led to the absurd result that a cricket match between Namibia and Holland was protected under the current anti-siphoning scheme.

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- 2.4. Another reason why the current scheme is flawed is because it effectively gives the free-to-air television networks an inequitable advantage in relation to the acquisition of sports broadcast rights. This unfairly gives free-to-air television networks greater bargaining power with the sporting bodies which reduces the flexibility available to those sporting bodies to achieve the best possible broadcasting mix and public exposure of their sports. At the same time, this restricts the way in which subscription television participants can acquire and broadcast listed events. The way in which the anti-siphoning scheme restricts competition between free-to-air and subscription television broadcasters in both acquiring rights and at a retail level is recognised by the ACCC in the Report and this recognition is welcomed by SIA.
- 2.5. The current scheme also does not operate to ensure that listed events are actually televised on free-to-air television. This means that the free-to-air networks can and often do hoard rights to certain events. Recent examples include:
- a. the Seven Network held all broadcast rights to all 31 matches in the 2003 National Soccer League finals series but only chose to broadcast 1 of those matches. All 31 matches were included on the anti-siphoning scheme.
  - b. the ABC only broadcast 2 of 8 matches involving Australia in the Netball World Championships in July 2003.
- 2.6. The hoarding of events can manifest itself not only in relation to events not being broadcast at all, but also hoarding by the free-to-air networks who intentionally delay their broadcasts to suit their own programming decisions, and at the same time prevent subscription television from televising those events. For example, the Ten Network has acquired the rights to broadcast each race in the Federation Internationale de l'Automobile (**FIA**) Formula 1 World Championship (**F1**). Even though the Ten Network only broadcasts the majority of F1 races on a delayed basis, it has been able to block subscription television participants from acquiring the rights to broadcast those races on a live basis. The unfortunate outcome for Australian F1 fans is that the anti-siphoning scheme has allowed Network Ten to deprive Australian F1 fans of having the opportunity to receive live coverage of these races if they choose to do so. This clearly does not promote the public interest of Australian sports fans and significantly inhibits consumer choice.
- 2.7. In other instances, free-to-air television networks have in the past held live rights to listed events, but because of the operation of the current scheme which does not compel them to broadcast these events live, they have been able to choose to not provide complete live coverage of the listed event. The most iniquitous examples of this are the decisions by the Nine Network and Seven Network respectively to not broadcast the first session of each test match held during the Ashes cricket tours in 1997 and 2001.
- 2.8. Another consequence of the operation of the current scheme is that regional viewers, especially those in Western Australia and South Australia can miss out on seeing listed sports events because of programming decisions made by the free-to-air networks. As an example, tennis fans in Perth missed out on seeing the US Open tennis in 2002 because the local Nine station, STW9, chose not to broadcast it. The current scheme creates the opportunity for this lack of regional coverage to occur on an ongoing basis.
- 2.9. In these instances, subscription television is generally not able to televise live in Perth at the time when the relevant events are being played, because there is live coverage of those events by a free-to-air network in other parts of the country and the free-to-air networks have been able to contractually restrict the coverage. This ludicrous situation could easily be avoided in the future with appropriate reform, as outlined in this submission. Yet the free-to-air networks are opposed to such reform because there will be greater public pressure on them from the Australian viewing public and the sports bodies to show events live.

2.10. Finally, the current scheme is fundamentally flawed because the free-to-air networks simply do not broadcast even a reasonable proportion of events which are listed. Issues relating to the track record of the free-to-air networks are discussed in the following section.

### 3. The broadcast record of the free-to air networks

3.1. The subscription television industry has monitored the actual broadcast record of the free-to-air networks in Sydney and Melbourne for the past four years. The research and analysis accurately lists the extent of coverage of listed events by the free-to-air television networks and is audited by Ernst & Young. The latest report, which covers the 2002 calendar year shows that in 2002:

- More than 6400 hours of sports events were protected for free-to-air television broadcast under the anti-siphoning scheme.
- Less than 17% of those hours of events were broadcast live on free-to-air television.
- More than 75% of those hours of events were not broadcast at all on free-to-air television.

