



SUBMISSION IN RESPONSE TO ANTI-SIPHONING DISCUSSION PAPER

DECEMBER 2022

Media Reform—Online Safety, Media and Platforms Division
Department of Infrastructure, Transport, Regional Development, Communications
and the Arts, GPO Box 2154 CANBERRA ACT 2601
By Email: media.reform@communications.gov.au

Janez Media

Janez Media is a boutique media and digital advisory and consultancy practice based in Australia which has been operating since 2013. Janez Media's expertise extends across Free-to-air television, pay television, international and domestic sporting bodies, OTT networks and SVOD platforms, telcos and international media organisations.

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

Janez Media is directly involved in the negotiation and acquisition of domestic and international premium sports rights for its clients so is at the forefront of operational understanding, ongoing trends, and strategic thinking in relation to these matters.

Janez Media is led by Jon Marquard, who was previously the Chief Operating Officer of the Ten Network (Ten) in Australia. In that capacity Jon oversaw a number of business units, including the sports department, and was responsible for the acquisition of all sports rights for the network, while also representing Ten on a number of Australian industry bodies including FreeTV, FreeView and the Interactive Advertising Bureau (IAB).

Prior to Ten, Jon held the position of Chief Operating Officer at Fox Sports. In Jon's role there, he oversaw all legal, policy and regulatory matters, and negotiated sports rights across a wide variety of listed sports events with both sports bodies, sports rights agencies and the FTA TV networks. At Fox Sports Jon was also a board member of ASTRA, the pay TV industry body responsible for the industry's policy and regulatory affairs, including full oversight of the Australian anti-siphoning scheme.

This submission reflects the views of Janez Media and not of any of its clients. Janez Media's views are formed from its direct and close involvement in the sports and media industry and the author's overall involvement with the anti-siphoning scheme for more than 25 years.

Introduction and Summary

The government is well served to review the anti-siphoning scheme (the **AS Scheme**) as the basic assumptions that underpins it- the primacy of free-to-air linear television viewing no longer holds true. Viewing behaviour and consumption patterns have changed considerably since the AS Scheme was introduced and the government should amend the scheme to broaden the concept of what free access means to ensure that the AS Scheme reflects technological and consumer changes to viewing behaviour that have occurred in the past 25 years.

The AS Scheme should be reformed in three ways:

- A. The specific focus on “television” should be removed as consumers can and now do access content on a number of devices and platforms, Janez Media submits that the government should be adopting a platform neutral approach, which focuses not on the device or platform but emphasises the “free access” which is the underlying broad objective of the scheme.

From a policy perspective the ongoing focus on linear free-to-air television (FTA) is flawed. Linear FTA access on one of the five free-to-air television services is only one of the ways in which free access can be provided to consumers, and the scheme should be updated to ensure that one platform is not artificially preferred over other platforms as is currently the case under the AS Scheme.

- B. An acquirer of rights to listed events should be required to transmit live that event on a free basis. In other words, the AS Scheme should be amended so that there is a positive obligation on the acquirer of the event to show it live and free, across the platform(s) of its choice, for example linear free to air television and/or a streaming platform.
- C. The list should be amended by reducing what is included to only those currently listed events which are shown live on FTA television.

Reasons supporting this submission are set out below and are followed by answers to specific questions posed in the Consultation Paper.

1. *Australian Viewing Behaviour and consumption patterns*

- 1.1. Australians’ consumption habits have changed significantly since the AS Scheme was introduced in the mid 1990s. At that time, all viewing occurred on television, so it was logical that the focus of the legislation was on linear television.
- 1.2. Today, the proportion of people watching linear FTA television is steadily declining and consumers can access content both free and via a paid subscription using the internet as easily as they can on television.

