

# **FOXTEL** GROUP

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

20 September 2023

## Executive Summary

- The Foxtel Group welcomes the opportunity to provide a submission in response to the 'Anti-siphoning review – Proposals paper' dated August 2023 (the "**Proposals Paper**").
- The Foxtel Group submits that the Government should adopt Model 1 for reforming the anti-siphoning scheme (the "**Scheme**"). Model 1 is capable of being implemented now due to the high level of availability and affordability of internet connections which support streaming of content. In particular, 99.3% of premises in Australia are able to access the NBN and fixed broadband speeds of at least 25 Mbps and 99% of Australian households have high-definition TV sets. For the reasons described further below, the coverage obligation in Model 1 should, however, apply only to the 'first acquirer' of rights which would enable a content service provider to show a listed event live and in full. Implementation of Model 1 for the Scheme should only occur in conjunction with the adoption of Model 1 for the *Broadcasting Services (Events) Notice 2023* (the "**List**").
- Although not preferable, Foxtel also submits that the Government could implement a simple interim model for a transition period which adopts Model 1, but adds an additional obligation on the 'first acquirer' of rights to show a listed event live and in full to offer the broadcast rights to the relevant events to FTA and national broadcasters on reasonable commercial terms. This transition period would apply for a fixed period of 3 years, in order to align with the Government's recently announced expanded fibre roll-out for the NBN, scheduled to be completed by the end of 2025.
- The Government's preferred options – Model 2 for the Scheme and Model 2 for the List – would exacerbate the current problems with the legislation rather than solve them. They would increase the regime's current anti-competitive preference in favour of the FTA broadcasters and ignore the Government's own stated policy to achieve a level-playing field for Australian media businesses.
- These models also disregard the success of the Government's own policy to invest substantial sums to ensure that NBN Co will reliably and affordably meet the current and future broadband needs of households and businesses. This policy has been one of the drivers for the rapid changes in modern content viewing habits in Australia. Australians not only already prefer to consume content online, but their shift away from traditional FTA television is increasing over time. With the last review of the Scheme occurring over 10 years ago, the Government must ensure it uses this important reform opportunity to adopt a future-proofed, technology neutral model which is reflective of modern viewing habits and the currently high level of availability and affordability of broadband, rather than further entrenching an existing model which is outdated and economically inappropriate.
- The Foxtel Group sets out further detail on its reasons below.
- This submission is structured as follows:
  - **Section 1** outlines the Foxtel Group's position regarding the Government's preferred model for reforming the Scheme referred to as 'Model 2' in the Proposals Paper.
  - **Section 2** outlines the Foxtel Group's position regarding the Government's preferred model for reforming the List, also referred to as 'Model 2' in the Proposals Paper.
  - **Section 3** outlines the Foxtel Group's submissions as to why the models for reforming both the Scheme and the List, both referred to respectively as 'Model 1' in the Proposals Paper, are superior to the Government's currently preferred reform models.
  - **Section 4** outlines the Foxtel Group's proposal for an interim version of Model 1 to apply for a transition period for 3 years.

In support of its submissions, Foxtel Group also tenders an independent expert economist report prepared by Dr Geoff Edwards of Charles River Associates ("**Dr Edwards' Report**") for the Government's consideration. This report is set out at Schedule 1 of these submissions. Dr Edwards' Report is also referred to in parts of the Foxtel Group's own submission

## 1 Issues with the Government's preferred option to reform the Scheme

Adopting Model 2 to reform the Scheme would be inappropriate for the reasons set out below.

### 1.1 Model 2 would exacerbate the existing anti-competitive nature of the Scheme and will do so to a greater extent than has been acknowledged by the Government in the Proposals Paper

Model 2 would entrench an unfair advantage for the FTAs to acquire broadcasting rights for both listed and unlisted events. It will also increase the FTAs' already substantial advantage in relation to the acquisition of other kinds of coverage rights, notably streaming rights. It is currently common for sporting bodies to bundle their broadcast rights and streaming rights together, often for both listed and unlisted events, to secure the highest cumulative price for those rights. Examples of the bundling of listed and unlisted events and the bundling of streaming and broadcast rights include:

- Rugby Australia's current deal with Nine includes broadcast and streaming rights for both listed events (e.g. Bledisloe Cup matches) and unlisted events (e.g. Super Rugby);
- Tennis Australia's current deal with Nine includes broadcast and streaming rights for both listed events (e.g. the Australian Open) and unlisted events (e.g. the United Cup and the Adelaide international); and
- the Australian Professional Leagues' current deal with Network Ten and Paramount bundles both the broadcast and streaming rights to the A-League and the W-League.

As a result, Model 2, by formally granting FTAs the opportunity to negotiate with sporting bodies for listed events before any other content service providers, would increase the unfair competitive advantage FTAs are afforded under the Scheme in relation to the acquisition of coverage rights for sporting events. This will reduce media rights revenue, by reducing competition for those rights. This will be detrimental to governing sporting bodies with events on the List, and by extension the ability of those bodies to invest in grassroots development and in new competitions, such as those for women and para-athletes.<sup>1</sup>

Model 2 also contradicts the consistent advice of the Government's own Productivity Commission,<sup>2</sup> and is contrary to the Government's stated policy to ensure, "... a level playing field for Australian media businesses in which they can compete effectively."<sup>3</sup> The Government's own recently announced Competition Policy Review is designed to provide advice on how to improve competition across the economy and "... to ensure that competition policy settings are fit for purpose in the face of big shifts underway in our economy, so we can make the most of digitalisation...".<sup>4</sup> The Government's preference for Model 2 is expressly contrary to these objectives.

Model 1, on the other hand, would implement a level-playing field for all content service providers. By allowing rights to listed events to be acquired by any content service provider so long as they provide free access via any broadly available technology platform, Model 1 would result in increased competition.<sup>5</sup> This increase in competition would in turn enable sporting bodies to maximise revenue for their rights and allow those bodies to engage in greater investment in the

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<sup>1</sup> Dr Edwards' Report, at [41].

<sup>2</sup> Australian Government Productivity Commission (March 2000) , '[Broadcasting Inquiry Report](#)', pp. 443 – 445 and Australian Government Productivity Commission (2009), '[Annual Review of Regulatory Burdens on Business: Social and Economic Infrastructure Services](#)', p. 154 - 163.

<sup>3</sup> The Hon Michelle Rowland MP, Minister for Communications (14 November 2022), '[Media Policy: Priorities for a New Government Seminar Communications and Media Law Association \(CAMLA\) and International Institute of Communications \(IIC\) Australian Chapter](#)'.

<sup>4</sup> The Hon Dr Jim Chalmers MP, Treasurer (23 August 2023), '[A more dynamic and competitive economy](#)'.

<sup>5</sup> Dr Edwards' Report at [43].

types of competitions which the Government is seeking to add to the List.<sup>6</sup> Model 1 would also be positive for viewers, by matching the preference of the majority of Australians to watch content via the internet, as further detailed in the section below.