3.2. SIA is aware that the free-to-air networks through CTVA have made alternative claims about their level of coverage of listed events. We believe these are inaccurate and misleading and should not be relied on by the Minister. One reason for this distorted evidence is that CTVA does not take into account in its analysis the fact that every match of every tournament is a listed "event". This has been conveniently glossed over by CTVA to disguise the real figures. CTVA also admits that it has excluded "de-listed" events which again improves its own figures and analysis.

3.3. No matter what way one looks at this question, the undeniable issue is that there are an extraordinary number of events which are protected for free-to-air broadcast on the anti-siphoning list which are not broadcast by the free-to-air networks. The most obvious examples of these are overseas cricket tours. These are not, and have not been, consistently broadcast by the free-to-air networks and the case for their permanent and complete removal from the list is unarguable.

3.4. SIA has previously made submissions to the Australian Broadcasting Authority (**ABA**) in relation to its *Investigation into events on the anti-siphoning list*. The ABA published its findings of this investigation in a report released by the Minister in 2001 (**ABA Report**). SIA supplied the ABA with detailed information on the coverage patterns of the free-to-air networks together with an analysis of the hoarding of listed events by the free-to-air networks. For reasons that are unclear from the ABA Report, the ABA did not fully address the question of hoarding or the way in which events are listed so as to include whole tournaments. Incredibly, while recognising the problems that occur because of the way listed events have been scheduled by the free-to-air networks, the ABA stated that it had not become "closely involved in issues concerning the scheduling and coverage of events on the anti-siphoning list, nor is this something the ABA would seek to do." In SIA's view, the ABA's failure to do so helps perpetuate the problems caused by the anti-siphoning scheme. The ABA's decision to continue to ignore its responsibilities by neglecting to play a part in preventing listed events from being hoarded provides another cogent reason why the scheme should be reformed.

### 4. The Framework for Change - Views of other Stakeholders

4.1. SIA notes that almost all stakeholders involved in the sports and television industries are calling for the list to be abolished or dramatically reformed. Those calling for reform include major sports bodies, the Australian sports peak industry group, and the advertising community. The only major group opposed to reform is the free-to-air television industry.

4.2. Sports bodies do not support the scheme because it forces them to deal with their rights in a fixed, inflexible way. Sports bodies are in the best position to determine the mix of broadcast rights and

do not see the need for the current regulations. Sports bodies want the widest possible coverage of their sports and will seek free-to-air coverage independently of regulation.

- 4.3. The major Australian advertising representative organisation, the Australian Association of National Advertisers (**AANA**) also welcomes reform of the scheme. The AANA recognises the fundamental anti-competitive nature of the current scheme and knows that if reform occurs, the free-to-air networks will still acquire rights to telecast major sporting events.

## 5. How the scheme should be reformed

- 5.1. For the reasons stated above, SIA believes it is not necessary or appropriate to continue with an anti-siphoning scheme. In the absence of a list, sports bodies would still seek free-to-air television coverage and the free-to-air networks would still vigorously pursue sports broadcast rights to sporting events of national importance and cultural significance.
- 5.2. If SIA's views are not accepted, and the government still believes that it should retain some form of scheme for the time being, then we support the ACCC's call for the current scheme to be reformed. However, SIA believes any reform should firstly address the number of events listed and the classification of "events" themselves, as well as the question of dual rights, as proposed by the ACCC.
- 5.3. A revised list should include events which meet an established list of objective criteria and the onus should be on those who seek to have an event included on the list to show that it meets these criteria. An event must only be listed on a revised anti-siphoning list if the event:
- is of national importance and cultural significance to Australian society;
  - is generally held in Australia;
  - generally involves a national Australian team;
  - has traditionally been consistently broadcast live and in full on free-to-air television; and
  - there must be a real or perceived threat that the event will be acquired exclusively by subscription television, rather than a theoretical risk.

In addition, the views of the relevant sports body should be taken into account. This is of particular relevance because the sports body will be best able to discuss what its policies are in relation to its broadcast arrangements and can also provide information on what the ongoing effects of being listed would be for that sport.