- 1.3. Research from ACMA showed that in June 2021 more Australians watched online subscription content 58% than those who watched live FTA television 54%.¹
- 1.4. The proportion of people watching FTA television has been in a gradual and inexorable decline and has been well documented. For example, a research report from the Social Research Centre commissioned by the Department of Infrastructure, Transport, Regional Development and Communications, found that 83% of Australian adults made use of online video services in 2021, up from 81% in 2020. Conversely, only 77% of Australian adults had watched free-to-air television, down from 80% the prior year.²
- 1.5. The decline in television viewing has corresponded with an increase in internet access which is now ubiquitous. The 2021 ACMA research noted that internet access was now universal with 99% of Australian adults accessing the internet and 91% of people having a home internet connection.³
- 1.6. The trend away from linear FTA television and towards consumption of sports content on the internet is being mirrored overseas. For example, several broadcasters of the FIFA World Cup 2022 have reported record streaming audiences:
 - 1.6.1. The England v Iran match was streamed a record 8 million times on the BBC player and BBC Sports online representing around 50% of the audience making it the largest live streamed event on the BBC. The game had a peak linear TV audience of 8.12 million on the BBC⁴
 - 1.6.2. In the US, NBC has reported that its Telemundo streaming platform has increased viewership of 209% compared to the last FIFA World Cup in Russia, with streaming now accounting for 26% of its total viewership⁵
- 1.7. A recent report by Ofcom in the UK highlighted the change in viewing behaviour, particularly amongst younger people. The report found that people aged 16-24 watch seven times less broadcast TV than those aged 65+ and that younger people's broadcast viewing was down two thirds in one decade.⁶
- 1.8. In the future more and more viewing is likely to be non-linear rather than linear. That is not to say linear television will disappear- it will continue to play an important role in Australian viewing habits, but it will not necessarily be the primary or preferred platform for people's consumption of audio-visual content. This is already true of younger Australians who do not watch much linear FTA television. The AS Scheme should be updated to reflect this significant change in consumption behaviour.

2. *Platform Neutrality*

- 2.1. Given the significant change in viewing habits that has occurred and will continue to evolve, the focus of the AS Scheme in prioritising linear free to air television should be changed.
- 2.2. The AS Scheme should be reformed to change to broaden the way in which a listed event can be transmitted in order to satisfy the scheme. In particular, it

¹ [ACMA Internet Access 2021](#)

² <https://www.infrastructure.gov.au/department/media/publications/2021-media-content-consumption-survey-social-research-centre-presentation>

³ [ACMA Internet Access 2021](#)

⁴ <https://www.bbc.co.uk/mediacentre/2022/england-v-iran-bbc-live-streaming-record>

⁵ <https://nbcportsgroupinbox.com/2022/11/28/first-week-of-fifa-world-cup-qatar-2022-propels-telemundo-and-peacock-to-record-consumption/>

⁶ <https://www.ofcom.org.uk/news-centre/2022/streaming-revolution-stretches-tv-generation-gap>

should enable an acquirer of rights to a listed event to transmit that event live and for free on any platform or service that is widely available in Australia by the internet. This would therefore enable the event to be shown live on a streaming service that does not require the payment of a regular fee to access it.

- 2.3. To further ensure that there is no artificial “gate” on accessing the free service, the government could also include a provision in the AS Scheme that registration of a consumer’s personal details should not be permitted for the purposes of satisfying the AS Scheme. That would enable consumers to easily and instantly access the service without any impediment, or their personal data being captured or stored.

3. *Requirement to Transmit a Listed Event Live and Free*

- 3.1. The government should amend the objective in the AS Scheme to make it clearer that the AS Scheme is intended to only enable the opportunity for a listed event to be made available for free, and to then put the onus on the industry participants who acquire a listed event to actually transmit it by requiring them to provide free coverage.
- 3.2. The public challenge with the AS Scheme is that it is widely misunderstood. Most people believe that the AS Scheme reserves events for exclusive acquisition by FTA TV Broadcasters and then requires them to broadcast those events live and in full.
- 3.3. In practice, the AS Scheme does neither of those things- it merely operates to ensure that FTA TV Broadcasters must be given a **reasonable opportunity to acquire** broadcast rights, and then if those rights are acquired, they **may be, but do not have to be**, broadcast.
- 3.4. These elements play out in a number of different ways, particularly in how events end up being broadcast on Australian television but demonstrate a critical point- that is not **because** events are listed on the scheme that they end up being broadcast on FTA Television, but ultimately because the relevant sports organisation and the FTA TV Broadcaster both want that event to be broadcast on FTA Television in a particular way and reach a commercial agreement to deliver that outcome.
- 3.5. Given the changes to consumer viewing behaviour, and the fact that each of the FTA TV networks now have both multichannels and streaming platforms on which to transmit events, there are no capacity limits to what they can transmit.
- 3.6. Equally, each of the subscription streaming platforms and pay TV operators has a streaming platform which is set up to transmit multiple events live.
- 3.7. In these circumstances, it is easy to solve the perception problem of events not being transmitted. The government should change the AS Scheme to require that a listed event must be transmitted live and free (on any platform).
- 3.8. This should be done in conjunction with a winding back of the list to include only those currently listed events which are shown on FTA television. This would then eliminate the current artifice, which is used to technically satisfy the list, where FTA broadcasters acquire an event on the list but do not show it, or never intend to show it.