## **1.2 Model 2 contradicts modern technology and viewing habits and the Government's own policies to invest in and ensure wide availability of high-speed broadband services**

Model 2 does not take into account the current viewing habits of Australians. Since 2021, the ACMA reports that Australians are more likely to have watched content on a SVOD service in the past week than via live FTA television.<sup>7</sup>

The Government has stated that technology and market conditions in Australia are not mature enough to enable the adoption of Model 1 in the near- to medium-term and that Model 1 "...could be considered once online services are able to support free access to televised coverage of nationally important and culturally significant sporting events for all Australians, regardless of their financial means, location or other factors."<sup>8</sup>

The Foxtel Group submits that this conclusion is incorrect and not supported by the available data. Internet services capable of streaming sports are already accessible and affordable to the vast majority of Australians. Sources referred to in the Proposals Paper show that the access and the affordability of such internet services is further improving over time.<sup>9</sup> This is in part because of the Government's rollout of the nbn and the availability of other high-speed internet services. The current NBN Co Statement of Expectations sets out the objective that "*NBN Co will enhance Australia's digital capability by delivering services to meet the current and future needs of households, communities and businesses, and promote digital inclusion and equitable access to affordable and reliable broadband services.*"<sup>10</sup>

In relation to accessibility, we refer to our submissions in response to the consultation paper and restate the following points made by Dr Geoff Edwards:<sup>11</sup>

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

By contrast, both the current Scheme and Model 2 only require that commercial television broadcasting licensees whose services cover more than 50% of the population *have a right* to televise the event in order for the subscription television anti-siphoning licence condition to be satisfied.<sup>12</sup> This does not require that events are, in fact, made available to that proportion of the population or made available at all. Indeed, as the Government is aware, many listed events are

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<sup>6</sup> Coalition of Major Professional and Participation Sports (COMPPS) (6 December 2022), '[Submission of COMPPS to the review of the anti-siphoning scheme](#)', pp. 2-3.

<sup>7</sup> ACMA (February 2023), '[Communications and media in Australia: How we watch and listen to content](#)'.

<sup>8</sup> Proposals Paper, p. 36.

<sup>9</sup> Australian Digital Inclusion Index (2023), '[Measuring Australia's Digital Divide: Australian Digital Inclusion Index 2023](#)', p.5.

<sup>10</sup> NBN (19 December 2022), '[Statement of Expectations](#)', p.1.

<sup>11</sup> Foxtel Group (6 December 2022), '[Foxtel Group: Submission in response to the review of the anti-siphoning scheme - Consultation Paper](#)', p. 16 ("**Foxtel Group's Consultation Paper Submission**") and Dr Geoff Edwards (6 December 2022), '[Australia's Anti-Siphoning Scheme: Competition Assessment and Alternatives – Submission to the Review of the Anti-Siphoning Scheme](#)', at [50].

<sup>12</sup> *Broadcasting Services Act 1992* (Cth), Schedule 2, Part 6, section 10(1)(e).

not currently televised on a live, national basis. They are instead televised only in particular States and Territories. Model 1 would be far superior to this position.

On the issue of uptake of internet services, the Government's concerns are unfounded. The ACMA's latest *Communications and media in Australia* report identified that 99% of Australians access the internet.<sup>13</sup> The sharpest rise in the use of the internet was noted amongst those over the age of 75, where between 2019 to 2022, use of the internet increased from 52% to 94%.<sup>14</sup> The percentage of Australians living in regional areas who access the internet is identical to those in Metropolitan areas.<sup>15</sup>

Specifically in relation to the watching of content, the use of the internet already exceeds live FTA television. In the 7 days to June 2022, only 56% of Australian adults watched live FTA television, compared to 59% who watched content via a paid subscription service.<sup>16</sup> This latter statistic does not include free to air catch up TV, which would increase the disparity. This increasing preference among Australians to watch content via online services rather than live FTA television has been consistent since at least 2021.<sup>17</sup> This trend is set to continue, with the Government's own Australian Sports Commission and the CSIRO predicting that, "...streaming and OTT service will continue to increase their market share of sports and all broadcast media."<sup>18</sup>

In relation to affordability of internet services:

- the average Australian household spends less than \$17 a week on services over the nbn network, representing only 1.1% of the average household income;<sup>19</sup>
- even for very low-income households (i.e. making less than \$750 per week), 12 Mbps and 25 Mbps nbn services cost only 1.62% and 1.97% respectively of those households' income;<sup>20</sup>
- the average nbn user saves 120 hours and \$2,580 per year by using the nbn network while nearly 1 in 5 nbn users have boosted their income by working remotely over the nbn network;<sup>21</sup> and
- the Australian Digital Inclusion Index rates the affordability of a quality internet bundle (consisting of a fast internet connection (such as that provided through a cable (HFC) service, NBN 50 or above, or 5G wireless service), an unlimited monthly data allowance and a mobile broadband or mobile phone data allowance above 61 GB per month) 95 out of 100. This affordability score is largely consistent across major cities and very remote areas of Australia;<sup>22</sup>

The amended Special Access Undertaking variation lodged by NBN Co with the ACCC in August 2023 also proposes reductions in the wholesale price levels for 12, 25 and 50 Mbps speed tiers and the introduction of a Weighted Average Price Control (WAPC) that will cap overall annual wholesale price increases on average at CPI, ensuring overall average wholesale prices do not increase in real terms.<sup>23</sup>

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<sup>13</sup> ACMA (December 2022), ['Communications and media in Australia: How we use the internet'](#).

<sup>14</sup> Ibid

<sup>15</sup> Ibid.

<sup>16</sup> See note 7.

<sup>17</sup> Ibid.

<sup>18</sup> Australian Sports Commission and CSIRO (December 2022), ['The Future of Australian Sport: Megatrends shaping the sport sector over coming decades'](#), p. 36.

<sup>19</sup> Accenture (February 2023), ['Affordability of services over the nbn network'](#), p.8.

<sup>20</sup> Ibid, p.10.

<sup>21</sup> Accenture (February 2023), ['Value of services over the nbn network'](#),p.12.

<sup>22</sup> See note 9, p.9.

<sup>23</sup> NBN Co (August 2023), ['NBN Co lodges amended SAU variation with ACCC'](#).

The Foxtel Group submits that it is therefore incorrect to conclude that technology and market conditions in Australia are not mature enough to enable the adoption of Model 1 in the near- to medium-term.

It would also be inappropriate for any reform of the Scheme to perpetuate and increase the anti-competitive and privileged access for FTA television to nationally important and culturally significant events and to ignore widely available and affordable internet services as an alternative and preferable mode of delivering content (including on a truly national basis), and the Government's overall policy objective. Subject to the Foxtel Group's comments in Section 3 to clarify the operation of Model 1 as described in the Proposals Paper, there is no need to delay the implementation of Model 1.

### **1.3 The Government's preferred option would open the possibility for the hoarding of broadcast rights to listed events by the FTAs**

Model 2:

- would facilitate the FTAs to monopolise the coverage of listed events by enabling them to more easily acquire both the broadcast and streaming rights to listed events;<sup>24</sup> and
- does not impose any obligation on FTAs to make the listed events in respect of which they acquire broadcast rights freely available to the Australian public, either at all or on a national broadly-available basis.

