

Foxtel Group: Submission in response to the review of the anti-siphoning scheme – Consultation Paper

6 December 2022

Executive Summary

- The anti-siphoning scheme (the "**Scheme**") is no longer an appropriate regulatory mechanism in view of its negative effect on competition, the Australian economy, viewers, sporting codes and grass roots competitions.
- The Scheme is inherently anti-competitive and distorts the playing field in favour of the free-to-air broadcasters.¹ This anti-competitive effect has increased with the emergence of integrated free-to-air and subscription platforms which provide the FTAs with an unfair competitive advantage with respect to acquiring the rights for listed events for their subscription offerings.
- This anti-competitive effect is further exacerbated as other parties that are not subscription television broadcasting licensees ("**STV**") (e.g. Amazon and Google) are unrestricted in their ability to acquire rights to listed events.
- The Productivity Commission has historically supported the view that the Scheme is anti-competitive and shifts the negotiating power in favour of the FTAs and disadvantages sporting bodies by dictating how they must sell their rights. The Scheme clearly does not satisfy the Government's stated policy to ensure, "... a level playing field for Australian media businesses in which they can compete effectively."²
- The Scheme does not align with comparable schemes in other jurisdictions. The number and scope of matches and events regulated under comparable 'listed event' regimes in other jurisdictions is considerably lower than under the current Scheme. This is the case notwithstanding that the policy objective of both the Scheme and comparable overseas regimes is to ensure free public access to events of national interest. In certain other countries which have a substantially similar cultural affinity with sports - the United States of America and New Zealand – there is no anti-siphoning or analogous listed events regime at all.
- It is no longer appropriate to maintain a legislative regime which aims to preserve access to nationally important and culturally significant events via a single medium which the majority of Australians are using increasingly less frequently as their primary means for media consumption. Technology and changing audience preferences have made online media consumption as ubiquitous as free-to-air television services were at the commencement of the Scheme. "Free access" should no longer be equated with "free-to -air television", particularly where 91% of Australian households are currently able to view OTT streaming services via their current televisions with either no or little upfront cost.³
- For these reasons, the Scheme should be substantially amended to address these negative impacts as follows:
 - the *Broadcasting Service (Events) Notice (No.1) 2010* (the "**Anti-Siphoning List**") should be reduced in scope and only include those events that truly satisfy the objective of ensuring Australians have free access to events of national importance and cultural significance; and
 - the current Scheme should adopt a technology neutral approach ensuring listed events are made freely available by the acquirers of rights.

¹ Including both the national broadcasters and commercial television broadcasting licencees, together "**FTAs**".

² Minister for Communications (14 November 2022), ['Media Policy: Priorities for a New Government Seminar Communications and Media Law Association \(CAMLA\) and International Institute of Communications \(IIC\) Australian Chapter'](#).

³ Dr Edwards' Report, [50].

- Changing the Scheme to allow STV and all other players to compete on an equal basis would satisfy the following important principles:
 - it would recognise current Australian media viewing habits;
 - it would better serve the Scheme's underlying objective of providing free access to events of national importance and cultural significance, and do so on a broadly available basis;
 - it would replace the current focus on the acquisition of rights with a requirement for the relevant events to be transmitted - better serving the policy objective of ensuring free access;
 - it would permit STV licence holders to fairly compete for free and subscription rights to those events, in a manner not currently permitted by the Scheme;
 - it will address the current potential for subscription based online streamers to acquire exclusive rights to listed events and put the events behind a paywall; and
 - it would implement a level playing field for industry consistent with the Government's Media Policy.⁴
- The Foxtel Group submits that regardless of any changes effected to the Scheme, the Scheme as a policy mechanism will remain anti-competitive, and continue to have a negative impact on both Australia's sports bodies and viewers.

⁴ See n 2 above.

Part 1 – Summary and observations on trends identified in Consultation Paper

1 Introduction and Structure of Submission

The Foxtel Group welcomes the opportunity to provide a submission in response to the 'Review of the anti-siphoning scheme – Consultation Paper dated October 2022 (the "**Consultation Paper**").

The Foxtel Group is one of Australia's most progressive and dynamic media companies, directly employing around 1,800 people and delivering a diverse subscription television service to both regional and metropolitan areas over cable and satellite, as well as providing a range of internet delivered services including Foxtel Go, Foxtel Now, and the Kayo Sports, Kayo Freebies and Binge streaming services. The Foxtel Group also includes Fox Sports Australia, which is Australia's leading producer of sports coverage across eight dedicated channels. Via these services, the Foxtel Group provides coverage of a range of sporting events, including a number of those currently included on the Anti-Siphoning List.

The Foxtel Group's submission is structured as follows:

- (a) **Part 1** outlines the Foxtel Group's position in relation to the Scheme in its current form and the issues raised by the Consultation Paper. It also sets out a summary of the Foxtel Group's proposal for reform of the Scheme.
- (b) **Part 2** contains the Foxtel Group's responses to each of the specific questions set out in the Consultation Paper.
- (c) An independent expert economist report prepared by Dr Geoff Edwards of Charles River Associates is set out at **Schedule 1** for the Department's consideration ("**Dr Edwards' Report**"). This report is also referred to in parts of the Foxtel Group's own submission.
- (d) **Schedule 2** sets out the amended Anti-Siphoning List which the Foxtel Group proposes to ensure the Scheme is more accurately aligned with its policy objective of ensuring free access to events of national importance and cultural significance.

2 Concerns with the current Scheme

2.1 The Foxtel Group submits that the Scheme has a detrimental impact on competition, the Australian economy, viewers, sporting codes and grass roots competitions. Therefore it is no longer an appropriate policy mechanism. The reasons for this are set out below.

2.2 The Scheme is anti-competitive

- (a) The Scheme is inherently anti-competitive and distorts the playing field in favour of the FTAs as it directly and significantly limits competition between STV and FTAs by restricting the ability of STV to acquire broadcast rights for listed events to the benefit of the FTAs.⁵
- (b) The emergence of free-to-air and subscription platforms within the same corporate groups⁶ means the Scheme can be used by the FTAs to provide an unfair competitive advantage with respect to acquiring subscription rights for listed events for their subscription offerings.
- (c) This anti-competitive effect is further exacerbated as other parties that are not STV (e.g. Amazon and Google) are unrestricted in their ability to acquire rights to listed events.
- (d) In addition, it is common for sporting bodies to sell the rights to both listed and unlisted events as part of one package in order to secure the highest cumulative price for those rights (e.g. SANZAAR sells the rights to listed events (certain Wallabies matches) and non-listed events (e.g. Super Rugby)). As a result, the Scheme affords FTAs not only an unfair competitive advantage in respect of acquiring rights to events on the Anti-Siphoning List, but also to events that are not.
- (e) By imposing a licence condition solely on STV to the benefit of FTAs, the Scheme does not conform to the Government's stated policy to ensure, "... a level playing field for Australian media businesses in which they can compete effectively."⁷
- (f) In 2000, the Productivity Commission concluded that the Scheme was exclusionary and gave FTAs a competitive advantage over subscription broadcasters and increased their revenue. The Productivity Commission also concluded that the Scheme disadvantaged sport organisations by decreasing their negotiating power in marketing their products.⁸
- (g) In 2009, the Productivity Commission concluded again that the Scheme was anti-competitive, imposing a protracted negotiation process on STV, an unnecessary burden on those businesses, and reducing the bargaining power and potential revenue of sports bodies.⁹ With only limited amendments to the Scheme having occurred since that time,¹⁰ and noting that Australian viewing preferences have increasingly moved away from free-to-air TV viewership,¹¹ the Productivity Commission's conclusion in 2009 that the

⁵ Dr Edwards' Report, [26] – [30].

⁶ For example the launches of Nine's digital platform Stan (2015) and Network Ten's Paramount+ (2021).

⁷ See n 2 above.

⁸ Australian Government Productivity Commission (March 2000), '[Broadcasting Inquiry Report](#)', pp. 435 – 437.

⁹ Australian Government Productivity Commission (2009), '[Annual Review of Regulatory Burdens on Business: Social and Economic Infrastructure Services](#)', p. 156.

¹⁰ E.g. the amendments made in 2017 as part of the [Broadcasting Legislation Amendment \(Broadcasting Reform\) Bill 2017](#) which included:

- the removal of all golf events, the English Football Association (FA) Cup final, and a number of other international sports events from the Anti-Siphoning List;
- the removal of the rule that prevented free-to-air broadcasters from televising listed events solely on their digital multichannels, instead of telecasting the events on their main broadcast channels or simulcasting them on their respective main channels and multichannels; and
- the increase to the time out from an event that events are automatically delisted from the Anti-Siphoning List from 12 to 26 weeks.

¹¹ Since 2017, the percentage of Australians watching live FTA TV has decreased from 75% to under 50%. As of 2022, more Australians were watching content via online subscription services than live free FTA TV. See Australian Communications and Media Authority ("[ACMA](#)") (June 2022) '[Communications and media in Australia: How we watch and listen to content](#)' p. 5.

Scheme's anti-competitive features warranted the Scheme to be either abolished or substantially amended, have become even more relevant today as they were at that time.¹²

2.3 The Scheme has a negative impact on sporting bodies

- (a) The anti-competitive nature of the Scheme results in a negative financial impact for sporting bodies by reducing the potential price that sporting bodies might be able to receive for their rights. As these media rights often constitute these bodies' largest source of revenue, the Scheme has the effect of placing a limitation on the amount of money available to sports to fund players, teams and communities at both the professional and grass roots levels which hinders the uptake and development of those sports.¹³
- (b) These negative effects extend to sports and events not on the Anti-Siphoning List by potentially limiting innovation and investment in the broadcasting of those sports.¹⁴

2.4 The Scheme negatively impacts the Australian public

- (a) The Scheme also negatively impacts the Australian public, its intended beneficiaries, by reducing content innovation and development; reducing the quality of sports coverage and, by extension, viewer enjoyment of such sports; and increases the likelihood of reduced participation in sport.¹⁵

2.5 The Scheme's protection of events is no longer in line with comparable international regimes

- (a) The number and scope of matches and events regulated under comparable 'listed event' regimes in other jurisdictions are considerably lower than under the Scheme. This is the case notwithstanding that the policy objective of both the Scheme and comparable overseas regimes is to ensure free public access to events of national interest.¹⁶
- (b) Notably, under each of the regimes of the United Kingdom, France, Ireland, Belgium, Germany, Italy and Denmark:
 - no regular season games, quarter finals or semi finals of domestic competitions are listed, including for what is arguably those countries' most popular sport - football; and
 - a consistent approach is generally taken in respect of international matches and competitions, i.e. it is not the case that matches and tournaments played in particular countries are listed in the same way as for particular events on the current Anti-Siphoning List held in New Zealand, England and Papua New Guinea.

¹² Australian Government Productivity Commission (2009), ['Annual Review of Regulatory Burdens on Business: Social and Economic Infrastructure Services'](#), pp. 163-164.

¹³ Dr Edwards' Report, [31] – [34].

¹⁴ Dr Edwards' Report, [35].

¹⁵ Dr Edwards' Report, [36].

¹⁶ In regards to the UK, the [Broadcasting Act 1996 \(UK\)](#) gives the Secretary of State for Digital, Culture, Media and Sport the power to draw up a list of sporting events of "national interest" (see, House of Commons (May 2022) ['Broadcasting: listed sporting events'](#), p. 5). In France, the equivalent regime is formulated to "ensure wide public access to broadcasts of events of major importance for society" (see, [Commission Decision of 25 June 2007 on the compatibility with Community law of measures taken by France pursuant to Article 3a\(1\) of Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities](#) [2007] OJ L 180/333. Preamble, [cl.17](#)). The regimes of Belgium, Denmark, Germany, Ireland and Italy each seek to protect access to events "...of major importance to/for Society" (see, [Commission Decision of 25 June 2007 on the compatibility with Community law of measures taken by Belgium pursuant to Article 3a\(1\) of Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities](#) [2007] OJ L 108/24. Annex, [Art. 76 § 2](#) (Belgium), [Publication of consolidated measures in accordance with Article 3a\(2\) of Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, as amended by Directive 97/36/EC of the European Parliament and of the Council](#) [2001] OJ C 208/29 (Denmark, Germany and Italy) and the [Broadcasting Act 2009 \(Ireland\)](#), s 162).

- (c) In certain other countries which have a substantially similar cultural affinity with sports - the United States of America and New Zealand – there is no anti-siphoning or analogous listed events regime at all.

2.6 The current Scheme is obsolete in light of modern technology and viewing habits

- (a) In the current Australian media environment, it is no longer appropriate to maintain a legislative regime which aims to preserve access to nationally important and culturally significant events via a single medium which the majority of Australians are using increasingly less frequently as their primary means for media consumption.
- (b) Technology and changing audience preferences have made online media consumption as ubiquitous as free-to-air services were at the commencement of the Scheme. Viewership of licensed commercial television broadcasters and national broadcasters via terrestrial transmission technology has declined as a proportion of overall viewership. Since 2020, online subscription services have overtaken the use of FTA as the main source of screen content for Australian adults.¹⁷

2.7 Many of the listed events do not conform to the Scheme's policy objective

- (a) The Scheme is currently intended to provide free access to nationally important and culturally significant events. The Anti-Siphoning List should therefore only capture events that clearly fit that description. The Foxtel Group has included an updated list in Schedule 2 for the Department's consideration.

¹⁷ Social Research Centre (2021), ['2021 Media Content Consumption Survey – Key results'](#), pp. 3 and 6.

3 Reform proposal to the Scheme

3.1 In view of the negative features and outcomes of the current Scheme described above and in Dr Edwards' Report, the Foxtel Group submits that the Scheme must be substantially amended as follows:

- (a) the Anti-Siphoning List should be reduced in scope; and
- (b) the Scheme should adopt a technology neutral approach ensuring listed events are made freely available to viewers by the acquirers of rights.

