

The logo for Optus, consisting of the word "OPTUS" in a bold, teal, sans-serif font.

Submission in response to
DITRDCA Consultation Paper

**Review of the anti-
siphoning scheme**

Public Version

December 2022

Section 1. EXECUTIVE SUMMARY

- 1.1 Optus welcomes the opportunity to comment on the Government's review (the review) of the anti-siphoning scheme. As the Minister recently noted, Australia needs to move its policy settings and regulatory frameworks into the 21st century and consider how changing technologies and content delivery platforms impact the broader media landscape.¹
- 1.2 First implemented in the 1990s in response to Pay TV entering Australia, the anti-siphoning scheme is now well overdue for review to ensure the policy objective and regulatory framework remain fit for purpose.
- 1.3 Optus considers the policy objective, that nationally important and culturally significant events be delivered free to Australians, remains appropriate. But we consider the existing regulation, focussing on restricting acquisition of events, may not be a best practice regulatory mechanism for achieving that objective.
- 1.4 The existing anti-siphoning scheme restricts who can acquire events and as such, is inherently anti-competitive with resulting negative impacts for viewing audiences and sports bodies. It can stifle innovation in content delivery, stop sports bodies from achieving fair market value for content rights and contains no obligations to stop acquired sports being buried on commercial broadcasters' secondary digital channels.
- 1.5 A key issue for the review is whether streaming services should also be restricted in acquiring content in the same way as Pay TV. However, Optus considers that the concerns about Pay TV that prompted the introduction of the anti-siphoning do not apply to streaming services.
- 1.6 Streaming services have seen significant take up in Australia (far exceeding Pay TV take up) due to lower costs than Pay TV services; ease of access via Smart TVs and other smart devices without the need for additional set-top box equipment; a large array of content and flexible month to month subscription arrangements. Subscription video on demand (SVOD) and broadcast video on demand (BVOD) services continue to grow as Australians' (including older Australians) viewing habits change and BVOD represents a future growth opportunity for commercial television broadcasters.
- 1.7 Streaming services participating in sports coverage has many benefits – it helps sports bodies achieve a fair market value for their sport; leads to more innovative coverage and particularly helps promote sports engagement with younger viewers. This is particularly beneficial for sports that are niche, have otherwise been under-represented on commercial television, under-funded or have Australian sports stars participating in overseas league competitions.
- 1.8 The growth of online viewing has been facilitated by faster and more reliable broadband with the completion of the NBN rollout and ubiquitous broadband coverage and services being available across Australia, supported by Government policies.
- 1.9 Ultimately, Optus considers that streaming services should not be precluded from acquiring rights given the benefits that can flow from their involvement, but, if the

¹ Minister for Communications, Speech, 'Media Policy: Priorities for a New Government Seminar Communications and Media Law Association (CAMLA) and International Institute of Communications (IIC) Australian Chapter', 14 November 2022.

concern is that viewers should be able to access nationally important and culturally significant events live and free, then the regulatory framework could be amended to focus on such outcomes for viewers. That is, instead of restricting acquisition of rights, the regulatory framework could instead focus on delivery and require listed events be provided live and free.

- 1.10 This could be accompanied by other obligations, such as
- (a) viewers being able to watch events on streaming services without needing to register personal login details with the streaming service; and
 - (b) Prominence for listed content on the delivery service – if delivered via a linear broadcast service, then listed content should be broadcast on the main channels of commercial and public television broadcasters. If delivered via a streaming service, then listed content should be given appropriate prominence within the user interface.
- 1.11 Therefore, instead of restricting specific providers from participating in acquiring rights, the regulatory framework could be amended to be technologically neutral, with new obligations on delivery of content. This balances the benefits of greater provider participation with ensuring viewers receive content live and free while reducing the potential for negative impacts.
- 1.12 Significant media reform occurred five years ago to change media ownership and control regulations to support the long-term sustainability of the broadcasting industry. Ensuring the anti-siphoning framework promotes positive outcomes for sporting bodies and viewers without anti-competitive impacts would create a more level playing field focussed on achieving the overarching policy objective. This would be a further step in broader reform to achieve a more consistent, fit for purpose and outcomes-focussed approach to media regulation.