Model 2 would therefore raise the possibility that FTAs could siphon events behind paywalls of one of their subscription platforms within their respective corporate groups to maximise their return on the coverage rights they acquire.<sup>25</sup> It also allows the continuation of the present position in which many listed events are not broadcast to all Australians on a national basis.

This means that the adoption of Model 2 would lead to fewer Australians being able to view sporting events for free, contrary to the overall policy objective.

Conversely, Model 1 would ensure more Australians are able to enjoy live and full coverage of listed events by imposing a coverage obligation on the first acquirers of rights capable of showing a listed event live and in full.

Model 1 is clearly superior to Model 2.

## **2 Issues with the Government's proposal for reforming the List**

The Foxtel Group disagrees with the Government's preferred Model 2 option to expand the List for the reasons set out below:

### **2.1 The Model 2 List would disincentivise future investment in sports**

Adoption of the Model 2 List, which would include events not previously on the List, but which have grown in popularity in part through investments from subscription service providers would create disincentives for future investments of a similar nature in other sports.<sup>26</sup> The FTAs should not now be allowed to unfairly benefit from investment made by other enterprises in those sports.

Sporting bodies with events that are newly added to the List are likely to receive less revenue overall for their broadcasting rights because there would be less competition for rights from non-FTA content service providers. This will limit the investments those sports can make including in

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<sup>24</sup> See section 1.1 above.

<sup>25</sup> For example, Nine's digital platform Stan (2015) and Network Ten's Paramount+ (2021). See Dr Edwards' Report at section 4.2.1.

<sup>26</sup> Dr Geoff Edwards (6 December 2022), '[Australia's Anti-Siphoning Scheme: Competition Assessment and Alternatives – Submission to the Review of the Anti-Siphoning Scheme](#)', at [45].

grassroots development and new competitions such as for women and para-athletes.<sup>27</sup> As noted by the submission made by the Coalition of Major Professional and Participation Sports (COMPPS) in response to the Consultation Paper:

*"The revenue derived from the sale of media rights is the single most important revenue stream for COMPPS members. The proprietary media rights of COMPPS members in respect of their sporting events and competitions are significant and highly valuable assets of each organisation. The commercialisation and sale of their media rights is critical to COMPPS members being able to invest in their sport from the grassroots to the elite level and underpins their operations as the not-for-profit custodians of their sports in Australia."<sup>28</sup>*

...

*"The anti-siphoning scheme restricts the ability of sporting organisations to conduct a truly competitive process for the sale of their media rights."<sup>29</sup>*

...

*"Including a women's event on the anti-siphoning list may not automatically assist in developing and growing that women's sport and could have counterproductive consequences if it means that the sporting organisation is not able to maximise its commercial revenue from the sale of its media rights to that particular women's sports event or competition..."*

*Rather than adding women's sport to the anti-siphoning list, COMPPS submits that certain events need to be removed from the anti-siphoning list so the sports can maximise their commercial revenues which can be used to help develop and support the women's game. Many of the professional women's competitions conducted by COMPPS members are relatively new (such as AFLW and NRLW) and are still seeking to grow their commercial revenues streams. As a result, the revenue generated by the men's competitions contributes to the development and growth of the women's competitions. As such, the more that sports are able to maximise the revenue from the men's competition the more they can help to grow and support women's sport."<sup>30</sup>*

The Model 1 list, on the other hand, would enable sports to maximise their commercial revenues which can be used to help develop and support the very sports which the Government is seeking to assist by expanding the list.

## **2.2** No objective test appears to have been applied to determine which events should be added to or remain on the List

Model 2 proposes that a number of female sporting events should be added to the List, irrespective of whether the viewership and engagement with those events to date is comparable to their male equivalent event. For example, the 2022 NRLW and AFLW grand finals, both of which would be added to the List if Model 2 is adopted, were watched by 342,000 and 439,545 people respectively (with only 117,00 and 213,000 of those views coming via FTA TV).<sup>31</sup> Those figures are not comparable to the 2.76 million domestic viewers of the 2022 NRL grand final and 3.06 million viewers of the AFL grand final (noting that those viewership figures for the men's

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<sup>27</sup> See Dr Edwards' Report, at [41] and [61] - [64]. Foxtel Group's Consultation Paper Submission, at [2.3]; Dr Geoff Edwards (8 September 2023), 'Grass Ceiling: The Unintended Consequences of Listing Women's Sports', at [8]-[9] ("**The Grass Ceiling Report**").

<sup>28</sup> See note 6, p.2

<sup>29</sup> Ibid., p.4.

<sup>30</sup> Ibid. p 5.

<sup>31</sup> Proposals Paper, p.54; Department of Infrastructure, Transport, Regional Development, Communications and the Arts (October 2023), 'Review of the anti-siphoning scheme: Consultation paper', p.50. ("**The Consultation Paper**").



competitions were historically low).<sup>32</sup> This is despite the fact that the NRLW and AFLW are freely available on TV to the same or a greater extent than the corresponding male competitions that are currently on the List.<sup>33</sup> It should also be noted that the AFLW's overall TV viewership figures this year are down 70% on season one (averaging a TV audience of just 53,000 per match) and crowds are also down.<sup>34</sup>

Similarly, the Foxtel Group submits that, under Model 2, a number of events would remain on the proposed List which no longer meet the test of being events of 'national importance and cultural significance' by reference to their current coverage by FTA broadcasters or by their viewing figures. For example, just 16,000 people respectively watched Davis Cup matches involving Australia in 2021.<sup>35</sup> The Foxtel Group further notes its comments in relation to the scope of the List and in particular, with respect to the regular season matches of the domestic sporting competitions.<sup>36</sup>

As noted by Dr Edwards, of the List options posited in the Proposals Paper, "*Only Option 1... is consistent with a regime that exists to protect events of "national importance and cultural significance."*"<sup>37</sup>

### **3 Both Model 1 options in the Proposals Paper should be preferred in respect of reforming the Scheme and the List**

The Foxtel Group submits that each of the Model 1 options set out in the Proposals Paper are more appropriate than the respective Model 2 options and should be adopted by the Government. This is for the following reasons:

- The Model 1 options would reduce the current anti-competitive features of the Scheme.<sup>38</sup> As the Proposals Paper acknowledges, Model 1 to reform the Scheme would "*...avoid a number of the acknowledged concerns with the scheme, including that it imposes regulatory burdens, constrains the ability of sports bodies to freely market their content, and impairs the capacity of subscription television broadcasting licensees to bid for such rights.*"<sup>39</sup>
- The Model 1 options would better serve the Scheme's policy objective of ensuring free access, on a broad national basis, to events of national importance and cultural significance and would be reflective of Australian viewers' modern technological preferences and viewing habits.<sup>40</sup> Model 2 would fail to ensure free access, nor would it ensure that access is provided on a truly broad, national basis.
- The Model 1 options would address the current potential for subscription based online streamers to acquire exclusive rights to listed events and put the events behind a paywall, without further entrenching the preferred position of the FTAs.<sup>41</sup>
- Adopting the Model 1 options would implement a level playing field for industry consistent with the Government's media policy and broader objectives for a competitive economy.<sup>42</sup>

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<sup>32</sup> Sportsmedia (4 October 2022), '[2022 NRL grand final attracts lowest TV ratings in history](#)'; AFR (25 September 2022); '[AFL grand final a rating bomb for Channel 7](#)'.

