

Submission to anti-siphoning inquiry

Emeritus Professor Rodney Tiffen, University of Sydney
Emeritus Professor David Rowe, Western Sydney University
Professor Brett Hutchins, Monash University

The focus of this inquiry should be unashamedly and consistently on the public interest. The public interest is not synonymous with the self-interest of any of the major players.

The anti-siphoning laws had their origin in the development of pay TV in this country, and although their benefit to the free-to-air (FTA) networks and especially Kerry Packer no doubt played some role in the government's thinking, the wishes of the majority of the public were at least equally important.

The clear intention of the *Broadcasting Services Act 1992* was to ensure social equity and the continuation of the long-standing ability of Australian audiences to watch their favourite sports on TV for free. Sport then, and still now, attracts very large audiences and is significant in the everyday lives of many Australians.

In the decades since the introduction of anti-siphoning laws, the dominant lobbying pressure has been overwhelmingly in one direction – towards a weakening of the public safeguards.

One obvious source of this urging was the monopoly pay TV company, Foxtel. Perhaps more surprisingly another has sometimes been individual sports bodies themselves, because pay TV could offer more money than the FTA networks despite their much smaller audiences because of the different financial logics involved.

For commercial FTA TV, buying the sporting rights must essentially pay for itself in terms of the extra viewers and advertising revenue that the events will bring. A pay TV operator, however, is primarily motivated by the wish to secure paying subscribers, and so purchasing the rights can pay off if it generates sufficient extra subscriptions and extra advertising across the whole network. Rupert Murdoch told his shareholders in 1996 that, 'we intend to [...] use sports as a battering ram and a lead offering in all our pay-television operations'.

For sporting bodies this is typically a Faustian bargain involving a trade-off: greater rights revenue but fewer people watching. Some sports, it seems, are more interested in short-term profits than in enhancing or maintaining the popularity of their game through greater exposure. This decline in viewers can be steep. For example, in 2005 in the United Kingdom, almost 2 million people watched the FTA live telecasts of an Ashes series, and just under 200,000 watched it on pay TV. In the following years, when it was no longer available on FTA, the number watching on pay TV rose, but only marginally, to just over 200,000. Sporting bodies are thus choosing to make their product unavailable to many, indeed most, of their existing fans. Inside each sport this also typically seems to involve redistribution upwards. More of the income is kept at elite level and less of it flows down into developing the sport at community level.

The digitisation of television enabled multi-channelling for all broadcasters, but this technological process also offered many other ways of providing screen-based content, including through over-the-top (OTT) internet-enabled, on-demand streaming services.

The growth of OTT services in Australia since 2015 has seen the introduction of: (1) streaming video services specialising in live and on-demand sport (e.g. Optus Sports, Kayo, The Olympic Channel, beIN Sports Connect, DAZN and Sports Flick); (2) streaming services featuring live and/or on-demand sport programmes and documentaries amongst a broader range of entertainment offerings (e.g. Stan, Amazon Prime Video, Paramount+, Netflix, SBS On Demand and ABC iView); (3) social media and user-generated content services that have expanded their operations to include live professional and semi-professional sport alongside dedicated sport channels and highlights (e.g. YouTube, Twitch, TikTok, Facebook and Twitter). National and international operators include small start-ups, heavily capitalized services focused on single and multiple sports, and established telecommunications operators and terrestrial broadcast television networks moving their programming to live and on-demand streaming. ‘Big tech’ such as Amazon (Prime Video and Twitch), Google (YouTube) and Facebook are also expanding their live rights and content libraries across multiple territories, including Australia. Consistent with the history of sport on FTA and subscription television, both exclusive and non-exclusive coverage rights are used by OTT platforms to attract viewers, sell advertising, and promote wider programme offerings and related services.

The determination of subscription-based media companies to control and monetise premium sports content remains despite the technologies used by viewers having changed since the introduction of pay television. If anti-siphoning is removed or greatly reduced consumers may have to subscribe not only to one pay network but to several to see their favourite sports. One sport reporter estimated that, as of 2021, the increased number of commercial mediated sport content providers in Australia meant that sport viewing ‘has just become more complicated and more expensive’ and the ‘coverage of sport has become increasingly balkanised’. He calculated that the combined cost of four key subscriptions ranged between \$747 and \$1704 a year, depending on broadcast quality and delivery service.

The previous Coalition government substantially reduced the list of protected events. It removed several overseas tournaments, such as Grand Slam tennis tournaments including Wimbledon. It has completely delisted all golf tournaments, both international and Australian. Some of these changes may be justified, but at the same time they have made it harder and more expensive for viewers to watch Australian representative teams in some sports.

FTA television is increasingly challenged by the multiplication of new services. But live sport is a form of programming where television continues to play a preeminent role for viewers nationally. FTA access to sport than its competitors. The further reduction of protected sports does not benefit the bulk of the viewing public. All the preceding considerations mean that more than ever there need to be strong anti-siphoning laws.

Proposal 1: ‘Modernising’ policy to meet the new challenges of the digital age means expanding and strengthening the anti-siphoning regulations not reducing and weakening them.

The multiple modes of delivery now available do not mean that the concerns that led to anti-siphoning regulations have disappeared, rather the opposite.

Proposal 2: The anti-siphoning laws should be extended to all potential sources of digital media.

Any loopholes which emerge due to technological change, including overseas ownership and organisation of platforms, need to be closed to ensure that nothing interferes with the public's right to watch the biggest and most popular events ('events of national importances and cultural significance, in the words of the Act) for free. The public issues concern cost to consumers and exclusivity rather than particular modes of delivery.

Proposal 3: The ability of FTA networks to secure broadcasting rights brings the responsibility to deliver them to enable the greatest public access.

