



**SUBMISSION IN RESPONSE TO ANTI-SIPHONING REVIEW
PROPOSALS PAPER**

SEPTEMBER 16, 2023

Media Reform—Online Safety, Media and Platforms Division
Department of Infrastructure, Transport, Regional Development, Communications
and the Arts, GPO Box 2154 CANBERRA ACT 2601
Lodgement online: <https://www.infrastructure.gov.au/have-your-say/>

1. Overview

- 1.1. Janez Media welcomes and applauds the government's review of the anti-siphoning scheme (the **AS Scheme**). A conceptual review is long overdue, as the scheme was introduced at a time when both consumer viewing behaviour and platform availability was very different to today. Since it was introduced almost 30 years ago, the way in which audiovisual content is consumed is fundamentally different.
- 1.2. Janez Media is strongly of the view that the government should adopt a "free-to view" model (as identified in the Proposals Paper as Model 1) along with a streamlined list as it will best serve Australian audiences now and into the future, while still maintaining the core objectives of the AS Scheme.
- 1.3. Janez Media is concerned about the government's proposed support of Model 2, which would extend the scope of the restriction on the acquisition for the right to acquire listed events to online services until a FTA broadcaster had acquired FTA broadcast rights. Reasons for this are detailed below but chiefly fall into four categories:
 - (a) The proposal would effectively entrench the FTA networks as a gatekeeper in relation to the acquisition of online rights, not merely FTA broadcast rights, due to the way sports rights are bought and sold, which would significantly distort the sector dynamics.
 - (b) The model flies in the face of the government's stated intentions to promote competition and boost productivity. The government should not try and pick industry winners and distort the media sector by favouring the FTA television networks when viewership and use of television is not universal and is in gradual material decline.
 - (c) There is a substantial risk that the Model 2 concept would lead to de facto hoarding or manipulation of sporting rights by those FTA networks that operate an OTT service. Those networks could acquire both FTA television and online rights but then take a commercial decision to transmit a substantial portion of those listed events on their owned and operated OTT services rather than on FTA television.
 - (d) The proposed restriction on acquisition would capture sports federations themselves, which now regularly stream online content directly and do not necessarily license it to third parties. The Model is silent on how this would be dealt with.
- 1.4. Janez Media supports the government's assessment that Model 3 (the free-to-air first) model should not be pursued, although Janez Media does not agree with some of the government's assumptions about how the FTA networks would likely transmit events across various platforms if it were applied, or its

theoretical concerns about how some rights sales in some international markets would be mirrored in Australia, if the model was adopted.

- 1.5. Janez Media repeats its view, articulated in its [previous submission in December 2022](#)¹ that the government should be adopting a platform neutral approach, and a policy which factors in current and future state of affairs, and ongoing changes in consumption patterns, one in which online viewing is increasingly more important than linear FTA television viewing.
- 1.6. The government should not broaden the list to extend to women's and para sports event without clear and cogent evidence that doing so will not impede the recent growth in the audiovisual coverage of women's sport. Adding events for the sake of the list being gender neutral could have serious medium term ramifications by stifling the investment needed in women's sports and will stall sports bodies attempts to promote the growth of women's sports across a range of audiovisual platforms. There is simply no evidence that adding these events is needed as a policy outcome, and the Proposals Paper does not consider the downsides of adding these events to the AS Scheme.

2. The government should focus on audiovisual coverage rather than an outmoded television concept

- 2.1. As outlined below and in Janez Media's earlier submission, the objective of the AS Scheme should be re-stated to support free access to audio-visual coverage of events of national importance and cultural significance.
- 2.2. The ongoing references to "televised coverage" are starting to look quaint. As noted by the government's research, a significant number of younger adults do not even have a TV in their household², and people increasingly use a range of devices to watch content not merely television. The government should adopt terminology that is suitable for the future as well as today.
- 2.3. The government's own research clearly shows that most consumers are now watching screen content online (both paid and free). Online subscription services were used for viewing by 66% of respondents in 2022, up from 60% in 2020³, while free video streaming services, were used by 58% of respondents, up from 54% in 2020.⁴ The same research highlighted the inexorable drop of free-to-air television viewing with only 53% watching screen content on commercial free-to-air TV and 41% watching publicly owned free-to-air TV.⁵ and that free-to-air viewing is in decline while online viewing is increasing.
- 2.4. In these circumstances, the government should amend the AS Scheme to make policy considerations based on the more general "audiovisual" concept rather than the device specific "televised" or "television". The suggestion at