<sup>33</sup> The Grass Ceiling Report, at [5] – [7].

<sup>34</sup> The Age (11 July 2023), '[The broadcast was almost unwatchable: The insiders' view on why Australia switched off AFLW](#)'.

<sup>35</sup> The Consultation Paper, p.53.

<sup>36</sup> See Foxtel Group's Consultation Paper Submission, at [3.2].

<sup>37</sup> Dr Edwards' Report at [60].

<sup>38</sup> See Foxtel Group's Consultation Paper Submission, at [2.2] and responses to questions 1(b), 6 and 7 of The Consultation Paper.

<sup>39</sup> Proposals Paper, p.32.

<sup>40</sup> See Foxtel Group's Consultation Paper Submission, at [2.6], [3.2] - [3.3], [5.1] – [5.2] and responses to questions 2(a) and 26 - 33 of The Consultation Paper.

<sup>41</sup> See Foxtel Group's Consultation Paper Submission, response to question 2(a) of The Consultation Paper.

<sup>42</sup> See section 1.1 above and Foxtel Group's Consultation Paper Submission, response to question 9 of The Consultation Paper.

The Foxtel Group submits that an important amendment would need to be made to the Model 1 option as currently described in the Proposals Paper. The coverage obligation included in the Model 1 option for reforming the Scheme should be restricted only to the *first acquirer* of rights capable of showing a listed event live and in full. This amendment is consistent with the Foxtel Group's submissions in response to the Consultation Paper.<sup>43</sup> As outlined by Dr Edwards, by applying the coverage obligation to only the *first acquirer* of such rights, it would stop unnecessary restrictions being placed on the commercial freedom of sports bodies and, potentially, unnecessary duplication of free transmission in situations where, "... *the sports body selling the rights would like one content service provider to transmit its listed events via a subscription service and another content service provider to transmit those events via a broadly available free platform.*"<sup>44</sup>

The Foxtel Group agrees with the assessment set out in the Proposals Paper that the Model 1 options for reforming the Scheme and List are interrelated and therefore must only be implemented in conjunction with each other.<sup>45</sup>

#### 4 **Alternative transition model to reform the Scheme while allowing the Government to complete its current NBN Co expansion plan**

As set out in detail in section 1.2 of this submission and supported by Dr Edwards, the Foxtel Group submits that internet services of adequate quality to permit the streaming of listed events *are already* sufficiently accessible and affordable to Australians in order to adopt Model 1 for reforming the Scheme. Model 1 can be implemented now.

However, the Foxtel Group acknowledges the Government's announcement in late 2022 that it intends to expand full-fibre access to 1.5 million premises by 2025 with a \$2.4 billion equity investment in NBN Co over four years. The Government has stated that the intention of this investment is to give Australians who now rely on copper connections the choice of having full fibre connections to their premises if they want a faster NBN service than their current copper wire can deliver. It is also intended to benefit over 660,000 premises in regional Australia and means around 10 million homes and businesses across Australia will have access to speeds of up to one gigabit per second by late 2025.<sup>46</sup> In addition, the Foxtel Group acknowledges that the recently proposed NBN Co SAU variation has not yet been accepted by the ACCC.

The Foxtel Group therefore proposes an alternative transition option to implement Model 1 for reforming the Scheme. This transition option would apply as follows:

- Model 1 for reforming the Scheme would be implemented immediately, together with Model 1 for the List.
- Model 1 for reforming the Scheme would be amended, as set out in section 3 above, such that the coverage obligation applies only to the *first acquirer* of rights capable of showing a listed event live and in full.
- An additional obligation would be placed on such first acquirer to offer free to air broadcasters (adopting the same formulation as per the current Scheme and in Model 2) the right to acquire broadcast rights to the relevant listed events on 'reasonable commercial terms', for exercise via a commercial broadcasting service or national broadcasting service, but not via a streaming service (the "**Broadcast Offer Obligation**").

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<sup>43</sup> See Foxtel Group's Consultation Paper Submission, response to question 33 of The Consultation Paper.

<sup>44</sup> Dr Edwards' Report at [35].

<sup>45</sup> Proposals Paper, pp. 51-52. See also Dr Edwards' Report, at [56].

<sup>46</sup> The Hon Michelle Rowland MP (20 October 2022), '[Albanese Government delivers major NBN boost in 2022-23 Federal Budget](#)'.

- This transition model would apply for a maximum period of 3 years but could be disapplied earlier if the Government is satisfied that NBN Co has completed its current fibre footprint expansion and a NBN SAU variation has been accepted.

The Foxtel Group submits that this alternative transition model should be more appropriately viewed as a genuine "Broadcasting Safety Net" rather than the Government's preferred Model 2 which bears that name in the Proposals Paper. This alternative transition model would both *ensure* transmission of listed events live, in full and for free on a broadly available technology platform *and also* provide a reasonable opportunity for listed events to be acquired by FTA broadcasters and broadcast on FTA terrestrial networks while the Government completes its NBN Co policy objective. It would also ensure the broader benefits of Model 1 to viewers, sports bodies and the media industry as a whole can be implemented now, without further delay. These include:

- ensuring a level playing field for the media industry;
- increasing the competition for rights for listed events;
- increasing the revenue sporting bodies can earn for rights to their events;
- increasing the amounts sports bodies can pay athletes and invest in their sports, including in new and nascent competitions (including for women and people with disabilities), sports facilities and programs and grassroots development of their sports, thereby improving the quality of more sporting events;
- promoting more content innovation and development; and
- driving greater viewer enjoyment and increasing engagement with and participation in sports.

This alternative transition model would allow the Government to avoid the detrimental effects of Model 2 identified in its own Proposals Paper. The Government has acknowledged itself that Model 2 would "*exacerbate a number of the acknowledged concerns and risks with the current scheme*" including broadening the restriction on the commercial freedom of sports bodies to negotiate with content service providers to maximise revenues for their sports and invest in their sports, and extending the commercial advantages afforded to FTA broadcasters. The Proposals Paper further acknowledges that "*while these adverse impacts are likely to be material, they need to be balanced against the costs and risks associated with the status quo where online rights to iconic events are not regulated in any way*".<sup>47</sup> This alternative transition model is overwhelmingly better than the current Scheme and the Government's Model 2 for the Scheme. It has none of the acknowledged downsides of Model 2 and addresses the Government's key current concern with Model 1.

The Foxtel Group welcomes the Government's observations on this alternative transition model.

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<sup>47</sup> Proposals Paper, p. 40.

