

When Too Much Sport is Barely Enough*: Broadcasting Regulation and National Identity

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Sport and broadcasting appear to enjoy a symbiotic relationship. Similarly, sport seems to play a central role in many current understandings of national identity. In this article, we explore some of the ways in which the legal regulation of sport broadcasting is often couched in terms of the protection of an essential, yet ill-defined, national interest. We offer a series of critiques of the competing interests at stake under such regulatory regimes – market power and competition, legally entrenched preferences for certain broadcast technologies, democracy and the construction of national identity. Through a critical and comparative analysis of the legal system of anti-siphoning and anti-hoarding legislation in effect in Australia, we attempt to highlight the confused and confusing state of broadcasting regulation there and in other jurisdictions in relation to access to key sporting events on television.

Introduction: Sport, Law and the Regulation of Cultural Identity

When IOC President Juan Antonio Samaranch declared the Sydney 2000 Olympics the ‘best Games ever’, most Australians felt a great sense of relief, mingled with strong sentiments of national pride. The nation had performed and excelled on the world stage, and the successful Olympics were interpreted and portrayed as a symbol of the country’s true emergence onto the international arena.

That this sense of national pride and identity should surround the staging of a sporting event comes as little surprise. After all the title of ‘greatest living Australian’, until his death in 2001, belonged by consensus not to one of the country’s Nobel laureates nor to an Aboriginal elder, holder and protector of her people’s dreaming, but to Sir Donald Bradman, whose contribution to Australian national identity consisted in wielding a cricket bat more consistently than anyone else in the history of the game. What ‘stops the nation’ on the first Tuesday in November is not a democratic

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Parliamentary vote or the memory of the nation's founding political moments, but a horse race, the Melbourne Cup. In January 2001, the country began its yearlong celebration of the centenary of Federation with a parade and a cricket Test at the Sydney Cricket Ground. Quite simply, Australians love sport and that love of sport is central to most constructions of current Australian cultural and national identity.¹

Sport remains a defining element in the formation of Australian national identity. As a relatively small and young nation competing against economically and politically powerful countries with long histories and strong cultural traditions, sport is one area where Australia has been able to demonstrate some superior abilities and consolidate a sense of national spirit.²

One domain of cultural and political significance in which issues of sport and national identity have come to be debated and contested is that of television broadcasting rights. For example, in England, only government intervention prevented the takeover of Manchester United by BSkyB.³ The loss of *Match of the Day* by the BBC has raised questions about the role of national public broadcasters in a competitive sports TV marketplace. Deals with broadcast companies by English Premiership clubs Liverpool and Arsenal, among others, demonstrate, if there was any doubt, that television sport is big business.⁴ The advent of subscription television and the drive by these broadcasters to acquire content as a subscription driver has led to a number of sports events 'migrating' to Pay Television. The creation of the English Premier League as a virtual product of Pay TV is the classic example.

More recently, the collapse of the Kirch media empire⁵ and of ITV Digital in the UK⁶ have demonstrated graphically the consequences and risks involved when huge expenditure is made in securing sports content which may not be easily recouped through the sale of broadcast rights or subscription services.

While these outcomes may be explained by fluctuations in consumer taste and market conditions, they are often compounded by government decisions to regulate access to certain broadcast rights. One important area of regulation is so-called 'crown jewels' or anti-siphoning legislation whereby the government mandates that certain events of national and cultural significance must be shown on Free To Air (FTA) Television. This legislation was developed with the advent of Pay TV and the concern that certain programming would in the future only be accessible on a subscription basis. In this article we wish to explore the political, social and economic issues which have informed, both explicitly and by implication, these aspects of the legal regulation of sports broadcasting in Australia and elsewhere.

The goal here is to examine the ways in which broadcasting regulation in Australia, in the form of anti-siphoning and anti-hoarding provisions in relation to sport on Free To Air and Pay TV, has attempted to balance the needs and concerns of public policy and national identity on the one hand, and the demands of the marketplace for sports broadcasting on the other.⁷ Drawing on an analysis of comparative legislation in the US, UK and EU, the Australian example, we believe, might offer interesting and useful insights into, and points of conjuncture with, broadcasting and telecommunications policies in many other jurisdictions where debates around the role, if any, of government intervention in and regulation of a broadcasting 'market' for sporting events, form an important part of current politics and legal practice.

We hope to underline the ways in which unarticulated or poorly articulated regulatory policy and often unsophisticated economic analysis have resulted in the current legal and political situation in Australia, which is, to put it simply, the worst of all possible worlds. In the sections which follow we will briefly highlight the unarticulated and unproblematised assumptions which inform current legislative, regulatory, cultural and commercial practices. In doing so, we hope to indicate key areas in need of further elaboration and public debate in the complex interstices of broadcast and telecommunications law and cultural policy.

Anti-Siphoning and Anti-Hoarding Legislation

The Anti-Siphoning List

In Australia, s.115 of the Broadcasting Services Act 1992 (Cth) specifies that certain events may be designated to be carried by Free To Air television. In 2001 the Australian Broadcasting Authority (ABA) conducted an inquiry into the legislation recommending some amendments to the list.⁸ In the UK the exercise of discretion by the Independent Television Commission under the equivalent 'crown jewels' or 'listed events' provisions⁹ of the Broadcasting Act 1996 (UK) has been recently subject to judicial review.¹⁰ The decision makes important references to the interplay of market forces and the public interest and harmonisation with the European Community Television without Frontiers Directive in schemes such as the UK Act. The government also recently threatened to invoke the legislation over the refusal by Kirch to sell the television broadcast rights for the 2002 World Cup in Japan and Korea to the BBC and ITV on reasonable terms.¹¹

In Australia, anti-siphoning rules are of a recent vintage for the simple reason that before the advent of Pay TV, they were unnecessary. These rules were apparently required because there was a perception that certain events

would no longer be broadcast on FTA television but would be available only to paying customers. This fear of the phenomenon of programme 'migration', based on the financial resources, perceived and real, of Pay TV operators and the centrality of sport programming to those broadcasters, is the first pillar in the edifice of the current regulatory framework.

Quite simply, the Australian government, like its UK and European counterparts, appears to have adopted the position that certain events are so important and vital to the national interest that they must (or at least should) be shown on Free To Air TV. Thus, the advent of Pay TV brought about the introduction of s.115(1) of Broadcasting Services Act 1992 (Cth), which provides that:

The Minister may, by notice in the Gazette, specify an event, or events of a kind, the televising of which should, in the opinion of the Minister, be available free to the general public.

This section empowers the Minister for Communications, Information Technology and the Arts ('the Minister') to list certain events which should be carried by Free To Air television. The anti-siphoning list was introduced by The Broadcasting Services (Events) Notice No.1 of 1994, which was gazetted on 6 July 1994.¹² The Explanatory Memorandum to the Broadcasting Services Act states that the objective of the anti-siphoning provisions is to ensure that:

sporting events of national importance and cultural significance ... be received by the public free of charge. This process should ensure, on equity grounds, that Australians continue to have free access to important events.

Generally, the Minister may declare any event to be 'of national importance and cultural significance', although the Explanatory Memorandum refers solely to 'sporting events'. The Minister also has the power under s.78(1) of the Australian Broadcasting Corporations Act 1983 (Cth) to direct the public broadcaster, the ABC, to air an event considered to be in the 'national interest'. There is here quite clearly not just an interventionist regulatory policy at work, but also a policy which seems to imply that the broadcasting of certain events is somehow essential to Australian national identity. Equally implicit in this regulatory framework is an understanding that the Australian public interest and the country's national identity are to be served by the three commercial broadcasters (Channels 7, 9 and 10) and/or by the two national networks (the Australian Broadcasting Corporation, the ABC, and the Special Broadcasting Service, SBS). In other words, this legislation is in effect national policy grounded in an ideal of a public service obligation imposed through the broadcast

licensing process. In exchange for the degree of market power which goes with a FTA broadcast license, television networks, both public and private, are burdened with certain licence obligations, such as Australian content standards, in the national interest. Moreover, this idea and ideal of public service is informed by some sort of notion that the 'market' is not always nor by definition a sufficient guarantor of the broader, more important goals of national interest. In the context of anti-siphoning and sport broadcasting, some events are so vital that they should be on Free To Air Television and not on Pay TV. This policy and regulatory framework is clearly grounded in notions of universal access to the processes of creating and consolidating national identity and culture for all members of the democratic polity, regardless of their willingness or ability to pay a market price for a broadcast commodity. Democracy and equality are underlying norms at play here in the Australian legislative framework for defining the scope of televised sport and its role in constructing a national identity.

This is, of course, not in and of itself extraordinary, if one accepts the more general cultural and political claim about the centrality of sport to national identity in Australia. Such protection and reinforcement of this cultural normative context is perfectly consistent with an ideal construction of the role of the state in a modern liberal democracy.¹³ Any Australian national government which was perceived to be 'selling out' a vital element of the nation's pride and identity and preventing the less fortunate from having access to that identity, would fall afoul not just of Australians' love of sport but of their vaunted sense of 'a fair go'. The idea that an Australian Football League (Aussie Rules) or a National Rugby League Grand Final could be seen only by those able to pay a television subscription fee is one which the 'Australian public' would not tolerate.¹⁴

The Australian anti-siphoning list includes: the Melbourne Cup, Australian Rules Football (AFL) Premiership matches and finals, Rugby League (NRL) Premiership matches and finals, Rugby Union World Cup and Australian Test matches, all Australian Test cricket and One-Day International games, National Soccer League finals, the FA Cup Final and soccer World Cup, various tennis matches, including all Grand Slam events and Australia's Davis Cup ties, Australian international netball games, Australian National Basketball League playoffs, the golfing Grand Slam, Formula 1 auto racing, 500cc motorcycle world championship, and so on. From this list it is not difficult to see that Australians love their sport.

Of course, the entire regulatory story is not told by a literal reading of the list. The anti-siphoning list includes events which 'should' be shown on FTA TV. In reality, this means that the commercial networks and the two public broadcasters, ABC and SBS, are given rights to bid and of first refusal to all the listed events. The reality of this legislative scheme is that

the networks will ultimately decide on commercial grounds what is shown and therefore what is of 'national significance'.

Under the legislative scheme now in force in Australia, the main Pay TV providers, Foxtel and Optus, are subject to licensing conditions which prevent them accessing these listed broadcast rights. The licensee will be in breach of its conditions if it acquires a right to broadcast live a listed event unless a national broadcaster has the right to televise the event; or a FTA broadcaster, which has access to more than 50 per cent of the Australian population, has the right to televise the event.¹⁵ If no FTA broadcaster has acquired the rights to a listed event, a subscription broadcaster can acquire them only if the event is removed from the anti-siphoning list.¹⁶

Anti-Hoarding Legislation

One circumstance which was not foreseen by Parliament when the 1992 legislation was adopted was the possibility that a commercial or public Free To Air broadcaster would and could engage in strategic behaviour by using their regulatory protection under the anti-siphoning regulations to buy up rights to events on the list and then refuse to show them. In these circumstances, FTA broadcasters could effectively and lawfully 'hoard' the rights created by legislation in order to 'harm' their fellow Free To Air competitors or to prevent the sports from migrating to Pay TV. In order to deal with the possibility of this type of 'market failure' in the FTA oligopoly, so-called anti-hoarding provisions were subsequently adopted.

If a commercial television broadcasting licensee acquires a right to provide live television coverage of a designated listed event or series,¹⁷ but does not intend to televise the whole or a part of the event or series live, or within a specific time, the licensee must offer to transfer the right for a nominal charge of \$1 to the ABC and the SBS.¹⁸ Similarly, national broadcasters must offer listed events to each other for a nominal charge, if they do not intend to use live rights. A programme supplier who intentionally or recklessly breaches the anti-hoarding rule is also liable for a civil penalty.¹⁹ The programme supplier must offer the programme rights to the entire event live to a commercial broadcaster or offer to transfer them to one of the national public broadcasters. The anti-hoarding provisions, which supplement the policy objectives of anti-siphoning legislation, impose a 'use it or lose it' paradigm on broadcasters of FTA sports programmes. Here again we can see that while 'commercial' television is given a primary role in carrying out the mission of constructing and maintaining this essential element of Australian national identity, continuous regulatory revisions are required to ensure that commercial interests do not ultimately thwart the public interest intent of the legislation.

Now that we have briefly outlined the legislative and regulatory framework through which Australian culture is constructed in the context of

anti-siphoning and anti-hoarding rules, we want to turn to a discussion which will, we hope, problematise the assumptions on which the law is based and critique the legislative measures employed in the Australian context. This critique can then, we believe, be extended to similar legislative and regulatory regimes in other jurisdictions.

The Regulatory Construction of Identity: Events of National and Cultural Significance

Television and/as Democracy

There appear to be several complimentary but sometimes competing policy objectives which inform the legislative and regulatory framework governing television sports broadcasting in Australia. Australians love sport; sport is essential to their national identity; Free To Air TV is the best place for national identity to be played out and constructed. The events on the anti-siphoning list are, by legislative and governmental fiat, 'events of national importance and cultural significance'. Yet there is no obvious and clear articulation of how and why the events on the list, other than by the mere fact of their presence, might actually meet these criteria. Each and every one of these assertions and assumptions, we argue, is patently problematic and needs to be examined if we are to be in a position to evaluate accurately and usefully the utility and political import and impact of anti-siphoning regulation of broadcasting and culture in Australia. If the Australian model is to serve as an example, good, bad or indifferent, in other jurisdictions, these problems must be investigated.

There can be no doubt that the idea and ideology of Australia as a sporting nation, whose collective identity and character have been carved out on playing fields, pitches and race tracks of the country, is one which resonates not just with much of Australian history, but also with the policy imagination of the current Howard federal government. Prime Minister John Howard's love of sport, especially cricket, is well-known, and the political imagery which his policies often construct has been criticised as being based in a nostalgia-imbued ideal of Australia in the 1950s – an Australia of suburban comfort, backyard cricket and conservative isolationism, not to mention the oppression of Australia's indigenous peoples, a White Australia immigration policy and so on.

Australian anti-siphoning and concomitant anti-hoarding rules, in fact and in law, however, are grounded in the more prosaic distinction between Free To Air and Pay TV. The real terrain of the debate here is not about national identity and cultural significance but instead pits competing technologies and market models against one another. Indeed, what is at stake is not national identity but the commercial success of one form of

oligopoly, FTA television, and on the other hand, the economic viability of another oligopoly, Pay TV. Each is a creature of statute, and the statutory frameworks themselves are in turn the results of historical, economic, technological and political contingencies and national peculiarities.

Somewhat bizarrely, then, the very image of Australia's love of sport as embodied in John Howard's nostalgic harkening for a past which never really existed, is called into question within this very legislative and regulatory system which is meant to embody this vision of national identity in law. Instead of confirming an Australian version of the character building nature of sport, of 'the playing fields of Eton', or better yet of Manly or Broken Hill or Hawthorn, what the anti-siphoning list actually does is to confirm Australia as a nation of couch potatoes.²⁰ In other words, what is protected and constructed in this regulatory framework is the phenomenon of watching sport on television. We do know that, in fact, 96 per cent of Australians watch sport on TV, so at this level at least, law simply reflects and reinforces reality.²¹ However, debate about whether watching sport on television is a character enhancing, equality-based, nation-building exercise, is remarkably absent.

The public and legislative creation of sport and of particular sporting events as events of national importance and cultural significance as embodied in the anti-siphoning list, is grounded in a particular passive ideal of the Australian citizen as a television spectator. This ideal does not necessarily coincide with what might be seen as a broader implicit goal of the legislation, the empowerment of a democratic polity, grounded in the normative world of an engaged and equal citizenry. Indeed, the ideological and political framework here seems aimed more at the creation and construction of an audience for commercial television. While the idea that fans in the stands at a game have an impact on performance and can result in a 'home field advantage' is of course well known, the notion that watching one-day cricket at home in the living room is an event of 'national importance' is more problematic and less intuitively obvious in democratic theory. That television viewers will effect the outcome in any way other than selling more advertisers' products, or that it has much to do with a democratic polity, must at the very least be carefully interrogated.