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?
 - Should the scheme seek to define what constitutes 'nationally important and culturally significant'? Is so, in what way? Is popularity a proxy for importance and significance, or are other inputs or variables relevant?
 - Should other factors, in addition to free access to events, be considered for the objective?

Response:

- 1.1. The objective of ensuring that Australians have free access to nationally important and culturally significant events is still relevant, but the AS Scheme does not ensure this occurs
- 1.2. Currently, the AS Scheme merely provides a mechanism to give the linear FTA networks first access to acquire the rights to listed events without requiring them to actually broadcast the listed events.
- 1.3. Since it is hard to come up with an agreed definition of what constitutes nationally important and culturally significant, there is a gap between public perception of what the scheme actually does, and what many members of the public believe it does.
- 1.4. While the notion of popularity can be regarded as one indicator of determining whether an event is nationally important and culturally significant, there are significant challenges in using that notion as the sole indicator or a proxy of what is a "nationally important and culturally significant" event. Several obvious challenges jump out:
 - 1.4.1. If popularity is measured by participation across the Australian population, then the most popular sports would be in order such as running/athletics, swimming and cycling, while currently listed sports like NRL, AFL and cricket would be far down the list.⁷
 - 1.4.2. Measuring popularity by viewership on television may provide some guidance but viewership can be affected by several factors including an Australian team's performance or where an event is played. For example a Rugby World Cup match played by Australia in France at 03:00AEST may not attract a large audience, but a similar match played in Australia in prime time may attract a much larger audience.
- 1.5. To be considered as nationally important and culturally significant an event should generally satisfy most of the following elements:
 - 1.5.1. The event should be played in Australia
 - 1.5.2. If the event is not played in Australia it should have an extra element associated with it to make it nationally important
 - 1.5.3. The event should be played by an Australian national team
 - 1.5.4. The event should have some other cultural or significant connection to or across Australia
 - 1.5.5. The event should be of widespread and general national appeal- not merely in one state, territory, city or region
 - 1.5.6. It should be nationally important due to historical widespread

⁷ [Ausplay 2022 Participation Report](#)

significant and sustained popularity; and

1.5.7. It should have a track record of being televised by FTA TV networks on a live and national basis, primarily on a primary channel.

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

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

Response

2.1. As outlined in section 2 above, given the way in which content is viewed in Australia free should be defined by more than free-to-air television. The scheme should be reformed to make it clear that an acquirer of rights to a listed event can satisfy the AS Scheme by showing it live by an online streaming or BVOD service without a direct access fee.

2.2. It is fundamentally flawed to raise a notion that having to pay for internet access means an event is not "free" to access for several reasons including:

2.2.1. The argument is specious – right now people must pay for a tv set and have access to an aerial and/ or digital tuner and pay electricity bills to access free-to-air television, all of which cost money. The average cost of a new TV set is \$1380⁸, which is significantly greater than the average cost of internet access whether by NBN, wireless or mobile. These associated costs have never been regarded as something which impacts on whether or not an event is free under the current AS Scheme.

2.2.2. The vast majority of people in Australia have internet access -more than those who watch FTA television, as outlined in section 1 above. Over time, based on current trends it is expected that FTA viewing will further decline so the government should move away from focusing on FTA television in relation to the scheme.

2.2.3. Mobile phone access is almost universal in Australia with 9 out of 10 Australian adults owning a smartphone. Research from the ACCC shows that the average data allowance for postpaid mobile phone users is 33gb per month while the average data allowance for prepaid mobile phone plans is 30gb per month, with data cost per Gb declining in the past few years.⁹

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?