¹ <https://www.infrastructure.gov.au/sites/default/files/documents/assr--janez-media.pdf>

² https://www.infrastructure.gov.au/sites/default/files/documents/tv_consumer_survey_2022_-_final_report_0.pdf page 17

³ Social Research Centre (2023), [2022 Television Consumer Survey – Final Report](#), prepared for the Australian Government Department of Infrastructure, Transport, Regional Development, Communications and the Arts, p21

⁴ ibid

⁵ ibid

page 16 of the Proposals Paper that the object of the Broadcasting Service Act should be amended to include a reference to “televised coverage” should therefore not be made.

3. *Why Model 1 (Free-To-View) is the best model for the Government to adopt (with a few tweaks)*

- 3.1. The government’s conceptual proposal to introduce a new scheme as part of Model 1 to replace the current AS Scheme by streamlining the list and imposing availability and coverage obligations makes sense because it future proofs the system. It ensures that both current and future platforms will be covered and therefore supports the broad policy objective of the AS Scheme
- 3.2. The Proposal Paper sets out a perspective that the coverage obligation of the content service must be available to a minimum of 99% of the Australian population, and notes that the NBN access already exceeds that, so it is easily met. However, it is worth querying whether the number of households that can access FTA linear television meets that threshold in 2023, given the data points used in the paper date back to 2017, and whether a slightly more relaxed benchmark should be applied in any event?
- 3.3. Whilst the proposals paper notes that home internet services are not fully ubiquitous, it is also worth noting that neither was television reception for much of the period that the AS Scheme has been operating, and the current AS Scheme only mandates a 50% level of coverage for FTA television.
- 3.4. It is also worth noting that through the years, the government has chosen to step in to facilitate better television access through programs such as VAST. As television viewing continues to decline it would make more sense for the government to look at extending programs that are aimed at narrowing the digital divide, such as its school student broadband initiative⁶ where the government is working with NBN Co to provide up to 30,000 families with no internet at home free NBN for 12 months in order to assist families to make the transition to home internet services and other digital opportunities
- 3.5. The concerns raised in the proposals paper around service capability of online services being able to transmit content to large audiences are also not borne out by actual market practice. Consumers of these services are viewing in large numbers every day without issue. Some examples include:
 - 3.5.1. Optus Sport successfully streamed the final of the UEFA Euro 2020 tournament live exclusively to more than 900,000 households.⁷
 - 3.5.2. The Seven Network recently announced that it had broken that record with its streaming service 7Plus transmitting a match during the FIFA Women’s World Cup 2023 to 957,000 people simultaneously.⁸
 - 3.5.3. While Optus Sport doesn’t breakout viewing numbers, it did reveal that viewing for the FIFAWWC23 broke a number of engagement

⁶ <https://www.infrastructure.gov.au/media-communications-arts/internet/national-broadband-network/school-student-broadband-initiative-ssbi>

⁷ <https://www.optus.com.au/about/media-centre/media-releases/2021/061/optus-sports-commitment-to-change-the-future-they-see-marking-two-years>

⁸ <https://7news.com.au/sport/fifa-womens-world-cup/matildas-smash-all-time-tv-records-with-mind-boggling-ratings-c-11615468>

and viewing records, with average viewers watching more than 21 hours of live football during the tournament,⁹ without any public concern expressed about the quality of the stream.

- 3.5.4. While Kayo also does not release viewing numbers, as far back as early 2022 it revealed it was transmitting more than 500 hours of live sport in one weekend and had successfully transmitted more than 12 000 live sports in the previous six months.¹⁰
- 3.5.5. Stan Sport has been transmitting all matches of the Rugby World Cup 2023 (being held at the time of submission) live and exclusively without any public concern. The only match that was transmitted on FTA television in the first weekend of the tournament was the Australia v Georgia match.