- 5.4. The classification of tournaments and competitions also needs to be urgently addressed under a revised scheme. Whole tournaments or competitions should not be included on the list because they do not meet the criteria. It is relatively easy to specifically define particular matches or parts of tournaments which can be included on a revised list. SIA notes this occurs overseas without any difficulty.
- 5.5. A revised list should then be formulated based on these criteria and amended classifications. In SIA's view, this list should only operate for a few years, and there should be an automatic sunset clause at the end of this term.
- 5.6. Finally, the government should also introduce dual rights in relation to those events which are placed on the revised list. Dual rights would ensure that sports bodies are placed in the best position to determine the mix of broadcasting rights because it would prevent either subscription broadcasters or free-to-air broadcasters limiting the on-licence of the other form of rights by the relevant sports body. Conversely, it would allow the sports body to have the best possible opportunity to ensure that national coverage of their sport on television is achieved. Dual rights can play a very important role therefore in reducing the effects of hoarding on a national basis by the free-to air networks and therefore ensure that those Australian consumers who currently miss

out on seeing their favourite sports on television due to programming decisions by the free-to-air networks are afforded the choice of receiving such coverage on subscription television.

- 5.7. In its Report, the ACCC has identified 2 main concerns about the potential detrimental effects that the introduction of a dual rights system may have being the unfounded claim that coverage of sporting events will disappear from free-to-air television and the potential for “gaming” the regime. It is SIA’s view that such concerns are seriously misguided.
- 5.8. Firstly, there is simply no evidence to suggest that a dual rights system would result in fragmentation of the free-to-air networks’ television audience which would ultimately result in a migration of sports events to subscription television. In the United States, where there is no anti-siphoning scheme, subscription television is purchased by about 82% of the 108 million television households. The subscription television industry has been well-established for many years, is highly profitable and participants are able to trade freely in sports rights with domestic and international sporting organisations and thereby compete on a level playing field with the free-to-air networks. However, major sports are, and continue to be, available on free-to-air television in the United States. In other words, despite the deep financial resources of the US subscription television operators, their wide availability, high penetration of television households, and the existence of an open market in sports television rights – free-to-air television coverage of sport remains high and unaffected by competition from subscription television.
- 5.9. By contrast, the subscription television industry in Australia has only been established for about 8 years, its major operators continue to incur heavy financial losses, and have penetrated only about 22% of Australian television households. Subscription television in Australia has enormous potential to add value to sport and increase overall television coverage in both regional and metropolitan areas within Australia. However, the industry’s ability to trade freely in sports television rights is hindered by the anti-siphoning scheme which only serves to protect the incumbent Australian free-to-air broadcasters from appropriate levels of competition.
- 5.10. Major sporting events of national importance and cultural significance have traditionally attracted and will continue to attract large television audiences in Australia. As the tables set out in Attachment 1 demonstrate, sporting programs are regularly listed among the most watched programs on free-to-air television each year. It would not be in the commercial interests of the free-to-air networks to not provide coverage of major sports events. Not only do their viewers demand this but so do their advertisers who want to reach the widest possible audience and the sports bodies who want the widest possible coverage of their sport to attract and retain naming rights and sponsorship revenue.
- 5.11. Finally, in relation to the question of “gaming”, sports bodies will continue to seek maximum exposure for their sport irrespective of regulation. There has been no evidence put forward that sports bodies would game the regime or would constructively refuse to deal with a free-to-air broadcaster. As outlined above, all sports bodies are and will continue to be critically interested in obtaining free-to-air television coverage precisely because this ensures the broadest possible exposure to those sports bodies.

## **6. Other matters relating to Anti-siphoning raised in the Report**

- 6.1. The ACCC notes that the current scheme reduces the amount of sport broadcast on television and suggests that it may be appropriate to continually review the events on the anti-siphoning list. SIA is not entirely sure what the ACCC means by this – whether it is referring to the de-listing provisions or by undertaking regular reviews of the list which may involve reducing the scope of the list. If it is the latter, we are a little sceptical that this would achieve any positive results given that the ABA appears to believe it is not appropriate for it to step in and promote live telecasts of listed events by the free-to-air networks. Instead, we believe that it will be more effective to reduce the list and introduce dual rights which would have the effect of giving sports bodies the opportunity of achieving full national coverage and reducing the effects of hoarding by the free-to-air networks.