⁸ <https://www.canstarblue.com.au/technology/tvs/>

⁹ <https://www.accc.gov.au/publications/accc-communications-market-report/accc-communications-market-report-2020-21>

Response

Yes. The policy rationale should be specifically defined to focus on sporting events. It makes sense to specifically limit the scheme's operation to sporting events.

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?

Response

While the interplay between sports federations intermediaries and buyers (FTA networks, pay networks and streaming platforms) can achieve a similar outcome, provided the AS Scheme is reformed as proposed it remains the most obvious mechanism as it is a known commodity in the industry.

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

Response

As stated elsewhere in this submission, the AS Scheme does not deliver on its objective as it does not ensure that events are shown live for free. The proposed reforms as outlined in this submission would provide more certainty by requiring an acquirer to ensure that live free access is provided-either on a free streaming platform or on linear free-to-air television.

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?

Response

- 6.1. The AS Scheme makes the sale of sports rights more complex because a FTA broadcaster must be involved, so that impacts the way in which the sale and acquisition can be made when there are multiple parties involved and the terms that apply to any grant of rights.
- 6.2. The AS Scheme also impacts the price that a sports body can obtain as it acts as a natural suppressant of price because it significantly imbalances the competitive bargaining position of the seller and the buyers and erodes any exclusivity premium which may otherwise be traded by a seller against other factors.
- 6.3. With the advent of OTT services, the current scheme is likely to further distort the market by inadvertently tilting the balance of commercial negotiation to favour those buyers who own and operate both a free television service and a paid OTT service and artificially protect them from competition from other potential buyers who do not.
- 6.4. Without amendment, that could result in the system being gamed by those participants.

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?

Response

Yes, but others are best placed to quantify specific costs.

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?

Response

- 8.1. The premise of the question is slightly misleading because of the reference to “exclusive rights acquisition” which infers that there has been a trend of rights in overseas markets exclusively migrating to online services. In practice, while there have been several instances of acquisitions by subscription based online services overseas, these represent only a part of the rights ecosystem and do not support the contention that there has been a trend towards exclusivity in the jurisdictions mentioned. For example, the examples cited in the consultation paper around the NFL doing a deal with Amazon and the IPL do not properly represent how those deals work:
- 8.1.1. The Amazon NFL deal is one of five domestic media distribution deals announced by the NFL and by value was the least expensive sold due to its limited number of games
 - 8.1.2. The IPL deal in India was not an exclusive deal in that there was also a deal done for television distribution.
- 8.2. Nonetheless, the acquisition of some rights by online operators both overseas and in Australia is occurring and should be seen in light of changing viewer consumption patterns with viewers wanting flexibility on being able to watch premium sports content on the device and platform of their choice. That trend is likely to continue and will be impacted by territory specific factors in any particular jurisdiction.
- 8.3. In Australia, we can expect participants to acquire rights to and offer consumers different ways to watch listed events to reflect consumers’ desire to watch across multiple platforms. However, given that many audio-visual deals for listed events have been secured for many years into the future, we should not expect a material change in the short or medium term. This is demonstrated in Table A below which shows the length of time that key deals in Australia have been secured and the way in which those properties may be exploited.
- 8.4. Another reason that we are unlikely to see a material change is that many sports organisations insist on a level of “free” coverage irrespective of whether the event is listed. Examples of organisations adopting that approach are the IOC, the organisers of Wimbledon and FIFA, all of whom require minimum levels of free coverage in order to maximise reach as part of any sports rights deal.

Table A

Listed Event	Term of Rights Deal	Licensee	Transmission Method
AFL	To 2031	Seven	FTA TV, plus free online streaming on 7Plus (from 2025-31)
AFL	To 2031	Fox/Kayo	Subscription TV and/or OTT streaming
NRL	To 2027	Nine	FTA TV, plus free online streaming on 9Now
NRL	To 2027	Fox/Kayo	Subscription TV and/or OTT subscription streaming
AO Tennis	To 2029	Nine/Stan/9Now	Free, online streaming on 9Now, OTT subscription streaming
Supercars	To end of 2025	Fox/Kayo	Subscription TV and/or OTT streaming
Supercars	To end of 2025	Seven	FTA TV, plus free online streaming on 7Plus

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?

Response

- 9.1. As outlined above, the AS Scheme should be platform neutral across the board- it should not set up linear FTA television as the primary distribution method, as the current scheme does.
- 9.2. Homogeneous regulation should be applied with similar obligations, including the obligation to transmit a listed event live.