(the "**Proposal**")

Foxtel Group submits that both elements of the Proposal are interrelated and therefore must be implemented in conjunction with each other. Each of the elements are explained in further detail below.

3.2 The Anti-Siphoning List should be reduced in scope

The Anti-Siphoning List should only include those events that truly constitute events of national importance and cultural significance. It does not currently do so. In order to properly align to this policy objective, the Anti-Siphoning List should be amended in accordance with the following principles.

- (a) Domestic sporting competitions – regular season matches:
 - (i) AFL and NRL matches should only be included on the Anti-Siphoning List if they qualify as events of national importance and cultural significance. There are very few matches that satisfy this test other than the finals and specific matches occurring on public holidays (e.g. ANZAC Day, Queens Birthday and the Easter public holidays). This approach would align with that adopted in many of the comparable international regimes and with other events included on the Anti-Siphoning List that satisfy the national interest test.
 - (ii) However, in the event that it is determined appropriate to retain some regular season matches per round, then this should be limited to the number of matches that currently satisfy the test of national importance and cultural significance being the number of matches that are consistently transmitted by FTAs on a national basis. The fact that a significant number of matches per round are not currently transmitted by FTAs on a national basis is reflective of the FTAs and sports rights bodies having each assessed that certain matches are not of sufficient national importance and cultural significance to require this to be the case. This indicates that protection on the Anti-Siphoning List is not required for all AFL and NRL Premiership matches in each regular season full round.
 - (iii) In the case of the AFL, there is also no justification for retaining matches that are only transmitted in one state by a FTA as they clearly do not satisfy the test of national importance and cultural significance. In the case of the NRL, the New Zealand Warriors entered the NRL Premiership after the creation of the Anti-Siphoning List and as such, NZ Warriors home matches were automatically included in the Anti-Siphoning List, however there is no justification for continuing to retain matches which are played in New Zealand as they also do not satisfy the national importance and cultural significance test.
 - (iv) If it is determined that it would be appropriate to retain on the Anti-Siphoning List some regular AFL and NRL season matches, then those particular matches should fall to be determined by the relevant code. Foxtel Group proposes that no more than three NRL matches per full regular season round are retained on the

Anti-Siphoning List which aligns with the number of matches that are currently transmitted as national games on a live basis by the relevant FTA. In the case of the AFL, Foxtel Group proposes that 1 and up to 3 matches per regular season round are retained on the Anti-Siphoning List. This recognises that there is currently one AFL match per round that is broadcast nationally by the FTA but there can be up to 3 in a round. In many rounds, local team games are substituted for the national game in certain states which means these games should not be regarded as satisfying the national importance and cultural significance test.

- (v) This principle should also apply for the same reasons to specific matches occurring on public holidays to the extent they are not currently shown on free-to air TV. In short, removal of these events from the Anti-Siphoning List will result in no detriment to free-to air viewers given the current choice by FTAs not to broadcast these events.
- (vi) This principle is aligned to the criteria applied in previous changes to the Anti-Siphoning List. For example, when Supercars races (other than Bathurst 1000 races) were removed from the Anti-Siphoning List in 2017, the reason cited in the relevant bill was the fact that the relevant FTA (at that time, being Network Ten) only wished to acquire the rights to some, but not all, rounds of the Supercars championship series.¹⁸
- (vii) As has been evident over a number of years, the removal of events from the Anti-Siphoning List does not equate to the removal of coverage of those events from free-to-air television. For example, despite the fact that Supercars races (other than Bathurst 1000 races), US Masters golf, Australian Open golf, Wimbledon and US Open tennis were all removed from the Anti-Siphoning List in 2017, they have since been acquired by and have (or will be) transmitted by various FTAs (Supercars – Network 10 /Seven Network, US Masters, Australian Open, Wimbledon, US Open – Nine Network).

(b) International Competitions / Matches:

- (i) Matches / competition tournament matches played overseas: These should be removed from the Anti-Siphoning List. There is no reasonable justification to continue to include matches situated in certain overseas jurisdictions where international matches involving Australian teams in *other* overseas jurisdictions are and have not been considered to be of national importance and cultural significance. In some cases, these events may be out of time-zone or alternatively held at a time in the Australian evening which clashes with other content which has been deemed to have a greater importance (e.g. FTA primary 6:00pm/7:00pm news and current affairs broadcasts). In some cases this causes the relevant events to be only be transmitted on a FTA multichannel service. Removing these matches would also conform with the approaches taken in other jurisdictions. For example, overseas cricket test matches played by the English team, including Ashes series matches held in Australia, are not listed events under the UK anti-siphoning regime.¹⁹
- (i) Matches / competition tournament matches played in Australia: Only those matches involving Australia, and in respect of tournament matches, the final, should remain on the Anti-Siphoning List. Matches cannot reasonably be

¹⁸ [Explanatory memorandum to the Broadcasting Legislation Amendment \(Broadcasting Reform\) Bill 2017, p.73.](#)

¹⁹ Ofcom (April 2010), '[Code on sports and other listed and designated events](#)', Annex 1.

assumed to have national importance and cultural significance when there is no Australian participation. The one exception to this is the final of competition tournaments held in Australia. As the final both represents the global pinnacle of the relevant sport and is hosted in Australia, it is likely to be of significant national interest.

(c) Cricket:

ODIs and T20s in Australia (which are not played as part of a World Cup): These should be removed from the Anti-Siphoning List for the same reason as applies for domestic sporting competition regular season matches. FTAs have elected not to transmit these matches in the past, providing an indication that the events are not of sufficient importance or significance to warrant ongoing inclusion on the Anti-Siphoning List. By comparison to test matches, the high number and frequency of white ball cricket events means that they do not have the same degree of individual national importance and cultural significance.

(d) Davis Cup: This event should be removed as it is no longer of national importance and cultural significance, evidenced by declining viewing figures.

(e) Others:

- (i) The Foxtel Group acknowledges that the retention of the Melbourne Cup and the motorsports events currently on the Anti-Siphoning List remains justified on the basis of the principles set out above. These represent the pinnacle events for these sports held in Australia and as such, like the finals of the AFL and NRL competitions, represent nationally important and culturally significant events.
- (ii) Additionally, the Foxtel Group further recognises that the Olympics and Commonwealth Games warrant retention on the Anti-Siphoning List. These events are appropriate to be ringfenced from the approach advocated above in relation to International Competitions/Matches principles on the basis that Australian participation in these events is historically high, the events involve a wide range of sports, represent the pinnacle competition in many individual sporting events, and the competitions have a longstanding cultural significance for the Australian population. Furthermore, a separation of particular events/heats involving Australians and non-Australians is not practical or feasible for rights bodies or broadcasters.
- (iii) For similar reasons, the Foxtel Group recognises that the Australian Open (Tennis) warrants retention on the Anti-Siphoning List. This event has historically had high Australian participation across a variety of the competitions and has a longstanding cultural significance for the Australian population. Additionally, a separation of matches involving Australians and those not involving Australians is unlikely to be practical or feasible for rights bodies or broadcasters (particularly given specific match scheduling generally occurs the day before, if not on the day itself).

The Foxtel Group submits that there is no basis to expand the Anti-Siphoning List to cover any additional sports or events. The inclusion of women's and emerging sports on the Anti-Siphoning List may actually limit their ability to develop and negatively impact the sport itself. One example of this is netball where the previous arrangements between Netball Australia and the relevant FTA required Netball Australia to schedule matches at times that suited the broadcaster rather than at times which best suited the players and the fans.

3.3 The Scheme should adopt a technology neutral approach to ensuring the listed events are made freely available to viewers by acquirers of rights

- (a) In conjunction with a reduction in the Anti-Siphoning List (as outlined above), the Foxtel Group proposes that the current Scheme should be replaced with an obligation that the first acquirer of audio-visual rights to the listed events must ensure transmission of those events in full on a live and free basis but may do so via any form of technology that is broadly available.²⁰ This obligation would also apply where any acquirer enters into an arrangement which would prevent the granting of live rights to an event to a third party or restricts the terms on which the live rights could be granted. The obligation to ensure transmission could be satisfied either by the acquirer transmitting the events itself, or ensuring that a third party does so.
- (b) FTAs commonly transmit listed events in respect of which they have acquired rights via the Scheme over the internet via their Broadcast Video On Demand ("**BVOD**") services. Despite this, STV are unable to compete at first instance to acquire rights to listed events, even if they were to provide assurances to also transmit the relevant events on a free basis over the internet. Changing the Scheme to allow STV and all other players to compete at first instance would satisfy the following important principles:
- it would recognise current Australian media viewing habits;
 - it would better serve the Scheme's underlying objective of providing free access to events of national importance and cultural significance, and do so on a broadly available basis;
 - it would replace the current focus on the acquisition of rights with a requirement for the relevant events to be transmitted, therefore also better serving the policy objective of ensuring free access;
 - it would permit STV to fairly compete for free and subscription rights to those events, in a manner not currently permitted by the Scheme;
 - it will address the current potential for subscription based online streamers to acquire exclusive rights to listed events and put the events behind a paywall; and
 - it would implement a level playing field for industry consistent with the Government's Media Policy.²¹
- (c) The Foxtel Group proposes that under this approach, the concept of being 'broadly available' would include any relevant online service generally able to be viewed by individuals with an internet connection supporting download speeds of 3 Mbps or more.²² The Scheme currently requires that commercial television broadcasting licensees whose services cover more than 50% of the population have a right to televise the event in order for the subscription television anti-siphoning licence condition to be satisfied. By contrast, 99.3% of premises in Australia are able to access the NBN and fixed broadband speeds of at least 25Mbps²³ while 99.5% of the Australian population is covered by 4G

²⁰ Dr Edwards' Report, [46] – [55].

²¹ See n 2 above.

²² 3 Mbps is a generally accepted recommended minimum download speed required for a user to view a standard definition transmission stream. For example, Kayo requires 2.5 Mbps for a seamless stream via broadband (see Kayo, '[What internet speed do I need to use Kayo?](#)'), 7plus, Stan and Paramount+ each require 3 Mbps for a standard definition streaming (see 7plus, '[FAQ](#)', Stan, '[Minimum Internet Requirements](#)' and Paramount+, '[Paramount+ support](#)'). The ACCC considers that a High Definition stream from Netflix takes up around 2.2 Mbps on average (see ACCC (August 2022), '[Measuring Broadband Australia: Report 18 Appendix, August 2022](#)').

²³ Department of Infrastructure, Transport, Regional Development and Communications (November 2020), '[International comparison of fixed broadband performance](#)', p.1.

networks.²⁴ All current internet technologies available in Australia currently support at least 3 Mbps download speed, with the exception only of a limited number of VDSL connections.

- (d) The adoption of such an approach would enable the current subscription television anti-siphoning licence condition to be removed entirely, and therefore remove the anti-competitive effect of the Scheme on only one type of participant in the sports rights sector.

²⁴ ACMA (December 2021), '[Communications and media in Australia: Trends and developments in telecommunications 2020-21](#)'. The average download speed experienced by customers on Telstra's, TPG's and Optus' 4G networks between 1 January and March 31 2020 was 50.4 Mbps, 43.9 Mbps and 38.7 Mbps respectively, see Opensignal (April 2020) '[Mobile Network Experience Report April 2020](#)'.

4 Information on the Foxtel Group's current services

- 4.1 The Foxtel Group provides a premium subscription television service to 1.5 million subscribers in both regional and metropolitan areas, over cable and satellite, via our proprietary set top boxes. These services are provided via a combination of subscription television broadcasting licences and as subscription narrowcasting services pursuant to the narrowcast television class licence.
- 4.2 The Foxtel Group also provides the internet delivered content services Foxtel Go, Foxtel Now, Kayo Sports (1.3 million subscribers), Binge (1.45 million subscribers) and Flash. Kayo Sports includes Kayo Freebies, which is available to stream online for free through kayosports.com.au and via the Kayo Sports app. Sports made available via Kayo Freebies have included 2 matches per week of Netball, all international Netball matches, ICC Women's Cricket World Cup, NBL (2 games per week), hockey (men's and women's), surfing, women's baseball, supercars (6 races), sailing and boxing.
- 4.3 The Foxtel Group also includes Fox Sports Australia ("**FOX SPORTS**") which is Australia's leading producer of sports coverage and which compiles and produces live content across eight dedicated high definition channels – FOX CRICKET, FOX LEAGUE, FOX SPORTS 3, FOX FOOTY, FOX SPORTS 5, FOX SPORTS 6, FOX SPORTS More and FOX SPORTS NEWS, all available via the Foxtel subscription television platform and available to stream via Foxtel Go and Foxtel Now. The FOX SPORTS channels are also available to stream on Kayo Sports.
- 4.4 FOX SPORTS delivers a variety of sport from Australia and around the world, including every NRMA Test Series, Dettol ODI and T20I Series and KFC BBL match live of the domestic Australian summer, every game of every round of the Toyota AFL Premiership Season and the NRL Telstra Premiership, along with every practice, qualifying session and race of the Repco Supercars Championship, FIA Formula One World Championship™ and MotoGP.
- 4.5 FOX SPORTS is at the forefront of sports broadcast innovation, having been responsible for the introduction of many new technologies in recent years, including Foxkopter, Corner-post Cameras, Helmet Cam, Line Eye, AFL Cap Cameras, Fox Cricket's Flying Fox, Fox Rover, AR Ball Tracking and utilising an impressive IP Production Facility (The HUB) Networking at all major sports stadiums in Australia.
- 4.6 FOX SPORTS operates FoxSports.com.au, Australia's number one sports news website with a unique monthly audience of over 4 million viewers, as well as the FOX SPORTS social media pages which have combined audience of 8 million users across Facebook, Twitter and Instagram.

