



Submission to the Review of the Anti -Siphoning Scheme December 2022

About Australians for a Murdoch Royal Commission

We are a non-partisan association committed to researching and advocating for media diversity in Australia. Our core objective is a judicial inquiry with the powers of a royal commission to combat concentration of media ownership and ensure a strong, free and more diverse media for Australia's future.

Introduction

We support the objective of updating the anti -siphoning regime to meet the challenges of the present. However, the Government should be extremely cautious not to exacerbate emerging problems such as cybersecurity challenges and threats to online privacy.

This review has undoubtedly received self-interested submissions from media companies hoping to enhance their relative market position in the guise of creating a level playing field. As News Corporation global chief executive Robert Thomson said last year in his evidence to the Senate Media Diversity Inquiry:

Honestly, I have conflicting views on this [anti-siphoning regime]. I would like it to be relaxed for us and intensified for them.¹

This review should judge harshly simplistic demands designed to give certain companies a competitive edge, and instead focus on the major public interest challenges facing this regime over the coming decades.

This submission outlines how the current anti-siphoning regime is unfit for purpose: first, in terms of how it categorises different outlets; and second, how the list itself has become a stale echo of Australia in the 1990s, failing to adapt to Australia's evolving interests and changing attitudes – particularly regarding women and disability.

We make some modest recommendations to address each of these, a summary of which is appended.

¹ <https://apo.org.au/sites/default/files/resource-files/2021-12/apo-nid315537.pdf>

“Payment is payment” – whether in dollars or in data

The Consultation Paper attempts to define “free access” by focusing narrowly on financial burdens such as direct access fees and the cost of internet access. In doing so, it overlooks the major emerging questions of online privacy and cybersecurity.

In the 1990s, technology was largely unidirectional – broadcasters transmitted images and households received them. This is no longer the case. Digital technologies constantly trade data back and forth between broadcasters and customers. Often this data is collected and harvested purely because it is considered commercially valuable to the broadcaster. Australians have become increasingly concerned about who holds such data, and the security protocols around its access, with one recent poll finding 51% of respondents would support stronger curbs on data collection by private firms².

We therefore reject the simplistic argument advanced by Foxtel and others that “free is free”³ and there is no meaningful difference between free-to-air and no-charge streaming services. We say instead, “payment is payment” – whether that is in dollars, or in commercially valuable personal data.

Case Study: “Free Optus Sport”

Many sport streaming services offer two kinds of personal account: free accounts that provide access to basic content; and paid subscriptions to unlock premium content.

In the case of Optus Sport, both types of account require customers to provide personal details – including their full name, date of birth, email address and phone number – and further data is collected from users as they navigate the service.

The privacy policy governing Optus Sport gives the company broad discretion to use this data for its commercial objectives and those of its business partners.⁴ This includes building detailed personal profiles by cross-referencing this data with external sources and sharing this data with other companies within the Singtel Group that owns Optus.⁵

In September 2022, Optus disclosed a major cybersecurity failure that had exposed personal details of about nine million people. Even now, it is unclear (at least from public reporting) how Optus Sports accounts were affected.

Given these facts, it is difficult to regard these “free” accounts as truly free.

Recommendation 1: The Government should implement standard terms of service for anti-siphoning events to prevent broadcasters using anti-siphoning events to collect or retain non-essential personal data.

² <https://www.theguardian.com/australia-news/2022/oct/04/guardian-essential-poll-one-in-two-australians-want-stronger-privacy-laws-after-optus-breach>

³ <https://www.afr.com/companies/media-and-marketing/fight-begins-over-access-to-major-sporting-events-20221014-p5bprh>

⁴ <https://www.optus.com.au/about/legal/privacy>

⁵ Optus is a wholly owned subsidiary of Singtel, which is majority controlled by the Singaporean Government.

Risk of property damage

In a similar way, an event should not be considered “free” to customers who are encouraged to expose themselves to elevated risk of property damage.

This is especially relevant where most users would be expected to use a streaming app whose terms of service attempt to hold consumers personally liable for damage caused to their property by defective or malicious software.