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?

Response

- 10.1. If the AS Scheme is reformed as proposed in this submission, then there would be minimal impact over time on industry. However, if the AS Scheme was amended so as to extend the restriction that currently only applies to pay TV operators to cover online services and digital platforms without extending the way in which free access could be provided, then there is a

danger that the FTA networks who provide online subscription services would be advantaged relative to those who do not as it could increase the chances of them gaming the system.

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?

Response

- 11.1. As above. If the AS Scheme is only reformed partially, then those FTA networks with an online subscription service would be able to selectively choose what events to put on FTA television and what to place on an online service and “force” consumers to subscribe to the online service in order to receive full coverage of that event.

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?
- If so, under what circumstances would either one or both of these alternatives provide advantages over an acquisition-based rule?
 - Should these alternatives seek to ensure that the offer or conferral has been made on reasonable terms? How would this be achieved?

Response

- 12.1. A conferral-based rule should not be considered as it would enable the FTA television networks to have unfettered ability to manipulate the AS Scheme by not agreeing to acquire an event thereby preventing the award of the rights to other parties. It would also shift the regulatory burden/onus onto the sports organisations
- 12.2. An offer based approach is similarly problematic. It would require governments and the relevant department to be actively involved in commercial discussions which have multiple nuances and deciding the reasonableness of an offer could be challenging. In addition, it would adversely affect sports bodies by requiring them to offer rights separately thereby further reducing competition for their rights!!!!It is illustrative to note that the UK scheme, which is cited in the Consultation paper, is not without its challenges in relation to an offer-based approach. A recent example highlights this. In the UK, the government decided to include the FIFA Women’s World Cup on its list of events. This decision has had the effect of stifling competition for the rights, but none of the UK FTA broadcasters have been prepared to pay a fair price for the rights. This has led to an extraordinary stand-off with no broadcaster being confirmed, and FIFA publicly condemning the broadcasters lack of willingness to pay to broadcast the tournament “This is not a case of being priced out, but rather testament to a lack of willingness of broadcasters to pay what the women’s game deserves...We know the opportunity for women’s football is there. Now, together, we need to capture it.”¹⁰

¹⁰ <https://www.standard.co.uk/sport/football/womens-world-cup-tv-rights-fifa-b1034039.html>

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?

Response

See above. An offer or conferral-based rule would have a major impact for not for profit sports bodies.

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?

Response

See above. The risk is that Australian consumers end up with sub-standard coverage and options to view events because of the way in which the AS Scheme could be manipulated. In turn this could perversely lead to less coverage of sports that are listed!!

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?
- If so, in what circumstances is this taking place?
 - Is this resulting in a detrimental coverage outcome for Australian audiences?

Response

- 15.1. There are numerous examples of an artificial edifice being used by FTA networks and pay operators to ensure technical compliance with the AS Scheme . An example of how this is done is as follows:
- 15.1.1. A pay TV operator acquires the rights to transmit a range of listed events on a pay basis.
 - 15.1.2. A FTA TV network also acquires FTA television rights to those listed events.
 - 15.1.3. The parties have a mutual understanding that the FTA network will only transmit on FTA television some, but not all, of those events.
 - 15.1.4. The parties agree that if the FTA network does exploit those rights on FTA television it will pay the pay TV operator a substantial sum of money. That sum is usually set at an artificially high level to act as a disincentive for the FTA network to actually do so.
- 15.2. The parties then proceed to enact the deal and operate as though the AS Scheme only extends to include those events which the FTA network has agreed to transmit without paying the pay TV operator.
- 15.3. This leads to considerable public dissatisfaction as the public misunderstands what the scheme does. The public expects that if an event is important enough to be listed, and someone acquires the right to broadcast the event, that it should in fact do so.
- 15.4. As outlined in this submission, this problem can be cured by:
- 15.4.1. Changing the scope of how an event can be provided for free;
 - 15.4.2. Requiring that an acquirer transmits that event on a free basis; and
 - 15.4.3. Reducing the list in a few key areas to bring it into line with only those currently listed events which are in fact currently shown on FTA

television.

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

- If so, should this be the anti-hoarding rule (in its current form), an amended anti-hoarding rule, or a new regulatory mechanism?
- 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?
- How would the anti-hoarding mechanism be integrated with other potential changes to the scheme, including the potential extension to online services?