5 Foxtel Group's observations on domestic trends in media viewing

- 5.1 Over the past five years, there has been a consistent rise in Australia in online media content consumption coinciding with a decline in live free-to-air TV viewership.²⁵ ACMA's 2021 edition of its annual consumer survey noted that for the first time ever, more Australians were watching content via online subscription services than live free-to-air TV.²⁶ More specifically, the survey noted that as at June 2021 only half of Australians were watching free-to-air TV, declining from 75% in June 2017, while the number of Australians watching online subscription services had increased from 32% in June 2017 to over 58% in June 2021.²⁷ During the same five year span, the survey also noted increases in Australians' consumption of online pay-per-view services, catch-up TV (being the BVOD services provided by FTAs), and TV shows being watched over the internet.²⁸
- 5.2 This decline in traditional free-to-air broadcast television viewership and the growth of online content consumption has coincided with an increase in viewing of the FTAs' own unregulated online services. Nine's 2022 annual report recorded that the BVOD sector in FY22 had grown by 47% and that, "*9Now (Channel 9's BVOD service)... continues to evolve and is expected to further capture viewers as audiences migrate from linear delivery to free streaming of their Total Television content... Nine expects this migration of Total Television viewers to 9Now will continue to gather momentum with the penetration of connected televisions*".²⁹ Nine also noted as part of its strategic priorities that the group intended to deliver on an accelerated shift to Digital, citing the live streaming BVOD records on 9Now during the 2022 State of Origin series.³⁰ SevenWestMedia too noted in its latest annual report that its digital earnings has increased to 40% of Group earning driven by its BVOD services³¹ and that it expected that digital was 'well on the way to generating 50% of the group's earnings "*over the next couple of years*".³² The annual report also noted that the attraction of BVOD was heightened in part by the very successful Tokyo and Beijing Olympics. In 2022, 7plus, Channel 7's BVOD offering, recorded over 12.5 million registered, verified users.³³

²⁵ See n 13 above.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Nine (2022), '[Annual Report 2022](#)', p. 16.

³⁰ Ibid, p. 89.

³¹ SevenWestMedia (2022), '[Annual Report 2022](#)', p. 4.

³² Ibid, p. 6.

³³ Ibid, p. 9.

Part 2 – Responses to specific Issues for Consultation

Chapter 4: Policy settings and considerations

A. Policy objective

1 **Is the objective of ensuring that Australians continue to have free access to nationally important and culturally significant events still relevant and appropriate? What changes to this objective, if any, would you propose?**

Assuming the Scheme is to be retained, the Foxtel Group agrees that ensuring that Australians have "free access" to "events of national importance and cultural significance", as originally set out in the Explanatory Memorandum to the Broadcasting Services Bill 1996, remains a relevant and appropriate policy objective.

However, as set out in Section 2 of Part 1 above and in the answers to the remaining questions below, the Foxtel Group submits that this objective is not being achieved by the current policy mechanism and that revisions to the Scheme, in line with the Proposal, are required in order to allow the objective to be more effectively achieved.

(a) Should the scheme seek to define what constitutes 'nationally important and culturally significant'? If so, in what way? Is popularity a proxy for importance and significance, or are other inputs or variables relevant?

The Foxtel Group does not consider that the legislation should be amended to codify a defined meaning of "national importance and cultural significance". These concepts can change over time, and should accordingly be assessed from time to time in context as part of the periodic remaking of the relevant legislative instrument which establishes the Anti-Siphoning List.

However, the Foxtel Group submits that the following principles are relevant to an assessment of whether events should be included on the Anti-Siphoning List, i.e. whether they satisfy the objective of ensuring that Australians continue to have access to events of national importance and cultural significance:

- whether a listed event is currently broadcast on free-to-air TV on a national basis;
- whether an event is currently broadcast on a FTA's primary channel, or on one of its multi-channels, or only on a BVOD service;
- whether part or all of the event is currently accessible via other means for free; and
- in respect of international competitions and matches, whether the matches are held in Australia.

(b) Should other factors, in addition to free access to events, be considered for the objective?

The Foxtel Group submits that, in addition to the requirement for "free access", the policy objective should also incorporate a concept of the free access being "broadly available" on a technology neutral basis. As identified in the Consultation Paper, the current Scheme only requires that a commercial television broadcasting licensee acquiring rights to events on the Anti-Siphoning List have TV services which cover more than 50% of the Australian population in order for the licence condition on STV to be fulfilled. The Foxtel Group submits that this is no longer a relevant test in an era of ubiquitous high-speed internet penetration. Instead, as proposed in Section 2 of Part 1 of this submission, the Foxtel Group considers that the policy objective would be better served by imposing an obligation on the first acquirer of audio-visual rights for listed events to ensure the transmission (either by itself, or through a third party) of those events on a live and free technology neutral basis provided the service is broadly available. According to Dr

Edwards' Report such an approach would "avoid the incongruent outcomes and possibilities of the current mechanism, level the playing field and enhance competition for rights to listed events, bringing benefits for sports bodies and the general public, while continuing to realise the objective of the regime."³⁴

The concept of being broadly available would include any relevant online service generally able to be viewed by individuals with an internet connection supporting download speeds of 3 Mbps or more. As noted above in paragraph 3.3(c), 3 Mbps is a generally accepted recommended minimum download speed required for a user to view a standard definition transmission.

Referring to the findings of Dr Edwards' Report, the Foxtel Group submits that Over-The-Top ("**OTT**") streaming services should be considered to meet this threshold of being 'broadly available' on the basis that:

- there is the potential for 98% of Australian households to view free OTT streaming services on their existing TV sets, as 99.3% of premises in Australia are able to access the NBN and fixed broadband speeds of at least 25 Mbps and 99% of Australian households have high definition TV sets;³⁵
- already today 91% of Australian households are currently able to view OTT streaming services via their current TV sets with either no up-front cost (for the 70% of Australians' who have Smart TVs connected to the internet) or with only a small up-front cost;³⁶ and
- at least 94% of households are able to view OTT streaming services via their current mobile devices.³⁷

2 What does, or should, 'free access' to events mean?

(a) Is an event 'free' only if it is shown on free-to-air television, or could availability via an online service without a direct access fee (such as a BVOD or streaming service) also satisfy this criterion?

The current limitation of the Scheme to FTAs is no longer appropriate. It is a mechanism which originated when there were only two types of commercial audio visual broadcast media that were regulated under the *Broadcasting Services Act 1992* (Cth) being commercial television broadcasting licence holders and subscription television broadcasting licence holders.

The Foxtel Group submits that free access should no longer be equated with free-to-air channels given the widespread availability of free internet streaming services. This means availability via an online service without the need to make payment of any fee (whether one-off or recurring) to view the online service, should be treated as satisfying this criterion. This is in line with the Government's own view that regulation should reflect the reality of how content is currently consumed.³⁸ Dr Edwards' Report supports the proposition that 'free' should no longer be solely equated with access to free-to-air channels because:

- access to OTT streaming services requires no to little additional up-front and ongoing costs for the vast majority of Australian households;³⁹ and
- events on the Anti-Siphoning List could be adequately protected from being put behind the paywall of OTT streaming services by simply requiring winning bidders for listed events to transmit these listed events for free via their OTT streaming services, i.e.

³⁴ Dr Edwards' Report, [11].

³⁵ Dr Edwards' Report, [50(b)].

³⁶ Dr Edwards' Report, [50(c)].

³⁷ Dr Edwards' Report, [53].

³⁸ See n 2 above.

³⁹ Dr Edwards' Report, [51] – [54].

without the requirement for a subscription or access fee to be paid in order for an event to be viewed by the public.⁴⁰

(b) Does having to pay for internet access alter your perspective on whether these events are 'free' to access?

This does not alter the Foxtel Group's view. As noted in the answer to question 2(a) above, Foxtel Group agrees with Dr Edwards' Report assessment that providing coverage of listed events via OTT streaming services should be considered 'free' on the basis that access to OTT streaming services would require little to no additional up-front and ongoing costs for the vast majority of Australian households.⁴¹

The Foxtel Group notes that there is also a cost to consumers of obtaining access to free-to-air services. This cost includes the installation costs for an antenna system, including labour and supply of the antenna and other equipment; the cost of a television; and the cost of operating the television itself. An average energy efficient TV uses between 7 and 18 cents worth of energy per hour⁴², and the average Australian spends 13 hours per week watching TV: \$47- \$120 per year.⁴³

3 Should the policy objective be rationalised to focus on sporting events (which, in practical terms, is where the anti-siphoning scheme operates today), or remain broadly cast to include any events?

The Foxtel Group's view is that there is no current policy need for the Anti-Siphoning List to include events of a non-sporting nature. There is no market failure in this regard which warrants the imposition of ex ante regulation through the Scheme. However, the Foxtel Group also submits that there is no need for the current stated policy objective to be narrowed in scope.

B. Policy mechanism

4 Is the anti-siphoning scheme the right mechanism to support the achievement of the stated policy objective of ensuring access to important sporting events?

For the reasons set out in Section 2 of Part 1 above, the current Scheme is not the right mechanism to support the stated policy objective.

5 To what extent does the anti-siphoning scheme deliver on its stated objective, particularly for audiences?

For the reasons set out in Section 2 of Part 1 above, the current Scheme does not deliver on its stated objective, for multiple stakeholders.

6 How does the anti-siphoning scheme alter decisions made in your industry regarding media rights to sporting events, both listed and unlisted? Does it make it easier or harder to sell and acquire such rights?

The overall effect of the Scheme is, as set out in Section 2 of Part 1 of this submission, to reduce competition for the rights to listed events.

As the holder of subscription television broadcasting licences, the Foxtel Group is currently unable to compete with FTAs on a stand-alone basis to acquire the rights to listed events. This means that it is competitively disadvantaged compared to media groups which include both a commercial television broadcast licence holder and subscription services.

⁴⁰ Dr Edwards' Report, [46] and [55].

⁴¹ See n 40 above.

⁴² Canstar (June 2018) ['TV Running Costs Explained'](#).

⁴³ Australian Bureau of Statistics (July 2013) ['Australians spend one month a year watching TV'](#).

The Foxtel Group is instead required to enter into a licensing arrangement with a FTA or require the relevant sporting body to license the free-to-air television rights to a FTA in order that the free-to-air rights to listed events are acquired in tandem with subscription television rights to those events. As FTAs have progressively launched their own subscription streaming services, this partnering process is less likely to occur in the future which will only further add to the anti-competitive effects of the Scheme.

In addition, as it is common for sporting bodies to sell the rights to both listed and unlisted events as part of one package in order to secure the highest cumulative price for those rights (e.g. SANZAAR sells the rights to listed events (certain Wallabies matches) and non-listed events (e.g. Super Rugby), the Scheme affords FTAs not only an unfair competitive advantage in respect of acquiring rights to events on the Anti-Siphoning List, but also to acquire unlisted events.

7 Does the anti-siphoning scheme impose compliance cost on industry? Is it possible to quantify or estimate these costs? Would any changes to the operation of the scheme potentially alter these compliance costs?

The Foxtel Group does not assess there to be a significant imposition of compliance costs as a result of the current Scheme. The more critical economic impacts of the Scheme are as set out in Section 2 of Part 1 of this submission.

Chapter 5: The operation of the scheme

C. Application of the scheme to new media

8 Is the trend of exclusive rights acquisition by subscription-based online services evident in overseas markets likely to be replicated in Australia? If so, under what timeframes and circumstances?

The Foxtel Group's view is that the major sporting codes in Australia all continue to have a clear interest in ensuring that a certain proportion of their matches are transmitted on a free basis in order to maximise reach and therefore public engagement with the sport. Paragraph 45 of Dr Edwards' Report notes the example of the Netball Australia rights deal concluded in February 2021 in which Foxtel acquired the rights to the Super Netball domestic competition as well as Diamonds internationals (excluding Netball World Cup matches) starting in 2022. These events are not listed events. Nonetheless, the terms of the arrangement include that Foxtel will transmit two Super Netball games each week as well as all finals and Diamonds international games for free on Kayo Freebies.⁴⁴ In addition, Rugby Australia now prefers to have one game per week of Super Rugby broadcast on free-to-air TV in order to assist with creating broad engagement. A similar position exists with the A-League soccer rights and the same will be seen for the 2023 FIFA Women's World Cup on the Seven Network.

9 Should the anti-siphoning scheme be extended to cover online services and digital platforms and services? If so, should broadcasting and digital rights be treated in the same manner under the scheme (homogenous regulation), or should different restrictions and obligations apply to each?

The Foxtel Group submits that the current subscription television anti-siphoning licence condition should not be extended to cover online streaming services. To do so would further strengthen the artificial competitive advantage that the Scheme currently provides to FTAs and it would be contrary to the Government's own stated intention to adopt a consistent approach to regulation

⁴⁴ Super Netball (3 February 2021), '[New broadcast and rights deal announced for 2022](#)'.

and to create a level playing field for industry.⁴⁵ As noted in Dr Edwards' Report, it would also substantially reduce the level of competition for sports rights now and into the future, thereby reducing the revenue generated by sports rights bodies for the sale of their rights.⁴⁶

If the Foxtel Group's Proposal is adopted, there would be no need to treat broadcasting and digital rights differently. Instead, this would implement an entirely technology neutral approach to regulation which is appropriately structured for future developments in content distribution methods.

10 What impact would the potential extension of the scheme to online services have on industry? Is this potential impact able to be quantified or estimated?

See the answer to question 9 above, and Section 2 of Part 1.