**Schedule 1**

Charles River Associates “Economic Observations on the Anti-Siphoning Review Proposals Paper”

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# Economic Observations on the Anti-Siphoning Review Proposals Paper

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## EXECUTIVE SUMMARY

1. The Government's Anti-Siphoning Review Proposals Paper (Proposals Paper) identifies a "regulatory gap" in relation to online services (streaming services). Online service providers are currently able to acquire rights before FTA broadcasters and may take advantage of this "gap" to acquire listed events and place them behind their paywalls.
2. The Proposals Paper lays out three reform models to address this "gap", including a model that would impose a technology neutral obligation on any content service provider that makes coverage of listed events available to audiences in Australia to ensure that coverage is made available to the Australian public live, in full and for free on a broadly available technology platform (Model 1),<sup>1</sup> and an extension of the Current Scheme to restrict online service providers as well as subscription television (STV) licensees from acquiring rights to listed events before rights to those events have been acquired by FTA broadcasters (Model 2).
3. The Government has indicated that Model 2 – extending the Current Scheme to restrict competition for rights from online service providers as well as STV licensees – is its preferred reform model. The Government is also proposing to expand the anti-siphoning list (the List) to include events from a number of women's competitions (including AFLW and NRLW finals matches) as well as all events at the Paralympic games held every four years.
4. This report explains why, based on cost-benefit analysis, the Government should prefer Model 1 as the reform model to address the "gap" concern, and reduce rather than expand the List.
5. A fundamental consideration that is downplayed in the Proposals Paper is that the objective of the anti-siphoning regime is to **ensure** free access to televised coverage of events of national importance and cultural significance. The Current Scheme and Model 2 **do not ensure** free access to events on the List. They can at best be said to "support" free access by increasing the likelihood of free access compared to no regulation. This is because, under the Current Scheme and under Model 2, FTA broadcasters that acquire rights to listed events are free to arrange for these events to be televised behind paywalls (or not be televised at all). There is therefore a risk with Model 2 (indeed, a likelihood) that events considered to be of "national importance and cultural significance" will not be available for free to *any* Australians. This is the first of two significant costs of Model 2 compared to Model 1. Of the models canvassed in the Proposals Paper, only Model 1 fulfils the objective of the anti-siphoning regime by **ensuring** free access to events on the List.
6. The second significant cost of Model 2 compared to Model 1 is that Model 2 distorts the playing field in favour of FTA broadcasters, limiting competition for exclusive rights to listed

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<sup>1</sup> This model is similar to a model that I proposed in my response to the Government's November 2022 Consultation Paper. The difference, however, is significant, and the proposed version of Model 1 is problematic as a result: in particular, the proposed version of Model 1 would result in unnecessary restrictions on the commercial freedom of sports bodies and, potentially, unnecessary duplication of free transmission. This is explained in detail in Section 4.1.2. The version of Model 1 that I proposed would solve for this by placing an obligation to ensure transmission live, in full and for free via a broadly available technology platform *only upon the first acquirer* of rights to the events.

events. Indeed, by extending the Current Scheme to restrict online service providers as well as STV licensees, Model 2 distorts the playing field even more than the Current Scheme and provides FTA broadcasters with even greater freedom from competition. This restricts the commercial freedom of sports bodies and is likely to reduce the revenues they can earn for rights to their events. In turn, reduced revenue is likely to reduce the amounts sports bodies pay athletes and invest in their sports, including in new competitions (including competitions for women and people with disabilities), sports facilities and programs, and grassroots development of their sports. For the general public, this will mean less content innovation and development, reduced quality of sports, reduced viewer enjoyment and reduced engagement with and participation in sports.

7. According to the Proposals Paper, these effects are “likely to be material”. By contrast, by targeting how rights are used once they are acquired, Model 1 ensures listed events will be televised for free, and the technology neutrality of Model 1 in relation to the acquisition of rights will ensure competition for rights, with beneficial effects for sports, athletes and the wider Australian public.
8. Set against these costs, the Proposals Paper argues that, compared to Model 1, Model 2 offers the benefit of FTA broadcasts being more widely accessible than internet-based services. This is the Proposals Paper’s main reason for not preferring Model 1. However, even if FTA broadcasts are more widely accessible under Model 2, the benefit is only a potential benefit: the benefit will not arise where FTA broadcasters acquire rights to listed events and do not broadcast those events over FTA networks, which is a possibility under Model 2. The Proposals Paper also overstates the benefit: it is possible that, after accounting for (i) the many households that rely on mobile services for their internet services at home (including for transmissions of listed events), (ii) the further households that cannot access FTA broadcasts of listed events, and (iii) people with no interest in viewing listed events, the (potential) benefit of FTA broadcasts being more widely available than internet transmissions may be in relation to only a very small percentage of the population.
9. I therefore consider that the costs of Model 2 compared to Model 1 are significant and likely to outweigh the benefits. While Model 1 may not deliver free access to listed events for *all* Australians, it will *ensure* free access to *all* listed events for the vast majority, whereas Model 2 is likely to result in some listed events not being freely available to *any* Australian. Moreover, Model 2 restricts the commercial freedom of sports bodies and competition for rights to sports events (even more so than the Current Scheme), with adverse effects on sports, athletes and the general public as a result of reduced revenues and investments that can be made in the sports. I therefore consider that Model 1 should be preferred to Model 2.
10. Regarding the options presented in the Proposals Paper for reform to the composition of the List, I make the following comments.
  - a. If reform Model 1 is chosen, it should only be in conjunction with a substantial reduction in the List to only retain events currently broadcast on FTA channels on a national basis and that are viewed by a substantial proportion of the population. Option 1 for the List is the closest to this. This is to ensure that the obligation to transmit events live, in full and for free is not extended to events which are not of national importance and cultural significance.
  - b. In any event, it is difficult to reconcile the sheer number of events on the List under Options 2 and 3 with the concept of events of “national importance and cultural



significance” that have a degree of national resonance that unite the Australian community. Only Option 1 for the List is consistent with this concept.

- c. Including women’s sports and sports for people with disabilities on the List will have no practical effect on the amount of women’s sports and sports for people with disabilities that will be freely available for viewing, and is likely to have unintended adverse consequences for investment in women’s sports and sports for people with disabilities as well as the welfare of female athletes and athletes with disabilities.