3.6. In terms of affordability, the average Australian household spends \$16.90 a week on services over the nbn network, representing only 1.1% of the average household income.¹¹ The cost of nbn services is less than that for electricity and the cost has remained stable for the past two years.¹² To characterise quality internet services as being unaffordable for Australians is therefore inaccurate and not supported by the actual evidence.

3.7. Finally, contrary to what the proposals paper states, online services are in fact much better set up to transmit many events on the AS Scheme than linear services because they do not have the same capacity constraints as linear FTA broadcasts. This is illustrated by the Nine Network's recent announcement¹³ that it intends to use its free-to-view service 9Now to transmit 40 channels during the Olympic Games while its OTT service Stan will bring every minute of the Olympics 24/7, live and on demand featuring an exclusive, dedicated 24 hour Olympics news channel, every minute of the Olympics action live, and a full on demand offering consisting of highlights, minis and full replays. By way of contrast, on FTA linear television Nine will only devote 2 of its linear channels to broadcasting the event.

4. ***Why Model 2 (mis-referenced as the broadcasting safety-net model) would lead to significant distortions and challenges***

4.1. This model, which would prevent any acquisition of any rights to transmit listed events until a FTA broadcaster had acquired the rights to broadcast the event, effectively entrenches the FTA networks as the gatekeeper on all audiovisual rights to events listed under the scheme.

This is because sports bodies and distributors do not generally buy and sell rights for each distribution platform separately, and the overall valuation for an event will depend on the level of distribution and relative exclusivity across all platforms. Typically, rights are offered for all distribution platforms, not merely FTA broadcast rights, and the prior grant of rights for FTA will

⁹ <https://www.mediaweek.com.au/everything-you-ever-wanted-to-know-about-optus-sportexcept-audience-numbers/>

¹⁰ <https://media.kayosports.com.au/media-releases/kayo-sports-set-for-record-breaking-weekend>

¹¹ <https://www.nbnco.com.au/content/dam/nbn/documents/about-nbn/reports/reports-and-publications/nbn-affordability-report-2022.pdf.coredownload.pdf>

¹² *ibid*

¹³ <https://www.nineforbrands.com.au/media-release/one-year-to-go-to-paris-2024/>

significantly impact all other forms of distribution. It is naïve to think that the rights will be offered independently of one another or that the grant of FTA rights will not impact the outcome and terms of a sale of online or pay rights.

When each of the FTA networks acquires sporting rights, they do not do one deal for linear television, and another deal for online rights. They buy them as integrated packages, and each of the networks now only acquires rights across multiple platforms including online not just television rights¹⁴. So, if they are given a first mover and legislated advantage in being available to acquire rights on one-platform it is inevitable that will carry over to other platforms as well.

- 4.2. The model flies in the face of the government's stated intentions to promote competition and boost productivity. The government should not try and pick industry winners especially where the sector it is protecting is declining in terms of overall audience and consumption patterns. This is particularly true of younger Australians, for whom linear free-to-air television is not used extensively. Recent research showed that 1 in 5 viewers under age 34 do not use free-to-air channels at all and approximately 50% of them used it less than a few times per month.¹⁵
- 4.3. There is a significant risk that the model would lead to de facto hoarding of sporting rights and manipulation by those FTA networks that own or operate an OTT service. This is because those networks could buy the FTA rights as well as the OTT/pay rights and would be in a better position to monetise them than a FTA network with no owned/operated OTT service. That FTA network could then choose not to transmit the listed event on its FTA service or transmit only a small component of the listed event on FTA, but elect to transmit the balance of the listed event on its owned and operated OTT service, thereby circumventing the policy intent of the AS Scheme.
- 4.4. The model 2 option could add to industry and governmental cost and consumer uncertainty as it can lead to commercial and regulatory disputes on whether a FTA network has had a reasonable opportunity to acquire the rights to a listed event, or could result in a sports federation refusing to accept offers from FTA broadcasters because they are derisory.