11 What are the potential positive and negative impacts of extending the scheme to online services for Australian viewers? Is this potential impact able to be quantified or estimated?

See the answer to question 9 above, and Section 2 of Part 1.

D. Regulatory rule: acquisition, conferral or offer

12 Do you consider that an offer or conferral-based rule for the anti-siphoning scheme should be considered?

No, the Foxtel Group does not support such a model. The Foxtel Group submits that it would not be appropriate to impose significant new regulation on sporting bodies. Rather, the Scheme should be applied to the acquirers of rights to listed events, as further set out in Section 2 of Part 1 and in the answer to question 9 above.

We refer also to the conclusions of Dr Geoff Edwards in paragraphs 56 to 60 of his report. Dr Edwards notes that both the offer and conferral-based rules proposed in the Consultation Paper would be inferior to the Proposal. Both the offer and conferral-based rules would perpetuate the detrimental outcomes which already arise from the Scheme, such as those outlined in Section 2 of Part 1. In particular it would exacerbate the Scheme's anti-competitive effects.⁴⁷ The offer-based rule would be particularly problematic requiring:

- extensive ex-ante stipulation regarding the terms of offers (which may need to be sport or event specific);
- behavioural regulation to ensure that offers are genuine and give enough time to FTA to accept; and/or
- an independent body be assigned a regulatory oversight role to prevent "gaming" of the system, a role currently fulfilled by Ofcom under the UK regime.

This would impose additional cost compared to the current Scheme and a conferral-based mechanism.⁴⁸

(a) If so, under what circumstances would either one or both of these alternatives provide advantages over an acquisition-based rule?

The Foxtel Group does not support these models.

⁴⁵ See n 2 above.

⁴⁶ Dr Edwards' Report, [30] – [34].

⁴⁷ Dr Edwards' Report, [63].

⁴⁸ Dr Edwards' Report, [64].

(b) Should these alternatives seek to ensure that the offer or conferral has been made on reasonable terms? How would this be achieved?

The Foxtel Group does not support these models.

13 What impact on business would the move to an offer or conferral-based rule have? Are these potential impacts able to be quantified or estimated?

The Foxtel Group does not support these models. The implementation of these rules will not rectify the current anti-competitive effects of the Scheme but would instead add to the anti-competitive effects. They would not, on their own, result in a level playing field being established for industry.

We refer again to the conclusions of Dr Geoff Edwards, independent economic expert, in paragraphs 56 to 60 of his report and summarised in the answer to question 12 above.

The Foxtel Group also submits that it would be inappropriate to impose a new compliance burden on sports bodies and rights owners. This would, overall, increase the burden of the regulatory impact of the Scheme.

14 What impact would the adoption of an offer or conferral-based rule have for Australian viewers? Are these potential impacts able to be quantified or estimated?

As set out in the response to question 13 above, neither model would, without additional reform, result in any rebalancing of the current anti-competitive effects of the Scheme. There would accordingly be no change for viewers.

E. Use and disposal of a right to televise an event

15 Is there evidence that the rights to anti-siphoning listed events are being acquired but not used by any party in the contemporary media environment?

In certain circumstances, commercial television broadcast license holders have made a commercial decision to make payment of rights fees for the right to transmit on a national basis a particular number of NRL and AFL matches per round only. This number has historically amounted to 3 matches per full round of the NRL Men's Premiership and 3-4 matches per full round of the AFL Men's Premiership. At the same time, they have also elected to retain flexibility to pay additional rights fees if they determine that they do wish to transmit further NRL men's' Premiership and AFL men's' Premiership matches on a national basis. This is also currently the case for One Day International and Twenty20 International Cricket matches involving the senior Australian representative team selected by Cricket Australia and which are played in Australia.

These matches are, however, transmitted on a live basis by the Foxtel Group services and therefore the rights are being used. Beyond this, the Foxtel Group is not aware of any rights to listed events that have been acquired but are not currently exercised.

However, it is the case that certain rights to listed events are acquired by FTAs, but not transmitted on the FTA's primary channel on a national basis, with other programming instead being preferred for transmission on the primary channel. For example, only 45% of Australia's cricket test matches in the UK in 2019 (the Ashes series) were transmitted on Nine's primary channel. In 2022, only 51% of matches involving the Australian senior representative team selected by Rugby Australia and which took place in Australia or New Zealand were transmitted on Nine's primary channel.

(a) If so, in what circumstances is this taking place?

See the answer to question 15 above.

(b) Is this resulting in a detrimental coverage outcome for Australian audiences?

The Foxtel Group does not consider that there has been any detrimental impact to Australian audiences as a result of FTAs making a commercial decision not to pay for more rights than is commercially viable. This is in part because, in making that commercial decision, the FTAs have presumably assessed that there is greater audience interest in other forms of content at the time those matches are played. This practice also supports the view that not all events should be on the Anti-Siphoning List as evidently not all matches played in each round of the AFL and NRL are of sufficient “national importance and cultural significance”.

No clear detrimental impact arises as a result of FTAs transmitting listed events on a non-primary channel, although it should be noted that the multi-channels generally attract considerably lower viewer numbers. As set out in Section 2 of Part 1, whether a FTA chooses to transmit an event on a multichannel rather than its primary channel is an important indicator of the degree of national importance and cultural significance of that particular event. By choosing to transmit a listed event on its multi-channel, the Foxtel Group submits that the FTA is effectively confirming it considers there to be alternative, more important and significant content that can be aired on the primary channel.

16 Is a regulatory mechanism necessary to prevent the hoarding of rights to anti-siphoning listed events?

- (a) If so, should this be the anti-hoarding rule (in its current form), an amended anti-hoarding rule, or a new regulatory mechanism?**
- (b) What impact would the mechanism have on free-to-air broadcasters, subscription broadcasters, online service providers, the relevant sports bodies, and audiences? Are you able to quantify or provide an estimate of these impacts?**
- (c) How would the anti-hoarding mechanism be integrated with other potential changes to the scheme, including the potential extension to online services?**

The Foxtel Group does not consider that the current anti-hoarding mechanism is a required feature of the Scheme. This is evidenced by the fact that the mechanism has not been used since 2006.

The Foxtel Group's Proposal outlined in Section 2 of Part 1 above is a preferable alternative to either the use of the existing anti-hoarding rule, or amendments to it. Accordingly, the Foxtel Group does not have specific responses to questions 16 (a), (b) and (c).

17 Are there other circumstances where contractual or other arrangements for the right to televise events on the anti-siphoning list are being used to subvert the intent of the scheme? Can you provide examples?

Not to the Foxtel Group's knowledge.

F. Coverage of anti-siphoning listed events

18 Are you concerned about broadcast coverage of events on the anti-siphoning list? Please provide specific examples.

The Foxtel Group has no specific concerns to raise about broadcast coverage of events on the Anti-Siphoning List.

19 Is there a need for coverage obligations to be introduced for free-to-air broadcasters that acquire the rights to anti-siphoning listed events?

- (a) If so, what form should those obligations take?
- (b) Should they be applied to specific events, or all events on the anti-siphoning list?
- (c) How should coverage obligations be integrated with other reforms to the anti-siphoning scheme?

The Foxtel Group does not support the introduction of coverage obligations applicable only to FTAs in the context of the Scheme in its current form.

Instead, as set out in the Proposal, the Foxtel Group proposes the implementation of a new technology neutral obligation on acquirers in relation to listed events.

20 Would the imposition of coverage obligations alter decisions made by industry regarding media rights to sporting events, both listed and unlisted?

See the answer to question 19 above.

- (a) Would this make it easier or harder to sell and acquire such rights?

See the answer to question 19 above.

21 What practical changes would Australian viewers see from the imposition of coverage obligations?

See the answer to question 19 above.

G. Transparency: information disclosure and information gathering

22 Is there a case for the imposition of an information disclosure requirement regarding the rights held to anti-siphoning listed events? What are the upfront and ongoing compliance costs for such an obligation likely to be? Are you able to quantify or provide estimates of any such costs? What may be some of the considerations relevant to the kinds of information that would be disclosed regarding these rights (e.g. any commercial sensitivities)?

The Foxtel Group considers there is no case for such a requirement. This mechanism is unnecessary and is not a feature of any other similar regime in other jurisdictions.

23 Is there a case for the imposition of an information disclosure requirement regarding the coverage of events on the anti-siphoning list? What are the upfront and ongoing compliance costs for such an obligation likely to be? Are you able to quantify or provide estimates of any such costs?

No. See the answer to question 22 above.

24 How should any information disclosure requirement – whether relating to rights of coverage – integrate with other changes to the scheme?

N/A – See the answer to question 22 above.

25 Should a rights and / or coverage disclosure obligation be mandatory (enforceable through primary or subordinate legislation), or should any disclosure be voluntary?

N/A – See the answer to question 22 above.

Chapter 6: The composition of the anti-siphoning list

H. Sports on the anti-siphoning list

26 Are any changes warranted to the sports on the anti-siphoning list? Should any sports be added? Should any be removed?

The Foxtel Group does not consider that there are any sports which currently warrant addition to the Anti-Siphoning List. If any competition emerges, or an existing sport increases in popularity, to the threshold that particular events are of "national importance and cultural significance", the Minister would have power to amend the Anti-Siphoning List as required at that time.

27 Should the anti-siphoning list include the comparable women's competitions of the events on the current list that, by naming convention or omission, only apply to the men's competitions?

The Foxtel Group is currently the largest broadcaster of women's sport nationally broadcasting more than 4,700 hours of women's sport across 15 different codes and 24 competitions.⁴⁹ The Foxtel Group considers that the principles set out in the Proposal in relation to events which should be removed and retained on the Anti-Siphoning List are of mutual application to both men's and women's competitions. Foxtel Group submits that such women's competitions and events should not now be added to the Anti-Siphoning List unless they warrant inclusion on the Anti-Siphoning List having regard to the principles set out in the Proposal.

The inclusion of women's competitions and events on the Anti-Siphoning List is not a prerequisite to ensuring that coverage of women's sport is made available on a free basis, as will be the case for the 2023 FIFA Women's World Cup where market forces and commercial willingness has resulted in the Seven Network entering into a sub-licence to acquire free-to-air rights for certain matches from Optus Sport. Moreover, given that there is no requirement for any FTA to actually acquire the rights to an event which is on the Anti-Siphoning List, there is no guarantee that adding women's events to the Anti-Siphoning List will have the effect of increasing coverage of women's sport via free-to-air television.

The Foxtel Group also submits that any consideration of the inclusion of women's events on the Anti-Siphoning List should also have regard to the views of the relevant sporting bodies and the alternatives available for accessing coverage of the relevant sport. The Foxtel Group has been able to assist a number of women's sports to develop their profile and their sport generally.

The Foxtel Group announced a new agreement with Netball Australia in February 2021 for the rights to the Super Netball domestic competition and the Diamonds Internationals (excluding Netball World Cup matches).⁵⁰ The Foxtel Group has worked closely with Netball Australia to ensure that the sport is able to schedule events in a manner that best suits the sport, viewers and those that attend the game whereas previously Netball Australia was required to schedule games to suit the FTA's preferred broadcast times.

28 Are there other women's events — that don't have a comparable men's format — that should be added?

The Foxtel Group is not aware of any such events which currently justify addition to the Anti-Siphoning List. See our response to question 27 above.

29 What impact would these possible inclusions or exclusions have on free-to-air broadcasters, subscription broadcasters, online service providers, the relevant sports bodies and Australian viewers? Are you able to quantify or estimate these impacts?

⁴⁹ Foxtel Group (7 March 2022), '[New research reveals popularity of women's sport rising](#)'.

⁵⁰ Foxsports (3 February 2021), '["Landmark" netball broadcast rights deal struck with Foxtel Group](#)'.

N/A – see the answers to questions 26 – 28 above. The Foxtel Group does not consider that any particular sports presently warrant additional inclusion or wholesale removal from the Anti-Siphoning List. The Foxtel Group's primary concern relates to the particular events of each of the sporting codes currently on the Anti-Siphoning List.

30 Should non-sporting events be included for consideration on the anti-siphoning list? If so, which events? Is television coverage of these events being siphoned behind a paywall and not freely available to Australians, or is there a risk of this occurring?

No. See the answer to question 3 above.

I. Events on the anti-siphoning list

31 What events should be added to or removed from the anti-siphoning list? Please provide specific recommendations.

The Foxtel Group has set out a proposed revised Anti-Siphoning List at Schedule 2 for the Department's consideration. This list is based on the application of the principles for reducing the Anti-Siphoning List set out in the Proposal above, which the Foxtel Group consider necessary in order to ensure the Scheme is more accurately aligned with its policy objective of ensuring access to events of national importance and cultural significance.

32 What factors or circumstances do you consider to be important in recommending the retention, inclusion or removal of particular events from the anti-siphoning list?

To what extent do average audience numbers influence or inform your recommendation?

As per the Scheme's stated policy objective, ultimately the retention, inclusion or removal of particular events from the Anti-Siphoning List is entirely dependent on whether an event can be said to be of national importance and cultural significance. See the Foxtel Group's answer to question 1(a) above as to the factors or circumstances the Foxtel Group considers may be important in discerning whether an event is of such importance or significance. These in turn form the basis of the principles which the Foxtel Group proposes the Anti-Siphoning List should be reduced, set out in the Proposal.

33 What impact would these possible inclusions or exclusions have on free-to-air broadcasters, subscription broadcasters, online service providers, sports bodies and Australian viewers? Are you able to quantify or estimate these impacts?