The FTA networks quickly showed that their commercial interests are not identical with the public interest by only broadcasting events belatedly or partially rather than live and in full.

The old simple binary of FTA vs pay has become more complex, with FTA networks and subscription companies forming coalitions. This was first manifested where a sport's offerings can be disaggregated, such as in the two main winter codes – Australian rules football and rugby league – where there are several matches in each round. This scheduling also helped solve the networks' problem, that while the rights were allocated on a national basis, the two football codes have greatly contrasting popularity in the northern and southern states.

In 2020, under a new agreement, four of nine matches over each weekend of the AFL competition were shown live on the Seven Network, while all were shown live on Fox, meaning that five of the nine AFL games were shown exclusively on Fox. This arrangement did not provoke much criticism, as it did not entail an actual reduction in the games already available to FTA viewers.

However, this disaggregation was a prelude to a much more important degradation of the policy. In 2018, a six-year agreement between Cricket Australia, the Seven Network and Foxtel removed, for the first time, a sport event that had been explicitly nominated on the anti-siphoning list through a commercial arrangement. As a result, the first men's one-day international cricket match of the series between Australia and South Africa in Perth in November 2018 was only available on the subscription-based Foxtel platform. Therefore, only about three in ten households had access to it. In late 2022 Australia played three one day internationals against England which were not available on FTA. It is very likely that these matches drew the smallest TV audiences ever for such a series thanks to the exclusivity arrangements.

When the 2018 agreement was reached the then Minister, Mitch Fifield, was unconcerned

[the anti-siphoning list] does not mandate that free-to-air broadcasters have to purchase events. It does not mandate that if they do purchase, that they have to show them. And it does not mandate that if they do purchase events that they can't then on-sell them to other platforms. The list ... is there to increase the likelihood some of these significant events are on free TV.

This is a radical misrepresentation of the history and purposes of the Act, turning a safeguard for public access into a property transaction simply guided by the greatest commercial opportunities. That the relevant provisions of the Act can be reduced to '[increasing] the

likelihood' that some listed events *might* appear on FTA television highlights the political and regulatory disengagement under the Coalition government.

It follows that FTA networks using the opportunities open to them through anti-siphoning should not be allowed to on sell these rights in ways that don't allow free to air audiences to have access. It also follows that TV networks should broadcast events live and fully whenever possible. The gift of multi-channelling to the existing networks by the Howard Government should mean that this is almost always feasible.

Proposal 4: Rules should be enforced.

The dominant deregulatory ethos was manifested in the response to a request to ACMA by one of us (Tiffen) in 2018. ACMA was asked to investigate a *prima facie* breach of the anti-siphoning laws in the agreement between Cricket Australia, the Seven Network and Foxtel, which involved Foxtel gaining exclusive rights to some events on the anti-siphoning list. In response, the industry regulator 'concluded that it would not be in the public interest to proceed with an investigation of your complaint'.

Proposal 5: The anti-siphoning list should be maintained, and subject to regular reviews, with the reasons for decisions made as transparent as possible.

Unless and until other platforms are comparable to FTA television in social equity terms and in geographical reach beyond the major cities it should remain the principal vehicle for carriage of listed sports events. This means the 'freemium' streaming offerings like Foxtel Kayo Sports should not be considered as the equivalent of FTA TV until they attain comparable household reach of over 80 per cent. If and when they do so, another issues needs to be addressed – audience surveillance and data collection.

When the anti-siphoning list is publicly debated, most attention is on which sports will be included or removed. This has typically been an opaque process. A government advisory body, the Productivity Commission was a critic of the list's very existence as far back as 2000, concluding that it was exclusionary and gave the FTA broadcasters an unfair advantage over the subscription broadcasters. It also made the telling criticism that there were no transparent criteria for including sports on the anti-siphoning list. Why, it asked, were the Hong Kong Rugby Union Sevens on the list, but not swimming and athletics events taking place in Australia?

Neither media nor sport organisations always respond quickly to accommodate major changes in social demography and cultural pursuits. The list should be regularly scrutinised and discussed, and sometimes revised, not just reduced.

The diversification of the anti-siphoning list in terms of sports, participants and spectators should be a continuing concern. Arbitrary screen audience sizes for sports, such as 200,000 (mentioned in the Consultation paper) should not provide by themselves sufficient grounds for exclusion. Current audiences numbers alone do not provide an adequate test of 'events of national importance and cultural significance'. For example, sports that benefit from national government funding for development programs, athletic scholarships and facilities should be made available to the tax payers who provide the support.

Proposal 6: There should be a budget allocation for partnerships between particular sports, FTA networks and government.

Perversely the Coalition gave Foxtel grants of \$40 million to broadcast women's and other under-represented sports. If that were the aim – and not simply to give Foxtel a handout – it was ridiculous to give it to a broadcaster which reached less than a third of the population. No criteria for evaluating effectiveness seem apparent.

Such grants should be maintained but awarded to an FTA network. They should be contestible with different sporting organisations and networks combining to make submissions based on how a grant would become commercially feasible over say three years, its potential popularity and audience size, and how it would contribute to the growth of the sport in the community, especially among women and other under-represented groups. Normally such a grant would last for two to three years

Even in the digital age, free to air television remains a popular, reliable and widely accessible medium that has minimal barriers to Australian citizens who wish to watch listed sports events. The list of 'protected' sports events has shrunk in recent years while flaws in the regime have become increasingly apparent, including the ability of acquired broadcast sports rights to be on-sold to subscription platforms.

This inquiry should make a strong statement about the continuing need for an anti-siphoning list and recommend ways as we have above to make it more effective. In a world of changing technologies and globalising media the need to guarantee the Australian public's access to events of national importance and cultural significance remains of central importance.