An example of this occurred in major European territories in relation to the FIFA Women's World Cup 2023 where the event was listed on corresponding listed event regimes, which had the effect of stifling competition for the rights, making it only relevant for FTA television. In each of those markets, none of the FTA broadcasters was prepared to pay a fair price for the rights and a standoff developed, which was only resolved after much public anguish that there could be a broadcasting blackout¹⁶ and behind the scenes

¹⁴ See for example James Warburton comments on the importance of digital rights to Seven <https://www.youtube.com/watch?v=VSFiM5sWmc4>, Ten's Beverley McGarvey discussion of the importance of streaming to Paramount <https://www.mi-3.com.au/08-08-2022/australias-fastest-growing-streaming-player-anz-boss-bev-mcgarvey-flags-triple-digit> and Nine's then Head of Sport Tom Malone discussing why Nine's acquisition of exclusive rights across all platforms made the Australian Open tennis a transformative deal for Nine <https://mumbrella.com.au/streaming-wont-destroy-relationship-sport-mass-media-509763>

¹⁵ https://eprints.qut.edu.au/238930/1/ASSVR_Part1_Final_PDF.pdf

¹⁶ <https://www.theguardian.com/football/blog/2023/jun/08/womens-world-cup-broadcast-rights-fifa-bbc-sky-itv>

government intervention. A deal for those rights was only confirmed five weeks before the tournament began.¹⁷

- 4.5. Model 2 will undoubtedly impact federations whose sports are listed adversely and will over time reduce media rights revenue for them. This in turn will be detrimental to the participants and fans of those sports as there will be less money to invest in grassroots and across the entire ecosystems of those sports including in relation to new competitions and growth of women's sports. For those federations which are based in Australia it will also reduce their international competitiveness relative to other federations based overseas which could then have further long-term negative impacts on those sports in Australia.
- 4.6. Finally, Janez Media notes that this model does not seem to account for an important development in the global industry over the past 10 years, which is that many sports federations have established and are operating their own OTT content services- both free and pay.

The Proposals Paper is totally silent on how federations would be expected to deal with this and whether they would automatically be in breach of the legislation (in many cases the content service would be the same entity) and how the government would intend to enforce the regime if the sports federation operated globally and did not have an Australian presence. This seems to be a significant flaw with this model.

It is not clear either how the government would have jurisdiction in relation to extra-territorial matters or governance in relation to global federation's structures.

Whilst not all federations are currently showing listed events live in Australia, they have the capacity to, and many show events on delay already. Relevant sports federations which have an existing online content service already that operate in various parts of the world/and or Australia include:

- World Rugby
- New Zealand Rugby
- FIFA
- International Cricket Council
- Formula 1
- MotoGP
- International Tennis Federation

5. *The Proposals Paper proposal to amend the List under Model 2*

- 5.1. The Proposals Paper does not adequately make the case for adding women's sports events. While there has been a very welcome increase in popularity of and transmission of women's sports events, most of that has come about through increased and sustained investment from OTT and pay service providers.

¹⁷ <https://www.bbc.co.uk/mediacentre/2023/bbc-itv-rights-deal-womens-fifa-world-cup/>

- 5.2. Adding events to the list has the capacity to disincentive future investments by OTT or pay operators, and could impact attempts by affected sports federations to grow their sport and apply revenues they would otherwise receive back into grassroots developments.
- 5.3. The government last week announced that it has added some FIFA Women's World Cup matches to the current list. This has been done despite the fact that there is no threat to those matches not being made available for free, and that for the FIFA Womens World Cup 2023, in the absence of any listing, 16 matches in the tournament were broadcast by the Seven Network on a free-to-air basis, and 11 matches were transmitted by Optus on a free basis.
- More than 40% of the tournament was free without listing, a significantly greater proportion than the previous Women's World Cup, meaning that the government had no real reason to list the event.
- 5.4. As outlined in Janez Media's previous submission, listing women's events is not needed. Absent any listing, some relevant women's sports events have seen substantial growth in free coverage. On many occasions the FTA network or OTT operator which has transmitted the event on a free basis has trumpeted the ratings or engagement result and has confirmed its intent to continue to expand its investment and coverage into the future.
- 5.5. In any event, the government does not appear to have undertaken a valid assessment whether events proposed to be added or currently on the list satisfy the threshold test that the event is of "national importance and culturally significant." The Proposals Paper is demonstrably silent at assessing popularity and engagement of those events it proposes to be listed and that should be undertaken prior to any events being added to the list.