The Full Federal Court in *Foxtel Cable Television Pty Ltd v. Nine Network Australia Pty Ltd & Australian Broadcasting Authority* stated that:

events are selected because the Minister is of the opinion that many people will wish to feel part of them, by seeing them as they occur; not by later seeing a television record of them.²²

What seems to be valued here is a form of existential experience which may or may not be related to a shared experience with others as part of a

community. If the current regulatory framework is to stand up to any scrutiny, we must begin to interrogate many of the cultural, political and legal assumptions which inform sport broadcasting. We must, as a body politic, inquire about and discuss the role sport plays or should play among democratically involved and active citizens. A more cynical viewer/citizen might well argue that most events on the list are little more than spectacle manufactured for television by the media corporations such as Murdoch's Super League in Rugby League or Premier League Football in England, with little concern for the 'real' fans. In Australia today, it is the National Rugby League (NRL), an agglomeration of Pay TV and sporting club interests, which determines what constitutes the best 'product' or television spectacle for consumption, not the fans or any other set of democratic deliberations.²³ These events are not the real outcome of democratic deliberation or political empowerment of all Australians in the construction of their national identity.²⁴

The idea of democratic empowerment of Australians through televised sport is most clearly belied by the recent controversies concerning the composition of the new NRL. As in England and Wales with the creation of the Super League competition in Rugby League, many teams were forced to merge in order to survive in the reduced League. One of the oldest teams, South Sydney Rabbitohs, were excluded from the competition despite the fact that, 'rugby league is an icon to be preserved for the people who love and support it, not a product to be carved up to the media for their own gratification'.²⁵ Again, political and regulatory rhetoric and practice which invoke and claim to maintain the centrality of sport to Australian national identity are belied by our experience of the policy. The NRL example clearly establishes that what is important in the creation of national identity and events of cultural significance is the commercial reality of profit for Murdoch and Packer. 'Real' fans are ignored and replaced by viewers and advertising revenue. The idea that events of national importance must be shown on FTA TV, as embodied in legislation and regulation, appears to be grounded in the identity of the national interest and the interests of the commercial networks or, to a lesser extent, the two national broadcasters. Here, sport and Australian national identity are made synonymous with the appearance of certain specified events on Channels 7, 9 or 10. There can be little doubt that, at a practical market level, it has often appeared to be the case that such a symbiotic relationship between commerce and sport exists. The close historical affiliation, for example between Channel 9 and many Australians' experiences of televised cricket would be a case in point. Here the history of cricket broadcasting in Australia is the history of the creation of World Series Cricket by Kerry Packer, the owner of Channel 9, in order to secure broadcast product and advertising revenue for his television

stations.²⁶ There can be little doubt, at this level at least, that the national interest and the interests of corporate commercial broadcasters are one and the same. This, of course, does not necessarily mean that the national interest is not being served, but it does at the very least demand a more careful consideration of the legislative and regulatory framework in effect today. The situation in the UK is little different.

Walsh and Giulianotti argue that one important feature of the commodification of sport is the supplanting of more democratic structures or community ownership by distinctively impersonal, corporate frameworks of power. This is manifest most clearly in less reliance by clubs on income from the fans at the games. Until the 1980s football clubs in the UK drew most of their money from gate receipts; in 1998 only 34 per cent of Manchester United's annual income came from this source.²⁷

While it did not strictly address the issue of subscription television, the Mellor Report in the UK examined the relationship between the fan and the football club. It resulted in the creation of the Independent Football Commission to review ticket prices, accessibility to matches and merchandise, and supported the creation of community supporter trusts for clubs, which inevitably has only had an influence on the lower divisions.²⁸ Even then, results have been mixed.²⁹ Again football fans feel as if they are being treated not as 'fans' but as 'consumers'. Their feelings of loyalty and devotion to their clubs are being repaid with increased admission prices, inflated prices for their team's 'kit' or other team merchandise and a strong idea that they are irrelevant. If fans must battle not to be turned into consumers, one might well ask where and how they are to be transformed into 'citizens'.

National Identity as Television Programming: The List Examined

Indeed, even a brief examination of the actual content of the current anti-siphoning list and the way the system operates in Australia indicates many of the problems inherent in the present regulatory format. It is clear, for example, that it would be physically impossible for Free To Air TV to carry all of the events in question and still have time for other programming. The list is simply too large, including, for example, all Grand Slam tennis matches.³⁰ Not even the BBC carries every point of every game at Wimbledon. In addition, one might and should question how events like the Australian National Basketball League playoffs are 'events of national importance and cultural significance'. Basketball is a minor sport in Australia and certainly not one associated in the popular imagination with Australian cultural and national identity. One might cynically imagine that these games are listed simply because a commercial calculation indicated that FTA coverage was essential to the market success of a new sport.³¹

Certainly, the decision of the NBL to change the season for its competition from winter to summer, to avoid competing with the football codes, indicates that commercial success for basketball in Australia is still in the balance. Moreover, one might ask why only the playoffs are of national importance for basketball while all Premiership matches in the AFL and NRL competitions are subject to anti-siphoning. Is this not evidence in and of itself that the list is incoherent and that Aussie Rules Football and Rugby League are more clearly important to the construction of Australian identity and culture than basketball?

Of course, it might be possible to argue here that basketball enjoys a large degree of its popularity among young Australians and more particularly among young Australians from poor economic and/or from non-English speaking backgrounds. In light of this, one might then make an argument that the inclusion of the sport (or at least part of it) on the anti-siphoning list, is evidence of the government's efforts to include that 'audience' in the Australian polity. We do not accept or reject any of these possibilities. Instead, we use this example to point out that this type of cultural legal regulation is fraught with difficulties and that the failure to offer a clear, coherent and public set of criteria about government policy in the field of the legislative and regulatory construction of national identity is bound to fail because the basis for such regulation, if unarticulated, will always appear to be both incoherent and inefficient.

Similarly, the inclusion of more mainstream sports also raises serious questions about Australian national identity and the utility of government policy in this area. Despite attempts by competition organisers to 'nationalise' their respective sports by placing franchises in other jurisdictions, it is still the case that Australian Rules football is based in Victoria and states to the west and south, whereas Rugby League is essentially an eastern states' (New South Wales and Queensland) phenomenon. Thus, important questions arise out of the inclusion of each of these sports in the anti-siphoning list. Just what is meant by the term 'national' in such circumstances? What is Australian identity in the context of televised sport if, say, unlike the UK or Europe for example, there is no one code of football which truly unites the nation? Soccer is played in all Australian states but only the finals of the National Soccer League are on the list. Cricket is a truly national sport, but does not really have the same fan base and 'audience' as either of the main football codes. In such a case are we really dealing with the creation of a national identity or are we protecting regional games, their fans and their fans as parts of different potential television audiences? Conversely, what do we make of the situation which occurs in New Zealand, where Rugby Union is not just a national sport but a 'national religion', and where there is no anti-siphoning

legislation? Again, in the absence of debate and clearly articulated and publicly proclaimed policy arguments by government, these questions simply remain unanswered and any regulation appears to be arbitrary.

At other levels as well, the actual content of the list raises important questions about national identity, sport and government regulation of broadcasting. The dominant football codes, AFL, Rugby League and Rugby Union, are included on the list and might even be said to dominate it. All are evidently and clearly masculine and masculinised games. They involve, as Australian social commentators Roy and HG might say, 'big, boofy blokes', engaged in physical combat. Naturally, this idea of Australian national identity as masculine, virile, physical, is perfectly consistent with one historically and culturally constructed image of 'Australianess'. One might here ask serious questions about a government policy in the twenty-first century which confirms and elevates this gendered (and violent) ideal of national identity to the legislatively enforced status of 'national importance'.

Cricket might equally be placed in the same category. Test matches involving the Australian women's cricket team are apparently not of enough cultural significance to warrant inclusion on the anti-siphoning list. Similarly, the only predominately female sport included on the list is netball, and Australian international matches are carried not on commercial FTA television, but on the public ABC. Finally, but not exhaustively, many questions about sport and gender (not to mention class and ethnicity) might be raised if one were to interrogate the governmental decision-making process which included Formula One motor racing and 500cc Motorcycle Grand Prix. What cultural, political and economic factors led the government to include these events in a list of sporting events essential to the construction of Australian national identity? What national identity is constructed and reflected by watching the Monaco Grand Prix on television at home in Adelaide or Perth?

At the same time, the inclusion and example of cricket (or at least men's cricket) on the list, leads to an exploration of the actual operation of the anti-siphoning regulatory framework and the values implicit in the current legislation. All One-Day Internationals and Test matches are included in the list, but of course, not all such games actually appear on Free To Air television in Australia. Clearly this is in part, at least, an effect of the operation of the legislation, which is, as we have already noted, merely permissive in that it gives a right of first refusal to FTA networks and national broadcasters to listed events. Therefore, at some level, events of national importance and cultural significance are always going to be only events of occasional importance and sometime significance. The actual decision about access and broadcasting is made by the networks in question

on, in the case of Channels 7, 9 and 10, commercial grounds. Again, this is a practical and real consequence of a regulatory framework and legislative policy which adopts the position that commercial television is the medium through which important public policy objectives should be primarily achieved.³²

In the case of cricket, the results of such a policy are clear. Channel 9 has, since the settlement of the World Series Cricket imbroglio, been the network of choice for television coverage of Test match cricket involving Australia. In the course of this time, Channel 9 has failed to offer live coverage of the first session of Ashes Tests from England because that would conflict with its Wimbledon coverage.³³ It has consistently interrupted live Test match coverage to bring viewers local horse races and it has failed to cover any number of overseas Test matches. These commercial broadcast decisions not only bring into question the efficacy of the current listing process but also raise other important questions about how the legislation works and is meant to work in practice.

For example, the FTA broadcaster's right to televise a listed event is not satisfied by a delayed telecast or a highlights package.³⁴ This introduces such complicated interpretation issues as determining what exactly constitutes a 'right to televise' and the circumstances in which a highlights package is or is not, as a matter of law, 'a highlights package' and establishing what is a 'substantial part' of the event. As the Full Federal Court pointed out in *Foxtel Cable Television Pty Ltd v. Nine Network Australia Pty Ltd & Australian Broadcasting Authority*, 'A summary of a work is not the work itself'.³⁵ Other questions, such as what constitutes a right to televise a programme 'as it happens, or as soon thereafter as is technically feasible',³⁶ are also raised by the poor drafting of the legislation: is, for example, acquiring the right to televise a half-hour delayed broadcast an acquisition of a right to televise 'live'?³⁷

Here, of course, one might equally begin again to interrogate the vague legislative criteria which require the televising of a 'substantial part' of an event. Is the showing of only two of three sessions in a day's play in a Test match sufficient to meet the legal criterion here? Is the conflict between live tennis and live cricket an issue of 'technical feasibility', which allowed Channel 9 to delay the cricket and show highlights during the luncheon break?³⁸ And what does any of this have to do with the building of Australian national identity and the constitution of a democratic polity?

Clearly, the Wimbledon and horse racing decisions are based on corporate executives' calculations about what the viewers want and what is more profitable in terms of audience and advertisers. Here we find the literal embodiment of Cass Sunstein's assertion that 'There is a large difference between the public interest and what interests the public'.³⁹ If events are vital,

in the opinion of the government, to the construction of an Australian national identity, it is difficult to imagine how such public policy goals are best achieved by granting final decision-making power about what the public actually gets to see to commercial television programming executives.

The question of commercial television and overseas Test matches also raises somewhat more troubling questions about anti-siphoning legislation, broadcasting regulation and the construction of Australian national identity. Here, we believe, what the public wants and what the public gets are to a great extent influenced by underlying racist attitudes which continue to permeate Australian culture and society and which must therefore raise serious issues about the role of government and commercial broadcasters in the construction of that identity. Thus, tours by Australian cricket teams to the Asian sub-continent are consistently not shown on Free to Air TV. Arguments about the loss of audience because of time zone differences carry little weight here given that the time change between say India and Australia is less problematic than that between England and Australia, yet the Ashes series continues to be a programming highlight. What appears to be at work here is nothing more complicated than 'good old fashioned' Australian racism, in this context a belief that Pakistani, Indian and Sri Lankan cricketers cheat and are corrupt, as are their umpires. For 'Australians', sub-continental fans are unruly, threatening the life and limb of those Australian players who have not already been laid low by bad food or water. Therefore, the argument goes, there is no audience for such matches on FTA TV. Real cricket fans, or members of the sub-continental diaspora in Australia, can be served by Pay TV coverage. The 'national interest' in a multicultural, diverse Australian identity, plays second fiddle here to the still dominant Australian construction of the sub-continent and of commercial television's deployment of these constructions in terms of audience satisfaction and commercial viability. Of course, this can change when other factors emerge. Thus when the Australian cricket tour of India in 2000–01 became, as the result of exciting play, the 'greatest cricket series ever', cries about the fact that the games were available only on Pay TV began to be heard. Again we are not arguing that these are the only explanations for what happens on Australian television in these circumstances. We are however suggesting that such an explanation is based in social and political reality. In such conditions, cricket, TV and Australian national identity become more complex and nuanced than the mere inclusion of Test matches on the anti-siphoning list might at first suggest.

The ABA Inquiry and the Future of the List

Even the most recent attempt by Australian regulators and government to engage with the problems have fallen miserably short of any serious

engagement with the real cultural, political and legal issues involved here. The Australian Broadcasting Authority (ABA) recently concluded an inquiry into the anti-siphoning and anti-hoarding legislation.⁴⁰ The terms of reference determined by Senator Alston, the Minister for Communications, Information Technology and the Arts, authorised the ABA to conduct an inquiry into the content of the list and 'in conducting the investigation, to have regard to the policy that an event should only be included in the Notice if the event has been consistently broadcast by free-to-air television broadcasters in the past five years'.⁴¹ The inquiry was not asked to investigate whether items should be included because of 'national importance and cultural significance', but whether they were 'consistently broadcast' and therefore popular with the viewing public who would have a 'legitimate expectation' to continue viewing them on FTA television.⁴² In other words, the Australian government itself now seems to be openly operating on the basis that what is an event of national significance is simply an event which a significant number of people watch. By this fact alone, there is a sort of democratic (and market) expectation that FTA broadcasting will continue. We appear to have reached, without any deliberation or discussion, a stage at which the symbiosis between citizen and viewer is beyond doubt. The policy here, despite the reasonably clear wording of the legislative instruments in question, is fundamentally based not on ideas of popularity in any democratic or even majoritarian sense. Nor is it informed by any ideological view that government has a positive role to play in constructing and maintaining national and cultural identity. Instead what the government asked the ABA to do is to determine, by way of a regulatory Nielsen ratings, which were the programmes shown because they were likely to attract a particular viewer who was attractive to advertisers.⁴³ This legislative review was simply an exercise in constructing the ideal couch potato/citizen for commercial broadcasters and their clients. The ABA states:

Sports coverage is important for building audience, particularly young men, who are under-represented among viewers of other kinds of television programmes. Commercial broadcasters make judgements about the worth of particular sports to advertisers which is reflected in the kinds of sports which are covered and the nature of the coverage. This is one of the reasons for traditionally much lower coverage of women's sport.⁴⁴

The ABA was, in its own view, 'confirming the underlying philosophy' of the regime.⁴⁵ 'Inclusion on the anti-siphoning list should reflect the significance of, and public interest in those sporting events. Surveys and ratings data are indicative of interest in television sports'.⁴⁶ The list contains that which we all

want to see and by definition should not therefore have to pay for, at least not directly. Any national or cultural significance that may attach to women's netball is by definition excluded. If it is not 'popular' among young adult male television viewers, it is not of national or cultural significance.