## 1. INTRODUCTION

11. This report responds to the Government's call for comments and submissions on the proposals for reform of the anti-siphoning scheme and the anti-siphoning list set out in its August 2023 Anti-Siphoning Review Proposals Paper (Proposals Paper).
12. In December 2022 I submitted a report responding to the Anti-Siphoning Review Consultation Paper (Consultation Paper).<sup>2</sup> In that report I observed that:
  - a. The Current Scheme generates a number of outcomes and possibilities that are incongruent with the objective of the regime, including that FTA broadcasters are free to acquire rights to listed events and transmit them behind a paywall or not transmit them at all;
  - b. The Current Scheme distorts the playing field in favour of FTA broadcasters by excluding subscription television (STV) licensees, limiting competition for exclusive rights to listed events (and an extension of the Current Scheme to restrict online service providers as well as STV licensees would exacerbate this);
  - c. The restriction of competition under the Current Scheme (and an extension of the Current Scheme to restrict online service providers as well as STV licensees) is likely to limit the revenues that sports bodies earn from rights to listed events, in turn limiting the amounts that can be spent on players, coaches and programs as well as the investments sports bodies are able to make in new competition, sports facilities, grassroots development and inclusivity programs; and
  - d. For the general public, the restriction of competition inherent in the Current Scheme (and an extension of the Current Scheme to restrict online service providers as well as STV licensees) has the potential to negatively impact viewer enjoyment, engagement and participation.
13. Given these significant issues with the Current Scheme (and any extension of the Current Scheme to restrict online service providers as well as STV licensees), my report in response to the Consultation Paper proposed a substantial overhaul, rather than a mere tweaking, in order to realise the objective of the anti-siphoning regime. The premise for this overhaul is that, in the current media environment, with high speed internet coverage in excess of 99% of the population, "free" should mean free, not FTA.
14. Specifically, I proposed replacing the current mechanism of regulating the order in which rights to televise listed events may be acquired (via a condition in STV licenses) with a technology neutral obligation on the first acquirer of rights to a listed event to ensure the event is transmitted live, for free and in full via technology that is accessible by a large proportion of the population. I explained that this technology neutral obligation would realise the "free access" objective of the regime without incongruent outcomes and possibilities and without restricting competition for rights to listed events. I also proposed that the List be substantially reduced to include only events that are truly of "national importance and cultural significance".
15. The Proposals Paper identifies a "regulatory gap" in relation to online services (streaming services). Online service providers are currently able to acquire rights before FTA

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<sup>2</sup> Geoff Edwards, *Australia's Anti-Siphoning Scheme: Competition Assessment and Alternatives*, Submission to the Review of the Anti-Siphoning Scheme, 5 December 2022.

broadcasters and may take advantage of this “gap” to acquire listed events and place them behind their paywalls. The Proposals Paper lays out three reform models to address this “gap”. The first of these (Model 1) is similar to my proposal for a technology neutral obligation on the first acquirer of rights to listed events to ensure those events are transmitted live in full and for free via a widely accessible technology. The second (Model 2) is an extension of the Current Scheme to restrict streamers from acquiring rights before FTA broadcasters. This would place streamers in the same boat as STV licensees and further protect and advantage FTA broadcasters compared to the Current Scheme. The third reform model (Model 3) would favour FTA broadcasters even further by preventing STV licensees and streamers from acquiring any rights to listed events before a FTA broadcaster has acquired *both* a right to televise the event on a broadcasting service *and* a right to transmit the event on a streaming service. The Government has indicated that Model 2 – extending the Current Scheme to restrict competition from streamers as well as STV licensees – is its preferred option.

16. The Proposals Paper also presents three options for the composition of the anti-siphoning list (the List). All of these options seek to “ensure consistent treatment” of events irrespective of gender. The first option would reduce the List to around 330 events, a significant reduction compared to the current List of around 1,900 events. The second and third options would *increase* the number of events on the List (to around 2,500 and 2,800 respectively) by adding a number of women’s sports events including AFL Women’s and NRL Women’s matches, as well as all events held as part of the Paralympic games.
17. In Section 2, I begin with the objective of the anti-siphoning regime, as set out in the Explanatory Memorandum to the Broadcasting Services Bill 1992, which is to *ensure* free access to important events, and I observe that only Model 1 fulfils that objective. Models 2 and 3 can at best be said to “support” free access by increasing the likelihood of free access compared to no regulation.
18. In Section 3, I provide some brief comments on cost-benefit analysis and observe that the reform model and the composition of the List that are ultimately chosen should be shown to deliver benefits that outweigh any costs, both compared to the status quo (continuation of the Current Scheme) *and* compared to alternative models and List compositions being considered.
19. In Section 4, I comment on the reform models laid out in the Proposals Paper and explain why I consider that the costs of Model 2 outweigh the benefits when compared with Model 1. Putting aside benefits to a particular group of commercial and government entities (the FTA broadcasters), the benefits of Model 2 are limited to a small and declining proportion of the population that can readily access terrestrial FTA transmissions but do not have ready access to the internet via either fixed or mobile services with sufficient speeds. The costs, meanwhile, include:
  - a. The risk that FTA broadcasters will acquire rights to listed events and arrange for these events to be placed behind paywalls or not transmitted at all (in each case denying free access to these events to *all* Australians); and
  - b. A distortion of competition for rights to sports events, with negative impacts on the revenues sports bodies can earn and the amounts they can share with athletes and invest in the sports, and consequential adverse impacts on the quality and development of the sports (including new competitions), athletes and the general public.

20. Finally, in Section 5, I comment on the options in the Proposals Paper for reform to the composition of the List, and observe that:
- a. If reform Model 1 is chosen, it should only be in conjunction with a substantial reduction in the List to only retain events currently broadcast on FTA channels on a national basis and that are viewed by a substantial proportion of the population (Option 1 for the List is the closest to this);
  - b. In any event, it is difficult to reconcile the sheer number of events on the List under Options 2 and 3 with the concept of events of “national importance and cultural significance” that have a degree of national resonance that unite the Australian community – only Option 1 is consistent with the concept; and
  - c. Including women’s sports and sports for people with disabilities on the List will have no practical effect on the amount of women’s sports and sports for people with disabilities that will be freely available for viewing, and is likely to have unintended adverse consequences for investment in women’s sports and sports for people with disabilities as well as the welfare of female athletes and athletes with disabilities.

## 2. THE OBJECTIVE OF THE ANTI-SIPHONING REGIME

21. The original objective of the anti-siphoning regime, as stated in the Explanatory Memorandum to the Broadcasting Services Bill 1992 is to “**ensure**, on equity grounds, that Australians will continue to have free access to important events” (emphasis added).<sup>3</sup>
22. The Proposals Paper, however, describes the objective as to “**support** free access to televised coverage of events of national importance and cultural significance”<sup>4</sup> and proposes to amend the objects listed in Section 3 of the Broadcasting Services Act 1992 by inserting this form of words.<sup>5</sup> Supporting free access is a weaker objective than ensuring free access: the “bar” for a model that “supports” free access is indeterminate in height and potentially quite low. The word “support” appears to have been chosen carefully in place of “ensure”. The Proposals Paper even omits the word “ensure” when quoting from the Explanatory Memorandum, as if it is an inconvenient nuisance, allowing “support” to take its place.<sup>6</sup> In this subtle way, the Proposals Paper waters down ambitions in relation to the anti-siphoning regime.
23. The Current Scheme and Model 2 (which is the Government’s preferred model) **do not ensure** free access to events on the List. Nor does Model 3. These models can at best be said to “support” free access by increasing the likelihood of free access compared to no regulation. As explained below, under the Current Scheme and under Model 2, FTA broadcasters that acquire rights to listed events are free to arrange for these events to be televised behind paywalls (or not be televised at all). Of the three models canvassed in the

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<sup>3</sup> Explanatory Memorandum to the Broadcasting Services Bill 1992, page 67. The word “ensure” can also be found in the quote on page 17 of the Proposals Paper, which is attributed to a Press Release from the Minister for Communications and the Arts, the Hon Michael Lee OAM: “the ‘anti-siphoning’ list would ensure that viewers would not be forced to pay for major sporting programs which they now received free of charge”.

<sup>4</sup> Proposals Paper, pages 4, 14 and 16.