Section 2. ANTI-SIPHONING REQUIRES REFORM

Introduction

- 2.1 Optus Sport is an SVOD streaming service that primarily focusses on distributing football matches (such as overseas league competitions), as well as related sports and fitness content. From time to time Optus has provided selected matches for free.
- 2.2 The review considers if the objectives of the anti-siphoning scheme remain relevant and if the scheme, as currently set up, is fit for purpose to achieve those objectives .
- 2.3 Optus acknowledges that certain events, particularly sporting events, have a special place as part of Australia’s cultural identity. The objective of the scheme was to ensure that events of national importance and cultural significance could be received by the public free of charge.² Optus considers this remains appropriate and such an outcome should be the focus of any regulatory framework.
- 2.4 At the time the anti-siphoning scheme was first introduced, the scheme sought to achieve this objective by putting in place a process that regulated the acquisition of broadcast rights for such events by giving national broadcasters or commercial television licensee’s the first opportunity to acquire broadcast rights. If national and commercial television broadcasters did not take up such an opportunity, an event could then be removed from the list with the Pay TV broadcaster able to acquire the broadcasting rights.³ This was to address the concern that otherwise key sports would end up behind an expensive Pay TV paywall, unable to be accessed by the Australian viewing public.
- 2.5 A key issue for this review is whether streaming services should also be restricted from acquiring listed events, the same as Pay TV. Optus considers there are good reasons not to restrict streaming services from acquiring content in the same fashion as Pay TV because:
 - (a) there are clear negative impacts from restricting acquisition;
 - (b) that the traditional concerns about Pay TV do not apply to streaming services; and
 - (c) there are benefits from streaming services participating in sports coverage.
- 2.6 Instead of restricting streaming services, the Government could ensure free delivery of listed events to viewers by amending the regulatory framework to attach obligations to delivery of content, that is, listed events be delivered live and free. Along with this, Optus considers the regulatory framework could also include obligations that:
 - (a) viewers do not have to register with a streaming service if listed events are delivered this way;
 - (b) ensure prominence of Australian BVOD/SVOD services on smart TV interfaces; and

² Broadcasting Service Bill 1992 Explanatory Memorandum, p. 61.

³ Broadcasting Service Bill 1992 Explanatory Memorandum, p. 61.

- (c) ensure prominence of listed events on the delivery service – if delivered via a linear broadcast service, then listed content should be broadcast on the main channels of commercial and public television broadcasters. If delivered via a streaming service, then listed content should be given appropriate prominence within the user interface.
- 2.7 It is likely some delisting processes would still need to be retained to ensure it's clear what, if any obligations apply to listed events if rights are not acquired prior to the delisting period. Optus would welcome further engagement with Government on this and anti-hoarding obligations depending on the nature of any changes to the operation of the scheme.
- 2.8 This is an alternate approach to achieving the overarching objective of providing nationally important and culturally significant content to Australians for free without risking the detrimental impacts associated with the existing regime. These matters are discussed further below.

There are clear negative impacts from the current anti-siphoning scheme

- 2.9 The anti-siphoning scheme was implemented by way of a license condition on the Pay TV licensee – which was likely considered an effective way of achieving the desired outcome at that time. However, such a mechanism is protectionist in nature and discriminates against specific providers and has detrimental impacts to competition and innovation.
- 2.10 The consultation paper notes the Productivity Commission has previously identified such negative impacts of the scheme. The scheme also imposes substantial regulatory burdens and competitive disadvantages on those specifically discriminated against by the scheme (at that time, Pay TV). The Productivity Commission described the list as a “blunt, burdensome instrument” that was “inherently anti-competitive” and suggested the option of abolishing the anti-siphoning scheme should be explored.⁴
- 2.11 The Productivity Commission concluded that the “anti-siphoning list appears to be unnecessary to meet the objectives of wide consumer access to sports broadcasts (it may actually reduce consumer access to sports broadcasts)”.⁵ The Productivity Commission considered factors such as the penetration of Pay TV and the popularity of sport would mean it could be expected that broad coverage of events would be maintained even in the absence of an anti-siphoning list.⁶ It also considered that commercial broadcasters would be in a strong position to acquire rights even without the anti-siphoning regime because of its higher audience base and potential; to generate large advertising earnings.⁷

⁴ Productivity Commission, Annual Review of Regulatory Burdens on Business: Social and Economic Infrastructure Services, August 2009. p. 155, 157, 163.

⁵ DITRDCA, Review of the anti-siphoning scheme – consultation paper, October 2022, pp. 29-30, referencing Productivity Commission, Annual Review of Regulatory Burdens on Business: Social and Economic Infrastructure Services, August 2009. p. 163.

