

Submission in response to *Media Reform Green Paper: Modernising television regulation in Australia*, May 2021

***Events of National Importance and Cultural Significance:
Sustaining and Enhancing Sport Anti-Siphoning***

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Executive Summary

Sport should have been included in the *Media Reform Green Paper*, and the free-to-air televising of sport should be a central concern in government responses to it. Sport attracts very large audiences and is significant in the everyday lives of many Australians. The anti-siphoning laws have important weaknesses that should be addressed. But, they were introduced for the compelling reason that exclusive commercial deals between media and sport organisations should not prevent the widest possible, free public access to major sports events of national importance and cultural significance.

To summarise, we submit that an anti-siphoning list should be maintained, revised as necessary, and protected from circumvention. For this important aim to be realised as crucial media reform, the governing legislation requires:

- Amendment to ensure that all those who carry live sport, including broadcast, Internet, streaming and mobile services, are embraced by legislative anti-siphoning criteria.
- Closure of the loophole that allows acquired listed sports rights to be on-sold or passed around in ways that repudiate the principles of social equity.
- The integrity of the anti-siphoning list to be maintained on the basis that it is enforceable but also regularly modified (and not simply reduced) according to clear criteria whereby sports events join and leave it according to their national cultural relevance.
- The progressive reincorporation of public service broadcasting into the media sport field as a guarantor of cultural citizenship rights regarding live television sport.
- Recognition that even in the digital age, free-to-air television remains a popular, reliable and widely accessible media technology that has minimal barriers to Australian citizens who wish to watch listed sports events.
- A multiple rights model to operate that overrides exclusivity in cases where it reduces access to listed events. Unless and until other platforms are comparable to free-to-air television in social equity terms, it should remain the principal vehicle for carriage of listed sports events.

Television regulation in Australia cannot be ‘modernised’ by allowing the anti-siphoning regime to wither on the vine in gesturing to technological innovation, market de-regulation and unequal choice. Retaining and revising a list of sports of national importance and cultural significance in this changing televisual environment would enable innovation to enhance rather than erode cultural citizenship in Australia.

Introduction

The *Media Reform Green Paper* addresses important concerns about the free-to-air television business model in Australia and the public policy problems flowing from it. These include the persistent reliance on free-to-air television by “older Australians, the less affluent and those in regional and remote areas” (p. 4). Wide availability of content, including news services, “for items of national importance, and items of local significance” (p. 4), are also emphasised as crucial to the current public policy framework. While there are many areas of television content “of national importance”, including news, children’s, documentary, art and drama (and, missing from the *Green Paper*, education) that require urgent attention, there is little concern in the *Green Paper* with the important domain of sport. Although there is continuing, lively debate concerning the place of sport in Australian culture, including its relationship to other cultural forms (such as the arts) and to gendered, sexual, racial and ethnic structures of power, there is no doubting sport’s significance in the everyday lives of many Australians (Rowe, 2016; Gayo and Rowe, 2018; Rowe and Gayo, 2020).

As one of television’s most valued viewing experiences and prized commercial assets, live sport has been at the centre of digital media transformations in the ‘network society’ (Hutchins and Rowe, 2012; 2013). Broadcast sports events of “national importance and cultural significance” are intended to be protected by an anti-siphoning regime that preferences free-to-air access in maximising public access to them on grounds of social equity:

Moreover, the potential effects of the scheme on sports organisations and broadcasters need to be considered alongside the broader aim of enhancing the viewers’ experience of major sporting and other events. Notwithstanding the rapid changes underway in the media market, the FTA and subscription television broadcasting remain the two platforms on which the vast majority of sports viewing takes place in Australia. If the aim of the scheme is to ensure the free availability of nationally important and culturally significant events, then protections in favour of the FTA platform are one mechanism to achieve this ‘social equity’ objective.

Reform of the Anti-Siphoning Scheme Regulation Impact Statement (Australian Government, 2017: 14-15).

In addition to social equity concerns, live sport is, along with news, current affairs and (sport-like) competitive reality show programming, of key importance to the financial viability of free-to-air television in the 21st century (Turner et al, 2020). For these reasons, sport must figure strongly in any program of reforming and modernising media regulation in Australia.