6. *Conclusion*

- 6.1. The Australian government has recently [announced](#) that it is undertaking a review of competition policy settings to help build a more dynamic and productive economy.¹⁸ If the government adopts Model 1 in the Proposal Paper it would be acting in accordance with those settings. However, the government's preferred approach (Model 2) flies in the face of that intention by enacting a regime that would further entrenching the unequal bargaining power and position of the free-to-air networks relative to other media sector participants and would significantly distort competition for all audio-visual rights to listed sporting events.
- 6.2. In the future, more and more viewing is likely to be non-linear rather than linear. That is not to say linear television will disappear- it will continue to play an important role in Australian viewing habits, but it will not be the primary or preferred platform for people's consumption of audio-visual content. This is already true of younger Australians who do not watch much linear FTA television. The AS Scheme should be updated to reflect this significant change in consumption behaviour.
- 6.3. Actual world experience and industry evidence provides strong support for a model which promotes online free access (Model 1) rather than providing legislated protection to free-to-air linear access by prohibiting any acquisition by third parties (Model 2). At the same time, there is good reason to modernize the list as the government has proposed in relation to Model 1.
- 6.4. I would be happy to elaborate on any aspect of this submission as required and would ask to be included in any further consultation that the government undertakes in relation to reform of the AS Scheme

Jon Marquard
Director
Janez Media
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¹⁸ <https://ministers.treasury.gov.au/ministers/jim-chalmers-2022/media-releases/more-dynamic-and-competitive-economy>

About Janez Media

Janez Media is a specialist digital and media advisory and consultancy practice based in Australia which has been operating for 10 years. Janez Media's expertise extends across Free-to-air television, pay television, international and domestic sporting bodies, OTT networks and SVOD platforms, telcos and international media organisations.

Janez Media is led by Jon Marquard, who was previously the Chief Operating Officer of the Ten Network (**Ten**) and, prior to that, the COO at Fox Sports.

As a result of those roles and Janez Media's ongoing engagements with sports federations, media distributors across the entire sector, and online sports services, he is uniquely qualified to provide subject matter expertise input into the government's consultation on the anti-siphoning scheme.

Janez clients and engagements have spanned a range of Australian and international entities across the tech, sport and media sectors: free-to-air television networks including the Nine Network, domestic sporting bodies including the NRL, the Australian Professional Leagues (which organises and oversees the Australian A League women and A League men's competitions), Rugby Australia (RA), New Zealand Rugby Commercial, international sporting organisations including SANZAAR (comprised of SA Rugby, NZ Rugby, RA and Union Argentina de Rugby) and MLB, as well as OTT platforms such as Optus Sport, Showmax, and international pay TV aggregators and pay TV networks.

At Ten Jon oversaw a number of business units, including the sports department, and was responsible for the acquisition of all sports rights for the network, while also representing Ten on a number of Australian industry bodies including FreeTV, FreeView and the Interactive Advertising Bureau (IAB).

At Fox Sports. Jon oversaw all legal, policy and regulatory matters, and negotiated sports rights across a wide variety of listed sports events with both sports bodies, sports rights agencies and the FTA TV networks. He was also a board member of ASTRA, the pay TV industry body responsible for the industry's policy and regulatory affairs, including full oversight of the Australian anti-siphoning scheme.

Janez Media has also been engaged in other jurisdictions in relation to sport listed event regimes imposed by other governments, most notably in South Africa in responding to ICASA's review of that jurisdiction's listed events regime.

For the avoidance of doubt, this submission reflects the views of Janez Media and not of any of its clients. Janez Media's views are formed from its direct and close involvement in the sports and media industry and the author's overall involvement with the anti-siphoning scheme for more than 27 years.