⁶ Productivity Commission, Annual Review of Regulatory Burdens on Business: Social and Economic Infrastructure Services, August 2009. p. 157.

⁷ Productivity Commission, Annual Review of Regulatory Burdens on Business: Social and Economic Infrastructure Services, August 2009. p. 160.

- 2.12 The Productivity Commission also contemplated whether the anti-siphoning regime should be extended to cover subscription IPTV services. It noted that this may be difficult to do where subscription IPTV services are supplied from overseas and noted that such technological change is likely to decrease the effectiveness of the scheme. It concluded on issue that attempts “to increase the reach of anti-siphoning regulations could exacerbate the anti-competitiveness of the scheme and may prove difficult to achieve in any case”.⁸
- 2.13 The anti-competitive nature of the scheme negatively impacts both sporting bodies and viewers by:
- (a) inhibiting the ability of sports bodies to achieve fair market value for their sports (reducing certainty and revenue that could be invested to promote sports participation); and
 - (b) stifling innovation in coverage - for example, HD coverage of sports was first introduced by Pay TV rather than commercial broadcasters.
- 2.14 While interim measures recommended by the Productivity Commission, such as substantially shortening the list, and applying criteria to do so have been implemented, this does not address the fundamentally anti-competitive nature of restrictions on acquisitions.
- 2.15 Optus submits that serious consideration must be given to whether the objectives of the scheme can be achieved in an alternative way, that minimises the likelihood of detrimental impacts.
- 2.16 Optus further notes a key consideration of the review – whether streaming services should be restricted from acquiring rights the same as Pay TV – would have additional negative impacts if introduced. The participation of streaming services in sports coverage has many benefits (discussed later in this submission) and these would be diminished or no longer realised if streaming services were restricted from acquiring rights in the same way as Pay TV.
- 2.17 Optus submits that before considering the operation of the anti-siphoning scheme it should be considered whether the traditional concerns about Pay TV are relevant when considering streaming services. Optus does not consider that streaming services raise the same sorts of concerns as Pay TV and therefore, streaming services should not be treated the same as Pay TV.

Traditional concerns about Pay TV do not apply to streaming services

- 2.18 Optus submits there are key differences between Pay TV and streaming services that mean the traditional concerns about Pay TV that prompted the introduction of the anti-siphoning scheme do not apply to the same extent streaming services. This is because:
- (a) Streaming services already have strong penetration in Australia with 84% of households having at least one paid digital service.
 - (b) Streaming services are significantly cheaper than Pay TV with month-to-month subscriptions do not have lengthy lock-in contracts like Pay TV has

⁸ Productivity Commission, Annual Review of Regulatory Burdens on Business: Social and Economic Infrastructure Services, August 2009. p. 162.

traditionally had (e.g. 12 or 24 months) and offer flexibility in easily managing subscriptions;

- (c) Streaming services are easily accessible via multiple platforms such as smart TV, laptops/computers, tablets and phones and do not require additional equipment like set top boxes (STBs).
 - (d) Faster and more reliable broadband infrastructure is widely available with completion of the NBN rollout and Government policies.
 - (e) Delivering content over the internet is as reliable and valuable as terrestrial transmission, with viewers and commercial and public television broadcasters making increased use of internet delivery.
- 2.19 Streaming services have become an integral part of Australians' viewing habits – 84% of Australian households have at least one paid digital subscription in 2022⁹ and 30% of households have a sports subscription, driven by aggregated providers such as Optus Sport and Kayo.¹⁰ As a result of this continuing take up, Australians are more likely to be watching streaming services than traditional commercial broadcast television.¹¹
- 2.20 Streaming services are popular for a number of reasons. They offer relatively easy access to a large array of content via existing internet connections, without the need for additional equipment, at a significantly lower price point than traditional Pay TV.¹²
- 2.21 The low cost and ease of accessing streaming services have contributed to take up of multiple services per household – on average, households have 3.1 services.¹³ Ease of access means that streaming services are not just used by younger demographics. The majority of more mature households have at least one paid entertainment subscription (73% of households aged 56-74 and 64% of households over age 75).¹⁴ Importantly, recent growth in digital subscription penetration has been entirely driven by older age groups as younger consumers have largely reached peak penetration (95%).¹⁵
- 2.22 The flexibility of month-to-month subscriptions allows simple management of services compared to traditionally lengthy lock-in contracts for Pay TV services (usually 24 or 12 months). This means consumers can adjust their spend and services regularly as needed. For example, the Deloitte Media Consumer Survey notes that while 33% of

⁹ Deloitte, Media Consumer Survey 2022, p. 3. Available at: <https://www2.deloitte.com/au/en/pages/technology-media-and-telecommunications/articles/media-consumer-survey.html>

¹⁰ Deloitte, Media Consumer Survey 2022, p. 35.