Protection and Enforcement

The list of ‘protected’ sports events has shrunk in recent years (Australian Government, 2017: 16-17; Rowe, 2017), while flaws in the regime have become increasingly apparent, including the ability of acquired broadcast sports rights to be on-sold to subscription platforms, and the reluctance of the Australian Communications Media Authority (ACMA) to intervene in the public interest when there are apparent breaches of the Broadcast Services Act 1992 (as amended) relating to anti-siphoning. The comments of former Minister for Communications, Mitch Fifield (a member of the free-market Institute for Public Affairs think tank), who oversaw the reduction of the list, are instructive:

[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. (quoted in Tiffen, 2018a)

That the relevant provisions of the Act can be reduced merely to trying to “increase the likelihood” that some listed sports events might appear on free-to-air television only serves to highlight current regulatory and political disengagement.

The future of the anti-siphoning list – extended for two years by the Federal Government in March 2021 – and the legislative provisions surrounding it are uncertain (Hennessy, 2021), with a review of the list expected “as part of a broader media reform program” (Samios, 2021). Except, as noted, there is no mention of anti-siphoning in *Modernising television regulation in Australia*. Confidence in its future is also hardly reinforced in light of a request by one of us (Tiffen) for ACMA to investigate a *prima facie* breach of the anti-siphoning laws in an agreement between Cricket Australia, the Seven Network and Foxtel. The referral to ACMA was made because Foxtel acquired exclusive rights to One Day International (ODI) and Twenty20 (T20) matches involving Australia, played in Australia, both of which are 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. (quoted in Tiffen, 2018b)

As a result of this arrangement, for example, 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 Foxtel. Therefore, only “about three in 10 households”, averaging “205,000 viewers” or about one fifth of the usual free-to-air TV audiences for such matches (Tiffen, 2018b), could see the match on television at home.

Here the different financial calculi for commercial free-to-air broadcasters and pay TV operators are revealed. The former seek to maximise viewership and advertising exposure, while the latter are motivated mainly to secure more paying subscribers for this and various other services, although they also receive advertising income. As the history of the international ‘Murdoch Empire’ has dramatically demonstrated, subscription broadcasters are willing and able to outbid the free-to-air networks, sometimes by enormous margins, in order to build their subscriber bases (Rowe, 2004). Sporting bodies, many of which, like subscription providers, object to state interference in the media sport market (while usually being in receipt of public funds and tax concessions), are prepared to ‘trade’ increased revenue for smaller broadcast audiences, choosing to make their product unavailable to many, indeed most, of their existing fans. This financial strategy is unconvincingly justified by gesturing to ‘trickle down’ sport economics, whereby lower and junior levels of the sport receive some of the benefit of these large rights contracts. The conventional outcome, though, is for most of the additional funding to go to the elite tiers that attracted it in the first place, while there is much less exposure of paywalled sports to new generations of players and spectators (Rowe, 2011).

Lax enforcement and degradation of the anti-siphoning laws must, as a result, lead to even more sport TV audience reduction and fragmentation in an era where many more subscription-based broadcasters and providers are entering the Australian market.

More Players, Shrinking List

As the *Green Paper* indicates, there are many more digitally-enabled ‘players’ in contemporary television, including Over-the-Top (OTT), streaming, web-based and mobile services. The *Green Paper* mentions sport only twice; with regard to job losses at Fox Sports News in 2020 (p. 16) and in the Consultation Question:

6.1 Should the investment obligation apply to all types of SVODs [Subscription Video-on-Demand], BVODs [Broadcast Video-on-Demand] and AVODs [Advertising Video-on-Demand] including those that specialise in content such as sport? (Australian Government, 2020: 35)

This reference to sport relates to “the challenge of safeguarding access to content with local cultural relevance in an increasingly globalised screen content distribution marketplace” (p. 34). But, it has no direct bearing on the key question of whether major local broadcast sports events should remain freely accessible rather than only available at a price. What counts as ‘local’ is also in question given that, for example, Network Ten, Foxtel, Optus, Amazon Prime Video and other organisations are internationally owned and controlled.

The rapid growth of OTT services (SVOD, BVOD and AVOD) makes these questions more urgent and underlines the importance of safeguarding access to content of national relevance in a world of changing media technologies and shifting market boundaries (Lobato, 2020). Since around 2015, for example, Australia has seen the introduction of: (i) specialist sports streaming services (e.g., Optus Sports, Kayo, The Olympic Channel, beIN Sports Connect, DAZN, Sports Flick); (ii) streaming video services that feature live and/or on-demand sports content and programs amongst a wider range of entertainment offerings (e.g., Stan, Prime Video, Netflix, YouTube, Twitch); and (iii) social media services that have extended their reach to include the live streaming of sport (e.g., Facebook, Twitter) (Hutchins, 2015).