The Foxtel Group supports the views of Dr Edwards, set out at sections 56 and 57 of his report, that the proposed reductions to the Anti-Siphoning List set out in Schedule 2, in conjunction with implementation of a technology neutral obligation on the first acquirer of rights to a listed event to ensure the event is transmitted for free to a large percentage of the population, "... *would not only level the playing field and maximise competition for rights with consequential benefits for sports bodies and the general public...*" but also address the following negative externalities arising from the Scheme's current policy mechanism:⁵¹

- *"The current lack of an obligation on FTA broadcasters to transmit events on the List that they acquire rights to would be addressed directly as there would be an obligation on the first acquirer of audio-visual rights to a listed event to ensure it is broadcast for live and , for free and in full via technology that is accessible by a large proportion of the population.*
- *The current lack of an obligation on FTA broadcasters to transmit for free events on the List that they acquire rights to would also be addressed directly by the same obligation on the first acquirer of audio-visual rights to a listed event.*

⁵¹ Dr Edwards' Report, [56].

- *The current potential for pure streaming service providers to acquire exclusive rights to listed events and transmit these events only on subscription or PPV services would be addressed directly by the same obligation on the first acquirer of audio-visual rights to a listed event.*
- *The current distorted playing field between STV licenses and FTA broadcasters – regarding the acquisition of exclusivity to listed events across all forms of monetisation – would be addressed, as any bidder would be able to acquire rights on this basis.*
- *Finally, STV licensees would no longer be precluded from acquiring exclusivity to listed events across all forms of monetisation when they are willing and able to transmit the events live and , for free and in full to a large proportion of the population."*

J. Differentiated regulation – a two-tier list

34 Is there merit in considering differentiated regulation for events on the anti-siphoning list, or should regulation remain homogenous for all listed events?

The Foxtel Group does not support the creation of a two-tier list in the form set out on page 42 of the Consultation Paper. As set out in Section 2 of Part 1 above, the Foxtel Group considers that events should only be retained on the Anti-Siphoning List if they demonstrably meet the test of being of national importance and cultural significance. The potential criteria for this test are described in the response to question 1(a) above. If an event does not meet this test, it should be removed from the Anti-Siphoning List entirely rather than placed onto a tier 2 list.

35 If differentiated regulation is pursued, what form should this take?

- Two or more tiers, or some other form of differentiating between events on the anti-siphoning list?**
- How would this new arrangement be integrated with other amendments to the scheme?**

The Foxtel Group is of the view that the Scheme must be substantially amended in accordance with the Proposal from the Foxtel Group to ensure that the anti-competitive effects of the Scheme are addressed and to also ensure alignment with the Government's Media Policy to level the playing field.⁵²

The two or more tiered approach set out in the Consultation Paper will result in FTAs retaining their artificial competitive advantage in relation to the most iconic list of single sporting events in the country and would fail to recognise that sports rights are typically sold by sports bodies in one package. For example, the AFL and NRL always sell the rights to the AFL finals (including the grand final) together with the Premiership Season rights.

36 What impact would a differentiated regulation have on decisions made by industry regarding media rights to sporting events, both listed and unlisted? Would this make it easier or harder to sell and acquire rights under this general model?

See the answer to question 35 above.

37 Would a differentiated regulatory framework have a positive or negative impact on Australian viewers?

See the answers to question 34 to 36 above.

⁵² See n 2 above.

K. Delisting arrangements

38 Are the current de-listing provisions appropriate and effective?

- (a) If not, what changes would you recommend?**
- (b) In what way would any such changes be integrated with other amendments to the scheme?**

The Foxtel Group considers that the current de-listing provisions would continue to be appropriate if retained in conjunction with a reduced Anti-Siphoning List (as set out in the answers to questions 26 to 31 above) and the Foxtel Group's proposal for a technology neutral obligation as set out in the Proposal.

39 Is the automatic de-listing period of 26 weeks too long, or too short, for rights arrangements to be settled and for relevant parties to effectively promote events to audiences?

As noted above, the Foxtel Group considers that the current de-listing provisions would continue to be appropriate if retained in conjunction with a reduced Anti-Siphoning List (as set out in the answers to questions 26 to 31 above) and the Foxtel Group's proposal for a technology neutral obligation as set out in the Proposal.

Schedule 1 - Charles River Associates “Australia’s Anti-Siphoning Scheme – Competition Assessment and Alternatives”

Australia's Anti-Siphoning Scheme

Competition Assessment and Alternatives

Submission to the Review of the Anti-Siphoning Scheme

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TABLE OF CONTENTS

EXECUTIVE SUMMARY	1
1. INTRODUCTION.....	3
2. BACKGROUND.....	3
2.1. THE VALUE OF EXCLUSIVITY IN SPORTS RIGHTS DEALS.....	3
2.2. THE ANTI-SIPHONING REGIME AND THE CURRENT SCHEME.....	4
2.2.1. The objective of the anti-siphoning regime.....	4
2.2.2. The Current Scheme.....	4
2.2.3. The Current Scheme in the current media environment.....	5
3. EFFECTS OF THE CURRENT SCHEME ON COMPETITION FOR SPORTS RIGHTS	6
4. EFFECTS OF THE CURRENT SCHEME ON SPORTS BODIES AND THE GENERAL PUBLIC	7
5. ALTERNATIVES TO THE CURRENT SCHEME	10
5.1. REDUCTION OF THE LIST.....	10
5.2. ALTERNATIVE MECHANISMS	12
5.2.1. A technology-neutral obligation on acquirers	12
5.2.2. Conferral-based and offer-based alternatives to the current scheme.....	16
5.2.3. A differential / tiered approach to the List.....	17
5.3. SUMMARY.....	17

EXECUTIVE SUMMARY

1. This report has been prepared in the context of the Review of the Anti-Siphoning Scheme (Review) being undertaken by the Department of Infrastructure, Transport, Regional Development, Communications and the Arts (Department) and the consultation paper published by the Department in October 2022 (Consultation Paper).
2. The current Anti-Siphoning Scheme (Current Scheme) regulates the order in which the rights to televise events on the anti-siphoning list (List) may be acquired by licensed television broadcasters. The Consultation Paper describes the Review as examining “the role and impact of the scheme in a contemporary media environment” including “the composition of the anti-siphoning list” and “the central question” of “whether [the] broad objective of free access to televised coverage of important events is being met by the scheme and the anti-siphoning list in their current form, and whether changes to these regulatory arrangements are warranted”.¹
3. The objective of the anti-siphoning regime (as stated in the Explanatory Memorandum to the Broadcasting Services Bill 1992) is to ensure:

*“on equity grounds, that Australians will continue to have **free access** to important events. It will, however, also allow subscription television broadcasters to negotiate subsequent rights to complementary, or more detailed, coverage of events.”²*
[Emphasis added.]
4. The Current Scheme seeks to achieve the objective of the regime by regulating *the order* in which rights to televise events on the List may be acquired. The specific mechanism of the Current Scheme is the *imposition of a condition in subscription television (STV) licenses* that prohibits STV licensees from acquiring rights to a listed event unless rights to the event have first been acquired by a national broadcaster (ABC or SBS) or commercial television broadcasting (CTV) licensees whose broadcasting services cover more than 50 percent of the Australian population (one of Channel 7, Channel 9 or Channel Ten) (collectively, FTA broadcasters). The practical effect is that STV licensees are precluded from acquiring rights to listed events to the exclusion of FTA broadcasters.
5. In the current media environment, the Current Scheme generates a number of outcomes and possibilities that are incongruent with the objective of the regime. The Current Scheme also, by design, distorts the playing field in favour of FTA broadcasters and, by excluding STV licensees, it limits competition for exclusive rights to listed events.
6. By limiting the number of bidders for exclusive rights, the Current Scheme is likely to be limiting the revenues that sports bodies earn from rights to listed events. Greater revenue for sports bodies would increase the amounts that sports clubs can afford to spend on players, coaches and programs (e.g., sports medicine, nutritional and mental health specialists; first nations player programs; community foundations), as well as the investment sports bodies are able to make in new competitions (including women’s competitions), sports facilities (including stadiums), grassroots development of their sports and inclusivity programs.

1 Consultation Paper, page 5.

2 Explanatory Memorandum to the Broadcasting Services Bill 1992, page 67.

7. For the general public, there are a number of potential negative impacts of the limitation on competition inherent in the Current Scheme: less content innovation and development; reduced quality of sports and reduced viewer enjoyment of and engagement with sports; and reduced participation in sport.
8. Given the negative impacts of the Current Scheme on competition for rights, sports bodies, viewers and participation in sports:
 - a. It is important that the List be limited to only include events that truly fit the description of events of national importance and cultural significance; and
 - b. It is worth considering alternative mechanisms to the mechanism in the Current Scheme that would generate fewer incongruent outcomes and possibilities and have less impact on competition for rights to listed events.
9. In relation to the events that should remain on the List, any event that is on the List will be an event for which a sports body will be restricted in its ability to maximise revenue from selling audio-visual transmission rights, with the potential to adversely affect the quality of the sport, viewer enjoyment of and engagement with the sport, and grass roots participation. It follows that an event should be included on the List only if it is truly of “national importance and cultural significance”. It seems a reasonable principle that if an event is not transmitted by the FTA broadcasters live and for free today on FTA television on a national basis under the Current Scheme, or if it is transmitted live and for free by FTA broadcasters on FTA television but not viewed by a substantial proportion of the population, it is not of sufficient national importance or cultural significance to remain on the List. In my view, events of this nature should be removed from the List.
10. Regarding the mechanism, I propose a substantial overhaul, rather than mere tweaking of the Current Scheme. Australia has had nearly 30 years of a mechanism that limits competition for rights and permits a number of incongruent outcomes and possibilities. In the current media environment, events may be transmitted live and for free to a large proportion of the population without using the FTA television channels of FTA broadcasters. I estimate that there is the potential for 98% of households to view free OTT streaming services on their TV sets, already today free OTT streaming services are readily available to be viewed on TV sets by 91% of households, and at least 94% of households should be able to access free OTT streaming services on mobile devices. “Free access”, as expressed in the objective of the regime, should therefore no longer be equated with FTA television channels. I consider that, in this environment, the objective of the regime would be best realised by imposing a technology neutral obligation on the first acquirer of audio-visual rights to a listed event to ensure that the event is transmitted live, for free and in full via technology that is accessible by a large proportion of the population.
11. This technology neutral mechanism would avoid the incongruent outcomes and possibilities of the current mechanism, level the playing field and enhance competition for rights to listed events, bringing benefits for sports bodies and the general public, while continuing to realise the objective of the regime. This mechanism is designed for and should only be imposed in conjunction with a substantial reduction in the List. It should not have the effect of imposing on acquirers an obligation to transmit live and for free events that are not currently transmitted on FTA television on a national basis.
12. Other alternative mechanisms, including those proposed in the Consultation Paper, would exacerbate the restrictions on competition of the Current Scheme and perpetuate some of its incongruent outcomes and possibilities.

1. INTRODUCTION

13. This report has been prepared in the context of the Review of the Anti-Siphoning Scheme being undertaken by the Department of Infrastructure, Transport, Regional Development, Communications and the Arts and the consultation paper published by the Department in October 2022.
14. The current Anti-Siphoning Scheme regulates the order in which the rights to televise events on the anti-siphoning list may be acquired by licensed television broadcasters. The Consultation Paper describes the Review as examining “the role and impact of the scheme in a contemporary media environment” including “the composition of the anti-siphoning list” and “the central question” of “whether [the] broad objective of free access to televised coverage of important events is being met by the scheme and the anti-siphoning list in their current form, and whether changes to these regulatory arrangements are warranted”.³
15. The remainder of this report is structured as follows.
 - a. In Section 2, I briefly present relevant background information on the value of exclusivity and the operation of the Current Scheme.
 - b. In Section 3, I consider the effects of the Current Scheme on competition for sports rights.
 - c. In Section 4, I consider the effects of the Current Scheme on sports bodies and the general public.
 - d. Finally, in Section 5, I consider alternatives to the Current Scheme, including reduction of the List and a technology-neutral “obligation on acquirers” alternative, as well as alternatives raised in the Consultation Paper.

2. BACKGROUND

2.1. The value of exclusivity in sports rights deals

16. Exclusivity over rights to transmit sports content can take a number of forms. For a particular sports event (e.g., a single football game) one media entity may acquire exclusive rights in regard to free transmission while another may acquire exclusive rights in regard to subscription transmission. Alternatively, a media entity may acquire exclusive rights across all forms of monetisation and to the exclusion of all other media entities.⁴
17. Exclusivity over rights to transmit content is valuable for rights owners and buyers. Exclusivity is fundamental in enabling advertising-funded broadcasters and retailers of audio-visual content to differentiate themselves, so that they may attract viewers and/or subscribers and generate greater advertising and/or subscription revenue. Rights buyers

³ Consultation Paper, page 5.

⁴ In this case, in principle, the rights might be conferred only in relation to one form of monetisation (e.g., only for free transmission) or the rights might be conferred in relation to all forms of monetisation (i.e., the acquirer may acquire rights to transmit both free signals and encrypted signals). In the latter case, the acquirer might convert exclusivity across all forms of monetisation into limited exclusivity by sub-licensing rights to one form of monetisation (e.g., the subscription transmission rights) to another entity.

are consequently willing to pay more to rights owners for exclusive rights than for non-exclusive rights.