- 6.2. The Report also refers to the ABA Report's recommendations to remove a number of events from the list and to add three others. SIA submits that there is simply no justification for the addition of any events to the list and the ABA Report was grossly deficient in not even considering the existing or future broadcasting arrangements for those particular events or even one of the primary underlying reasons for listing an event under the current anti-siphoning scheme - namely that there is a real risk that an event of national significance which has always been broadcast on free-to-air television is likely to exclusively migrate to subscription television if it is not listed. The ABA Report did not address the question of whether any of the events it proposed to be added were in fact under threat to be acquired exclusively by subscription television.
- 6.3. If we take Swimming as an example. Both swimming events which the ABA recommends for addition to the anti-siphoning list are subject to separate long term contracts which were negotiated prior to the ABA Report being released. Both the Nine Network and SIA were able to freely negotiate in an open market long term broadcasting arrangements to ensure that swimming is given unprecedented coverage on both free-to-air and subscription television. Because these events were not listed under the anti-siphoning scheme, Swimming Australia and FINA in conjunction with the broadcasters were able to determine the best mix for the allocation of broadcast rights for these events. Swimming has been able to transform itself into a high profile Australian sport which has reaped the benefits that an open market for the acquisition of sports broadcast rights has to offer.
- 6.4. The conclusion to be drawn from this is simple - not being listed or removing an event from the list does not mean that the event will only appear on subscription television. This conclusion continually appears to be missed in the emotive debate that can sometimes surround the issue of the regulation of sports rights.

## **7. Other Matters in the Report**

- 7.1 SIA notes that the ACCC has recommended the removal of the prohibition on multi-channelling by free-to-air broadcasters. SIA strongly opposes any such relaxation of this restriction. Multi-channelling is the core distinction between subscription television and free-to-air services in the television entertainment market. It was on the basis of this prohibition being included in the digital broadcasting legislation, and assurances from the Government that the commercial free-to-air networks would be prevented from multi-channelling until at least 2005, that the subscription television industry and its participants continued to make substantial investments in developing the industry and providing employment opportunities for many Australians in both regional and metropolitan Australia.
- 7.2 The Government and the ACCC must recognise that participants in the free-to-air television and subscription television industries compete in a single market, and the free-to-air networks continue to receive regulatory concessions to the detriment of subscription television. It is SIA's view that, if the free-to-air networks are ultimately allowed to multi-channel, all available public spectrum, beyond that required to provide their core channel in SDTV mode, should be pooled and the free-to-air networks should compete in an open market with other interested parties for use of that spectrum for television multi-channelling or any other digital services the Government deems appropriate for use of that resource into the future. This will achieve a more efficient use of a scarce public resource, and ensure a return to Government and taxpayers that is commensurate with the market value of the resource.
- 7.3 Another startling recommendation by the ACCC is that the Channels produced by SIA should be subject to legislated access to content measures. SIA does not share the view, which seems to underpin the ACCC's recommendation, that exclusive agreements for the supply of subscription television content are anti-competitive. SIA submits that the ACCC's proposed scheme to prohibit such exclusive contracts is not only oppressive but excessive. Such a scheme assumes that exclusive supply agreements are inherently anti-competitive and places the onus on the operator

or the supplier to prove, on public interest grounds, that an exclusive contract should be allowed. The onus to demonstrate anti-competitive effects should remain with the regulator and can be adequately dealt with under the current legislative regime under the *Trade Practices Act 1974 (TPA)*.

- 7.4 Any legislative intervention beyond that which is already contained in the TPA would hinder competition by lessening the ability of subscription television participants such as SIA to compete with the incumbent free-to-air networks which are not subject to any such restriction. A legislated access regime to subscription television content would further entrench the free-to-air networks' dominance in the television entertainment market because not only would subscription television services become less attractive to operators attracting potentially smaller licence fees, the free-to-air networks, in the absence of reform, would continue to be protected from competition by reason of the operation of the current anti-siphoning scheme. SIA submits that this would be a highly undesirable outcome for the continued development of the Australian television industry.
- 7.5 Also, we note there is no consideration in the Report of the implications to sports bodies of introducing an access to content regime. We believe that any such regime would have serious adverse consequences to sports bodies whose revenue base and funding would be severely affected. This would have major implications for those sports and could jeopardise their grass roots programs and junior development investment as well as having adverse consequences in the area of stadium management, infrastructure upgrades and overall funding of their sports. These are extremely serious matters for the Government to consider.
- 7.6 Finally we note the Report's recognition that the introduction of such a system would have implications in the area of just compensation from the government because of the impact on business plans and investment decisions. Again, these are serious matters to be considered by the Government.