Response

The current anti-hoarding mechanisms no longer have any practical purpose because there are no current listed events on the anti-hoarding list- there have only even been two events designated under the anti-hoarding provisions, the 2002 and 2006 FIFA World Cups. Nothing else has been put on the anti-hoarding list for close to 20 years and there was never a need to enforce the anti-hoarding provisions in respect of those 2 events because the rights to the FIFA World Cup have been consistently utilised. If the reforms outlined in this submission were adopted, then the anti-hoarding provisions can be abolished.

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?

Response

See answer to question 15

Coverage of anti-siphoning listed events

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

Response

Other than the circumstance of the AS Scheme covering full competitions (for example in the NRL and AFL) and only broadcasting some parts of those competitions, No.

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?

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

Response

As outlined in this submission an integrated approach should be adopted:

- coverage obligations should be changed to enable free coverage on any streaming platform and/or FTA network.
- The list should be reviewed and those currently listed events which are not shown on FTA television should be removed (e.g. 5 games of NRL per regular round, and 4 games of AFL per round); and
- An acquirer of rights to a listed event on a free basis should be required to transmit that event live.

20. Would the imposition of coverage obligations alter 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 such rights?

Response

This would not alter the acquisition or sale of rights to unlisted events and would make the buying and selling process for listed events more transparent and level the playing field so to speak where there is even contest to acquire the rights. It would also reflect how rights are generally offered for sale by the sports bodies, that is free rights and pay rights, on a technology neutral basis. It would enable greater freedom between rights sellers (sports federations) and buyers to determine and ensure the appropriate level of free coverage and on what platforms.

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

Response

In the short to medium term, minimal change. Over time it could mean that some listed events are made available for free on a streaming platform rather than on a linear television platform but viewers are increasingly turning to those platforms as a regular and in some case primary or preferred source of viewing.

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)?

Response

If the changes are made as proposed in this submission, then there would be no reason for additional information gathering or extra compliance required. As a principal matter though, information disclosure of the type contemplated in the Consultation paper can create significant extra workload

and be time consuming for no apparent benefit. The process would involve ACMA in numerous commercial discussions and confidential information processes that it simply does not need to be across. Sports rights are particularly nuanced and require close attention to a range of factors that may not be immediately apparent.

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?

Response

Depending on the way any coverage requirement was established this may be workable. However, much will depend on the detail required, the form of notification and other matters related to it. Ultimately, it is relatively easy for anybody to discover what coverage of an event will be by using the internet or digital program guide for any operator.

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

Response

As outlined in this submission an integrated approach should be adopted with the changes linked to each other.

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

Response

Voluntary with a review period, to determine what matters, ACMA or the relevant department needs to know, that is not being provided through any coverage disclosure obligation.

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?

Response

Events which have not received regular coverage on FTA television in the current/past rights cycle should be removed. This would mean in practical terms, removing:

- Some AFL matches during the regular season
- Some NRL matches during the regular season

- T20 and ODI cricket matches played by Australia in Australia
- Some matches played during the Australian Open but ensuring that all key singles matches would remain.

No events should be added to the list

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?

Response:

- 27.1. While the idea to include comparable women's competitions of the events in the current list is ostensibly attractive from a policy perspective, it is fraught with challenge for a number of reasons.
- 27.2. It flies in the face of the underlying intent of the scheme which is to ensure that traditional coverage of events on FTA television were maintained. Unfortunately, the coverage of the relevant comparable women's events on FTA television historically has been patchy or non-existent.
- 27.3. While there have some very good progress made by several industry participants recently in upweighting coverage of women's sport, the next few years will be important to grow the financial returns available by maximising broadcast and streaming revenue. If events are listed, it is likely that the revenue otherwise available would substantially decline. As noted above, the recent experience of the FIFA Women's World Cup 2023 in the UK has highlighted this, with FIFA being very critical of FTA broadcasters who have leveraged the fact that the event is listed by reducing the amount they would otherwise pay. Similar experiences have occurred in France and Spain.
- 27.4. It is better for women's sporting events to be given the chance to be more highly profiled and given greater exposure on streaming and pay platforms, than being relegated to a viewer unfriendly timeslot on FTA television. As an example, the recent Netball Australia Foxtel deal has seen netball being able to schedule matches with more late afternoon/evening timeslots, rather than having to bend its timetable to adjust to a FTA broadcast schedule
- 27.5. Listing women's events is not needed. Absent any listing, some relevant women's sports events have seen substantial growth in free coverage without being listed. On many occasions the FTA network which has broadcast the event has trumpeted the ratings result and has confirmed its intent to continue to invest in it into the future. Examples of events which have secured or will result in increased FTA coverage include:
- 27.5.1. FIFA Women's World Cup. The number of games broadcast on FTA television in 2023 will increase to 15 compared to 11 in the past World Cup in 2019, a 36% increase.
- 27.5.2. The NRLW had its most comprehensive FTA TV coverage in 2022 in a deal running through to 2027 and was so successful that the NRL CEO was reported as looking at the women's competition as a standalone property to sell in the future.¹¹ Any listing of the competition would seriously impact the NRL's ability to achieve a