¹¹ The ACMA's annual consumer survey showed that in 2021 Australians were more likely to have watched streaming services (58%) than commercial broadcast television (54%). ACMA, Communications and Media in Australia - Trends and developments in viewing and listening 2020–21, June 2022, p. 4.

¹² ACMA, Communications and Media in Australia - Trends and developments in viewing and listening 2020–21, June 2022, p. 6.

¹³ Deloitte, Media Consumer Survey 2022, p. 8.

¹⁴ Deloitte, Media Consumer Survey 2022, p. 7.

¹⁵ Deloitte, Media Consumer Survey 2022, p. 16.

households added a subscription in the last 6 months; 31% cancelled a subscription during that time. Nearly half (46%) of all users periodically review whether to add, keep or cancel subscription services.¹⁶

- 2.23 Such behaviour shows that consumers actively use and take advantage of flexible month-to-month arrangements. It is also worth noting that even with current economic concerns, digital entertainment is only likely to be cancelled after reducing spending on eating out, alcohol and tobacco and groceries.¹⁷ Such services have clearly become a central part of Australians' entertainment and viewing choices. Notwithstanding this, some streaming services recognise there are opportunities for lower priced, ad-supported tiers to attract and retain price sensitive consumers.
- 2.24 Along with low monthly cost, large arrays of content and no lock-in contracts, the proliferation of smart devices (such as smart TVs) has also facilitated greater consumption of online content and usage of streaming services. Smart TVs offer improved functionality, with electronic program dashboards, onscreen apps and dedicated buttons on remotes allowing easy use and access of streaming services.¹⁸
- 2.25 The penetration of streaming services over the last eight years has coincided with the rollout of faster and more reliable broadband, with the NBN now built and fully operational. In particular, during the pandemic, Australians relied more than ever on broadband services to deliver health, education, business and entertainment services. Government policies such as the Universal Service Guarantee, Statutory Infrastructure Provider framework and Better Connectivity for Rural and Regional Australia Plan ensure that all Australians are able to access such broadband services.
- 2.26 Not only is NBN coverage ubiquitous, the NBN has legislated fixed-line speed performance targets¹⁹ with the Government able to specify performance standards, benchmarks and rules for connection, fault rectification and speeds that would apply to NBN Co and other Statutory Infrastructure Providers. In addition, the amended Special Access Undertaking and next Wholesale Broadband Agreement (WBA5) (expected to be finalised in mid-2023) are expected to further strengthen service levels with increased focus on reliability and performance now that construction of the rollout has finished.
- 2.27 The arrival of streaming services, changes in audience viewing habits, and improved broadband infrastructure has seen commercial and public television broadcasters respond by developing their VOD services to the benefit of viewers. Such services include live streaming channels, catch-up programming, back catalogue TV series and movies online and have also been used to complement main channels for listed events such as, the Olympics. The ACMA notes that these features of these platforms enable broadcasters to compete in the online content space for both audience and advertising

¹⁶ Deloitte, Media Consumer Survey 2022, p. 22.

¹⁷ Deloitte, Media Consumer Survey 2022, p. 9.

¹⁸ ACMA, Communications and Media in Australia - Trends and developments in viewing and listening 2020–21, June 2022, p. 6.

¹⁹ Section 360S, Telecommunications Act.

revenue²⁰ and viewing of these services has grown over the last 5 years from 19% to 37% of households.²¹

- 2.28 Importantly for commercial television broadcasters, earnings from their VOD services are increasing strongly, with a forecast annualised growth rate of 32.7% for 2019-2025. The ACMA notes that in 2020 revenue from broadcasters' VOD services grew 38.8% on the prior year, to \$229 million. The ACMA considers there are opportunities for commercial broadcasters to increase revenue growth for their VOD services with more ratings data being available to advertisers for these services.²²
- 2.29 All of these factors demonstrate that the original concerns about the cost and inaccessibility of Pay TV as justification for the anti-siphoning regime simply do not seem to be applicable to streaming services.
- 2.30 As such, despite the low cost of streaming services, and willingness of sports viewers to pay to watch sports on streaming services,²³ Optus considers the key focus of the review and the anti-siphoning scheme should not be whether streaming services should be restricted from acquiring rights in the same way as Pay TV but how best to achieve the desired outcome of ensuring viewers have access to specified events for free while minimising detrimental impacts to competition and innovation. Optus considers that rethinking this approach can minimise the likelihood of negative impacts while maximising benefits that come from more providers participating in sports coverage.