In submitting the terms of reference to the ABA as mere popularity and consistent broadcasting, the government effectively foreclosed any proper assessment or interrogation of the meaning of the public interest or of 'national significance' in relation to anti-siphoning and sport broadcasting regulation. Instead, the ABA simply asserted unproblematically the position that 'the legislation should strike a balance between the interests of free-to-air broadcasters and pay TV'.⁴⁷ The government and the ABA sidestepped the essential and central issues. Instead of focussing on the problematic assumptions of the legislation, the inquiry simply assumed that 'national significance' was synonymous with popularity and ratings. The interests at play are no longer citizenship and national identity, but the appropriate balance in market power between Pay TV and FTA broadcasters. In striking that balance by arguing for further additions to the list of events, the ABA assumed that Pay TV would act in a detrimental and predatory manner and that FTA actors should be granted special access to these new sports.

Nonetheless, despite these shortcomings, the ABA did in fact touch briefly upon issues of some importance. For example, it also acknowledged that rating figures are strongly affected by regional issues and loyalties:

The effect that these variables have on different sports' ratings need to be taken into account and for these reasons it is often difficult to state categorically that a sport is of national importance or cultural significance to a majority of Australians.⁴⁸

Here of course, we return to a point we have already made. In the Australian context, national identity is a complex issue. The relationship between identity and sport is as complex. The legislation which aims to protect and promote the crucial nexus between sport and Australian cultural identity does nothing whatsoever to offer any vision of what that nexus might involve. Instead we are left to programming officials, sporting administrators and some vague assertions about Australians and their love of sport. Fortunately, or unfortunately, we are not alone.

Identity and Sport Broadcasting: The Case of the UK and the EU

The United Kingdom also makes provision for the legislative protection of certain sports programming on FTA television. Provision is made under Part IV of the Broadcasting Act 1996 for the listing of sporting programmes of national significance, the so-called 'crown jewels' legislation, to be shown on FTA TV.

Section 97 gives the Secretary of State for Culture, Media and Sport the power to draw up a list of sporting or other events of national interest. The current list includes the Olympic Games, the Grand National, the Wimbledon Finals and Six Nations Rugby matches in which a home country is playing.⁴⁹ The list operates on a two-tiered basis of Group A and B events. Broadcast rights to Group A events can only be made available on a non-exclusive basis. Exclusive rights to events in Group B are permitted if other television broadcasters are providing supplementary coverage such as full or partially delayed coverage.

Section 101 provides that a broadcaster in one category may not without the consent of the Independent Television Commission ('the ITC') broadcast a listed event unless it is also broadcast by one in the other category. The practical effect of this provision is that a Pay TV broadcaster who wishes to broadcast a listed event on an exclusive basis has to obtain the consent of the ITC.

Section 104(1) requires the ITC to draw up a code of guidance as to the matters which it will take into account in determining whether or not to give consent under s.101.⁵⁰ Section 104(2) requires the ITC in exercising its powers to have regard to the provisions of the code. The ITC Code was first published in 1997 following consultation.⁵¹

In Europe most national Free To Air broadcasters belonged to a buying cartel called Eurovision which bargained collectively for the rights to events of international interest and therefore obviated the need for similar anti-siphoning rules. With the advent of Pay TV, however, fears about the accessibility of sporting events of national interest led to the insertion of Article 3a⁵² in the Television Without Frontiers Directive, 89/552/EEC.⁵³ Article 3a(1) allows each Member State to take measures in accordance with Community law to ensure that broadcasters under its jurisdiction do not broadcast on an exclusive basis events which are regarded by that Member State as being of major importance for society in such a way as to deprive a substantial proportion of the public in that Member State of the possibility of following such events via live coverage or deferred coverage on free television.⁵⁴

Provision is made for notification of these designated events to the European Commission. Article 3a(3) imposes a duty upon every member state to ensure 'by appropriate means' that its own broadcasters do not exercise an exclusive right to televise an event designated by another member state in such a way that a substantial proportion of its public is deprived of the possibility of watching.

To enable the UK to comply with this duty, the Secretary of State amended Part IV by regulations made under the European Communities Act 1972: the Television Broadcasting Regulations 2000. These regulations

inserted a new s.101b, which requires the consent of the ITC to the exclusive broadcasting of events designated by other member states, analogous to the consent required under s.101.

There is no provision in the Directive to define what are events of major importance to society. Instead, the focus is on establishing the 'substantial portion' who would be otherwise deprived of broadcast access to the event in question. For example this is defined as 95 per cent of households in the UK but 'only' 66 per cent in Germany.⁵⁵ There is some indication in the statements by the former Secretary of State for Culture, Media and Sport in the first Blair government, Chris Smith, that the important qualitative distinction which should drive this policy is that between events which are of interest only to 'fans' and those which are of interest to the nation as a whole. There are, of course, obvious difficulties in setting a definitive, knowable, legislative and legal standard by which one might distinguish between fan interest and broader national interest in some way beyond the merely quantitative.

An excellent example of the centrality of these debates in the United Kingdom to unarticulated understandings of culture and cultural regulation, is the controversy surrounding the acquisition of television broadcast rights for the 2002 World Cup in Japan and South Korea. FIFA, the world governing body for soccer, awarded these rights to German millionaire Leo Kirch, whose company then set about auctioning them to broadcasters in various countries. In the United Kingdom, the Labour government invoked the statutory provisions of the Broadcasting Act and declared that the World Cup be broadcast on free, or terrestrial, television. Kirch then claimed that the two television networks to whom he was attempting to sell the UK rights were acting as a cartel. After legal proceedings were instituted and following a public uproar over the idea that the World Cup would not be broadcast on FTA to audiences in the UK, the two sides eventually reached a compromise and fans breathed a sigh of relief as the 'national' game would be available to all.⁵⁶ These deals ultimately placed pressure on Kirch, which was then unable to recoup the premium prices it had paid for the World Cup rights, a factor which no doubt contributed to its subsequent financial failure.

Increasingly higher prices being charged for broadcast rights place economic pressure on the public broadcaster (BBC) and other Free To Air players such as ITV to compete in a market place for which, as the Kirch World Cup negotiations indicated, they are ill-adapted.⁵⁷ At the same time, and perhaps as a result of the rapid price inflation in the 'market' for sporting rights, there have been calls in the UK to extend the list of events on the 'crown jewels' legislation.⁵⁸ The former minister, Chris Smith, put the case as follows:

Where an event has particular national resonance, engaging the population of the country as a whole, and not just the dedicated followers of the sport itself, then it ought to be available freely to all, and the law needs to intervene in order to ensure that this can happen.⁵⁹

Here, as Smith points out, we face the needs and concerns of public policy and national identity on the one hand, and the demands of the marketplace for sports broadcasting on the other.

This is an entirely justified intervention in the free market of sporting rights, in order to secure a greater public good. It should be used carefully, of course, and only where there is a genuine national purpose to be served.⁶⁰

Once again, Smith identifies the key area of conflict between citizens as 'fans' and citizens as citizens. Cultural identity and national feelings of belonging are central here, and sport appears almost as if by magic as the point at which the transformation from isolated consumer to integrated member of the body politic begins to operate. Again, however, none of this is articulated in a way which takes into account any class, gender, regional or other distinctions which might bring into some doubt claims about national identity and the role of sport therein.

In the United Kingdom, one might for example further inquire as to the correct adjective which should precede the noun 'citizen'. Are we talking about regulating, or creating, 'British', 'Welsh', 'Irish', 'Scots' or 'English' citizen/viewers? Is the same telespectator a fan/citizen of Great Britain and Northern Ireland when he/she watches the Olympics and an English fan when the World Cup is on? Rugby is a form of national religion in Wales, and the sport of the wealthy private schools of England. Rugby league is part of working-class, northern England, and virtually unknown elsewhere in the country. Which women's sports, outside the 'Ladies' competition at Wimbledon every summer, would be essential to any understanding of English or British national identity? Perhaps women's curling after the success of the British (Scots?) team in Salt Lake City? Moreover, recent studies commissioned by the government indicate that football, the national sport, the sport England gave to the world, fails to attract ethnic minority groups as fans or employees.⁶¹ What idea of 'English' or 'British' culture is being created and enforced here? When the minister invokes legislative power to ensure English fans FTA coverage of the World Cup, because such an event is central to a 'greater public good', what message of official racism, ethnic, regional and national identity is produced? What of all those who are excluded from identifying with the team and therefore from identity as a member of the body politic?

Finally, it is again worth noting here that, while we are dealing in theory with ‘events’ of national significance, in practice we are in fact talking about sport. Thus, while Denmark, Italy, Germany and the United Kingdom have already notified measures to be taken under Article 3a(1), all the events listed as being of ‘national importance’ are sporting events with the sole exception of Italy, which also lists the San Remo music festival.⁶² The proposed French list includes the Winter and Summer Olympics, the Tour de France, the finals of the French Open tennis, games involving the French national (male) sides in soccer and rugby, important World Cup and European championship soccer matches, the finals of the Champions League and French Cup, again in football, and Six Nations Rugby games. Not quite as extensive as the Australian list, but again there is no sign of broader cultural events. Indeed, each of the lists constructed by governments and carried by broadcasters as constitutive of national identity in Australia, the UK and in other European countries shares this characteristic. In advanced, technologically sophisticated Western democracies, the citizen is the viewer, and more precisely the citizen is the sports viewer.

Shared Viewing of a Sporting Event as a Cultural Event

Why are the lists, except the Italian, confined to sport? In Australia, for example, several submissions to the ABA 2001 inquiry into the legislation suggested that the Sydney Gay and Lesbian Mardi Gras Parade should be considered to be, for example, an event of national importance and cultural significance.⁶³ Is there something about sport and the spectacle of sport on television which is not only essential to national identity, but which is deserving of the special protection it receives in the current regulatory environment?

Traditional economic analysis would assert that there are in fact good reasons to confine the list to sport. Sport is an instantly perishable good. A sporting competition at any particular time only competes with other sporting events played live at that time and which are therefore regarded as substitutable by the consumer.⁶⁴

At the same time, if exclusive live sporting rights have been made available, the purchase of delayed rights makes little economic sense.⁶⁵ NBC’s dismal ratings in the United States for their taped coverage of the Sydney 2000 Olympics were blamed in part on competition from other sources of live telecast, such as the Internet or satellite coverage from the Canadian Broadcasting Corporation in border areas.⁶⁶ If we accept this argument, the question which must then be answered by government and citizen is, if sports right markets operate in this way from an economic

perspective, is there any need to mandate such live coverage in legislation? Surely simple consumer demand and market pressures from competitors will operate to ensure that such events are broadcast and that they are carried live. Is the legislative protection provided by the anti-siphoning list and the anti-hoarding provisions, a case of regulatory intervention in the national interest or in the best interest of FTA broadcasters?

It might be argued that television programming, and sport on TV in particular, is an experience good. One can not assess its quality until it is consumed. Additionally the value of watching sport live on TV may also be enhanced by the knowledge that others are watching the programme, enabling social interaction with respect to that programming at a later time. In other words, the temporal element is in some way bifurcated. One must watch the game live in order to argue about the referee's or umpire's decision at the water cooler at work the next day. Instead of Adorno's alienated and isolated serial listeners or viewers, we can now imagine a post-match engagement with our fellow citizens; democracy made possible only through live TV. Couch potatoes engage as members of the new democratic polity after a good night's post-match rest.

Boardman and Hargreaves-Heap, for example, argue that this can enhance social capital where the shared viewing of an event and the ability to converse with others can create positive social network externalities where the value of seeing an event depends on the number of people who also watch it. 'As a result, an externality arises in viewing: an individual not only enjoys the event and the conversational network through viewing, their participation also adds value to the network for everyone.'⁶⁷ These issues were considered in the UK during the staging of the 2002 World Cup. Because of the time difference between Japan and South Korea, where the games were played, and the UK, most matches were on at 7am. Permission was granted to pub landlords to apply for special opening hours to accommodate customers who wanted to watch the games 'with their mates down the pub'.⁶⁸ Liberal Democrat MP Nigel Jones explained the importance of such legal interventions: 'If you can't be at the game, the next best thing is watching it with friends in a pub.'⁶⁹ In granting the permission Lord Woolf, the Lord Chief Justice of England and Wales, stated:

Customers go to the public house ... to take part and collectively enjoy the event. Just as attending a match in person is a different experience from watching it on television at home, so to take part in the atmosphere in public houses ... is a different experience. Spectators attending the public house can obtain the satisfaction of involvement as collective participants in the action ...⁷⁰

Here sport broadcasting and democracy find a new locus, the

neighbourhood 'local'. There can be little doubt that, for some, the pub has historically been a meeting place, a place of community, and a place for the *demos*. Nor is it beyond imagination to assert that watching a football match, in which the nation's pride and honour are on the line, with a group of one's fellow citizens, might be closer to the national interest in the creation of an active citizenry, than watching the game at home alone. At the same time of course, it would be necessary to ask about alternate imaginings and realities of the local pub as a place of male violence, or of the effect on 'families' if the male partner is out for breakfast every day for a month at the pub.⁷¹

In addition, we would also need to interrogate the ideas of national belonging and the exclusion which must be part of that identity. Would a German fan feel comfortable, or fully able to enjoy his/her European 'citizenship', giving him/her access to television in a Europe without frontiers, if he/she had walked into a pub in Manchester during a Germany-England encounter? Does the headline in the *Observer* about the Kirch television rights case, which read 'German threat to World Cup coverage',⁷² carry the same semiotics of cultural belonging in the new Europe as a story headlined 'Threat to World Cup coverage'? There can be little doubt that nationalism in general and sports nationalism in particular can be very ugly indeed. Do UK and European anti-siphoning laws, like their Australian equivalent, support and promote national identity or nationalism of the ugliest kind, and how can we tell the difference?

Markets, Technology, Regulation and Culture: A Critique

The Televised Game as a Public Good

We believe that these are the questions which are central to any analysis or understanding of sport broadcasting legislation. Sport is posited at one and the same time as a valuable corporate commodity and as a set of events which are central to the construction of national identity. In other words, sport is at once a private and public commodity and essential social good. The questions which face legislators, regulators and fans here concern the proper positioning of the various and competing interests in sport broadcasting in a complex matrix of concerns and priorities. Is the national interest compatible or synonymous with the interests of corporate capital? Is market capitalism a sufficient means to regulate and determine the democratic interests of citizens?⁷³ What distortions are imposed in the market for broadcasting rights by this form of legislation?

The question in this context seems to be whether the citizen or the fan should be entitled to watch games on FTA television, or whether 'fans'

should be forced, like movie or opera lovers, to adhere to the requirement of paying monthly subscriptions.⁷⁴ Is the televised game a 'public good'? Adrian Walsh and Richard Giulianotti argue that:

[Elite sporting events] are viewed increasingly as important public goods; access to these goods must be considered in terms of cultural citizenship and civil rights at the cultural level. It thus flows that the commodification of sport is pathological when it excludes persons from access to these goods, either at the actual level (in match attendance) or at the virtual level (on television or other media). How plausible this line of argument is will depend on the kind of sociological evidence that can be mustered to demonstrate that access to sporting goods is central to cultural citizenship.⁷⁵

They then assert:

In terms of cultural citizenship, people also have a right to access elite level sport, particularly for 'prestige' fixtures within football at the domestic and international levels. Hence we advocate policies of blocked exchange, such as a much tougher version of the antisiphoning legislation currently in place in Australia, for the televising of prestige fixtures.⁷⁶

Here again we find the policy position, in effect that at some level at least, a 'fan' can be and is transformed into a 'citizen', through watching sport on FTA television. What is merely or *prima facie* a personal taste, or as the economists would have it, a commodifiable preference, becomes, somehow, in an almost mystic fashion, a public, democratic practice. The problem here is that none of this is unassailably true. Sports broadcasting in Australia is not a conglomeration of simply private, capitalist interests left to the regulation of the market, nor is it a simple public good essential to Australian national identity and democracy as we know it. The reality as always is far more complex. The soccer fan in Germany may be someone whose love of the game transcends national or club identities and loyalties and who puts the sport above all else. Or not. The Australian example again offers what we believe are useful insights into the complex social, political, economic and ideological stakes at play in regulating sport broadcasting.