¹¹ <https://www.smh.com.au/sport/nrl/abdo-eyes-nrlw-as-standalone-product-in-next-tv-rights-talks-20220616-p5aucx.html>

financial outcome to in turn re-invest into the women's game.

27.5.3. The Australian Women's cricket team has been covered regularly on Seven during the current broadcast cycle in an improved broadcast schedule. All international matches are shown on both Seven and on Foxtel.

27.6. As a general matter of principle, the government should only add to the list or intervene if there is a clear need to do so – because there is a recognition that in doing so, the list distorts the generally applicable market dynamics. Here there is no demonstrated risk that events that have historically been shown on FTA television will, absent listing, be "siphoned" away and so listing is not warranted.

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

Response

No

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?

Response

29.1. There would be no impact due to non-listing.

29.2. There would be material impact on women's sports coverage if events are listed as the investments made by non FTA TV entities may dry up with the unintended result that the government would stifle the burgeoning growth in women's sport coverage.

29.3. The Australian government has in recent times questionably provided one market participant (Foxtel) with \$40m funding purportedly to increase broadcasting of under-represented and women's sports. That approach is not one that should be continued. Any future potential allocation of moneys by the government for women's or niche sports should be offered to all industry participants to contest for that funding on a fair and transparent basis or arguably should be allocated directly to the sports bodies who could then decide how to use those funds by either investing in its own digital platform or paying a third-party platform to broadcast their sport which is often a requirement demanded by some platforms in order to cover niche or under-represented sports. Based on my industry experience, it is very likely that many other participants (across streaming, digital and FTA) would have been willing or will be willing in future to provide commitments to produce and cover women's sports events with their own funding and funding jointly made available by the government. That will achieve a far better result than an allocation which favours one industry participant over another.

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?

Response

As outlined above, no. The anti-siphoning list should explicitly be confined to sporting events.

Events on the anti-siphoning list

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

Response

- 31.1. Events which are not historically shown live on FTA television should be removed being:
- 31.1.1. All AFL games played during the season, except those broadcast live by Seven being 77 games during the regular season plus nine finals that would remain on the list;
- 31.1.2. All NRL games played during the season, except those broadcast live by Nine being 76 games during the regular season plus nine finals that would remain on the list
- 31.1.3. All ODI international cricket matches played by the Australian men's team in Australia
- 31.1.4. All T20 international cricket matches played by the Australian men's team in Australia
- 31.1.5. Matches played in the Australian Open that are not shown on Nine. This could be pared back to cover select matches in a similar way that the list was previously formulated for Wimbledon, the French Open and the US Open.
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?

Response

- 32.1. Whether the events are genuinely regarded as nationally important and culturally significant. Do they have nationwide appeal and are especially significant
- 32.2. What level of live coverage have they consistently received on free to air television in the past
- 32.3. As outlined above average audience numbers are a useful proxy but can sometimes be misleading without additional context
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?