2.2. The Anti-Siphoning Regime and the Current Scheme

2.2.1. The objective of the anti-siphoning regime

18. The Explanatory Memorandum to the Broadcasting Services Bill 1992 describes siphoning as:

*the obtaining by a satellite subscription television broadcasting licensee of the rights to broadcast **events of national importance and cultural significance**, such that those events could not be received by the public **free of charge**.⁵
[Emphasis added.]*

19. The objective of the regime (as stated in the same Explanatory Memorandum) is to ensure:

*“on equity grounds, that Australians will continue to have **free access** to important events. It will, however, also allow subscription television broadcasters to negotiate subsequent rights to complementary, or more detailed, coverage of events.”⁶
[Emphasis added.]*

2.2.2. The Current Scheme

20. The Current Scheme seeks to achieve the objective of the regime by regulating *the order* in which rights to televise events on the List may be acquired. The specific mechanism of the Current Scheme is the *imposition of a condition in subscription television (STV) licenses* that STV licensees will not acquire the right to televise, on a subscription television broadcast service, an event that is specified on the List unless:

- a. A national broadcaster has the right to televise the event on any of its broadcasting services; or
- b. The television broadcasting services of commercial television (CTV) broadcasting licensees (excluding licensees of certain types of commercial television broadcasting licenses) who have the right to televise the event cover a total of more than 50% of the Australian population.⁷

21. In other words, STV licensees are prohibited from acquiring rights to a listed event unless rights to the event have first been acquired by a national broadcaster (ABC or SBS) or a national CTV broadcaster (one of Channel 7, Channel 9 or Channel Ten) (collectively, “FTA broadcasters”). The practical effect of the license condition is that STV licensees are precluded from acquiring rights to listed events to the exclusion of FTA broadcasters.

22. As will be discussed below, regulation of the order in which rights may be acquired, imposed via a condition in STV licenses, restricts competition and generates a number of outcomes and possibilities that are incongruent with the objective of the regime. Although this is the incumbent mechanism, it is not the only way in which the objective of the regime might be realised. In the current media environment, an alternative mechanism exists that

⁵ Explanatory Memorandum to the Broadcasting Services Bill 1992, page 67.

⁶ Explanatory Memorandum to the Broadcasting Services Bill 1992, page 67.

⁷ Broadcasting Services Act, Schedule 2, Part 6, Clause 10(1)(e).

would be more targeted at the objective, enhance competition and avoid the incongruities of the Current Scheme.

2.2.3. The Current Scheme in the current media environment

23. As explained in the Consultation Paper, at the time the anti-siphoning scheme was introduced, there was a concern that “iconic sporting events would be siphoned behind the paywalls of services that most Australians didn’t have access to” and “[i]nternet services were also non-existent”.⁸
24. As described above, a significant feature of the Current Scheme is its operation via a negative condition in the licenses of STV broadcasters precluding them from acquiring rights before FTA broadcasters. This mechanism may have seemed reasonable or at least expedient in 1993, pre-internet, when a number of propositions were likely held by most observers to be inviolable, including:
 - a. That audio-visual transmissions of sport events will only be via television sets and broadcasting by television licensees;
 - b. That the only potential acquirers of audio-visual rights to sports events will be television licensees (national broadcasters, CTV broadcasters or STV broadcasters);
 - c. That only the FTA broadcasters will be able to transmit audio-visual content for free to a large proportion of the population; and
 - d. That FTA broadcasters will not develop subscription services, or if they did, they would not transmit listed events exclusively on subscription services.
25. Nearly 30 years on, in the current media environment, the Current Scheme generates a number of outcomes and possibilities that are incongruent with the objective of the regime.
 - a. There is no obligation on FTA broadcasters to *transmit* events on the List that they acquire the rights to. There is therefore the potential that listed events will not be transmitted at all if an FTA broadcaster that acquires the rights does not make use of them and does not sub-license them to another party.
 - b. There is no obligation on FTA broadcasters to transmit *for free* events on the List that they acquire the rights to. In principle, it is possible under the Current Scheme for FTA broadcasters to transmit listed events only on subscription or pay per view (PPV) services. I understand that this was the case in 2016 for Channel 7’s coverage of certain Olympic Games events. Currently two of the major FTA broadcasters (Channel 9 and Network Ten) have affiliated subscription services (Stan and Paramount+, respectively) that can be used to transmit listed events on a subscription or PPV basis.
 - c. There is nothing in the Current Scheme that prevents pure streaming service providers (e.g., Amazon, Google, Facebook) from acquiring exclusive rights to listed events and transmitting these events only on subscription or PPV services. This is because the Current Scheme operates via a license condition in STV licenses and therefore only precludes STV licensees from engaging in this conduct.
 - d. There is an imbalance in that the Current Scheme is designed to prevent STV licensees from acquiring exclusivity across all forms of monetisation in relation to

⁸ Consultation Paper, page 28.

listed events, precluding the transmission of those events by FTA broadcasters on FTA television channels, yet the Current Scheme does not prevent FTA broadcasters from acquiring exclusivity across all forms of monetisation in relation to the same events, precluding the transmission of the events by STV licensees.

- e. The Current Scheme prevents STV licensees from acquiring exclusivity across all forms of monetisation in relation to listed events directly from sports bodies, even if they are willing and able to transmit the events live, for free and in full to a large proportion of the population.⁹

3. EFFECTS OF THE CURRENT SCHEME ON COMPETITION FOR SPORTS RIGHTS

26. The Current Scheme is designed to prevent STV licensees from acquiring exclusivity to listed events across all forms of monetisation, to the exclusion of FTA broadcasters. This is achieved by regulating the order of acquisition of rights, prohibiting an STV licensee from acquiring rights to a listed event unless a FTA broadcaster has already acquired rights to that event. The practical effect of this “order” mechanism is not to prevent STV licensees from negotiating with rights owners at the same time as FTA broadcasters, nor to prevent STV licensees ultimately securing rights to listed events. Rather, the practical effect is to prevent STV licensees from reaching agreements for rights to listed events that exclude FTA broadcasters from the opportunity to transmit those events. At the same time, FTA broadcasters are unrestricted in their ability to acquire rights to listed events to the exclusion of STV licensees and other parties.
27. The Current Scheme therefore, by design, distorts the playing field in favour of FTA broadcasters and by excluding STV licensees it limits competition for exclusive rights to listed events. The set of bidders for exclusivity across all forms of monetisation is reduced compared to a situation with no anti-siphoning regime and also compared to an alternative technology neutral mechanism (see Section 5.2.1 below, where this alternative is introduced).
28. Taking the AFL rights as an example, in the recently completed round of rights bidding, for the 2025-2031 seasons, Channel 9 and Network Ten both bid for exclusivity to all games across all forms of monetisation, with the intention of transmitting some games via FTA television channels and others via their subscription streaming affiliates (Stan and Paramount+, respectively). Unable to do the same, Foxtel reached an agreement with the AFL that allows Foxtel to transmit all games except Grand Finals live, but where many games will be simulcast with Channel 7 and its free streaming service 7Plus (i.e., where neither Foxtel nor Channel 7 will enjoy exclusivity).¹⁰ Had the AFL rights not been listed, or if the alternative technology neutral mechanism proposed in Section 5.2.1 below had

⁹ STV licensees may only acquire exclusive rights to listed events with the consent of an FTA broadcaster that has first acquired those rights.

¹⁰ See Amanda Meade, “Seven and Foxtel to keep AFL rights in record \$4.5bn seven-year deal”, *The Guardian*, 6 September 2022, accessed at: <https://www.theguardian.com/sport/2022/sep/06/seven-and-foxtel-to-keep-afl-rights-in-record-45bn-seven-year-deal>. According to this article, simulcast matches will include all Thursday night, Friday night and Sunday afternoon games as well as Saturday night games in the last 8 rounds, all marquee games (e.g. Dreamtime, Anzac eve, Anzac day, Good Friday, Easter Monday and Queen’s birthday) and all finals apart from the Grand Final.

been in place, Foxtel would have been able to bid on the same basis as Channel 9 and Network Ten for exclusivity to all games across all forms of monetisation. If Foxtel had adopted this approach, this would have increased competition and there would also have been strong incentives for Seven West Media to develop its own subscription streaming service and to bid on the same basis. The number of bids (not including bids from pure streaming service providers) would then have increased from three to four, and all four bids may have anticipated exclusivity across all forms of monetisation, rather than just two.

29. The Current Scheme also generates inefficiencies in negotiations between sports bodies and STV licensees. For an STV licensee to acquire rights to a listed event, the sports body needs to have first conferred rights to the event to a FTA broadcaster. This adds a layer of complication and the need to bring a third party into consideration when an STV licensee seeks to acquire rights to listed events, raising negotiation costs. By contrast, when FTA broadcasters seek to acquire rights to listed events, negotiations are more straightforward as FTA broadcasters can acquire rights without any restriction and without the involvement of any third party.
30. The Current Scheme creates an uneven “bidding field” for STV licensees not only compared to the FTA broadcasters (in particular FTA broadcasters with their own subscription streaming services), but also compared to other parties that are not STV licensees (e.g., pure streaming service providers such as Amazon, Facebook and Google) that are also unrestricted in their ability to acquire rights to listed events. From a competition policy perspective, the solution to this should not be to place similar restrictions on these other parties as the current restrictions on STV licensees. That would only make the playing field *more distorted* and *further limit* competition for rights.

4. EFFECTS OF THE CURRENT SCHEME ON SPORTS BODIES AND THE GENERAL PUBLIC

31. In general, auctions with fewer bidders are likely to result in less revenues for sellers. Specifically, in an auction in which all rights are assigned to the highest bidder, this will be the case when the value placed on the rights by the excluded bidder is one of the two highest valuations.¹¹ It follows that by limiting the number of bidders for exclusive rights to listed events, the Current Scheme is likely to be limiting the revenues that sports bodies earn from their rights.
32. The negative impact on revenues will be greater if there are complementarities in transmitting events for free and transmitting the same events via subscription services. Complementarities will increase the value placed by bidders on acquiring both types of rights. Complementarities may take a number of forms. For example, a bidder for both types of rights may anticipate cross-selling synergies from being able to promote the

¹¹ For example, in an ascending price auction the rights are awarded to the bidder with the highest value at a price equal to the value of the second highest bidder, so the expected price in the auction will be lower if we exclude a bidder with a positive probability of having one of the two highest valuations: in that case, the auction price will fall to the third-highest value among all potential bidders. Under fairly general circumstances, a “revenue equivalence” principle applies and all other auction mechanisms that allocate the rights efficiently (i.e., to the bidder with the highest value for them) and with zero payoff to the losers generate the same expected revenues for the seller (and the same expected net benefits for the bidders): for details see Section 3.3.4 in Paul Milgrom’s *Putting Auction Theory to Work*, Cambridge University Press, 2004.

subscription service when transmitting the FTA events. This would increase the bidders' valuation of both types of rights compared to the sum of the valuations of each type of rights on its own. Bids for both types of rights may also be greater (than the sum of bids for each type of right on its own) in anticipation that if a bidder wins both sets of rights, the bidder will benefit from any diversion of viewers from subscription services to free services, and vice versa. Currently, while the FTA broadcasters and pure streaming service providers are able to acquire both types of rights directly from sports bodies, and able to anticipate these complementarities, Foxtel is precluded from doing so by the Current Scheme.¹²

33. Reduced revenues for sports bodies will reduce the amounts that sports clubs can afford to spend on players, coaches and programs (e.g., sports medicine, nutritional and mental health specialists; first nations player programs; community foundations), as well as the investment sports bodies are able to make in new competitions (including women's competitions), sports facilities (including stadiums), grassroots development of their sports and inclusivity programs.

34. The impact of the Current Scheme on competition for rights, the revenues that sports bodies can earn and their ability to invest in their sports, has been a concern for sports bodies over the years that the Current Scheme has been operating. This is illustrated in the following quotes attributed to Australian Rugby Union, Australian Rugby League and National Rugby League and Cricket Australia in the Productivity Commission's 2009 *Annual Review of Regulatory Burdens on Business: Social and Economic Infrastructure Services*.¹³

a. Australian Rugby Union:

For sports operating in the mass entertainment business, it is vital that they be able to make their own decisions which balance the twin objectives of optimisation of exposure (say, through free to air television) and maximisation of revenue (perhaps via pay/subscription television and other forms of distribution platforms). Anti-siphoning is a form of regulation which can substantially reduce the competitive tension required for price maximisation and thus lessen the amount of funds available to invest in pathways and grass-roots sport.

b. Australian Rugby League and National Rugby League:

[T]he current anti-siphoning scheme has held back competition in media rights negotiations which have potentially deprived Rugby League of funding for the game's grassroots level.

The continued operation of the Anti-Siphoning scheme, in its current form, will continue to restrict sports from realising the full value of their media rights and driving for national coverage as part of their broadcasting model.

c. Cricket Australia:

¹² As a result of this, where the List applies, rights that Foxtel acquires are likely to be non-exclusive for at least some events in a sport. Taking the AFL as an example, currently Foxtel's agreement runs in parallel with Seven West Media's agreement with the AFL and allows Foxtel to transmit all games except the Grand Final, but at least three games each week as well as finals are broadcast live by Channel 7 and are therefore not exclusive to Foxtel. See AFL, *2017-2022 Broadcast Rights Summary*, 15 November 2019, accessed at: <https://www.afl.com.au/news/120/2017-2022-broadcast-rights-summary>.

¹³ Productivity Commission (2009), *Annual Review of Regulatory Burdens on Business: Social and Economic Infrastructure Services*, August 2009, page 159.

[C]hanges to the anti-siphoning policy in particular need to ensure that new settings do not create market distortions that deny sports their ability to derive fair market value for the rights that are central to the administration of sport.