Market Power and Regulatory Barriers to Entry

Sports rights are significant sources of advertising and other revenue for broadcasters. Exclusive rights to sports broadcasting are, in particular, the primary means to gain subscribers for Pay TV operators. Rupert Murdoch has described sporting rights as the 'battering ram' of his Pay TV services, the primary subscription driver.⁷⁷ These are then used as content in the form

of a 'loss-leader' in order to gain subscribers to his Pay TV networks and providers. On his own, however, Murdoch remains locked out of access to many more lucrative broadcasting deals in Australia because of that country's anti-siphoning legislation.

The anti-siphoning rules, which effectively protect the FTA broadcasters from competition for rights to the most popular and sought-after sporting events, raise a significant barrier to entry to that market. The FTA operators, in particular the three commercial networks, have the significant economic resources to purchase sporting rights.⁷⁸ The legislative provisions which create the anti-siphoning environment have enormous economic consequences for the increased market power of FTA broadcasters, particularly the commercial networks, and significantly weakened the competitive position of the Pay TV operators. The limited nature of the more desirable product available for purchase means that they can effectively operate as an economic cartel, within a highly interdependent relationship, where they very soon learn that the behaviour of one party has a significant effect on the others.

The market power of the FTA operators was further strengthened by the Television Broadcasting Services (Digital Conversion) Act 1998, which created a new regulatory regime for the introduction of digital television in Australia. Not only were the FTA networks granted additional spectrum for digital broadcasts without charge, but a ban has been placed on any new commercial television licenses until 31 December 2006.⁷⁹ Regulations have also been introduced which restrict the content that datacasters may carry to prevent them becoming *de facto* broadcasters. In its Inquiry into the Broadcasting Industry, the Productivity Commission argued that further restrictions on multi-channelling and datacasting, and the mandating of high definition television (which will require much more spectrum than standard digital transmission), will limit the ability of digital television to augment traditional sports broadcasts, through enhanced programming services. Additional sports programming provided through simultaneous transmission and the broadcasting of minor sports by datacasters will also be limited.⁸⁰ The cost of high definition receivers will also confine the opportunity for ordinary citizens, ordinary Australians, to access these programmes. The introduction of digital broadcasting was very much heralded by the Federal government as being about the enhanced viewing experience of sport on TV. The Prime Minister John Howard combined national identity and technology when he stated:

We have a great desire to master, to understand, to enjoy new technology. And I think that Australians will take to high definition television. Those of us who love our sport, whatever that sport may

be, will find in high definition television and all that goes with it an opportunity to enjoy the pleasures of our particular sporting passions like we've never enjoyed them before.⁸¹

These regulations, championed by Kerry Packer's Channel 9, may in fact prevent digital services from realising the potential emergence of more sports broadcasters as the cost of transmission of these programmes is prohibitive. Instead, we believe, with others, that the high definition television digital plan for Australian broadcasting will limit the opportunity, for all but a small percentage who can afford to do so, to gain access to high definition sporting programming. There is a clear but unresolved contradiction between government policy on digital television and the purported vision of democratic and universal access to sports coverage underlying the anti-siphoning legislation.

Market pressures and market failures will continue to exist under regimes such as Australia's anti-siphoning system. For example, as we have previously stated, the sheer number and breadth of sporting events listed means that not all events can possibly be shown on FTA. While there is provision within the Act for the 'de-listing' of certain events – s.115(2) – they are cumbersome procedures which require an application to the minister, who must be assured that no network is willing to take the FTA rights.⁸² The process is therefore open to abuse by the FTA operators.⁸³ The demands of programme scheduling often mean that delays in de-listing may mean that the event is in fact not shown.⁸⁴

As a consequence of these significant, government-created, regulatory barriers to entry and the exercise of market power by the commercial networks, event organisers are also prevented from operating in an efficient market in which they can fully exploit the economic value of their 'product' through sale of both FTA and Pay TV rights.⁸⁵ This results in reduced revenues being returned ultimately to the sporting bodies with consequences for the sporting communities within which they are based. Again, we are not suggesting that such circumstances and analyses should be determinative of government regulatory policy, nor is this necessarily an argument for the absence of all anti-siphoning or similar rules. The case of football in the UK clearly demonstrates that opening up broadcasting rights to all-comers can result in the enrichment of a few clubs, such as those in the Premier League, at the top of the competition, but may also result in financial turmoil for most others. The collapse of ITV Digital, which had promised vast sums for the broadcasts rights to the less popular and less wealthy First Division, has now left many clubs in severe financial difficulties.⁸⁶ The creation of an event for television which will attract the requisite viewers tends to reward only those elite teams at the top who have

global/national branding rather than a local community fan base.⁸⁷ Even a system of income redistribution or pre- and post-relegation supplementary payments does not avoid these problems.⁸⁸ Again, if sport is essential to national identity, if fans achieve a significant part of their existential well-being from their support of and connection with a particular club or code, questions about national interest and the role of government, regulation and telecommunications policy will continue to be raised.

For example, anti-trust remedies can be used to deal with contracts which lock in a large number broadcasting rights on an exclusive basis for a excessive period of time.⁸⁹ The sports leagues may be found to have misused their market power by acting collectively to sell rights exclusively to the highest bidder.⁹⁰ This depends ultimately on whether the sports leagues have substantial power in the market.⁹¹ Exclusive contracts may also substantially lessen competition in a market. Once again this depends on the degree of market power and market definition and on whether the downstream market is likely to be foreclosed.⁹²

Broadcasters may also have monopoly power in negotiating broadcasting rights and in the advertising market. Advertisers are limited to a small number of FTA networks if they wish to purchase time during popular sporting events. In turn, this results in the ability of these FTA operators to exert market power by increasing advertising rates. In addition, the purchase of exclusive rights by FTA operators, assisted by anti-siphoning legislation, can also facilitate additional profitable merchandising and marketing opportunities through the sale of related products or increasingly through the presence of associated media. The FTA broadcasts are then often used to cross-promote these merchandising interests and websites.⁹³ FTA networks are not prohibited, however, from purchasing both the FTA and Pay TV rights, and it is these networks, rather than the sporting bodies themselves, which are then able to fully exploit their economic value through sale to the Pay TV operators. Owners of FTA networks, such as Kerry Packer's PBL, have additional integrated interests in Pay TV outlets, like Foxtel. Foxtel then, through its other main shareholder, Rupert Murdoch's News Limited, has a significant stake in the NRL. This means that Foxtel and Channel 9 have access to the broadcast rights for live Rugby League games, and further that they might be able to use their market power in the FTA market to lessen competition significantly in the Pay TV market by merely making the rights available to their own Pay TV interests. The interlocking nature of Australian media interests was acknowledged by the Full Federal Court in *Foxtel Cable Television Pty Ltd v. Nine Network Australia Pty Ltd & Australian Broadcasting Authority*.⁹⁴ The Court explained why News Corporation, on this occasion, was far more interested in selling the delayed FTA coverage and highlights package of the South African cricket series to Channel 7 rather than Channel 9, which had offered

a substantially higher fee:

it seems to us naive to assume that decisions in relation to the televising of a particular event will necessarily be made only by reference to market forces. The Australian television industry is dominated by companies having a variety of media interests. A company's attitude to the televising of a particular event may well be influenced by other interests of that, or a related, company. This may be the reason why News refused Nine's offer in the present case but made an agreement with Seven that returned it a much smaller fee ... the Seven agreement would have given the Foxtel companies, which we understand to be part-owned by News, total freedom from competition in respect of the televising of the matches. That result would have defeated the purpose of the anti-siphoning provisions.⁹⁵

The economic position of the FTA networks, even in the absence of direct Pay TV interests, has also been significantly strengthened by the Australian Competition and Consumer Commission's (ACCC – Australia's anti-trust watchdog and enforcement agency) declaration of access to the analogue cable television in accordance with s.152AL(3), Part XIC of the Trade Practices Act 1974.⁹⁶ This access declaration, again the result of 'regulation' rather than the 'market', has enabled Channel 7 to gain access to the Foxtel cable for the broadcast of its sports channel C7.⁹⁷

The potential problems and issues raised by the complex corporate structure of Pay TV in Australia came to the fore in the bidding war for television rights to the Australian Football League (AFL). Channel 7 had held these rights for many years and, with the advent of Pay TV, had introduced AFL games to its cable subsidiary C7. A conglomerate of Channels 9 and 10, together with Foxtel, owned by Murdoch, Telstra (Australia's largest telephony company) and Packer put together a combined bid package and wrested away future rights to AFL matches from Kerry Stokes's Channel 7.⁹⁸ In effect, Kerry Packer now holds the rights for FTA broadcasts of the two major football codes, Aussie Rules and Rugby League (NRL), and a substantial interest in the Pay TV rights for the same sports, all of which are, by dint of their inclusion on the anti-siphoning list, events of national importance and cultural significance. Programming decisions about events of national significance to the construction of Australia's democratic self-understanding now have little to do with government regulatory policy and will rest to a great extent in the hands of Channel 9 executives. *Plus ça change*. In the 2002 season, Channel 9 have already decided not to show live broadcasts of AFL matches in regional areas of New South Wales, because they clash with higher rating programmes and NRL broadcasts.⁹⁹

While the ACCC has consistently held that FTA television and the Pay TV are, in fact and in law, separate markets, this is clearly not a view embodied in government practice and policy.¹⁰⁰ The introduction of anti-siphoning legislation, based as it is on a fear of migration, is at least partially informed by a belief that the two types of television providers do in fact compete for viewers and programming. Again, however, they do not 'compete' between themselves or with the other form of provider in an environment of real consumer choice and substitutability.

Regulatory agencies like the ACCC here adopt policy positions and practices which can and do have serious and long-lasting consequences for the future of television in Australia and which are at the same time, at least by implication, based on assumptions which conflict with government legislative and cultural policy.

Our fundamental understanding that '[t]here is a large difference between the public interest and what interests the public'¹⁰¹ is important once again. Anti-siphoning legislation is based on the assumption that the public interest demands that these events be shown on Free To Air TV. But FTA broadcasters are free to make their decisions not on public interest grounds but on economic criteria of what will maximise their respective revenue. As Sunstein points out, what broadcasters want to show may not even coincide with a real market in which 'viewers receive what they want', other than a pure form of pay-per-view:

The key problem here is that viewers do not pay a price, market or otherwise, for television. On the contrary, it is more accurate to say that viewers *are* a commodity, or a product, that broadcasters deliver to the people who actually pay them: advertisers.¹⁰²

If we are to understand that the ideal television market is one in which viewers receive what they want, then this reality of supply and demand in the television 'market' introduces some distortions. The interests of advertisers, who target certain demographic groups over others and who prefer certain content to other 'competing' content, can 'push broadcasters in, or away from, directions that viewers, or substantial numbers of them, would actually like'.¹⁰³

The Effect on the Market for Pay TV and the Development of Niche Markets

A statutorily imposed inability to purchase exclusive sport rights to listed events which is the core characteristic of Australian anti-siphoning rules, has arguably resulted in a slower uptake of Pay TV in Australia than originally forecast.¹⁰⁴ Here, anti-siphoning legislation has had clear knock-on effects in other parts and aspects of the broadcasting and telecommunications industries in Australia. The Australian government's

policy decision that, in effect, two main players, Foxtel and Optus, would contest a duopoly for the first several years of pay television in Australia rather than the promotion of regional monopolies such as those established in the United States and Canada, has led to a costly and inefficient duplication of broadband facilities in the small Australian market.¹⁰⁵ This industry structure, and the ACCC decision to refuse further consolidation in the 1995 Foxtel–Australis merger, has contributed to the financial difficulties.¹⁰⁶ The lack of viability of two full Pay TV services, coupled with the removal of the statutory duopoly and certain restrictions on advertising, has led to further consolidation in the industry, thus defeating the original policy intent of competition in Pay TV providers.¹⁰⁷ Indeed, the Channel 9–Foxtel consortium was able to succeed in its acquisition of FTA and Pay TV rights to AFL and NRL games in part at least because of the economic weakness of Optus, the second cable operator.¹⁰⁸ In essence, Foxtel which carries with it the economic prowess of Kerry Packer, Rupert Murdoch and Telstra, the former government telephony monopoly (now 49 per cent privatised), is itself quickly approaching monopoly status in Pay TV. The experiment of head to head competition for laying broadband cable and securing content has continued to result in financial losses.¹⁰⁹ Foxtel and Optus recently announced a deal to share programming. If approved by the ACCC the deal¹¹⁰ would have effectively resulted in one main provider of Pay TV programming and in addition have permitted Foxtel to bundle Pay TV with Internet and telephony services.¹¹¹

This jeopardises not only increased investment in this industry but also the development of technologies via the use of broadband cable such as telephony, interactive and Internet services. It can also be argued that the declaration of access to analogue cable by the ACCC will discourage investment, as will the restrictions placed on Pay TV operators and datacasting by the legislation regulating new digital technologies. In addition, as we have already mentioned, anti-siphoning restrictions, meant to increase access to and ‘democratise’ sport programming in the national interest, may also inevitably lead media providers such as Pay TV operators to integrate back either by forming their own ‘media leagues’ which are not subject to the Act, following in some ways the precedent set by Murdoch and his purchase of exclusive rights to the Premier League football in the United Kingdom and Super League in Australia, or by purchasing their own sporting complexes (and thereby potentially excluding access to competing broadcasters), as is the case with the new Colonial Stadium in Melbourne.¹¹²

Furthermore, it is becoming increasingly obvious that the different regulatory treatment of FTA and Pay TV is less justifiable in the context of conglomerate multimedia interests. Convergence means that any form of

content can be made available via any transmission medium, eroding the traditional distinctions between telecommunications and broadcasting.¹¹³

The presence of significant economies of scale, first mover advantages and network effects in the Pay TV industry reinforce the importance of obtaining a significant subscription driver for any Pay TV broadcaster.¹¹⁴ Economies of scale are obtained in cable networks as the cost of infrastructure and settop boxes decrease as total take-up increases.¹¹⁵ Network effects occur when a good is more valuable to a user the more users adopt the same good or compatible ones. Technical incompatibilities in Pay TV transmission and decoder standards, such as satellite and settop decoders mean that consumers who have purchased one type of equipment many not without significant cost be able to switch to another provider. Switching costs cause a lock-in effect, particularly for the first-mover in the market who uses the form of technology which is likely to be most frequently adopted.¹¹⁶ These factors can ultimately effect the content which can be provided.¹¹⁷

Subscription television, in the view of some, is in fact better able to cater for niche and special tastes than the mass medium of FTA television.¹¹⁸ As Veljanovski notes, 'pay TV can tap the willingness to pay of those with intense preferences for particular programmes or a different mix of programmes from that offered by the FTA broadcasters'.¹¹⁹ In a multicultural society, socially and geographically diverse, where a single homogenous national interest is more difficult to identify and define, the catering to niche and minority groups, including specialist language, indigenous and ethnic communities through the development of Pay TV programming or narrowcasting could contribute more to a notion of national interest and identity than a prescribed list of sporting events distributed on a mass medium basis, or vice versa. Indeed, if we return here to the examples of Rugby League and Australian Rules Football briefly, it might well be argued that is immanent in the current anti-siphoning list.