There are benefits from more providers participating in sports coverage

- 2.31 Optus submits significant benefits would come from a scheme that focusses on key obligations regarding delivery of specified sports events, rather than having a scheme that excludes certain providers from acquiring rights. It can provide benefits to players, the viewing public and sports bodies. Such benefits include:
- (a) A greater number of platforms provide greater exposure and funding for niche sports and sports that have been traditionally under-represented on commercial broadcast television, such as women's sports or overseas-based league competitions;
 - (b) Benefits to the viewer such as more innovation and increased viewing flexibility; and
 - (c) More opportunity and certainty to achieve fair market value for sports bodies which can support the ongoing sustainability and development of the sport (and therefore also more sports viewing opportunities for Australians).

²⁰ ACMA, Communications and Media in Australia - Trends and developments in viewing and listening 2020–21, June 2022, p. 7.

²¹ ACMA, Communications and Media in Australia - Trends and developments in viewing and listening 2020–21, June 2022, p. 6.

²² ACMA, Communications and Media in Australia - Trends and developments in viewing and listening 2020–21, June 2022, p. 8.

²³ 49% of sports viewers are willing to pay at least \$20 a month for watching sports on streaming services. Deloitte, Media Consumer Survey 2022, p. 13.

- 2.32 Optus notes that streaming services can promote sports that have traditionally been under-represented on commercial television broadcast channels, such as women's sports. This also includes providing a platform for Australian sports people playing in overseas league competitions or for other niche sports.
- 2.33 For example, Optus Sport was one of the first 3 broadcasters in the world to invest in rights for the Barclay's Women's Super League, where multiple national Australian players have played over the last several years. Similarly, no Australian broadcaster had the rights to the 2022 women's FA Cup final (which included Australian national players in the competing teams), so Optus Sport bought the rights and made it available for free to all Australians (i.e. viewers did not need to have Optus Sport or another Optus service to watch the match). Further, Optus provided free Optus Sport coverage of the FIFA Women's World Cup in 2019 for all school aged children as part of the 'change the future they see' campaign to promote visibility and engagement with women's sport.
- 2.34 Streaming services have contributed to the increasing viewership of women's sports with 51% engaging with women's sport.²⁴ The 2022 Deloitte's media consumer survey notes that 37% say they would watch more women's sport if advertised more broadly, and an equal proportion would watch more if more content was available.²⁵
- 2.35 Streaming services also promote engagement with sports that may otherwise be unfamiliar to viewers. For example, 17% of sports watchers engage with new sports because of sports documentaries on such services (and this figure is higher for younger viewers).²⁶ This increases a sports' fanbase and promotes engagement with the sport.
- 2.36 Optus considers that providers other than commercial television broadcasters have played an important role in promoting women's sports and providing opportunities to watch Australian players participating in high quality international competitions.
- 2.37 In addition, providers other than commercial and public television broadcasters have led to more innovation and advancement in sports coverage (such as high-definition coverage) and streaming services can offer flexibility in how content is watched (e.g. on portable devices, live or catch up on demand, whether long form or short form such as 'mini matches' and other related content) leading to a better viewing experience for the audience.
- 2.38 Finally, more providers seeking sports rights can provide more opportunity and certainty to sports administrators regarding fair market value for coverage which can be used to support the ongoing sustainability of the sport, for example:
- (a) via investment in and development of local sports programs and facilities to promote participation;
 - (b) by retaining quality Australian players who may otherwise leave to participate in competing international competitions; and
 - (c) by funding sports, such as women's sports, that have traditionally received less funding than men's sports.

²⁴ Deloitte's, Media Consumer Survey 2022, p. 13.

²⁵ Deloitte's, Media Consumer Survey 2022, p. 36.

²⁶ Deloitte's, Media Consumer Survey 2022, p. 35.

2.39 Therefore, providers other than commercial and public television broadcasters play an important role particularly in delivering international, niche, under-funded or under-represented sports, and can ultimately 'move the dial'/ bring about change over time.