## **8. Conclusion**

- 8.1 SIA strongly urges the Minister to implement reform of the current anti-siphoning scheme based on the recommendations contained in this submission so that sports bodies and subscription television operators are given the opportunity to provide Australian sports fans with increased choice over the amount of sport they watch on television.
- 8.2 The current scheme is too broad, does not address the question of hoarding by the free-to-air television networks and only serves to protect their commercial interests and not the interests of other stakeholders or the public.
- 8.3 There is no evidence to suggest that sports will disappear from free-to-air television if they are not listed. Sports bodies will continue to seek free-to-air television coverage for their sports. In any event, the free-to-air networks already have long term arrangements in place for their key sports properties which will ensure that these events continue to be seen on free-to-air television into the future.

# Attachment 1

## National Top Twenty Rating Programmes 2002

No	Programme	Channel	5 cap cities
1	Test Australia - The national IQ Test	9	2,778,568
2	World Cup Soccer Final	9	2,701,938
3	AFL 2002 Grand Final	10	2,615,942
4	2002 Melbourne Cup Carnival	7	2,503,262
5	Big Brother Final Eviction	10	2,301,461
6	Celebrity Big Brother - Opening Night	10	2,249,851
7	NRL Grand Final	9	2,176,761
8	XVII Comm Games - Day 5	7	2,156,173
9	Michael Jackson's Face	9	2,125,160
10	XVII Comm Games Opening Ceremony	7	2,084,601
11	9/11	7	2,079,578
12	Big Brother Day One	10	2,045,851
13	World Cup Soccer: Semi Final 2	9	2,023,078
14	State of Origin - Game 3	9	2,020,374
15	Pan Pac Swimming Chams - Day 6	9	1,997,376
16	XVII Comm Games - Day 6	7	1,966,646
17	Big Brother Housemates	10	1,953,547
18	24-Final	7	1,940,161
19	World Cup Soccer: Group Match 23	9	1,888,176
20	National Nine News Sunday	9	1,883,213

## National Top Twenty Rating Programmes 2001

No	Programme	Channel	5 cap cities
1	Wimbledon Final: Pat Rafter v Goran Ivanisevic	9	3,036,289
2	Big Brother Finale	10	2,789,029
3	Big Brother Sunday Final	10	2,615,942
4	AFL Grand Final	7	2,603,642
5	World Swimming Champs: Day 8	9	2,507,071
6	43rd Logie Awards	9	2,408,642
7	Survivor 2: The Australian Outback	9	2,256,864
8	World Cup Soccer Qualifier: Game 1	7	2,221,029
9	World Swimming Champs: Day 6	9	2,164,512
10	Rugby League Grand Final	9	2,097,311
11	Big Brother Eviction 10	10	2,063,583
12	Big Brother Eviction 8	10	2,056,434
13	World Swimming Champs: Day 4	9	2,045,382
14	World Swimming Champs: Day 5	9	1,962,902
15	Notting Hill	7	1,964,562
16	World Swimming Champs: Day 3	7	1,940,831
17	ER	9	1,938,078
18	World Swimming Champs: Day 7	9	1,927,824
19	Ground Force - Battle of the Nations	7	1,924,311
20	Big Brother Eviction 5	10	1,904,828

## National Top Rating Programmes 2000

No	Programme	Channel	000's 5 cap cities
1-23	Various Olympic Events	7	6,641 - 2,615
24	Swimming: Selection Trials	9	2,501
25	Olympics: Afternoon Day 16	7	2,456
26	Lifestyle: Better Homes and Gardens	7	2,426
27	Swimming: Selection Trials	9	2,938
28	Swimming: Selection Trials	9	2,398
29	Friends	9	2,340
30	Renovation Rescue 2	9	2,323
31	Olympics: Day 9	7	2,313
32	Olympics: Team Celebration	7	2,298
33	Paralympics	2	2,294
34	Olympics: Day 1	7	2,279
35	Olympics: Day 1	7	2,263
36	Swimming Selection Trials	9	2,232
37	Renovation Rescue	9	2,231
38	AFL Grand Final	7	2,224
39	Olympics - Day 1	7	2,222
40	Olympics: Day 9	7	2,129
41	Olympics - Day 1	7	2,185
42	Olympics - Day 2	7	2,179