Most Australians who download streaming apps would not read these terms and conditions, which are often thousands of words long and employ dense language. One survey of 2000 Americans conducted by Deloitte in 2017 found that 91% of consumers admitted to agreeing to legal terms and conditions without reading them, and this figure rose to 97% among adults aged 18 to 34.⁶

Case Study: Kayo Sports Application

Kayo Sports, owned by News Corp Australia, is growing rapidly. Its subscriber base has tripled to almost 1.3 million over the past two years, propelled by marketing campaigns interwoven with other Murdoch -owned properties.⁷

Apps are key to their success. Kayo’s iPhone and iPad apps are consistently the highest-grossing sports apps in the Apple Store⁸ and are among a dozen or so apps produced for Kayo across different consumer devices.⁹

However, the app’s terms and conditions include a lengthy section minimising the News Corp’s liability for damage caused by its software. It reads in part:

You must take your own precautions to ensure that any content within the Service which you use is free from viruses, worms, trojan horses or any other harmful component which may interfere with or damage the operation of your software, hardware or any other device used to access the Service.¹⁰

Few of Kayo’s 1.3 million paid subscribers would have read and understood this 700-word section, which is buried within 4000 words of university -level English.

It would be inconsistent with the democratic objective of the anti -siphoning events for protected events – which the Government has effectively certified as “free” – to become the vehicle for faulty or harmful software provided by companies that seek to wash their hands of any responsibility.

Recommendation 2: The Government should implement standard terms of service for anti -siphoning events that ensures broadcasters bear legal responsibility for damage caused by faulty services.

⁶ <https://www.businessinsider.com/deloitte-study-91-percent-agree-terms-of-service-without-reading-2017-11>

⁷ https://newscorp.com/wp-content/uploads/2022/11/Q1-FY2023-Earnings_FINAL_8-Nov-2022.pdf;
https://newscorp.com/wp-content/uploads/2020/11/Q1-2021-Earnings-Press-Release_FINAL.pdf;
<https://www.newscorpaustralia.com/kayo-sports-and-news-corp-australia-kick-of-their-first-bundled-subscription-campaign/>

⁸ <https://app.sensortower.com/top-charts?category=sports&country=AU&device=iphone&os=ios>

⁹ <https://help.kayosports.com.au/s/article/How-do-I-download-the-Kayo-app>

¹⁰ <https://help.kayosports.com.au/s/terms-and-conditions-kayo-sports-application>

The digital accessibility gap

Anti-siphoning events streamed online are not accessible for millions of Australians.

According to the Australian Digital Exclusion Index:

- 11% of Australians are “highly excluded” from digital technologies;
- 14% of Australians would need to pay more than 10% of their household income to obtain quality, reliable connectivity; and
- digital inclusion is lower among older people, regional Australians, social housing tenants, households without children, the unemployed, the less-educated and people who speak only English at home.¹¹

Foxtel chief executive Patrick Delany’s view that online streaming is no more exclusive than free-to-air television would probably be a common one among tertiary-educated, middle-aged, city-dwelling media executives. But it is not the reality on the ground.

When Mr Delany claims “free is free” by pointing to the statistic that “over 90 per cent of Australian households have access to the internet”, he is writing off up to 10 per cent of the population – equivalent to the combined population of Perth, Darwin and Hobart. This comment also ignores the divide between Indigenous and non-Indigenous Australians – more than a quarter of Aboriginal and Torres Strait Islander people aged over 15 did not access the internet in their home in 2014-15.¹²

Finally, mere access to the internet is not sufficient to stream an anti-siphoning event – internet must also be fast, reliable and affordable. Australia may be the fifth-most developed country on earth, but we are ranked 71st in the world for fixed broadband speeds.¹³

Online streaming services are certainly more accessible than Foxtel. However, it would be wrong to lump them into the same category as free-to-air television for reasons of online privacy, cybersecurity and accessibility.

However, it would also be wrong to put streaming services into the same category as Foxtel. Not only would this reduce access to anti-siphoning events, but it would have the effect of enhancing the power of Foxtel controller News Corporation, which is already a taxpayer-funded monopoly controlling 52.5% of media industry revenue.

Ultimately, any attempt to jam these square-peg platforms into the round hole of the 1990s-era anti-siphoning regime would mark yet another simplistic, piecemeal reform to a media system that is already characterised by simplistic piecemeal reforms implemented at the behest of powerful media interests with little regard for unintended consequences.