Operation of the scheme needs to change

2.40 As noted earlier in this submission, Optus does not consider the traditional concerns about Pay TV that prompted the introduction of anti-siphoning, apply to streaming services and therefore streaming services should not be restricted from participating in sports coverage. That said, significant reform of media ownership and control regulations occurred five years ago to address the changing media landscape and long-term sustainability concerns of the broadcasting industry. If the Government considers the anti-siphoning scheme also warrants reform, Optus considers it could be amended to adopt a more future-proof approach to operate in a way that benefits viewers and sporting bodies while minimising the likelihood of any potential negative impacts.

2.41 Therefore, Optus considers that a scheme that is focussed on achieving its objective of ensuring Australians have free access to nationally important and culturally significant events is likely to be more beneficial than a scheme that discriminates against certain types of providers and prevents them from acquiring rights in the first instance. That is, any regulation should focus on obligations on delivery, rather than regulation on who can acquire rights to listed events.

2.42 Optus considers that as the traditional concerns about Pay TV do not apply to streaming services the anti-siphoning scheme should move away from acquisition restrictions on certain providers defined by technology or platform. Instead, any regulation should be focussed on achieving the key outcome – that is, if the sport is able to be provided live and free broadly across Australia (whether this be broadcast specific infrastructure or broadband infrastructure), it should not be relevant who has acquired the sports rights.

2.43 Optus considers that a scheme should be crafted so that it does not protect or discriminate against specific platforms or technologies, but, that it focusses on achieving the content delivery objective. Optus considers that any scheme should focus on the following key aspects and obligations:

- (a) That restrictions on acquiring rights no longer exist for specific platforms/technologies and instead requirements focus on how content is delivered;
- (b) That listed events are supplied live and free of charge (in front of any paywalls); and
- (c) That listed events are supplied by a streaming service without viewers needing to provide personal login details to that streaming service in order to watch the event..

2.44 Such a scheme would ensure listed events can be delivered via ubiquitous services, live and for free (in front of any paywalls) without the viewer having to register personal login details with the streaming service (if the viewer does not ordinarily use that streaming service). This would ensure that listed events are supplied on the same terms as currently supplied under the anti-siphoning scheme while promoting market conditions that allow sports bodies to achieve a fair market value.

2.45 Streaming services already supply some selected content for free. For example, Optus Sport has delivered the 2022 UEFA European Women's Football Championship and the women's FA Cup final (2022) for free. Similarly, Kayo offers Kayo Freebies, offering

content free of charge, including some live tier one matches.²⁷ Optus considers if live and ‘free’ delivery is a key element of any anti-siphoning regime then there should be no restrictions over who can acquire the rights to listed events.

- 2.46 Optus also considers that prominence should be a key aspect of any scheme to ensure that specified content is easy for consumers to find. This could include:
- (a) Prominence for Australian BVOD/SVOD services on smart device platforms (for example, smart TV user interfaces); and
 - (b) Prominence for listed content on the delivery service – if delivered via a linear broadcast service, then listed content should be broadcast on the main channels of commercial and public television broadcasters. If delivered via a streaming service, then listed content should be given appropriate prominence within the user interface.
- 2.47 Optus considers that where content is considered so nationally important and culturally significant that it warrants listing on the anti-siphoning list, then such content should be delivered in a prominent fashion. If events are shown on secondary channels and not the main channels of commercial/public broadcasters this potentially suggests an event does not retain the importance and significance nexus needed to remain on the anti-siphoning list.
- 2.48 In addition, the reduction in events on the anti-siphoning list in 2017 removes some of the challenges that had previously been associated with such channel obligations. Such obligations are appropriate for events of national importance and cultural significance on the anti-siphoning list.
- 2.49 Adopting a technologically/platform neutral approach to the scheme would also be consistent with the Government’s proposed policy approach for broader reform of media regulation (and streaming services). In remaking the recent Broadcasting Services (“Broadcasting Service” Definition — Exclusion) Determination (the Alston Determination) for a further 5 years, the Government noted that this is to allow time for the Government to develop and implement broader reform to the regulatory arrangements applicable to broadcasting services.²⁸
- 2.50 Submitters acknowledged the importance (and necessity) of considering the making of the Alston Determination as part of a broader program of work to reform media regulations and harmonise media and broadcasting laws. Optus considers that adopting a technologically neutral, delivery-focussed approach to anti-siphoning is a simple first step as part of broader media harmonisation and regulatory reform.