35. Sports bodies as well as producers of content in other genres of programming may be impacted negatively by the Current Scheme in another way. Limiting the number of competitors for exclusive rights to listed events risks limiting innovation and investment in content. The more competitors there are for exclusive rights, the more “losers” there will be. Media entities that miss out on rights have incentives to find other content. If a FTA broadcaster lost the rights to listed events that it currently broadcasts by virtue of the Current Scheme, it may respond by seeking to fill the capacity created in its schedule with “tier 2” sport events that have not previously been transmitted (with the aim of turning them into more popular events), by creating sport events that do not currently exist, or by investing in the production of alternative genres of programming that are attractive to viewers and advertisers. To give one example, it has been reported that Cricket Australia is currently negotiating a new rights deal and that Seven West Media, which currently holds the rights, is “exploring alternatives to a cricket deal with three lower-tier sports” which “would give a smaller sport the potential to broadcast games on Thursdays, Fridays, and Saturdays during summer and boost its popularity”.¹⁴ FTA broadcasters that currently simulcast events with Foxtel may respond in a similar way if Foxtel were able to and did acquire exclusivity across all forms of monetisation (to the exclusion of FTA broadcasters) in relation to these events.
36. For the general public, there are a number of potential negative impacts of the limitation on competition inherent in the Current Scheme.
- a. Less content innovation and development. As explained above, limiting the number of bidders for exclusive rights risks limiting innovation and investment in sport and other content.
 - b. Reduced quality of sports and reduced viewer enjoyment of and engagement with sports. Less revenue and less investment in a sport will reduce the quality of the sport for viewing audiences, which will reduce viewer enjoyment of and engagement with the sport. This includes, but is not limited to, the effects of less spending on players and coaches, which will attract fewer players and marginalise the incentives of talented sportspeople to dedicate themselves professionally to the sport.
 - c. Reduced participation in sport. This may transpire in a number of ways. Less innovation and less sport being transmitted reduces exposure of the public to sports that interest them and that they might participate in. Reduced quality of sports will provide less inspiration to participate. And less revenue for sports bodies is likely to result in less funding for grass roots participation.

¹⁴ Zoe Samios, “Olympic bosses fly in to negotiate Games broadcast deal,” *The Sydney Morning Herald*, 14 November 2022, accessed at: <https://www.smh.com.au/business/companies/olympic-bosses-fly-in-to-negotiate-games-broadcast-deal-20221113-p5bxs4.html>. The Productivity Commission’s 2000 Broadcasting Inquiry Report observed that in the United States when the Fox Network acquired exclusive rights to the National Football Conference in 1994, the response of the previous rights holder, NBC, was to broadcast college football games that had not previously been broadcast.

5. ALTERNATIVES TO THE CURRENT SCHEME

37. Given the negative impacts of the Current Scheme on competition for rights, sports bodies, viewers and participation:
- a. It is important that the List be limited to only include events that truly fit the description of events of national importance and cultural significance; and
 - b. It is worth considering alternatives to the mechanism in the Current Scheme that would generate fewer incongruent outcomes and possibilities and have less impact on competition for rights to listed events.
38. In this section I first explain why the List itself should be reduced and suggest criteria for its reduction. I then consider alternatives to the current mechanism and recommend a particular alternative that I consider would address all of the incongruencies generated by the current mechanism and enhance competition for audio-visual transmission rights.
39. The length of the List and whether to adopt an alternative mechanism are interrelated matters. The alternative mechanism that I propose is premised on the List being reduced substantially so that it no longer includes events not currently shown on FTA television channels and that are not truly of national importance and cultural significance. It should not be adopted otherwise.

5.1. Reduction of the List

40. Any event that is on the List will be an event for which a sports body will be restricted in its ability to maximise revenue from selling audio-visual transmission rights,¹⁵ with the potential to adversely affect the quality of the sport, viewer enjoyment of and engagement with the sport, and grass roots participation. It follows that an event should be included on the List only if it is truly of “national importance and cultural significance”.
41. A large proportion of events on the current List are not transmitted by FTA broadcasters on FTA television today. This includes most games in each “home and away” round of the AFL and NRL seasons, as well as non-World Cup one day international (ODI) and Twenty20 international cricket matches played in Australia. The large proportion of events on the List not transmitted by FTA broadcasters on FTA television has been an ongoing issue with the List.¹⁶
42. It seems a reasonable principle that if an event is not transmitted by FTA broadcasters live and for free today on FTA television on a national basis under the Current Scheme, or if it is transmitted live and for free by FTA broadcasters on FTA television but not viewed by a substantial proportion of the population, it is not of sufficient national importance or cultural significance to remain on the List. In my view, events of this nature should be removed from the List. This would include many games in the AFL and NRL competitions.

¹⁵ Any restriction is likely to reduce the value of the rights for rights buyers, reducing the amount they will pay for the rights.

¹⁶ See Productivity Commission (2000), *Broadcasting Inquiry Report*, 3 March 2000, pages 430-431; and Productivity Commission (2009), *Annual Review of Regulatory Burdens on Business: Social and Economic Infrastructure Services*, August 2009, page 156.

43. There are many precedents for the removal from the List of events that were: (i) not being transmitted for free by the FTA broadcasters; (ii) generating only limited viewing numbers; or (iii) not deemed to be nationally important or culturally significant, including:
- a. the removal in 2006 of Test and One-Day international cricket matches (excluding World Cups) played by Australia outside of Australia and Britain, the Hong Kong Rugby Union Sevens tournament, preliminary rounds of the French Open and the Australian Hardcourt Championships; and
 - b. the removal in 2017 of all Supercars races except the Bathurst 1000, Wallabies rugby union matches played in countries other than Australia and New Zealand, all Wimbledon and US Open tennis matches, all remaining golf events (the Australian Masters, the Australian Open and the US Masters), Netball international matches involving Australia (excluding World Cups), Rugby League international test matches involving Australia played in the United Kingdom, Rugby League World Cup matches involving Australia but played in countries other than Australia, New Zealand and Papua New Guinea, matches of the FIFA World Cup not involving Australia other than the final, the English FA Cup Final and many other events played outside Australia in time zones that result in small audience numbers.
44. At least two other matters should be factored into consideration of how many and which events remain on the List. One is that many listed events will be transmitted live, for free and in full regardless of whether they are included on the List and even if the entire regime were removed. Sports bodies have incentives to strike a balance between, on the one hand, additional revenue they might earn by selling rights for subscription transmission to the exclusion of free transmission, and on the other, maintaining a high level of exposure for their sport, to maintain and grow interest and participation. Therefore, even without the regime, many sport bodies with events on the List would be likely to seek to ensure that some if not all of these events remain free to access for the general public. A recent example illustrates this. In February 2021, Foxtel reached a deal with Netball Australia for rights to the Super Netball domestic competition as well as Diamonds internationals starting in 2022. These events are not listed events. Nonetheless, the terms of the deal include that Foxtel will transmit two Super Netball games each week as well as all finals and Diamonds international games for free on Kayo Freebies.¹⁷
45. The other matter for consideration is that inclusion on the List of sports events that were not previously on the List but have grown in popularity through investments by subscription service providers (whether STV licensees or pure streaming providers) is likely to undermine incentives for future investments of that nature. There should therefore be a higher hurdle for including such an event on the List, in recognition of the dynamic inefficiency of doing so.

¹⁷ Super Netball, *New broadcast and rights deal announced for 2022*, 3 February 2021, accessed at: <https://supernetball.com.au/news/new-broadcast-and-rights-deal-announced-2022>.

5.2. Alternative mechanisms

5.2.1. A technology-neutral obligation on acquirers

Outline of a technology neutral regime

46. As I explain below, in the current media environment “free” should mean free, without conditioning on a particular transmission technology. It then becomes possible to design alternative mechanisms that are technology neutral and that level the playing field and enhance competition for rights to listed events, to the benefit of sports bodies and the general public. In particular, I consider that the objective of the regime would be best realised today by replacing the Current Scheme with a technology neutral obligation on the first acquirer of audio-visual rights to a listed event to ensure the event is transmitted live, for free and in full via technology that is accessible by a large proportion of the population, provided the List is reduced substantially so that it no longer includes events not currently shown on FTA television channels on a national basis and that are not truly of national importance and cultural significance.
47. This would represent a substantial overhaul of the regime, rather than a mere tweaking of the Current Scheme. An “obligation on acquirers” regime would provide a level playing field for all potential bidders to bid for and acquire exclusive rights to listed events, with the successful bidder obligated to ensure that those events are transmitted live, for free and in full via technology that is accessible by a large proportion of the population. FTA broadcasters would no longer be favoured and STV licensees would no longer be the only parties regulated.
48. As I also explain below, an “obligation on acquirers” mechanism would bring substantial benefits by addressing all of the Current Scheme’s incongruent outcomes and possibilities and maximising competition for rights to listed events (subject to free access to listed events being assured).

In the current media environment, “free” should mean free, not FTA television channels

49. At the time that the anti-siphoning regime was established in 1993, “free of charge” and “free access” equated in most if not all minds to FTA television channels, as the only alternative was subscription television channels. It would have been widely viewed as an inviolable proposition that only the FTA broadcasters would be able to transmit audio-visual content for free to a large proportion of the population.¹⁸ This remains the foundation of the mechanism by which the regime continues to be implemented.
50. Today, however, free OTT streaming services represent an alternative technology to FTA television channels for “free” transmission to a large proportion of the population. I estimate that there is the potential for 98% of households to view free OTT streaming services on

18 One could argue that FTA television channels do not truly provide “free” access to audio-visual content. Although there is no monetary consideration transferred from viewers to FTA broadcasters, viewers effectively “pay” FTA broadcasters by watching advertisements that interrupt the programming. This point has been made elsewhere: see, for example, Helen Weeds, “Digitisation, Programme Quality, and Public Service Broadcasting” in *Is there Still a Place for Public Service Television? Effects of the Changing Economics of Broadcasting*, Robert G. Picard and Paolo Siciliani (eds), Reuters Institute for the Study of Journalism, University of Oxford, September 2013, page 11. For some viewers, on some occasions, this cost may be high and detract significantly from the quality of the broadcast.

their TV sets, and already today free OTT streaming services are readily available to be viewed on TV sets by 91% of households.

- a. To view free OTT streaming services on a TV set, a household requires two things: (i) a TV set-up capable of OTT streaming (i.e., either a Smart TV or a TV with an HDMI port plus an OTT streaming device such as Telstra TV or an Amazon Fire TV Stick, among many others); and (ii) a broadband internet connection.
 - b. According to the Department, coverage of fixed broadband services with download speeds of at least 25Mbps was approximately 99.3% in 2020.¹⁹ And according to ThinkTV, 99% of households have high definition TV sets, which I assume have at least one HDMI port.²⁰ This suggests that there is the potential for 98% of households to view free OTT streaming services on their TV sets.²¹
 - c. ThinkTV reports that 92% of households have “internet connectivity”, which I assume means home broadband connections.²² It is also worth noting that, according to the ACMA, as of June 2021 70% of Australian adults had a Smart TV connected to the internet.²³ It follows that 91% of households²⁴ would, today, be able to view free OTT streaming services on their TV sets, either with no up-front cost at all (for the 70% that have Smart TVs connected to the internet) or with only the small up-front cost of an OTT streaming device (the Amazon Fire TV Stick Lite currently sells for \$59 on Amazon).
51. The small up-front cost of an OTT streaming device should not be viewed as disqualifying free OTT streaming services from being considered “free” in the sense of the term used in the description of the objective of the regime expressed in the Explanatory Memorandum to the Broadcasting Services Bill.
- a. First, 70% of households should not need to purchase an OTT streaming device as they already have a Smart TV connected to the internet.²⁵

19 Department of Infrastructure, Transport, Regional Development and Communications, Bureau of Communications, Arts and Regional Research, *International comparison of fixed broadband performance Coverage and minimum speeds November 2020*, accessed at: https://www.infrastructure.gov.au/sites/default/files/bcarr-international-comparison-of-fixed-broadband-performance_0.pdf.

20 ThinkTV, Fact Pack, H1 2022, page 5.

21 This figure is 99% (the proportion of households with high definition TV sets) multiplied by 99.3% (the proportion of premises covered by fixed broadband services with download speeds of at least 25Mbps).

22 ThinkTV, Fact Pack, H1 2022, page 5. This figure is consistent with data from Statista on the number of Australian households with internet access at home (<https://www.statista.com/forecasts/1144252/internet-households-in-australia>) and the total number of Australian households (<https://www.statista.com/statistics/611422/australia-number-households/>).

23 ACMA, *Communications and media in Australia: Trends and developments in viewing and listening 2020–21*, June 2022. This figure is similar to ThinkTV's proportion of households with “internet capable TV sets” (68%): ThinkTV, Fact Pack, H1 2022, page 5.

24 Assuming that 92% of the 99% of households with high definition TV sets have broadband internet connections, 91% of all households have high definition TV sets and broadband internet connections.

25 As mentioned, according to the ACMA, as of June 2021 70% of Australian adults had a smart TV connected to the internet: see note 23 above.