¹¹ <https://www.digitalinclusionindex.org.au/interactive-data-dashboards/>

¹² <https://www.pc.gov.au/closing-the-gap-data/dashboard/socioeconomic/outcome-area17>

¹³ <https://hdr.undp.org/content/human-development-report-2021-22>; <https://www.speedtest.net/global-index#fixed>

A multi -tiered approach

Media platforms are currently placed in one of two categories: those which are permitted to access the anti -siphoning list, and those which are not allowed. In our view, this blunt delineation has outlived its usefulness.

Rather, the Government should consider a multi-tiered approach that would assign bidders priority based on the burden that most consumers would face to access the event. Such factors could include data harvesting, consumer guarantees and access fees charged.

To further safeguard against hoarding of rights, consideration should also be given to updating the anti -hoarding rules and making them operational by default, rather than by ministerial action, to ensure events are scheduled for use in the manner promised .

Recommendation 3: The Government should consider replacing the current two -tier categorisation of broadcasters with a multi -tiered system where preferential access to anti -siphoning events is allocated on the burden that would fall on most consumers.

Recommendation 4: The Government should consider making anti -hoarding rules operational by default, rather than by ministerial action.

Composition of the anti -siphoning list

When the anti-siphoning list was announced in May 1994, the Minister said it would “preserve” major sporting events and “ensure that viewers would not be forced to pay for major sporting programs which they now received free of charge”. This was an appropriate objective at the time, but the anti-siphoning list has since become stuck in the mode of preserving events that were most popular three decades ago.

Australia’s national character has changed enormously since 1994. Sadly, sporting events that have grown in popularity, feature women or athletes with disability, or are treasured by Australia’s multicultural communities, are less likely to be included on the anti-siphoning list. Meanwhile, established events that are male-dominated have continued to be preserved even if their significance to the public may have waned.

For example:

- The Summer Olympic Games and Winter Olympic Games are preserved, but not the Summer Paralympic Games or Winter Paralympic Games.
- The NRL and AFL premiership competitions are listed, but the Super Rugby and A-League soccer competitions are not.
- A-League soccer is not protected by the anti-siphoning list despite the list previously preserving its predecessor, the National Soccer League.
- Australian NRL clubs’ matches played in New Zealand are protected, as are the Kangaroos’ rugby league test matches played in New Zealand; but the Socceroos’ World Cup qualifiers played in New Zealand are not protected.

Some of the anti-siphoning lists' quirks are demonstrably sexist. For example:

- The Socceroos' matches at the FIFA World Cup in Qatar are protected, but not the Matildas' matches at the FIFA Women's World Cup to be played here in Australia next year.
- Davis Cup tennis matches are protected when the Australian men's team is playing, but the list does not protect our women's team playing at the Billie Jean King Cup (previously the Fed Cup).

The Davis Cup also demonstrates how the anti-siphoning list can reflect the technical status of events, rather than how they are understood by the public in the real world. Davis Cup matches are presumably protected because the players are formally representing Australia at that tournament, rather than competing as individuals. But this ignores the enormous national pride around Australians competing at the Grand Slams at Roland Garros, Flushing Meadows and Wimbledon.

We believe the list should be regularly reviewed to ensure it keeps pace with the changing face and values of Australian society.

It is possible this review, whose scope includes many technical aspects, may have gone unnoticed by (or were inaccessible to) many Australians who would have strong views on the composition of the list. It may therefore be necessary to conduct further public consultations on the shape of the anti-siphoning list.

Recommendation 5: The Government should review the list with special attention to the changing values of Australian society, especially regarding women, disability and multicultural communities.

Appendix: Summary of Recommendations

Recommendation 1: The Government should implement standard terms of service for anti-siphoning events to prevent broadcasters using anti-siphoning events to collect or retain non-essential personal data.

Recommendation 2: The Government should implement standard terms of service for anti-siphoning events that ensures broadcasters bear legal responsibility for damage caused by faulty services.

Recommendation 3: The Government should consider replacing the current two-tier categorisation of broadcasters with a multi-tiered system where preferential access to anti-siphoning events is allocated on the burden that would fall on most consumers.

Recommendation 4: The Government should consider making anti-hoarding rules operational by default, rather than by ministerial action.

Recommendation 5: The Government should review the list with special attention to the changing values of Australian society, especially regarding women, disability and multicultural communities.