If Rugby League is an east coast game and Aussie Rules is followed elsewhere, then the idea that such events are in the national interest is in effect a recognition of sorts that Australia is not an homogenous whole but rather it is a nation constructed out of disparate parts. In reality, this idea of a dispersed-but-still-shared identity in the nation would perhaps be better served by a recognition that, at some level, the interest of the communities and of the community would be better served through a system of programming availability which is truly determined by need and demand. Of course, the success or failure of such a regulatory policy could only be determined once we, as citizens, had reached a judgment about what kind of national body politic we want. Multiculturalism and national identity are neither simple nor fixed, immutable concepts. Technology and regulation

are not the answer to issues of national identity unless and until the polity of citizen-viewers can begin to engage in real debates and discussions about what we want from those technologies and from the practices of government regulatory intervention, or indeed from the market.

In the absence of such a debate, however, the inconsistencies of the legislation in this area are only too apparent. For example, in the Federal Court decision in *Sportsvision Australia Pty Ltd v. Tallglen Pty Ltd*¹²⁰ the anti-siphoning provisions were avoided by the legal magic of characterising these particular Pay TV rights as 'narrowcasting' and not 'broadcasting' under the terms of the Act. Section 17 of the Broadcasting Services Act 1992 defines 'subscription narrowcasting services' as subscription broadcast services which are targeted to special interest groups or which provide programmes of limited appeal. In *Sportsvision Australia* the Court defined a channel which exclusively broadcast Australian Rules Football as a 'subscription narrowcasting service' and therefore not 'broadcasting'. In other words, the semiotics of legal interpretation and the economics and technologies of television raise issues of access which call into question the very democratic premises of the legislative policy. It also calls into question how a broadcasting event which can be defined as of 'limited appeal', AFL contests, can at the same time be included on the anti-siphoning list as an event 'of national importance and cultural significance'.

Public Interest Broadcasting and the Market

Market barriers to entry and calls for special treatment and protection of the FTA revenue base often relate to arguments concerning the special obligations imposed on FTA licenses which are not faced by Pay TV, such as Australian content and children's programming quotas and the need to bear the costs of digital conversion.¹²¹ The same public interest concerns of the need to protect a form of national identity, which drive anti-siphoning legislation, also underlie the Australian content rules. While the utility of these Australian content restrictions for the achievement of these policy objectives has been subject to debate, it is clear that they can still just as easily be satisfied under the current law by the same homogenous, non-inclusive view of Australia and Australians which also characterises the content of the anti-siphoning list.¹²² The interests and concerns of Aboriginal Australians, gays, lesbians, the physically and mentally challenged, and Australians from non-English speaking backgrounds, are as absent from this aspect of the national interest as they are from those events of national significance found in the anti-siphoning list. Once again, what interests the public does not always coincide with the public interest.

A more cynical viewer-citizen might argue that the FTA networks are simply extremely adept at invoking the rhetorical power of their 'public' obligations when it suits their private interests. Referring to the favourable

deals gained by the FTA broadcasters in the Australian digital regime Jock Given states:

Broadcasters too rediscovered the value of being special ... Broadcasters have worked to reinvent themselves as guardians of the public interest, favoured custodians of television's traditional public policy aspirations in the digital era.¹²³

The role of regulation and government policy has consistently been challenged in this and other contexts by the commercial networks in particular. Once again, the idea that Australia's public interest is best served, or served at all by commercial television is one which we believe must be more fully interrogated and debated.¹²⁴

Regulatory interventions such as anti-siphoning, anti-hoarding, legislative restrictions on new licences, digital conversion and access regimes, all clearly create severe market distortions in broadcasting. This has led the Productivity Commission in its report into the broadcasting industry¹²⁵ to conclude that the prohibition on new broadcasters and the anti-siphoning rules are contrary to the principles of the Legislative Review requirement of Australia's National Competition Policy (NCP).¹²⁶ These require that government regulation 'should not restrict competition unless it can be demonstrated that the benefits of the restriction to the community as a whole outweigh the costs'.¹²⁷

Again we must underline the obvious fact that the anti-siphoning legislation and regulatory framework in Australia appears in fact to be grounded in a symbiotic relationship, confirmed by Parliament, between ideas of national interest and identity on the one hand, and the Free To Air broadcasters on the other. Government has adopted the policy position that the interests of all members of the polity are best served if they have 'free' access to events deemed to be vital to the construction of Australian national identity. The market and competition here play an ambiguous and contradictory role.

Clearly, there is present here an understanding that access to FTA TV is more democratic, more broadly based, than is access to Pay TV.¹²⁸ Fear of programme migration is the fear that many citizens will be unable to act as citizens in this collective, televisual construction of national identity, if participation in the process is made conditional upon the exercise of a consumer choice in the Pay TV marketplace. At this level, then, there is a clear and unequivocal governmental decision to favour 'free' access over access by commercial choice. At the same time, of course, the mechanism through which public policy is deployed is, in effect, a commercial 'market'. Free To Air TV is only free to viewers because of payments made

by advertisers in the hope that those viewers will in fact ultimately choose to act as consumers and purchase the good or service in question. In essence, then, the choice of FTA TV over Pay TV as the medium through which Australian national identity is to be constructed, is a governmental choice in favour of one commercial medium over another.

Television without Frontiers, Citizens and Markets

Some of the more problematic areas of regulatory politics and the regime of anti-siphoning broadcast law were raised in a recent UK decision of the English House of Lords. The discretion exercised by ITC under s.101b of the Broadcasting Act 1996 and the interpretation of Article 3a(3) of the Television without Frontiers Directive were subjected to judicial review in *R v. Independent Television Commission, Ex Parte TV Danmark 1 Ltd.*¹²⁹ The decision makes important references to the interplay of market forces and the public interest and harmonisation with the EC Directive of schemes such as the UK Act.

The ITC had refused consent under s.101b to a UK based cable and satellite broadcaster, TV Danmark, which had purchased exclusive rights to televise five qualifying matches for the World Cup 2002 which were designated events under the Danish legislation. TV Danmark transmits programmes to Denmark by cable and satellite. Such broadcasts would have prevented a substantial proportion of the Danish public from watching on FTA television.

The ITC provides guidance in its code as to the matters which it would take into account in determining whether to grant consent under s.101b. The criteria are the same as those taken into account for domestic events under s.101. The relevant matters are listed under paragraph 13 of the Code. Broadcast rights must be subject to an offer which is communicated openly and simultaneously to broadcasters providing services in both FTA and Pay TV. The price sought for the rights must be fair, reasonable and non-discriminatory as between the two categories of programme service.¹³⁰

The House of Lords upheld the decision of the ITC to refuse consent as a lawful exercise of the discretion under s.101b.¹³¹ It rejected TV Danmark's arguments that the only issue to be determined by the ITC was whether the rights had been acquired in fair competition at a reasonable price and that this was determined at the time of purchase of the rights.¹³² The House of Lords rejected the interpretation of the Code by the Court of Appeal, which had emphasised a free market approach to the auction of rights. Under the Court of Appeal's approach, if an FTA broadcaster has had the opportunity to bid for exclusive rights at a fairly conducted auction and lost, the ITC is bound to be satisfied that it has had the opportunity to acquire the rights on reasonable terms. Once there has been a fair auction, it cannot be said that

a substantial proportion of the public has been deprived of the possibility of watching. The auction process was found *per se* to have provided such a possibility.

In the House of Lords, Lord Hoffmann argued, however, that Article 3a(3) of the Directive requires member states to achieve a result which is to prevent the exercise by broadcasters of exclusive rights in such a way that a substantial proportion of the public in another member state is deprived of the possibility of following a designated event.¹³³ Hoffmann L.J. stated:

The obligation to achieve that result is in no way qualified by considerations of competition, free market economics, sanctity of contract and so forth. The fact that reference is made to these matters in the recitals to the Directive explains why the scope of article 3a is limited in the way it is. Its terms represent a compromise between the policies in question and the interests of the general public in being able to watch sporting events for free ... the balance between the interests of sports organisers and pay-TV broadcasters in maintaining a free market and the perceived interest of the citizen in being able to watch important sporting events has already been struck in the terms in which article 3a has been framed.¹³⁴

He added

The Directive requires the public to have the possibility of following the event in the sense that a member of the public may watch it if he chooses to switch on his television set. If the match is not being shown on any programme to which he has access, he does not have that possibility.¹³⁵

The Court rejected the notion that Part IV of the Broadcasting Act merely required a fair auction in which the public broadcasters had a reasonable opportunity to bid.

Indeed, if that were the beginning and end of the matter, Part IV of the 1996 Act would serve very little purpose and Parliament might as well have left the allocation of listed sporting events to market forces in the same way as Premier League matches.¹³⁶

Lord Hoffmann then analysed the balancing function inherent in UK and European law

It is true that paragraph 13 of the code contemplates a process of bidding for de facto exclusive rights and lays down criteria for the fairness of the bidding process. But the ITC also makes it clear that it will have to be satisfied that the public broadcasters had the opportunity to acquire the rights on 'fair and reasonable terms'. It can

be said that the market price for the rights is what they will fetch on the open market and prima facie an opportunity to buy at the market price is an opportunity to buy at fair and reasonable terms. But this principle, if generally applied, would, as I have said, make the whole regulatory machinery in Part IV fairly pointless. The code makes it clear that the ITC will form a view of the value of the rights 'to the broadcasters', in other words, what that category of broadcasters could reasonably be expected to pay for them. Of course the ITC may consider that the answer should be the same for both categories; the public broadcasters are not without resources and market power and the ITC may take the view that the rights in question should simply be left to fair and open competition. But the clear purpose of Part IV is, if necessary, to protect the public interest in free access to important sporting events against market forces. The ITC is engaged in a delicate balance of the interests of broadcasters, sports organisers and the general public.¹³⁷

Again, we are struck not by the fact that regulatory bodies must engage in delicate and complex balancing analyses between and among interested parties, nor by the fact that Courts should adopt an attitude of deference for those bodies' expertise. Instead what is striking in this case, and elsewhere, is the relative ease with which ideas of national importance, interest and significance are simply assumed, by legislators, tribunals and courts, to be inherent in certain sporting events without any need for analysis or carefully articulated argument. We all seem to know as a matter of law and policy that watching the World Cup on television, and more specifically on Free To Air television makes us better, more complete, citizen members of the polity

Deregulation and the Issue of Migration

Likewise, the assumption that, in the absence of anti-siphoning legislation, migration of sporting events to Pay TV would occur, has also not been subject to careful substantive analysis or to real public debate over policy issues and our understandings of the politics of national identity. Another comparative regulatory example serves to highlight the areas of concern here.

There are currently no rules in force in the United States to prevent migration of sports programming from terrestrial to cable or satellite TV.¹³⁸ An earlier attempt by the Federal Communications Commission (FCC) to impose some rules was found unconstitutional by the United States Court of Appeals for the District of Columbia in *Home Box Office, Inc v. FCC*.¹³⁹ The rules infringed the First Amendment because they did not further an important or substantial governmental interest and the restriction on freedom of speech was broader than was necessary to further that interest.

The much feared migration to Pay TV has not occurred in the United States, where an FCC Report in 1994 concluded that the absence of anti-siphoning legislation has in fact resulted in more coverage by both FTA and cable as they compete to provide an ever-expanding range of sport programming.¹⁴⁰ There had not been significant migration of sports programming from broadcast to subscription media at the national or local level, although the FCC did express some concern about a decline in broadcast coverage of college football games in some markets.¹⁴¹

The decline in broadcast coverage of some sports was found to be due to reduced demand and declining ratings rather than migration. In the case of lesser-known basketball conferences, cable has provided the only television coverage in some instances. There was also evidence of 'reverse migration' with women's college basketball and professional beach volleyball – lower profile sports – which were first carried on cable and gained enough popularity to attract broadcasters.¹⁴² For the Americans, there is a competing public interest involved with cable coverage which is often ignored. Here sports such as the Paralympics can find an audience. The growth of cable sports programming indicates a growth in viewer choice rather than migration from Free To Air to cable, and should therefore be considered to be in the public interest.¹⁴³ Cable, it was argued, was better able to respond to a much more specialised audience than broadcast television, and the FCC should refrain from adopting any rules that would artificially constrain cable's ability to compete in the sports licensing rights market.¹⁴⁴

Here, in the US example, the 'market' has created the opportunity for a sport with no FTA coverage to gain a following on Pay TV and then to migrate to FTA. Again, we are not arguing here that this would necessarily occur in Australia, since we know that this has not happened in the UK. We are simply pointing out that the current situation which exists in Australia is the result of a combination of haphazard regulation, market rhetoric and a virtually unexamined set of ideas about national identity and sport.¹⁴⁵

It is difficult to assess what the situation might be in the absence of legislation in situations where the legislation, such as anti-siphoning provisions, has already created a significant barrier to entry. But in its recent inquiry into the operation of the anti-siphoning rules the ABA made no assessment of the likelihood of migration even in areas which had been identified for future additions to the list. These events included the Pan Pacific Swimming Championships, FINA World Swimming Championships and each international soccer match involving the senior Australian (male) representative team, 'reflecting changing viewer interest'¹⁴⁶ and 'future expectation'.¹⁴⁷ These additions are recommended even though it is acknowledged that 'the market has operated to deliver a number of sporting events to the free-to-air viewing audience without the intervention of the

anti-siphoning list'.¹⁴⁸

The more interesting and important questions, addressed by the United States FCC, would have demanded an investigation as to whether there is any evidence that these FTA programmes will migrate to Pay TV in the absence of legislation. The initial question the FCC invited comment on was whether there is a public interest in government action to promote free access to sports programming.¹⁴⁹ This is, of course, the central assumption behind the entire set of Australian provisions, and clearly informs regulatory practice in Europe and the UK as well. The FCC also determined that it was not within its mandate to determine the 'right amount' of sports coverage but rather to promote the availability of a broad and diverse menu of programming to the American public.¹⁵⁰

In examining possible public interest arguments the FCC considered that college football in particular obtains government subsidies, tax exemptions and anti-trust exemptions and therefore may have a responsibility to keep the majority of its programmes on FTA TV.¹⁵¹ While no similar anti-trust exemptions are in place in Australia, similar public interest arguments could be raised where sports academies, school sports programmes and stadia are often government subsidised. The mixture of public-private interests means at the very least that these events can not always be considered as merely a 'commercial product' for exploitation 'created' by Murdoch or Packer. While these considerations may have been beyond the mandate of the ABA which was merely asked, as we have seen, to examine whether these programmes have been 'consistently broadcast', they are clearly relevant to questions of 'national significance' and the 'public interest' in this area.

At the same time, the ABA reached other conclusions which only seem to confirm some kind of basic misunderstanding of the regulatory framework and the cultural and political dynamic at work here. The notion of an anti-siphoning list rejects a pure market approach to the sale of listed programming rights, yet the ABA invokes the market to reject the inclusion of other rights. The Women's National Basketball League (WNBL) opposed the inclusion of rights to broadcast its games on the anti-siphoning list. The ABA agreed that they should not be included because for them, it is important that sports with lesser 'economic clout' should be able to continue to negotiate freely with Free To Air and Pay TV.¹⁵² In other words, while on the one hand extending part of the anti-market, anti-siphoning list, the ABA also perceived no apparent contradiction in rejecting the expansion of the list in other areas simply by invoking a naïve argument about 'markets'. This same approach was applied as the ABA rejected the solution offered by the Productivity Commission that the rights on the list be offered on a non-exclusive basis.¹⁵³ The ABA asserted that such dual rights arrangements are not viable because lack of exclusivity significantly dilutes the

exploitable value of the product for the sporting leagues.¹⁵⁴

The Australian approach seems to be grounded still in assuming that there will always be market failure in relation to popular sports, that migration will necessarily always occur in the absence of legislation. This risks an over-inclusive legislative approach which may be critiqued on many grounds but at the very least it is contrary to National Competition Policy and the regulation review provisions of the Competition Principles Agreement, which requires an investigation into whether the objectives of the legislation can only be achieved by restricting competition (clause 5(1)(b)).¹⁵⁵

Again, the American experience might have served at the very least, as a useful comparative starting point. The FCC placed its examination within the context of audience fragmentation which was already occurring as a consequence of an expansion of broadcast capacity brought about by cable TV, both within broadcast television and from non-broadcast media. It argued that the impact of cable on the market for sports programming went beyond the mere addition of another bidder for local rights. 'The audience fragmentation is, to some extent, inherent in the nature of cable television; sports siphoning rules, even if otherwise legal and appropriate, would not eliminate it.'¹⁵⁶ The FCC also determined that cable access programming could still be accessible and affordable as there were in place regulated rates for subscribers and non-discriminatory access to those networks. Once again this was not a consideration in the ABA inquiry, where any assessment would of course be complicated by the lower number of subscribers (which is in turn partly related to the absence of premium sporting coverage) forcing up subscription rates. Nonetheless, if the market as regulator model plays some role in anti-siphoning law and policy, as the ABA seems to imply, then it is incumbent upon any real review of the bases of this legislation to offer a careful and fully considered analysis of the market, or markets, in question. Instead the ABA Report is a combination of contradictory elements, none of which is convincingly articulated.