It is, then, surprising to say the least that a *Media Reform Green Paper* dedicated to “modernising television regulation in Australia” is, as noted, silent on one of the most contentious areas of media regulation in the country – maintaining easy, without-charge access to sports events of national importance and cultural significance. Of course, what should be on or off the anti-siphoning list is a matter of debate. It currently reflects the Anglo-Celtic, male-dominated history of sport broadcasting in Australia, and like the institutions of media and sport has been slow to accommodate major changes to the social demography and cultural landscape of Australia before and since its inception alongside pay TV in 1995 (Rowe, 2017a). For this reason, the list should be scrutinised, discussed and periodically revised.

The current Coalition government has substantially reduced the list. It has 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 sports such as cricket, rugby league, rugby union, association football (still mostly called ‘soccer’ in Australia), and netball when playing outside, and even sometimes inside, Australasia (Rowe, 2017b; Tiffen, 2018b).

It has, rather perversely, provided \$40m to the Foxtel subscription service (Ziffer, 2020) that reaches about a third of the population – as opposed to free-to-air television’s approximately 90 per cent national reach – to broadcast women’s and other under-represented sports. It has

also, despite its denials regarding aggregate funding over successive budgets since 2013, reduced the funding available to the main public service broadcaster, the ABC, to carry such sports (RMIT-ABC, 2020).

Like previous governments of varying political persuasions, the Coalition government has not dealt satisfactorily with the legislative flaws related to anti-siphoning, especially with regard to on-selling that were in the legislation from its enactment but have become more obvious in the light of demographic, technological and economic changes. While the issue of hoarding acquired sport events has been addressed, as well as the expanded role of multi-channelling, there has been no action in preventing a simple switch of sport content from free-to-air television to subscription platforms. Nor has there been any significant interest in listing new sport competitions (notably the A-League in men's soccer and rugby union's Super League) that have demonstrably suffered from a lack of free-to-air TV presence.

Sport, Television and Cultural Citizenship

The first key point is to bring sport fully into the *Green Paper's* purview. Second, it is necessary to confirm the need for a sport anti-siphoning regime on public policy grounds, and to consider its relationship to 'cultural citizenship' (Rowe, 2018) regarding which sport events should be incorporated and how, other than via Ministerial fiat as at present, it ought to be refined on a continual basis. Third, access to important live mediated sport events ought to be guided by principles of inclusivity. The last point is especially important because it emphasises that an uncritical defence of commercial free-to-air television is unsustainable, especially where 'horizontal integration' – for example, of Nine free-to-air TV and the Stan subscription video streaming service – means that live sports events can be more easily passed across media platforms. There can be little doubt that the political power of commercial free-to-air media providers, especially of the Packer family, shaped the formation of the anti-siphoning list (Rowe, 2018). That power is now much diminished, as is that of free-to-air television itself, but this is not a justification for handing it over *holus bolus* to subscription television or to treating the difference between them as irrelevant.

We contend that broadcast sports events of "national importance and cultural significance" – both traditional and evolving - are an important part of the national cultural estate, not least because most have been nurtured in various ways by public as well as by commercial entities. It is not the interests of free-to-air television broadcasters and other providers *per se* that are paramount, but of free broadcasting and media access to the widest possible national publics. Given the expanding range of online portals and platforms for carriage of live sport (Hutchins et al, 2019), it ought to be possible to offer a judicious mix of free, mass appeal, niche and paid, value-added content. As the history of sport television has shown around the world (Scherer and Rowe, 2014), this apparatus cannot be left entirely to the market if the link between national culture and genuinely national audiences is to be maintained. A strong, flexible anti-siphoning regime can meet public policy equity and cultural citizenship objectives while enabling those willing and able to pay for other or enhanced sport content to access it. The critical citizen-consumer balance, therefore, can only be maintained by state intervention in a market that, left to its own devices, would produce expensive monopoly.