<sup>5</sup> Proposals Paper, page 17.

<sup>6</sup> Proposals Paper, page 15.

Proposals Paper, only Model 1 fulfils the original objective of the anti-siphoning regime by **ensuring** free access to events on the List.

24. It is not clear why the Proposals Paper proposes to settle with an objective of “support” for free access, rather than ensuring free access. Elsewhere, the Proposals Paper rejects Model 1 (a model that ensures free access) on the basis that a small percentage of the population would not be able to access free coverage via internet based services.<sup>7</sup> Yet a regime that merely supports free access, such as Model 2, would risk that the *entire population* not be able to access free coverage. If the Government is truly concerned that listed events be widely accessible for free, it should prefer a reform model that ensures free access.

### 3. COST-BENEFIT ANALYSIS

25. Among the principles of good regulation are that any regulatory measure chosen should be the minimum intervention required to achieve the objective, creating the least costs and distortions, and that regulation should produce benefits that outweigh the costs.<sup>8</sup> Cost-benefit analysis is therefore an important aspect of sound regulatory policy making.
26. According to the OBPR’s March 2020 Guidance Note on Cost-Benefit Analysis, the Government “is committed to the use of cost-benefit analysis (CBA) to assess regulatory proposals in order to encourage better decision making”.<sup>9</sup> As the Guidance Note explains, CBA is useful because, among other things, it “provides decision makers with quantitative and qualitative information about the likely effects of a regulation” and “encourages decision makers to take account of all the positive and negative effects of the proposed regulation, and discourages them from making decisions based only on the impacts on a single group within the community”.<sup>10</sup>
27. In the context of the Government’s review of the anti-siphoning scheme, the reform model and the composition of the List that are ultimately chosen should be shown to deliver benefits that outweigh any costs, both compared to the status quo (continuation of the Current Scheme) *and* compared to alternative models and List compositions being considered.
28. As explained further in Section 4.2.3, the Proposals Paper identifies costs and benefits of each of the three models it considers, but ultimately reaches a position on a preferred model and preferred List option without a clear CBA. In particular, there is no sense that the Government has carefully weighed the costs and benefits of Model 2 compared to Model 1.

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7 Proposals Paper, page 36.

8 See for example OECD, *OECD Guiding Principles for Regulatory Quality and Performance*, undated, page 3, and Australian Government, Office of Best Practice Regulation (OBPR), *Best Practice Regulation Handbook*, August 2007, pages 1-2. See also Geoff Edwards, *Prominence for local TV services on connected TV devices: Economic Observations and Recommendations*, Submission in Response to the Government’s December 2022 Proposals Paper on a prominence framework for local TV services on connected TV devices, 3 March 2023.

9 Australian Government, *Cost-benefit analysis: Guidance Note*, March 2020, page 1.

10 Australian Government, *Cost-benefit analysis: Guidance Note*, March 2020, page 1.

## 4. THE PROPOSED MODELS

### 4.1. Comments on the proposed models

#### 4.1.1. Model 2

29. Model 2 is essentially the Current Scheme – which restricts STV licensees from acquiring rights before a FTA broadcaster – with an extension to also restrict online service providers from acquiring rights before a FTA broadcaster. Model 2 therefore regulates the order in which rights to listed events may be acquired, giving preferential treatment to FTA broadcasters when it comes to bidding for and acquiring these rights.
30. Model 2 does not ensure broadcasting or any other form of transmission of listed events, and nor does it ensure that if transmission occurs it will be for free. Under Model 2, FTA broadcasters will continue to be free to acquire rights to listed events and arrange for the transmission of those events behind a paywall. This feature, which is incongruent with the objective of the regime, arises from Model 2's nature as an extension of the Current Scheme, which is itself an historical "cludge"<sup>11</sup> that continues to serve the interests of FTA broadcasters – providing them with some freedom from competition for rights – but is not well targeted at the objective of free access for the general public.
31. The Proposals Paper refers to Model 2 as a "broadcasting safety net" model. I consider this to be a misnomer. Model 2 does not provide a "broadcasting safety net" in the sense of ensuring listed events will be broadcast for free on terrestrial FTA networks. Again, under Model 2 FTA broadcasters are under no obligation to broadcast listed events for free and may arrange for events to be transmitted entirely behind paywalls. Model 2 would be better referred to as a "priority for FTA broadcasters" model, as its main effect is to give priority to FTA broadcasters when bidding for and acquiring rights. As explained below, with a small modification Model 1 would deserve to be referred to as a "broadcasting safety net" model: the modified Model 1 would both *ensure* transmission for free on a broadly available technology platform *and also* provide a reasonable opportunity for rights to listed events to be acquired by FTA broadcasters and broadcast on terrestrial FTA networks.
32. The Proposals Paper asserts that Model 2 "doesn't provide FTA broadcasters with preferential treatment in terms of their 'non-broadcasting' content services (i.e. BVOD or other online services)".<sup>12</sup> This is also not correct.
  - a. Model 2 would provide preferential treatment to FTA broadcasters when bidding for packages of rights that include rights to broadcast via terrestrial services and rights to broadcast via online services: FTA broadcasters would have the opportunity to bid for and acquire all of these rights before STV licensees and other online service providers.
  - b. Moreover, as explained earlier, Model 2 would allow FTA broadcasters to transmit listed events only behind their own paywalled online services, whereas other online service providers that acquire rights to listed events (after a FTA broadcaster has acquired rights to those events) may have to accept the simulcast of those events on FTA services.

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<sup>11</sup> A clumsy or inelegant solution to a problem.

<sup>12</sup> Proposals Paper, page 6.

#### 4.1.2. Model 1

33. Model 1 is similar to the model that I proposed in my report in response to the Consultation Paper. Under the proposed Model 1, anyone may acquire rights to listed events, but if coverage of these events is made available to audiences in Australia by a content service provider, that content service provider would need to ensure that coverage is made available to the Australian public live, in full and for free on a broadly available technology platform.
34. As with the model that I proposed, Model 1 is directly targeted at the objective of the anti-siphoning regime to ensure free access to events on the List. Whereas Models 2 and 3 regulate the sequence in which rights are acquired, Model 1 regulates *how rights are used once they are acquired*, which is the only way to ensure the objective of the regime. This difference is the source of Model 1's benefits compared to Models 2 and 3, which I explain in detail below.
35. The proposed Model 1 differs from the model that I proposed in a way that I consider problematic and in need of further consideration. In particular, under the proposed Model 1 an obligation to ensure transmission on a broadly available technology platform live, in full and for free would apply to *any content service that transmits the events to audiences in Australia*. This would result in unnecessary restrictions on the commercial freedom of sports bodies and, potentially, unnecessary duplication of free transmission, in situations where the sports body selling the rights would like one content service provider to transmit its listed events via a subscription service and another content service provider to transmit those events via a broadly available free platform.<sup>13</sup> The content service provider that the sports body would prefer to transmit the events via a subscription service would have an obligation under the proposed Model 1 to also transmit the events for free, crowding out the content service provider that the sports body would prefer to transmit the events for free.
36. The model that I proposed solves for this problem. Under the model that I proposed, the obligation to ensure transmission live, in full and for free via a broadly available platform would apply *only to the first acquirer* of rights to the events. The first acquirer would not need itself to transmit the events live, in full and for free via a broadly available platform but would be responsible to the Government and the public for ensuring that such transmission occur. This obligation might be fulfilled by contracting with another service provider for live, in full and free transmission via a broadly available platform. For example, under the model that I proposed, an online service provider may acquire rights to a listed event, transmit that event via its own subscription service, and fulfil its obligation in relation to free transmission of the event by sub-licensing the rights to the event to a FTA broadcaster.
37. Allowing for listed events to be transmitted for free and behind a paywall by different service providers would allow sports bodies to negotiate and contract freely with their preferred service providers and realise benefits of differentiation in terms of commentary, transmission quality and other features (e.g., interactivity).