- b. Second, many of the 29% of households with a high definition TV set that is not a Smart TV will already have an OTT streaming device.
 - c. Finally, for those households with a high definition TV set that is not a Smart TV and that do not already own an OTT streaming device, there would be a small up-front cost to purchase a device. However, this cost is comparable to or less than the historical up-front costs of viewing FTA transmissions. Viewing FTA transmissions has historically required an up-front investment in at least an aerial. At the time of the digital switchover, further investment was required in either a DTT set top box or a TV with an integrated DTT tuner. Up-front investments of this nature should therefore not disqualify free OTT streaming services from being considered “free”.
 - d. Like traditional FTA transmission, free OTT streaming services do not require any ongoing payments.
52. The set-up and ongoing costs of a broadband internet connection should also not disqualify free OTT streaming services from being considered “free”. For the 92% of households that have internet connectivity today, there is no incremental cost of viewing free OTT streaming services.²⁶
53. In addition to the 91% of households that should be readily able to view free OTT streaming services on TV sets (with the potential for this to increase to 98%), many households that do not have home broadband connections should be able to access free OTT streaming services on mobile devices such as smartphones and tablets. ThinkTV reports that 94% of households have smartphones and 59% have tablets.²⁷ It follows that at least 94% of households should be able to view free OTT streaming services via mobile devices.
54. Indeed, the ability to view free OTT streaming services on mobile devices means that free OTT streaming services are able to provide each individual with a smartphone or internet-connected tablet with far greater and more convenient “free” access to listed events than could have been contemplated at the time the regime commenced.
55. Given the widespread availability of free OTT streaming services, “free access”, as expressed in the objective of the regime, should no longer be equated with FTA television channels, and there is no longer any justification for persisting with the current mechanism, which was built on an outdated foundation that FTA transmission is the only technology capable of delivering audio-visual content for free to a large proportion of the population. In the current media environment, “free” should mean free, without conditioning on a particular type of technology and without favouring particular media entities over others. To continue to conflate “free” with “FTA television channels” would be unnecessary, anachronistic and distortionary. Instead, the regime should become technology neutral to ensure that as many potential bidders as possible (including pure streaming service providers as well as STV licensees) may compete for exclusive rights to listed events, conditional only on winning bidders being subject to an obligation to ensure that listed

²⁶ This addresses Question 2 in the Consultation Paper, which asks whether having to pay for internet access means that internet-based services are not free. This is like asking whether having to pay for a mobile phone subscription means that using Facetime (another OTT service) is not free. In each case, if the subscription would be purchased anyway, there is no incremental cost to use the OTT service.

²⁷ ThinkTV, Fact Pack, H1 2022, page 5.

events that they acquire are transmitted live, for free and in full via technology that is accessible by a large proportion of the population.

Benefits compared to the Current Scheme

56. The proposed technology neutral mechanism would address all of the incongruent outcomes and possibilities that have arisen under the Current Scheme.
- a. The current lack of an obligation on FTA broadcasters to transmit events on the List that they acquire rights to would be addressed directly as there would be an obligation on the first acquirer of audio-visual rights to a listed event to ensure it is broadcast live, for free and in full via technology that is accessible by a large proportion of the population.
 - b. The current lack of an obligation on FTA broadcasters to transmit *for free* events on the List that they acquire rights to would also be addressed directly by the same obligation on the first acquirer of audio-visual rights to a listed event.
 - c. The current potential for pure streaming service providers to acquire exclusive rights to listed events and transmit these events only on subscription or PPV services would be addressed directly by the same obligation on the first acquirer of audio-visual rights to a listed event.
 - d. The current distorted playing field between STV licenses and FTA broadcasters – regarding the acquisition of exclusivity to listed events across all forms of monetisation – would be addressed, as any bidder would be able to acquire rights on this basis.
 - e. Finally, STV licensees would no longer be precluded from acquiring exclusivity to listed events across all forms of monetisation when they are willing and able to transmit the events live, for free and in full to a large proportion of the population.
57. Moreover, technology neutrality would level the playing field and maximise competition for rights with consequential benefits for sports bodies and the general public, subject to continuing to guarantee free access to events of national importance and cultural significance for a large proportion of the population.

Qualifications

58. The proposed alternative mechanism should only be introduced in conjunction with a substantial reduction to the List to only retain events currently broadcast on FTA television channels on a national basis and that are viewed by a substantial proportion of the population (see Section 5.1 above). If the List were to retain events that are currently only transmitted via subscription services (including many matches of the AFL and NRL competitions that are only transmitted via subscription services) or matches that are only transmitted on FTA television in one state, the adoption of this alternative would impose an obligation to transmit live and for free events that are currently important drivers of subscription revenues and that are evidently not events of sufficient national importance and cultural significance, given that they are not currently transmitted via FTA television channels on a national basis.
59. The proposed alternative mechanism might also be introduced in conjunction with a mechanism by which the obligation to ensure that events are transmitted live, for free and in full may be waived if it would not be profitable for anyone to do so. This might, for example, take the form of an option for the Minister to waive the obligation in relation to an

event or a set of events if the Minister is satisfied that the acquirer has made every effort to transfer the rights to other parties for a nominal fee.

5.2.2. Conferral-based and offer-based alternatives to the current scheme

60. The Consultation Paper raises for discussion two alternative mechanisms that might replace the current condition in STV licenses that effectively prohibits STV licensees from acquiring rights to listed events to the exclusion of FTA broadcasters.
- a. A conferral-based rule that would restrict a party from conferring a right to a listed event until a right had been conferred to a FTA broadcaster; and
 - b. An offer-based rule that would restrict a party from offering a right to a listed event until an offer had been made to a FTA broadcaster.
61. The Consultation Paper characterises the mechanism of the Current Scheme as an “*acquisition-based rule*” in that it regulates the acquisition of rights by STV licensees, and explains that these alternatives would shift the regulatory obligation to the party selling the rights. The difference between the two alternatives is that under an offer-based rule rights to listed events would not need to be conferred to FTA broadcasters, only offered.
62. The Consultation Paper suggests that there may be advantages in moving to one of these alternatives in order to preclude subscription-based streaming services from acquiring rights to listed events and putting them behind a paywall.²⁸ These alternatives would therefore close the loophole identified in paragraph 25.c above, and place pure streaming service providers such as Amazon, Google and Facebook in the same position as STV licensees (i.e., unable to acquire rights to listed events to the exclusion of FTA broadcasters).
63. In my opinion each of these alternatives is inferior to the technology neutral mechanism that I have described above. Both only aim to address the third incongruity identified in paragraph 25 (by adding streaming service providers to the set of parties precluded from acquiring rights to listed events to the exclusion of FTA broadcasters). Both would perpetuate the rest of the incongruent outcomes and possibilities in paragraph 25 and neither would address the restriction on competition inherent in the Current Scheme. Indeed, they would make it worse: they would not only exclude STV licensees from bidding for and acquiring exclusivity across all forms of monetisation, but also pure streaming service providers.
64. An offer-based regime may be even more problematic. An offer-based regime is likely to require either: (i) extensive ex-ante stipulation regarding the terms of offers (which may need to be sport or event specific); or (ii) behavioural regulation to ensure that offers are genuine and give enough time to FTA broadcasters to accept. In the UK, where an offer-based regime is in place, Ofcom’s consent is required before a non-qualifying operator may transmit a listed event on an exclusive basis. Before consenting, Ofcom will make an assessment of whether qualifying operators “have had a genuine opportunity to acquire the rights on fair and reasonable terms” including “a reasonable time in which to do so”.²⁹ An offer-based regime is therefore likely to require that an independent body be assigned a

28 Consultation Paper, page 33.

29 See Ofcom, *Code on Sports and Other Listed and Designated Events*, available at: https://www.ofcom.org.uk/data/assets/pdf_file/0029/35948/ofcom_code_on_sport.pdf.

regulatory oversight role to prevent “gaming” of the system. This would impose additional cost compared to the Current Scheme and a conferral-based mechanism.

5.2.3. A differential / tiered approach to the List

65. The Consultation Paper suggests that if the current breadth of sports is retained on the List from April 2023 onwards, there may be merit in a two-tiered model to apply stronger regulation to “events that are of clear and demonstrable national significance [...] while allowing for more flexibility and potentially greater access by subscription-based providers to the rights to [events that] do not hold the same national resonance”.³⁰
66. In my view, events that “do not hold the same national resonance” should not be retained on the List. Any event that is on the List will be an event for which a sports body will be restricted in its ability to maximise revenue from selling transmission rights. Events on the List should therefore only be events that are of “clear and demonstrable national significance” and only these events justify regulatory restrictions on sports bodies and parties seeking to acquire sports rights.
67. If there were to be a tiered approach, it should avoid splitting events within a particular sport that are sold together in a bundle between different tiers (e.g., some AFL games in one tier and other AFL games in another). Requiring different sales processes and/or different sets of bidders for events within a sport that are normally sold together in a bundle would be likely to impose complexity and inefficiency in the sales process.
68. Regarding the specific two-tiered proposal in the Consultation Paper, automatic delisting of tier two events two years before they commence, with no capacity for the Minister to override the delisting if a FTA broadcaster has not had a reasonable opportunity to acquire the rights, would make a material difference in addressing the issues with the Current Scheme only for sports where rights agreements are typically negotiated later than this. For other sports, the distorted playing field favouring FTA broadcasters and restricting competition would remain.
69. If the aim in relation to tier two events is for these to be available to be acquired by subscription service providers on a more equal footing, it would be more effective and straightforward to simply remove these events from the List.

5.3. Summary

70. In relation to the events that should remain on the List, it seems a reasonable principle that if an event is not transmitted by the FTA broadcasters live and for free on a national basis on FTA television today under the Current Scheme, or if it is transmitted by FTA broadcasters but not viewed by a substantial proportion of the population, it is not of sufficient national importance or cultural significance to remain on the List. In my view, events of this nature should be removed from the List.
71. As for the mechanism, the proposed technology neutral obligation on acquirers addresses all the incongruent outcomes and possibilities of the Current Scheme and offers a level playing field and enhanced competition for rights, with benefits for sports bodies and the general public that can be expected to flow from that competition. The conferral-based and offer-based alternatives raised in the Consultation Paper would have the opposite effect,

30 Consultation Paper, page 42.

exacerbating restrictions on competition by restricting pure streaming service providers as well as STV licensees from competing on equal terms with FTA broadcasters.

72. The only concern with a technology neutral mechanism could be whether technologies available to be utilised by parties other than the FTA broadcasters would be accessible by a large proportion of the population. This should not be a concern today. I estimate that there is the potential for 98% of households to view free OTT streaming services on their TV sets, already today free OTT streaming services are readily available to be viewed on TV sets by 91% of households, and at least 94% of households should be able to access free OTT streaming services on mobile devices.
73. While the proposed technology neutral alternative would maximise competition for rights subject to realising the objective of ensuring free access to events of national importance and cultural significance, it should only be adopted in conjunction with a significant reduction of the List and should not have the effect of imposing on acquirers an obligation to transmit live and for free events that are not currently transmitted on FTA television channels on a national basis.

Schedule 2

The Foxtel Group's Proposed Anti-Siphoning List

1 Olympic Games

- (1) Each event held as part of the Summer Olympic Games, including the Opening Ceremony and the Closing Ceremony.
- (2) Each event held as part of the Winter Olympic Games, including the Opening Ceremony and the Closing Ceremony.

2 Commonwealth Games

Each event held as part of the Commonwealth Games, including the Opening Ceremony and the Closing Ceremony.

3 Horse racing

Each running of the Melbourne Cup organised by the Victoria Racing Club.

4 Australian rules football

- (1) One regular season match of the Australian Football League Premiership competition played in Australia held on each of the following days (to the extent a regular season game is scheduled by the Australian Football League to be held on these days):
 - (a) ANZAC Day;
 - (b) Good Friday;
 - (c) Easter Monday; and
 - (d) the King's birthday public holiday in Melbourne, Victoria.
- (2) Each match in the Finals Series of the Australian Football League Premiership competition which is played in Australia.

5 Rugby league football

- (1) One regular season match of the National Rugby League Premiership competition played in Australia held on each of the following days (to the extent a regular season game is scheduled by the Australian Rugby League Commission to be held on these days):
 - (a) ANZAC Day; and
 - (b) Good Friday.
- (2) Each match in the Finals Series of the National Rugby League Premiership competition which is played in Australia.
- (3) Each match in the National Rugby League State of Origin Series.
- (4) Each international rugby league test match that:
 - (a) involves the senior Australian representative team; and

- (b) is played in Australia.
- (5) Each match of the Rugby League World Cup that:
 - (a) involves the senior Australian representative team; and
 - (b) is played in Australia.

6 Rugby union football

- (1) Each international test match that:
 - (a) involves the senior Australian representative team selected by the Australian Rugby Union; and
 - (b) is played in Australia.
- (2) Each match of the Rugby World Cup tournament that:
 - (a) involves the senior Australian representative team selected by the Australian Rugby Union; and
 - (b) is played in Australia
- (3) The final of the Rugby World Cup tournament if the final is played in Australia.

7 Cricket

- (1) Each test match that:
 - (a) involves the senior Australian representative team selected by Cricket Australia; and
 - (b) is played in Australia.
- (2) Each match of the International Cricket Council One Day International World Cup that:
 - (a) involves the senior Australian representative team selected by Cricket Australia; and
 - (b) is played in Australia.
- (3) The final of the International Cricket Council One Day International World Cup if the final is played in Australia.
- (4) Each match of the International Cricket Council World Twenty20 tournament that:
 - (a) involves the senior Australian representative team selected by Cricket Australia; and
 - (b) is played in Australia.
- (5) The final of the International Cricket Council World Twenty20 tournament if the final is played in Australia.

8 Soccer

- (1) Each match of the Fédération Internationale de Football Association World Cup tournament that:

- (a) involves the senior Australian representative team selected by the Football Federation Australia; and
 - (b) is played in Australia.
- (2) The final of the Fédération Internationale de Football Association World Cup if the final is played in Australia,
- (3) Each match in the Fédération Internationale de Football Association World Cup Qualification tournament that:
 - (a) involves the senior Australian representative team selected by the Football Federation Australia; and
 - (b) is played in Australia.

9 Tennis

Each match in the Australian Open tennis tournament.

10 Netball

- (1) A semi-final of the Netball World Cup if the semi-final involves the senior Australian representative team selected by the All Australian Netball Association.
- (2) The final of the Netball World Cup if the final involves the senior Australian representative team selected by the All Australian Netball Association.

11 Motor sports

- (1) Each race in the Fédération Internationale de l'Automobile Formula One World Championship (Grand Prix) held in Australia.
- (2) Each race in the Fédération Internationale de Motocyclisme Moto-GP held in Australia.
- (3) Each Bathurst 1000 race in the V8 Supercars Championship Series.