It is notable that sports such as soccer and rugby union (mentioned above) have belatedly appreciated the exposure value of free-to-air television, with first the A-League and now Super Rugby having a minor free-to-air TV presence (the latter now on Nine and Stan Sport). New

arrangements are also emerging, such as the ‘freemium’ offerings from the Foxtel-owned streaming service Kayo, but they need to be monitored carefully in order to ensure that they do not become, primarily, vehicles for eroding the principle of unfettered access to sports events deemed to be of national importance and cultural significance in Australia. News Corp and, as noted, many sport organisations, including Netball Australia (which governs the only predominantly women’s sport placed on the list, although only involving some international events which now will be on Kayo’s freemium service – Long, 2021), have long opposed the existence of any anti-siphoning list. Some limited free sport event offerings on a streaming platform are, then, being presented as equivalent to listed free-to-air broadcasts. As Foxtel CEO Patrick Delaney has stated:

The Kayo Freebies is very much about keeping subscribers engaged when they pause their subscription and it means that if we can’t find a free-to-air partner or the deal is not appropriate, we have got the Freebies (quoted in Samios, 2021).

This arrangement, then, is designed from Foxtel’s perspective to engage audiences as non-Kayo subscribers rather than as viewing audiences, ensuring that they use the Kayo service without charge on a limited basis, and suggesting the possibility that its freemium offerings could accommodate the anti-siphoning regime if its preferred option – abolition of the list – does not come to fruition as a result of media reform.

Implicit within the presentation of freemium offerings is a false equivalence between specialist OTT streaming services and free-to-air television. In considering questions of access and social inclusion, OTT services present unavoidable associated costs that cannot be ignored. Additional expenses include Internet service provision (ISP) and mobile data plans, varying speeds and bandwidths depending on the ability of users to pay, and the need intermittently to upgrade operating systems and devices. Even with a high-cost ISP or mobile plan, ‘buffering’, service interruptions, program crashes, and drained batteries can negatively affect the live viewing experience. Optus Sports’ chronic outages (#floptus) during its streaming of the 2018 FIFA World Cup highlights is a case in point (Hutchins et al, 2019). Furthermore, subscription-based OTT services expose users to a range of unseen algorithmic and data harvesting practices that are at odds with the public interest (Lotz, 2019), with most users remaining unaware of how their personal data might be used, including being on-sold to third parties.

Being on the anti-siphoning list is recognition of the current commercial power of live sports events for subscription platforms. Those events have established histories of audience appeal, including annually producing most of the largest television audiences on all platforms (Thomas, 2021), and so can count as being of national importance and cultural significance. But, audience size is not the only measure of a sport’s cultural value, and other mechanisms are necessary to give opportunities for a range of manifestations of sport – including emerging, women’s, LGBTQI+ and disability – to be televised. ‘Digital plenitude’ (Hutchins and Rowe, 2009) ought to provide many such opportunities supported variously by governments, sport, community organisations and businesses. This should happen in ways that do not force almost all of it onto subscription platforms – as has occurred with the Coalition Government’s funding of Foxtel to enable subscribers to watch sports including “AFLW [Australian Football League Women’s], WNBL (Women’s National Basketball League], W-League [women’s association football], Rugby Sevens, hockey, softball, baseball and lawn bowls” (Meade, 2020), with only 5 per cent of this programming available on free-to-air television.

It is inexplicable that the public service broadcasters, ABC and SBS, have not been given this opportunity - via tied, targeted or aggregate funding, to use their greater audience reach and, crucially, free access - to be in receipt of such government subsidy to sport television. Indeed, the ABC has been forced to pay Fox Sports for some production costs in showing, for example, matches involving the very popular Australian women's football team, the Matildas (Duke, 2021).

Conclusion and Recommendations

To summarise, we submit that an anti-siphoning list should be maintained, revised as necessary, and protected from circumvention. For this important aim to be realised as crucial media reform, the governing legislation requires:

- Amendment to ensure that all those who carry live sport, including broadcast, internet, streaming and mobile services, are embraced by legislative anti-siphoning criteria.
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- The integrity of the anti-siphoning list to be maintained on the basis that it is enforceable but also regularly modified (and not simply reduced) according to clear criteria whereby sports events join and leave it according to their national cultural relevance.
- The progressive reincorporation of public service broadcasting into the media sport field as a guarantor of cultural citizenship rights regarding live television sport.
- Recognition that, even in the digital age, free-to-air television remains a popular, reliable and widely accessible media technology that has minimal barriers to Australian citizens who wish to watch listed sports events.
- A multiple rights model to operate that overrides exclusivity in cases where the latter reduces access to listed events. Unless and until other platforms are comparable to free-to-air television in social equity terms, it should remain the principal vehicle for carriage of listed sports events.

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