Response

- 33.1. Removing these events would have no short-term impact as the broadcasting

- rights deals are already in place.
- 33.2. They would have no flow on effect as FTA broadcasters would still be able to bid and acquire these rights and broadcast them even if they are not on the list. The FTA networks have shown this is something they will look to do irrespective of whether an event is listed or not.
- 33.3. The commercial FTA networks in Australia are thriving. Recent financial results bear this out.
- 33.3.1. In August 2022 the Nine Network announced that it had achieved a record financial result in the previous 12 months with revenue of A\$2.7 billion and EBIT of \$315m.¹²
- 33.3.2. Seven West Media which owns the Seven Network reported a statutory profit of \$211 million on revenue of \$1.54 billion¹³
- 33.3.3. The Ten network is owned by US media conglomerate Paramount. Paramount's global third quarter results indicated revenues of US\$6.916 billion with a profit of US\$516 million.¹⁴
- Despite claims to the contrary, the FTA networks have shown a continued willingness to invest in premium content where it is in their commercial interest to do so.
- 33.4. In this regard it is worth noting that multiple events that were previously on the list, but were removed years ago still enjoy free coverage on linear television and free digital streaming services despite not being listed. These include (not an exhaustive list):
- 33.4.1. Wimbledon- 9Gem, Nine and 9Now and prior to that 7Mate and 7Plus
- 33.4.2. French Open Tennis- 9Gem and 9Now and prior to that SBS and SBS OnDemand
- 33.4.3. FIFA World Cup (most matches removed)– SBS
- 33.4.4. US Open Tennis- 9Gem and 9Now and prior to that SBS and SBS on Demand
- 33.4.5. Australian Open Golf- 9Gem and 9Now and previously Seven Network and 7Plus
- 33.4.6. US Masters -9Gem and 9Now
- 33.4.7. Supercars- Multiple events – Seven Network, 7Mate and 7Plus, previously 10Mate and 10Play
- The extent of ongoing coverage on FTA of events that are no longer listed significantly erodes the argument raised by the FTA networks that listing is required in order to protect FTA TV coverage.
- 33.5. As outlined above average audience numbers are a useful proxy of popularity but can sometimes be misleading without additional context

¹² <https://www.nineforbrands.com.au/investors/financial-reports/>

¹³ <https://www.sevenwestmedia.com.au/investors/financial-results/financial-results-2022/>

¹⁴ <https://ir.paramount.com/static-files/6ede049c-a7f4-4631-94f6-33a621f03818>

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?

Response

- 34.1. A two-tiered list is not warranted as it would add additional complexity for sports bodies when selling their rights adding to their compliance costs and will not improve the current AS Scheme structure.
- 34.2. It is worth remembering that in 2010, the then Australian government announced that it would look to re-shape the AS Scheme by proposing a two-tiered scheme. The detail of that proposal was scrutinised closely by industry which had significant concerns about the regulatory uncertainty it would create and the potential flow-on effects, ultimately including to the grass-roots not-for-profit sporting codes which support Australian communities and sporting bodies. The proposal was quietly shelved a few years later.
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?

Response

Not applicable

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?

Response

Not applicable due to answers above. A differentiated framework could add complexity and cost, but it is not possible to determine prior to seeing a draft proposal of how it would operate.

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

Response

Not applicable due to answers above. A differentiated framework could be highly negative for viewers, but it is not possible to determine prior to seeing a draft proposal of how it would operate.

Delisting arrangements

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

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

Response

The current de-listing provisions appear to be working and are appropriate.

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?

Response

The current de-listing provisions appear to be working and are appropriate. There appears to be no reason to change the current length.

Conclusion

The broadcasting operating environment in Australia has changed significantly in the past 20 years.

The AS Scheme was conceived in an era when online streaming did not exist. It should be reformed to reflect contemporary viewing behaviour and expectations.

Historically, there has been a significant amount of focus on the important historic role played by linear FTA television. However, in a world where consumers expect to be able to access content on any device they choose, at any time, the focus on linear television as the primary method of viewing is outmoded. Most people under 35 do not watch linear television regularly and most children under the age of 16, hardly at all.

In these circumstances, the AS Scheme is ripe for reform in a way which reflects contemporary viewing behaviour as well as the increasing relevance of streaming platforms.

The AS Scheme should be updated in three key areas:

1. Shifting the emphasis away from free to air television to free generally.
2. Amending the scheme to only include on the list those listed events currently shown on FTA television to get the baseline right; and
3. Imposing an obligation on acquirers of a listed event to show it live and in full on a free basis, whether that is streamed or on linear free-to-air television.

I would be happy to elaborate on any aspect of this submission as required.

Jon Marquard
Director
Janez Media
December 2022