The anti-siphoning list should be carefully targeted

- 2.51 Optus considers it important that events on any anti-siphoning list should be reviewed regularly to ensure they are identified as being nationally important and culturally

²⁷ <https://help.kayosports.com.au/s/article/What-is-Kayo-Freebies#:~:text=Kayo%20Freebies%20provide%20a%20taste,at%20our%20Weekly%20Freebies%20Guide>.

²⁸ Explanatory Statement, Broadcasting Services (“Broadcasting Service” Definition — Exclusion) Determination 2022, p.

significant. Optus notes major streamlining of the list took place in 2017 with significant reduction of the events on the list.

- 2.52 Factors that were considered as part of that process included clearly identifiable national importance or cultural significance; audience viewing patterns, history of rights acquisition by commercial television broadcasters and whether the events were still current.²⁹
- 2.53 Optus considers that events that are niche or overseas-based league competitions based overseas should not be added to the event list as they are unlikely to meet the criteria of national importance or cultural significance.
- 2.54 In addition, there's unlikely to be benefits in adding further events to the list if the scheme continues to operate in the same way (by imposing restrictions on certain parties regarding rights acquisition). If the scheme continues to operate as is and expands to restrict streaming services from acquiring rights, instead of focussing on how content is delivered, it is difficult to see how any additional events on the anti-siphoning list would fit into an already full commercial broadcasting schedule.
- 2.55 As the existing scheme only regulates acquisition and not delivery of content, adding more events to the list could see these events potentially ending up with less exposure if they are not acquired nor broadcast on commercial television's main channels. It leaves the event with uncertainty over any delivery arrangements, with other providers potentially relying on delisting arrangements with less time to advertise, promote and prepare delivery of the event.
- 2.56 As noted previously, the broad acceptance and availability of streaming services means the concerns that originally prompted the anti-siphoning scheme no longer exist and the benefits to sports and audiences from streaming service participation means there is a less compelling case for adding any further events to the anti-siphoning list.

Anti-hoarding and delisting processes

- 2.57 Optus notes that depending on what (if any) changes the Government may wish to make to the scheme, anti-hoarding and delisting process may require further consideration, amendments or may no longer be needed.
- 2.58 If the Government considers streaming services should be brought within the scheme, then Optus considers that the operation of the scheme needs to focus on obligations on delivery of listed events, rather than on restricting certain providers or platforms in acquiring rights. In those circumstances, there may still need to be delisting processes. For example, if events have delivery obligations attached to their rights and rights for those events are not purchased prior to a certain time, then it's arguable the delivery obligations should not apply. Optus considers the delisting process is important and consideration should be given to whether 26 weeks is the appropriate period of time (or whether this should be longer) to allow other providers sufficient time to prepare and promote events acquired after the relevant time.
- 2.59 Similarly, as the existing scheme only focussed on regulating acquisition and not delivery, anti-hoarding obligations have been needed to address the risk that the overarching objective of the scheme could be undermined by acquiring rights without

²⁹ Explanatory Memorandum, Broadcasting Legislation Amendment (Broadcasting Reform) Bill 2017, pp. 7-8.

broadcasting the event for free. If the Government changes the scheme to focus on delivery obligations instead of acquisition restrictions then this may remove the need altogether for anti-hoarding obligations. Further consideration of this issue may be required depending on the Government's preferred approach and Optus would welcome further engagement on this issue at that time.

- 2.60 Ultimately, Optus considers that streaming services should not be precluded from acquiring rights given the benefits that can flow from their involvement, but, if the concern is that viewers should be able to access nationally important and culturally significant events live and free, then the regulatory framework could be amended to focus on such outcomes for viewers. That is, instead of restricting acquisition of rights, the regulatory framework could instead focus on delivery and require listed events be provided live and free along with other obligations such as:
- (a) viewers being able to watch events on streaming services without needing to register personal login details with the streaming service; and
 - (b) prominence for listed events on the delivery service – if delivered via a linear broadcast service, then listed content should be broadcast on the main channels of commercial and public television broadcasters. If delivered via a streaming service, then listed content should be given appropriate prominence within the user interface.
- 2.61 Optus considers that focussing on delivery outcomes for viewers could go some way to simplifying how the overarching objective of live and free delivery of nationally important and culturally significant events is achieved. Optus would welcome further engagement with the Government on additional matters as needed.