Of course, in reality, neither Free To Air nor Pay TV actually operates as a fully competitive market. Pay TV is also not in a position of free and open competition. The structure of Pay TV is determined by licensing legislation and the duopoly structure defined by the government at the outset. FTA commercial networks are granted licenses to broadcast and as a result operate in an oligopoly situation. This oligopoly, created and effectively maintained through legislation and regulation, has recently been reinforced through the privileged status granted to the existing commercial networks, and other barriers to entry, in new digital broadcasting laws. The two public networks, ABC and SBS, are funded directly by government grant, although SBS does now carry some advertising. They have very

specific public broadcasting responsibilities and obligations imposed in their founding legislation, and are now, like public broadcasting in the UK, also subjected to increasing pressure from government and government-appointed management, to adopt more commercial characteristics. Again, it cannot be said that they operate according to 'market' principles. In essence, then, both Free To Air TV and Pay TV operate in regulatory environments which have created significant barriers to entry, the effect of which is to protect the dominant positions of the current players and their economic interests.

In addition, of course, anti-hoarding provisions might also be seen as attempting to impose additional burdens of public or community service on the public broadcasters ABC and SBS. If programme rights are offered to them for \$1, are they under some assumed obligation to carry sports and events the commercial broadcasters do not, for whatever reason, wish to air? What of the other public service obligations, clearly enunciated in their legislative charters and imposed on the ABC and SBS? Is the public broadcasting arena to become nothing more than a place for excess sports programme capacity of the commercial networks as the result of an uncontested notion of what is in the national interest. As the Productivity Commission points out, these public broadcasters may be reluctant to show this programming because they can not incorporate the event into their programming schedule at the last minute.¹⁵⁷ Similar issues, as we have mentioned, may arise for de-listed programmes for Pay TV. Because the current process is so cumbersome and delays are likely to occur, it is likely that it would be difficult if not impossible for the Pay TV operator in question to place a delisted event successfully and viably into its schedule.

Recent events in Australia around broadcasting of the soccer 2002 World Cup highlight many of the competing regulatory and cultural policy dilemmas we have been discussing. Channel 9, which secured the FTA rights to World Cup matches, decided that it would carry only selected games, in order to continue its coverage of Rugby League and AFL competitions. Channel 9 then struck a deal with the public broadcaster SBS to permit the 'ethnic' station to carry the games it chose not to show. SBS head of sport Les Murray identified the station's position in non-commercial terms when he said that. 'We are working for a social dividend rather than a commercial dividend.'¹⁵⁸ Here a national public broadcaster fulfills its mandate, imposed by legislation, while the commercial broadcaster exercises its rights and flexes its commercial muscle, again courtesy of legislative, regulatory barriers to entry which simply ameliorate its market position.

The imposition of a \$1 transfer fee is clearly not in all circumstances a sufficient economic deterrent to a FTA broadcaster hoarding rights. The FTA networks may make a rational calculation that it is still in their

economic interests to buy live rights, which they have already been able to purchase at a discount because of the existing regime of extensive regulatory protection available to them, and transfer them to the national broadcasters for a nominal fee than to allow the rights to be purchased by Pay TV. This non-market approach also does little to remove the distortions in the original market for the broadcast rights where the sporting league is unable to maximise the revenue in the sale of its rights.

The question which then arises, given what we believe are the clear difficulties and contradictions inherent in current legislative policy and regulatory practice, is whether there are indeed other legal and/or market mechanisms which might create a public policy environment in which clearly articulated governmental ideals of national identity might be more openly and efficiently achieved. Could alternatives to regulation, such as a voluntary code of conduct or economic incentives, achieve the same regulatory outcomes?¹⁵⁹ The Productivity Commission suggests that at the very least the central role of the minister in the legislation in the process of listing and de-listing events should be transferred to the Australian Broadcasting Authority or some other regulatory body which may be able to conduct this process in a more transparent and efficient manner.¹⁶⁰ Calls for deregulation can never actually mean a return to a 'free market' model, for as Sunstein argues:

What 'deregulation' really means is a shift from the status quo to a system of different but emphatically legal regulation, more specifically one of property and contract rights, in which government does not impose specific public interest obligations but instead sets up initial entitlements and then permits trades among owners and producers. This is a regulatory system as much as any other.¹⁶¹

The removal of anti-siphoning legislation would still keep in place digital legislation which mandates another form of regulatory protection for FTA television. Likewise, is a legislative access regime to analog cable which can be utilised by FTA networks, or their subsidiaries such as C7, consistent with a policy that *prefers* that content to be shown on FTA?

Deregulation and the Issue of a National Versus Regional Communications Policy

Here, of course, it is important to recall and underline that many of the problems and difficulties associated with national communications policies in Australia are the result of the particular historical, political and even geographical circumstances of that country. For example, the population divide between the coastal regions of Australia, where the vast majority of the people live, and the vast, empty spaces of the interior, 'the bush', has

meant that peculiar and particular attention has had to be paid, for political and cultural reasons, to a relatively small and dispersed rural population.¹⁶² This city/country divide is crucial to Australian politics, as voting patterns and seat distribution in federal Parliament often allow a small percentage of the rural population to have what many city and suburban dwellers perceive to be a disproportionate voice. At the same time, the competing images of masculine Australian national identity are also played out here, with the coastal 'bronzed Aussie' surf lifesaver, side by side with the sunburned outback image of the rugged farmer or 'stockman'.

This political and cultural imaginary is then reflected in the contradictions and battles which have characterised the development of communications and broadcast policy. In many parts of rural (and even in many urban and suburban areas) television transmissions delivered through traditional technologies are simply not available to many citizen-consumers. Thus, a policy of developing and maintaining national identity through Free To Air sports broadcasting may well end up being a policy which excludes many rural Australians from having access to these processes.

At the same time, the cost of 'laying cable' to many remote areas of the country or the inordinate expense of full Australian conversion to high definition digital broadcasting, already set to be achieved through massive regulatory protections for the commercial FTA networks, might very well also mean that rural consumers and those from the lower socio-economic strata are priced out of the market for Pay TV. Again, the possibilities inherent in satellite delivery, or wireless Internet technologies, intersect both with issues and questions of commercial viability and government regulatory policy and practice. For example, Internet coverage is not subject to the anti-siphoning list and this creates the possibility of regulatory avoidance.¹⁶³

If 'deregulation' is the preferred choice, what place will be left for the public policy idea that 'free' access to issues and programmes of national importance is essential within Australian liberal democracy? Will televisual democracy in twenty-first-century Australia be available only to those who can afford cable or high definition television? Raising issues which obviously overlap with question of the scope and provisions of universal service obligations: will the Federal Parliament mandate tax breaks for low income families to subsidise their cable subscription or to allow them to purchase a high definition television?¹⁶⁴

The questions in such circumstances can never really be simple or neutral ones of technological choice or 'the national interest'. Instead, all of the issues of mode of delivery, content, price, equity and democracy come into play in a myriad of ways. Unless and until rules such as Australia's anti-siphoning and anti-hoarding legislation are placed in such a complex and

public political and social context, we will be left with the unsatisfactory hybrid which characterises current law and debate.

Conclusion

We have tried here, however briefly, to demonstrate some of the ways in which one particular aspect of Australian, UK and European television broadcast policy is fraught with incoherence. Anti-siphoning and anti-hoarding rules for sport on Free To Air and Pay TV are informed and shaped by a mixture of policies and political rhetoric about the market, national interest and identity, and culture. An array of considerations, from issues of technology to appeasing various commercial and voting constituencies, has apparently informed this regulatory framework which is now characterised by confusion and failure.

We are not attempting to put forward here a final answer to the cultural, economic and political questions which are raised in this particular context. This is not an argument for or against 'the market', nor is it a plea for more or less 'regulation'. This is the simplistic dichotomy which has characterised Australian debates so far. Instead we are positing that such a state of confusion arises out of bad decision-making and incoherent or unreflective policy decisions.

Government policy in Australia has resulted in the current position in which there are only three Free To Air commercial networks and effectively two cable, Pay TV companies which do not compete for programming. There is no 'market' in broadcasting in Australia. Instead we are left with vaguely imposed public service obligations, anti-siphoning and anti-hoarding provisions and competing oligopolies. Recent government policy decisions in relation to digital television have simply reinforced the pre-existing position of the three commercial networks.

In addition, notions of national identity which inform the anti-siphoning rules have never been fully and publicly articulated or debated. Ideals and ideas of democracy and citizenship which should be at the heart of such considerations have been silenced or included in government policy-making only by implication. In this case we are left with an anti-siphoning list which resembles a bizarre and incoherent combination of criteria which protect and enforce the commercial interests of some sports, some broadcasters and a cultural construction of Australian masculinity as wholly synonymous with Australian identity.

Again we are not arguing here for a narrow, foundationalist or an equally narrow anti-foundationalist reading of the texts, tropes and practices of Australian cultural regulation.¹⁶⁵ Masculinity is important to Australian

identity. Technology carries with it the possibilities for a newly imagined set of communities and a reinvigorated democratic polity.¹⁶⁶ Popular, fan control of broadcasts on the Internet, such as the ball-by-ball coverage made available on CricInfo, may allow some form of real democracy to emerge.¹⁶⁷ At the same time, technology carries with it the possibility of Microsoft hegemony. Broadcasting brings the possible continuing dominance of a few corporate interests as well as the potential for a new and emerging national identity. Watching sport on television can result in a nation of couch potatoes, atomistic monads sitting in the lounge room 'having a Bud, watching the game'. It can also mean groups flocking to the local pub to watch a match on Pay TV (in the absence of anti-siphoning legislation) or thousands of Australians in 2000 occupying Martin Place or Darling Harbour in Sydney to share an experience of watching the Olympics with others. Narrowcasting can result in the dispersal of identity and community into thousands of special interest conglomerations and it can mean a new empowerment for groups excluded from the electronic mainstream of broadcast politics and regulation.

The national interest, Australian, British, German or Italian, identity, technology, convergence, broadcast policy and law, are all, or they should be, domains of political, democratic debate and contestation. The example of Australia's experience with anti-siphoning, anti-hoarding and other broadcast legislation serves to illustrate what can and will go wrong when debate does not occur and politics becomes nothing more than corporate lobbying and legislative protection of commercial broadcasting interests.

NOTES

* The phrase favoured by Australian social commentators Rampaging Roy Slaven and H.G. Nelson, *This Sporting Life*, JJJ, Australian Broadcasting Commission Radio.

1. See R. Lynch, I. McDonnell, S. Thompson and K. Toohey (eds.), *Sport and Pay TV: Strategies for Success* (Sydney: Centre for Leisure and Tourism Studies, University of Technology, 1996). See also, David Mosler, *Australia, The Recreational Society* (New York: Praeger, 2002).
2. Australian Broadcasting Commission, Submission to the Australian Broadcasting Authority, *Report: Investigation into Events on the Anti-Siphoning List* (Sydney: Australian Broadcasting Authority, 2001), 1.
3. Competition Commission, 'British Sky Broadcasting Group PLC and Manchester United PLC: A Report on the Proposed Merger', 1999, <http://www.competition-commission.org.uk/reports/426sky.htm>, accessed 26 Nov. 2002.
4. See generally Janice Hughes, 'The New Hollywood Studios and the Optimisation of Rights', *Intermedia* 25/5 (1997), 4; Stylianos Papatthanassopoulos, 'Pay Per Game: The Advent of Pay TV Channels in Europe and Their Implications for Sport', *Intermedia* 26/3 (1998), 21.
5. The German Kirch media group, which owned the broadcast rights to FIFA World Cup and Formula One racing, declared itself bankrupt under unsustainable debts brought about largely by an ambitious push into pay TV. John Hooper, 'Kirch on the brink as banks step in', *Guardian*, 9 April 2002.

6. Matt Wells and John Casey, 'ITV Digital staggers towards collapse', *Guardian*, 28 March 2002.
7. This is the most common taxonomy used in discussions of Australian broadcast law and policy. The distinction is between the economic and consumer model employed in the delivery of television programming. Others invoke the technological distinction between terrestrial television on the one hand and satellite, microwave or cable on the other, or now between analog and digital broadcasting. Because the regulatory focus in Australia is couched in terms of the consumer access model, we have chosen to employ the Free To Air versus Pay TV distinction.
8. Australian Broadcasting Authority (note 2); Australian Broadcasting Authority, *Issues Paper, Investigation into the Implementation of the Anti-Hoarding Rules* (Sydney: Australian Broadcasting Authority, 2000). The final report was presented to the minister on 31 August 2000, www.aba.gov.au, accessed 26 Nov. 2002.
9. See Independent Television Commission (ITC), 'Code on Sports and Other Listed Events', revised Jan. 2002, <http://www.itc.org.uk>, accessed 26 Nov. 2002.
10. *R v. Independent Television Commission, Ex Parte TV Danmark 1 Ltd* [2001] UKHL 42, 25 July 2001. See R. Craufurd Smith and B. Böttcher, 'Football and Fundamental Rights: Regulating Access to Major Sporting Events on Television', *European Public Law* 8 (2002), 107; Angela Flynn and Jonny Searle, 'Listed Events Legislation in the United Kingdom', *Entertainment Law Review* 12/6 (2001), 168; see discussion below.
11. See John Goodbody, 'Minister rejects World Cup on pay-TV', *The Times*, 5 Feb. 2001; John Goodbody, 'German tycoon accuses BBC and ITV of World Cup cartel', *The Times*, 14 Aug. 2001; Vivek Chaudhary, 'BBC and ITV pay £160m in World Cup deal', *Guardian*, 19 Oct. 2001.
12. Australian Broadcasting Authority, 'Pay Television "Siphoning" Investigation Information Paper', Feb. 1994; Department of Communications and the Arts, 'Anti-Siphoning Rules for Pay TV and Sport', <http://www.dca.gov.au/nsapi-text/>, accessed 26 Nov. 2002. The current list has effect until 31 December 2004, although exceptionally, the 2006 FIFA World Cup has been added to the list.
13. See, for example, Cass R. Sunstein, 'Private Broadcasters and the Public Interest: Notes Toward A "Third Way"', University of Chicago Law School: Program in Law and Economics Working Paper #65 (04/99), http://www.papers.ssrn.com/sol3/papers.cfm?abstract_id=143174, accessed 26 Nov. 2002.
14. If and when there is a threat to such events being shown live on Pay TV there is a public outcry, such as the recent decision by Nine to limit its coverage of AFL games. Cosima Marriner, 'AFL may be in breach of Seven deal', *Sydney Morning Herald*, 12 April 2002; Annie Lawson and Melissa Ryan, '\$450m broadcast deal on line as Alston heeds anger of fans', *Sydney Morning Herald*, 11 April 2002.
15. Section 10(1)(e) of Schedule 2 to the BSA.
16. See discussion of de-listing below.
17. The anti-hoarding list s.146c is independent of the anti-siphoning list but for practical purposes will contain the same events.
18. Sections 146e–146h of the Broadcasting Services Act 1992.
19. Section 146f.
20. See Nicholas Rothwell, 'Teaming with spoiled sports', *Weekend Australian*, 16–17 Sept. 2000.
21. Brian Sweeney and Associates, *Australian Sporting Interests* (Sydney: Brian Sweeney and Associates, 1999); Australian Productivity Commission, *Broadcasting*, Inquiry Report no.11 (Canberra: AusInfo, 2000); D. Rowe, 'The Global Love-Match: Sport and Television', *Media, Culture and Society* 18/2 (1996), 562.
22. *Foxtel Cable Television Pty Ltd v. Nine Network Australia Pty Ltd & Australian Broadcasting Authority* [1997] 143 ALR 516, at 521 per Wilcox, Lee and R.D. Nicholson J.J.
23. See Luke Collins, 'Fox kicks goal in NRL bidding', *Australian Financial Review*, 15 Dec. 2000; Roy Masters and Sam North, 'League snubs C7 for record deal with Fox', *Sydney Morning Herald*, 15 Dec. 2000; Roy Masters, 'Clubs lost sight of their windfall as league

- takes another rights turn in the war of the moguls', *Sydney Morning Herald*, 15 Dec. 2000.
24. Commercial events such as the Super 12 rugby union competition, which was created specifically by Murdoch to avoid the operation of anti-siphoning laws in Australia, are now so popular that calls are being made to add it to the protected list in the 'national interest'. Matt Price, 'Free-to-air networks in Super Try', *Australian*, 22 May 2002.
 25. Submission by the South Sydney club to the Full Federal Court, in *South Sydney District Rugby League Football Club Ltd v. News Ltd* [2001] FCA 862, para. 11.
 26. See Steve Greenfield and Guy Osborn, 'Circus Games: Contract and Control in Cricket', in idem, *Contract and Control in the Entertainment Industry: Dancing on the Edge of Heaven* (Aldershot: Ashgate, 1998), 135.
 27. Adrian J. Walsh and Richard Giulianotti, 'This Sporting Mammon: A Normative Critique of the Commodification of Sport', *Journal of the Philosophy of Sport* 28 (2001), 56.
 28. Football Task Force, 'Football: Commercial Issues: A Submission by the Football Task Force to the Minister for Sport', 22 Dec. 1999 (Mellor Report).
 29. Vivek Chaudhary, 'Fans charter under fire', *Guardian*, 15 Aug. 2001.
 30. Foxtel and Optus claim that only 25 per cent of the 7,000 hours of listed events are in fact shown on FTA (audited by Ernst and Young), while FACTS, representing the FTA networks, maintains that 72 per cent of listed events are shown 'live or near-live' (audited by KPMG). Matt Price, 'Television networks brawl over sport rights', *Australian*, 1 May 2002.
 31. Contrary to the United States Federal Communications Commission (FCC) findings that it is actually Pay TV broadcast which can build an audience for possible migration to FTA, see discussion below.
 32. Channel 7, for example, recently declared that it would not broadcast the season finale of the National Soccer League if Perth hosted the game: because of the time differences between the east and west coasts of Australia, a game played in Perth would interfere with other programming in the major population (and consumer) centres of Melbourne and Sydney. See Matthew Hall, 'Seven to pull the plug if Glory play host', *Sun Herald*, 14 April 2002.
 33. It is important to note that Wimbledon is also a listed event. The legislation appears to be silent about the conflict between two listed events when rights have been legitimately acquired by the same broadcaster. The most recent Ashes series in 2001 was broadcast on Channel 7, which also kept prime time programming on air when live cricket was being played in England. Channel 9 came under criticism again during the 2002 Wimbledon for delayed coverage. Cynthia Banham and Alexa Moses, 'Rain delays play – and so does Nine', *Sydney Morning Herald*, 5 July 2002.
 34. Channel Nine sought judicial review of a decision by the ABA that Foxtel was not in breach of its licence conditions, the anti-siphoning provisions, by an agreement between News Corp and the Seven network to show a highlights package and delayed telecast of cricket matches in South Africa and the sale of the live rights to a Pay TV operator, Foxtel. *Nine Network Australia Pty Ltd v. Australian Broadcasting Authority* [1997] 143 ALR 8; *Foxtel* (note 22). Special Leave to appeal to the High Court was refused, *Foxtel Cable Television Pty Ltd v. Nine Network Australia Pty Ltd* S35/1997 [4 August 1997]; B. Moylan, 'Media Policy and Anti-siphoning', *Communications Law Bulletin* 16/3 (1997), 16; J. Court, 'Media Policy and Anti-siphoning', *Communications Law Bulletin* 16/4 (1997), 19; W. Lee and B. Moylan, 'Hosepipes and Footballs: How Sports Coverage went down the Gurgler', *Media and Arts Review* 2 (1997), 93.
 35. *Foxtel* (note 22), at 521 per Wilcox, Lee and R.D. Nicholson J.J.
 36. *Ibid.*
 37. *Ibid.*
 38. *Ibid.*
 39. Sunstein (note 13), 3.
 40. Australian Broadcasting Authority (note 2); Australian Broadcasting Authority (note 8).
 41. The review into the anti-hoarding legislation had similar terms of reference.
 42. This is consistent with the explanatory memorandum to the Broadcasting Services Bill 1992, which referred to the importance that Australians continue 'to have free access to important events'.
 43. As determined by the Sweeney Sports Report 2000–01, 'Overall interest: the top twenty',

- Sweeney Research Pty Ltd, March 2000, 4.
44. Australian Broadcasting Authority (note 2), 16.
 45. *Ibid.*, 8 (Executive summary).
 46. *Ibid.*, 31.
 47. *Ibid.*, 52.
 48. *Ibid.*, 32.
 49. Since apparently there can be no, or at least no sufficient, UK national interest in any game between Italy and France.
 50. Under provisions in the Draft Communications Bill 2002 (UK), which propose to overhaul broadcasting and communications legislation in the UK this power is to be transferred from the ITC to the new regulator OFCOM. See Draft Communications Bill, ss.289–292, www.communicationsbill.gov.uk, accessed 26 Nov. 2002.
 51. See Independent Television Commission (note 9).
 52. 97/36/EC, adopted by the European Parliament and the Council on 30 June 1997.
 53. European Commission DG X, 'The European Model of Sport' (Brussels: European Commission, 1998), 16.
 54. The European Union does not have specific power to legislate in this area. See P. Keller, 'The New Television without Frontiers Directive', in E. Barendt (ed.), *Yearbook of Media and Entertainment Law 1997/8* (Oxford: Oxford University Press, 1998), 177–95.
 55. European Commission, 'Third Report from the Commission to the Council, The European Parliament and the Economic and Social Committee on the application of Directive 89/552/EEC "Television without Frontiers"', www.europa.eu.int/comm/avpolicy/regul/tw/f/aplica/3rap_en.pdf, accessed 26 Nov. 2002.
 56. See Goodbody, 'Minister rejects World Cup on pay-TV' (note 11); Goodbody, 'German tycoon accuses BBC and ITV of World Cup cartel' (note 11); Chaudhary (note 11). Similar issues have arisen in other countries with the World Cup 2002. In Argentina legislation had to be introduced to ensure the World Cup games played by the national team were also shown on public television, Ley No.25.342, *Ley de Transmision Televisiva de Partidos de la Seleccion de Futbol de Argentina*.
 57. Although more recent events indicate that some sporting broadcast rights are 'overpriced' and a consequent market correction may allow FTA and public broadcasters greater access to these programmes. See, for example, John Casey, 'Armchair fans vote with remote', *Guardian*, 9 Oct. 2001; 'Football's revenge', *Economist*, 3 Nov. 2001. Some television broadcasters in Europe are refusing to carry some sports because they have become too expensive. See, 'Les télévisions refusent l'inflation des droits de retransmission sportifs', *Le Monde*, 14 March 2001; 'L'inflation des droits télévisés risque de nuire plus au football qu'au public', *Le Monde*, 11 Oct. 2001. The start of the Italian football season in 2002 was put at risk because of financial disputes, part of which concerned serious questions about television rights. See Phillip Willan, 'Berlusconi caught offside in TV fiasco', *Guardian*, 22 Aug. 2002.
 58. See Julian Le Grand and Bill New, *Fair Game: Tackling the Monopoly in Sports Broadcasting* (London: Demos, 1998), arguing that the problem with allowing the market to operate freely is that individual sporting leagues are natural monopolies which can extract a supernormal profit.
 59. Chris Smith, 'All to play for, not pay for', *Observer*, 8 July 2001. See also Denis Campbell, Kamal Ahmed and John Arlidge, 'Ex-Minister: Put more top sports events on free TV', *Observer*, 8 July 2001. The UK Advisory Group on listed events offered a similar analysis when it wrote that, 'There are, however, some events which clearly ... have a "national resonance" and represent a shared fixed point on the national calendar. Widespread enjoyment of such events on generally-available terrestrial television is a force of cohesion in society', *Report and Recommendations* (London: Department of Culture, Media and Sport, 1998), 3.
 60. Smith (note 59).
 61. Vivek Chaudhary, 'Football fails to get support of minorities', *Guardian*, 18 Aug. 2001.
 62. European Commission (note 55), at 8.
 63. Broadcast rights must be able to be traded to be included on the list. Many events that could

- be considered of national importance or cultural significance, such as the Anzac Day march, are public events that all broadcasters are entitled to cover freely.
64. C. Cowie and M. Williams, 'The Economics of Sports Rights', *Telecommunications Policy* 21 (1997), 620; cf. 'In the matter of an agreement between the Football Association Premier League Limited and the Football Association Limited and the Football League Limited', Restrictive Trade Practices Court, 28 July 1999; Office of Fair Trading, 'The value of the sporting event falls sharply once the event is over', *The Director General's Review of BskyB's Position in the Wholesale Pay TV Market* (London: OFT, 1996), para. 4.40–4.45.
 65. See *Nine Network Australia* (note 34); *Foxtel* (note 22), where the broadcast of a highlight package after the event on FTA did not satisfy the live coverage requirement in the Act.
 66. Other explanations are of course also available, among which is Mark Danner's assertion that NBC's decision to 'market' the Olympics as a human interest instead of as a sporting event, with the concomitant omnipresence of advertising, so distorted what viewers wanted, that many refused to watch. See 'The Lost Olympics', *New York Review of Books*, 2 Nov. 2000.
 67. Anthony E. Boardman and Shaun P. Hargreaves-Heap, 'Network Externalities and Government Restrictions on Satellite Broadcasting of Key Sporting Events', *Journal of Cultural Economics* 23 (1999), 168.
 68. Vivek Chaudhary, 'Pubs cleared to open early for World Cup games', *Guardian*, 13 April 2002. The problem and solutions are not limited to Europe or the West. For example, when important football matches involving Egyptian sides are limited to pay television, entrepreneurial coffee shop owners set up viewing facilities for their customers. See Alaa Shahin, 'Paying for Air', *Al-Ahram Weekly*, 26 July–1 Aug. 2001.
 69. David Brown, 'Breakfast in the boozer to watch World Cup games', *Guardian*, 3 Nov. 2001.
 70. *Martin James Gough v. Avon & Somerset Police Licensing Bureau* CO/1243/2002 [2002] WL 347180 (QBD) at para. 21.
 71. In Iran, for example, satellite TV meant that fans of that country's soccer team could follow their (failed) road to the World Cup at home and then celebrate with their fellow citizens in the streets. These celebrations were seen as a threat to security by government officials who confiscated and destroyed satellite dishes in Tehran, Jonathan Steele, 'Football protests spark political crisis', *Guardian*, 10 Nov. 2001.
 72. *Observer*, 11 Feb. 2000.
 73. See David Clark, 'Beautiful game needs protection from the market', *Guardian*, 15 Aug. 2002.
 74. Although opera with public sponsorship is a different category again.
 75. Walsh and Giulianotti (note 27), 65.
 76. *Ibid.*, 71.
 77. Rupert Murdoch has been quoted as stating that he intends 'to use sports as a battering ram and a lead offering in all our pay television operations', *Business Review Weekly*, 23 July 1999, 88–92. And Murdoch has been true to his word. In addition to the original sum of £304m for the rights to the Premier League, Murdoch has more recently spent £1.3bn to reserve further English soccer telecasts until 2005. He paid A\$750m to create the southern hemisphere Rugby Union Super 12 competition for which he received exclusive Pay TV rights until 2005. In the same sport in England he paid £87.5m for rights to England home matches and club fixtures. In 2000 he obtained all telecast and Internet rights to ICC events for seven years, including the 2003 and 2007 cricket World Cups. In addition, Murdoch has extensive interests in United States National Football League broadcasts and in the televising of Major League baseball fixtures. See Anne Davies, 'Murdoch's end game', *Sydney Morning Herald*, 23–25 Dec. 2000.
 78. In the 1998–99 financial year, Australian commercial television stations spent \$183m on Australian sports programming, the second largest category of programme expenditure at 20.4 per cent, after foreign drama at 30.4 per cent. Australian Broadcasting Authority, *Broadcasting Financial Results, 1998–99*, (Sydney: Australian Broadcasting Authority, 2000).
 79. Broadcasting Services Act 1992, s.28, although the government appears to be backing away from this position. See Laura Tingle and Cynthia Banham, 'Death of datacasting signals TV

- shake-up', *Sydney Morning Herald*, 30 April 2002.
80. Productivity Commission (note 21), 428–9, see also ch.7.
81. Australian Broadcasting Corporation, 'Idiot Box', *Four Corners*, ABC Television, 21 Aug. 2000.
82. Section 115(2) provides that:

The Minister may, by notice published in the *Gazette*, amend a notice under subsection (1) to remove an event from the notice. Note: The following are examples of situations in which the Minister might exercise the power to remove an event from a notice:

Example 1

The national broadcasters and commercial television broadcasting licensees have had a real opportunity to acquire the right to televise an event, but none of them has acquired the right within a reasonable time. The Minister is of the opinion that removing the event from the notice is likely to have the effect that the event will be televised to a greater extent than if it remained on the notice.

Example 2

A commercial television broadcasting licensee has acquired the right to televise an event, but has failed to televise the event or has televised only an unreasonably small proportion of the event. The Minister is of the opinion that removing that event, or another event, from the notice is likely to have the effect that the removed event will be televised to a greater extent than it would be if it remained on the notice.

83. Productivity Commission (note 21), 433–5.
84. Events are automatically de-listed one week after the event has occurred. Section 115(1b) provides:

Subject to subsections (1AA) and (2), an event specified in a notice under subsection (1) is taken to be removed from the notice 168 hours after the end of the event, unless the Minister publishes in the *Gazette* before that time a declaration that the event continues to be specified in the notice after that time.

85. N. Mulcahy and M. Rubinstein, 'Ballpark Figures: The Real Cost of Sports Broadcasting Rights', <http://www.gtlaw.com.au/gt/pubs/ballpark.html>, accessed 26 Nov. 2002.
86. As few as 1,000 viewers tuned in to watch some of the lower league games and the exclusive rights failed to attract the number of subscribers ITV had hoped for. ITV Digital told the First Division clubs it could afford to pay only £50m (now £74m) of the £178m it owed under the terms of a three-year contract. The League has warned that one third of its 72 clubs could go bankrupt. John Casey and Vivek Chaudhary, 'ITV Digital may close if 128m cut in soccer deal is rejected', *Guardian*, 21 March 2002; Jamie Wilson, 'Boom, then bust: up to 30 league clubs face possible bankruptcy', *Guardian*, 28 March 2002; Matt Wells and John Casey, 'ITV Digital staggers towards collapse', *Guardian*, 28 March 2002. BSkyB has now stepped in with a package of £304m which will see the First Division games now shown on BSkyB's satellite TV channels. David Lacey, 'Football sells out to Sky May 20 1992', *Guardian*, 15 July 2002. See Graham Kelly, 'Sky's expected European invasion will leave the home front vulnerable', *Independent*, 26 Aug. 2002; Vivek Chaudhary, 'Fans still in dark over league highlights', *Guardian*, 21 Sept. 2002. The collapse of ITV Digital, which operated a digital terrestrial television platform, may have wider consequences for the fledging digital TV industry. Sky's satellite BSkyB satellite platform position is now significantly strengthened as the remaining dominant digital platform with 5.7m subscribers.
87. See Stephen Moss, 'What a turn-off', *Guardian*, 22 March 2002. The elite Scottish clubs attempted a similar breakaway at the elite level, Michael Walker, 'Scotland in crisis after Old Firm snub TV deal', *Guardian*, 9 April 2002.
88. There are of course additional issues such as the distribution of increased revenues to the players who create the product which are beyond the scope of this article.
89. See, generally, Office of Fair Trading (note 64); see also W. Neale, 'The Peculiar Economics of Professional Sports', *Quarterly Journal of Economics* 78 (1964), 1.

90. This argument was eventually rejected however in Restrictive Trade Practices Court (note 64); cf. Andrew Osborn, 'Brussels may fine league on TV rights', *Guardian*, 30 Oct. 2001.
91. See *National Collegiate Athletic Association v. University of Oklahoma* [1984] 1468 U.S. 85, 104 S.Ct 2948; *News Ltd v. Australian Rugby Football League Ltd* [1996] 64 FCR 410.
92. These exclusive contracts may be contrary to s.47 of the Trade Practices Act 1974 (Aust) or Article 81 of the European Community treaty. See generally, Philip Alberstat and Chris Johnstone, 'Competition Law and Sports: The Way Forward', *Entertainment Law Review* 9/4 (1998), 174; Hazel Fleming, 'Exclusive Rights to Broadcast Sporting Events in Europe', *European Competition Law Review* 20/3 (1999), 143; European Commission, 'Broadcasting of Sports Events and Competition Law', Competition Policy Newsletter, No.2, June 1998, http://europa.eu.int/comm/competition/speeches/text/sp1998_037_en.html, accessed 26 Nov. 2002.
93. Productivity Commission (note 21), 427.
94. *Foxtel* (note 22), at 521 per Wilcox, Lee and R.D. Nicholson J.J.
95. *Ibid.*, at 521.
96. The ACCC Declaration of the Analogue Subscription Television Broadcast Carriage Service took effect on 8 September 1999. This new access regime, again the result of 'regulation' rather than the 'market', enabled Channel 7 to gain access to Foxtel cable for the broadcast of its sports channel C7.
97. See *Foxtel Management Pty Ltd v. ACCC* [2000] FCA 1161; *Telstra Corporation v. Seven Cable Television Pty Ltd* [2000] FCA 1160. Seven was subsequently unable to agree with Foxtel on the price it should pay to have C7 broadcast over the Foxtel Cable and C7 has recently been closed down.
98. News, PBL and Telstra paid A\$500m for a five-year deal: 'AFL kicks Seven for Foxtel', *Australian*, 20 Dec. 2000; Patrick Smith, 'Dream deal for AFL, clubs and football', *Australian*, 20 Dec. 2000 (the *Australian* is owned by News Corporation). Luke Collins and Simon Evans, 'News's AFL deal stuns Seven', *Australian Financial Review*, 20 Dec. 2000. Seven commenced legal action against News, PBL and Telstra for the manner in which they acquired the ARL and NRL, alleging collusion and misuse of market power with the purpose of damaging C7, Cosima Marriner, 'Foxtel case goes Seven's way', *Sydney Morning Herald*, 22 Dec. 2001.
99. The minister, Senator Alston, has threatening to overhaul the anti-siphoning rules in light of these events. Marriner (note 14); Annie Lawson and Melissa Ryan, '\$450m broadcast deal on line as Alston heeds anger of fans', *Sydney Morning Herald*, 11 April 2002.
100. Australian Competition and Consumer Commission, 'Australis/Foxtel Merger', *Annual Report* (1995-96), 54-7.
101. Sunstein (note 13), 3.
102. *Ibid.*, 12.
103. *Ibid.*
104. Foxtel has 780,000 subscribers and Optus 237,000, Jennifer Hewett and Cosima Marriner, 'Then there was one: TV giants unite', *Sydney Morning Herald*, 6 March 2002. The penetration rate in Australia for subscription television is about 14 per cent, Productivity Commission (note 21), 79, citing the submission to the Inquiry by the Australian Subscription Television and Radio Association. The penetration rate in the UK is 30 per cent, and 78 per cent in the US, Cento Veljanovski, *Pay TV in Australia: Markets and Mergers* (Melbourne: Institute of Public Affairs, 1999), 51.
105. Veljanovski (note 104), 42.
106. *Ibid.*; Australian Competition and Consumer Commission (note 100), 54-7; A. Little, 'Why three into two won't go - The Death of the Galaxy/Foxtel Merger', *Communications Law Bulletin* 16/4 (1997), 1-4; A. Windybank, 'Competition and Pay-TV', *Communications Law Bulletin* 15/1 (1996), 5-10.
107. The ability to advertise is also restricted and subscription fees must be the predominant source of revenue for the service: Broadcasting Services Act, sch.2, pt.6, s.2(b). The Productivity Commission (note 21), 294, found this restriction to be anti-competitive.

108. See Elizabeth Knight, 'Sportsmen are but spectators', *Sydney Morning Herald*, 22 Dec. 2000.
109. Foxtel was losing \$100m a year, Cosima Marriner, 'Pay TV to pay its way – at last', *Sydney Morning Herald*, 6 March 2002.
110. The ACCC already rejected a Foxtel/Australis merger in 1995. In examining the more recent proposal the ACCC was concerned over the dominance of Foxtel squeezing small Internet, cable and content providers out of the market. ACCC, 'Release of Foxtel Channels by Optus and Telstra', media release, 5 March 2002, www.accc.gov.au, accessed 26 Nov. 2002. The ACCC subsequently rejected the proposal, citing the likely dominance of Foxtel in the Pay TV market, raising issues of access by other content providers or channel suppliers to that network. ACCC, 'Foxtel/Optus Proposal "Likely to Breach Trade Practices Act"', media release, 21 June 2002.
111. Senator Alston, 'Proposed Foxtel/Optus Agreement', media release, 5 March 2002, www.dcita.gov.au/nsapi-graphics/?Mival=dca_dispdoc&ID=6245, accessed 26 Nov. 2002; Marriner (note 109); Cosima Marriner, 'Foxtel rights deal may give it control of pay TV', *Sydney Morning Herald*, 28 March 2002.
112. Competition Commission (note 3).
113. Department of Trade and Industry, *Regulation Communications: Approaching Convergence in the Information Age* (London: Department of Trade and Industry, 1998), www.dti.gov.uk/converg/, accessed 26 Nov. 2002, 2; cf. European Commission, *Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors and the Implications for Regulation: Towards an Information Society Approach* (Brussels: European Commission, 1997); Department of Trade and Industry, *A New Future for Communications: Communications White Paper* (London: Department of Trade and Industry, 2000); Productivity Commission (note 21), ch.3.
114. Carl Shapiro and Hal R. Varian, *Information Rules* (Boston: Harvard Business School Press, 1999).
115. Veljanovski (note 104), 38.
116. *Ibid.*, 37–9.
117. In Australia unlike the UK this particular problem is minimised because Pay TV operators in general do not require the subscribers to purchase the settop boxes or satellite dishes. Ownership is retained by the operator: *Ibid.*, 39.
118. Productivity Commission (note 21), 292.
119. Veljanovski (note 104), 31.
120. *Sportvision Australia Pty Ltd v. Tallglen Pty Ltd* [1998] NSWSC 221.
121. Commercial television licenses are subject to the Australian Content Standard and the Children's Television Standard, which set minimum quantities for Australian programmes, Australian drama programmes, documentaries and children's programmes to be broadcast. See generally, Productivity Commission (note 21), ch.11; *Project Blue Sky v. Australian Broadcasting Authority* [1998] HCA 28 (28 April 1998); Australian Broadcasting Authority, *Review of the Australian Content Standard, Issues Paper* (Sydney: Australian Broadcasting Authority, 2001).
122. Australian Broadcasting Authority (note 121).
123. Jock Given, *The Death of Broadcasting? Media's Digital Future* (Sydney: University of New South Wales Press, 1998), 65.
124. In the UK a similar issue has emerged in reverse. The BBC bid for Champions League rights was opposed by its commercial competitors on the grounds that a decision to show advertisements showing the names of the Champions League sponsors across the bottom of the screen before and after play and at half-time, would violate the public broadcaster's charter prohibitions on advertising. See Vivek Chaudhary, 'ITV complains over BBC bid for Europe', *Guardian*, 31 Aug. 2002; *idem*, 'BBC football bid includes screen ads', *Guardian*, 23 Sept. 2002.
125. Productivity Commission (note 21).
126. The 1993 Hilmer Report on national competition policy recommended large-scale restructuring of the Australian economy, principally by means of the corporatisation and/or privatisation of public utilities and government business enterprises and through the

- application of competition laws to previously unregulated sectors of the economy. Report by the Independent Committee of Inquiry, *National Competition Policy* (Canberra: AGPS, 1993), F.G. Hilmer (chair), M.R. Rayner, G.Q. Taperall (members).
127. Principles of Legislative Review in Competition Principles Agreement, cl.5(1)(a).
128. In the United States similar ideas were expressed by the Supreme Court in *Turner Broadcasting System v. Federal Communications Commission* [1994] 512 U.S. 622; decision affirmed (95-992) [1997] 520 U.S. 180. See generally, Monroe Price, *Television: The Public Sphere and National Identity* (Oxford: Clarendon Press, 1995), 194-9; cf. *Amalgamated Television Services Pty Ltd v. Foxtel Digital Cable Television Pty Ltd* [1996] 66 FCR 75 (Full Federal Court).
129. *Ex Parte TV Danmark* (note 10).
130. What is a fair price will depend upon the rights being offered and the value of those rights to broadcasters. Matters to be taken into account include previous fees for the event or similar events, time of day for live coverage of the event, the revenue or audience potential associated with the live transmission of the event (for example, the opportunity to sell advertising and sponsorship, the prospects for subscription income), the period for which rights are offered and competition in the marketplace.
131. The House of Lords reinstated the judgment at first instance which had been reversed by the Court of Appeal (Kennedy, Waller and Jonathan Parker L.J.J.) [2001] 1 WLR 74.
132. A second ground was that TVD had a legitimate expectation, based on the code, that it would receive consent if it acquired its rights on fair and reasonable terms.
133. Lord Hutton and Lord Hobhouse of Woodborough delivering concurring judgments.
134. *Ex Parte TV Danmark* (note 10), at para. 33.
135. *Ibid.*, at para. 35.
136. *Ibid.*, at para. 36.
137. *Ibid.*, at para. 37.
138. The FCC has imposed a Sports Blackout Rule for Cable, however, based on a concern that sports teams would refuse to sell the rights to their local games to television stations serving distant markets due to their fear of losing gate receipts if the local cable system imported the local sporting event carried on the distant station. The Satellite Home Viewer Improvement Act of 1999 applies this to satellites, 47 C.F.R. 76.156(a) In re Amendment of Part 76 of the Commission's Rules and Regulations Relative to Cable Television Systems and the Carriage of Sports Programs, Report and Order 54 FCC 2d 265 (1975). Under both these rules the local TV broadcast station may demand that the satellite carrier blackout any duplicate carriage of the programme (network or syndicated), regardless of whether the local TV station's signal is carried by the satellite carrier in question. The purpose is to protect contract rights to give broadcasters, programme providers and sports teams the protection they need to provide programmes to sports viewers. If a local TV broadcast station is not carrying the local sporting event and does not have permission to carry the local game, then no other broadcaster's signal displaying the game can be shown in the protected blackout zone. Blackout rules also operate in Australia, to prevent local TV coverage where the event is being held, although as part of the negotiated package between the sporting body and the broadcaster, rather than by regulation. But how is the operation of these contractual provisions to be reconciled with anti-siphoning rules? Is there a contradiction between anti-siphoning rules which determine that the TV viewer is more important than the fan in the stand and blackout rules which place more importance on the presence of the public at the event itself? Do the fans mean anything?
139. *Home Box Office, Inc v. FCC* 567 F.2d 9, (D.C. Cir 1977).
140. Federal Communications Commission, *Sports Programming Migration Final Report*, FCC Report No.94-149, adopted 9 June 1994, released 30 June 1994, www.fcc.gov/bureaus/cable/orders/1994/orcb4014.txt, accessed 26 Nov. 2002; P. Cox, 'Flag on the Play? The Siphoning Effect on Sports Television', *Federal Communications Law Journal* 47 (1995), 571.
141. Federal Communications Commission (note 140).
142. *Ibid.*, para. 89.
143. *Ibid.*, para. 92.

144. *Ibid.*, para.142.
145. If migration were to occur in Australia, of course, the consequences for access to these programmes by the Australian public would have been made more problematic by the Australian government's policy decision creating a duopoly for the first several years of cable television in Australia. A consequence of this industry structure, and the ACCC decisions to refuse further consolidation in the 1995 Foxtel/Australis merger would be that the popular sports will be split between two or more Pay TV providers to the detriment of consumers.
146. Australian Broadcasting Authority (note 2), 41.
147. *Ibid.*, 47.
148. *Ibid.*, 46.
149. Federal Communications Commission (note 140), para. 138.
150. *Ibid.*, para. 167. Similarly, the UK Restrictive Trade Practices Court (note 64) also found a public interest in collective agreements to sell broadcasting rights for subscription TV such as the Premier League. The public, it argued, has enjoyed substantial benefits from the improved standard of competition and stadia. It has also contributed to the maintenance of strong playing squads which, apart from providing a substantial benefit to the public, also has a national interest in maintaining quality players available to represent England internationally.
151. Federal Communications Commission (note 140), 165.
152. Australian Broadcasting Authority (note 2), 45–8.
153. Productivity Commission (note 21), 441–5.
154. As previously mentioned any exclusivity may be subject to antitrust liability however.
155. See note 126.
156. Federal Communications Commission (note 140), para. 162.
157. Productivity Commission (note 21), 431.
158. See Michael McGuire, 'SBS counts cost of screening World Cup', *Australian*, 17 April 2002. See also Michael Cockerill, 'Nine hamstrung by tunnel vision', *Sydney Morning Herald*, 21 March 2002.
159. Sunstein (note 13), 31ff.
160. Productivity Commission (note 21), 445.
161. Sunstein (note 13), 11.
162. See generally Productivity Commission, *Impact of Competition Policy Reforms on Rural and Regional Australia*, report no.8 (Canberra: AusInfo, 1999).
163. Clive Mathieson, 'Cricket website valued at \$150m', *The Times*, 6 June 2000; Vivek Chaudhary, 'The golden goal', *Guardian*, 6 Aug. 2001.
164. See generally G. Goggin, 'Voice Telephony and Beyond', and 'Citizens and Beyond: Universal Service in the Twilight of the Nation State', in B. Langtry (ed.), *All Connected: Universal Service in Telecommunications* (Melbourne: Melbourne University Press, 1998), 49–77.
165. See Allan Hutchinson, *It's All in the Game* (Duke: Duke University Press, 2000).
166. See, for example, S. Turkle, *Life on the Screen: Identity in the Age of the Internet* (New York: Touchstone Books, 1997); T. Miller, *Technologies of Truth: Cultural Citizenship and the Popular Media* (Minneapolis: University of Minnesota Press, 1998).
167. Although again, recent developments indicate that computer technology and sports broadcasting may simply make comfortable capitalist bedfellows. See Mathieson (note 163); Chaudhary (note 163).