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<sup>13</sup> This situation is commonly the case, for example in relation to AFL and NRL games, which are currently transmitted by Foxtel behind a paywall and for free by FTA broadcasters.

## 4.2. Costs and benefits of Model 2 compared to Model 1

### 4.2.1. Costs of Model 2 compared to Model 1

38. There are two significant costs of Model 2 compared to Model 1. First, Model 2 does not ensure free access to listed events. This is a significant downside of Model 2, given that ensuring free access is the objective of the regime. Under Model 2 there is no obligation on FTA broadcasters to acquire rights to listed events and no obligation to broadcast listed events that they acquire for free (or at all). FTA broadcasters will continue to be able to acquire rights to listed events in priority over other entities and then arrange for the events to be transmitted only behind paywalls. There is therefore a risk with Model 2 (indeed, a likelihood) that events considered to be of “national importance and cultural significance” will not be available for free to *any* Australians.
39. The Proposals Paper responds to this issue by asserting that there would be “very strong incentives” for FTA broadcasters to provide free, live and in-full coverage.<sup>14</sup> Incentives to provide free coverage should not be assumed. FTA broadcasters will sometimes have incentives to provide free coverage, sometimes to transmit events behind their own paywalls and sometimes to sub-license rights to other service providers to transmit events behind paywalls. Indeed, under the Current Scheme – which shares Model 2’s feature of regulating only the order of rights acquisition and not ensuring free access – many listed events are only available behind paywalls.
40. The same can be expected under Model 2. This reveals an irony in the Government’s current preference for Model 2. Model 2 is currently preferred by the Government as the means to address the risk of listed events migrating to platforms that involve costs for Australian audiences,<sup>15</sup> but it does not address that risk. Model 2 would in fact perpetuate the current situation in which rights to listed events may be acquired by FTA broadcasters and then exploited solely within subscription services, denying free access to these events for the Australian public. In other words, the Government’s preferred solution to concerns that listed events may become hidden behind paywalls would perpetuate a situation in which listed events can be hidden behind paywalls. This seems far less than optimal as a regulatory outcome. The difference between the Current Scheme and Model 2, in terms of the risk that listed events will become paywalled, is only that Model 2 favours the paywalls of FTA broadcasters.
41. Second, like the Current Scheme, Model 2 distorts the playing field in favour of FTA broadcasters, limiting competition for exclusive rights to listed events. Indeed, by extending the Current Scheme to restrict online service providers as well as STV licensees, Model 2 distorts the playing field even more than the Current Scheme and provides FTA broadcasters with even greater freedom from competition. This restricts the commercial freedom of sports bodies and is likely to reduce the revenues they can earn for rights to their events. In turn, reduced revenue is likely to reduce the amounts sports bodies pay athletes and invest in their sports, including in new competitions (including competitions for women and people with disabilities), sports facilities and programs, and grassroots development of their sports. For the general public this will mean less content innovation

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14 Proposals Paper, page 32.

15 Proposals Paper, page 6.



and development, reduced quality of sports, reduced viewer enjoyment and reduced engagement with and participation in sports.

42. This cost is recognised in the Proposals Paper, although as explained below the Government does not appear to have properly weighed this cost when conducting its preliminary assessment and arriving at its position. The Proposals Paper explains:<sup>16</sup>

*[Model 2] would broaden the effective restriction on sports bodies in terms of their ability to negotiate with content services regarding their rights. These bodies have noted that their ability to maximise revenue from these rights is critical for their ability to invest in their respective sports at the grassroots level, and underpins their operations as not-for-profit entities. This model would effectively require sports bodies to negotiate with free-to-air broadcasters for broadcast rights before opening negotiations with other parties. This is more restrictive than the current scheme, although less onerous than Model 3.*

*[Model 2] would extend the commercial advantages afforded to free-to-air broadcasters under the current scheme and is likely to advance their negotiating position with regard to sports rights compared with their competitors. This is a product of the requirement for a free-to-air broadcaster to have acquired a right to televise the event on a broadcasting service before another party can acquire a right to the event.*

43. According to the Proposals Paper, these effects are “likely to be material”.<sup>17</sup> By contrast, the targeting of how rights are used once they are acquired under Model 1 ensures listed events will be televised for free, and the technology neutrality of Model 1 in relation to the acquisition of rights will ensure competition for rights, with beneficial effects for sports, athletes and the wider Australian public.
44. The material nature of the costs of Model 2 means that there needs to be material and outweighing benefits of Model 2 compared to Model 1 for Model 2 to be the preferable model. The benefits of Model 2 compared to Model 1 are considered below.

#### **4.2.2. Benefits of Model 2 compared to Model 1**

45. The Proposals Paper argues that compared to Model 1, Model 2 offers the benefit of FTA broadcasts being more widely accessible than internet based services. This is the Proposals Paper’s main reason for not preferring Model 1.<sup>18</sup>
46. However, even if FTA broadcasts are more widely accessible under Model 2, the benefit is only a potential benefit: the benefit will not arise where FTA broadcasters acquire rights to listed events and do not broadcast those events over FTA networks, which is a possibility under Model 2.
47. The Proposals Paper also overstates the benefit. The Proposals Paper argues that, while availability of the internet is close to universal, “there are gaps and discrepancies in terms of take-up for certain groups within Australian society” with around 7% of Australians having no home internet connection and lower take-up more prevalent among regional Australians

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16 Proposals Paper, page 40.

17 Proposals Paper, page 40.

18 Proposals Paper, page 36.

and the elderly.<sup>19</sup> This 7% figure overstates the difference in accessibility of internet services compared to FTA broadcasting services for a number of reasons.

- a. First, there will be many households without a home internet connection that access the internet (and internet transmissions of listed events) via mobile networks. The Proposals Paper acknowledges that more than 99% of the population is able to access Telstra's 4G mobile services, and that 16% of Australian adults today rely on mobile services (mobile broadband or mobile phone) to access the internet ("mobile-only users"), saving themselves the costs of a home internet connection.<sup>20</sup> It follows that the 7% figure concerning the proportion of the population with no home internet connection overstates the proportion of the population without access to internet transmissions of listed events – many will have access via mobile services as their preferred method of internet access.<sup>21</sup>
  - b. Second, the Proposals Paper appears to assume ubiquitous availability and take-up of FTA broadcasts and does not subject FTA broadcast services to the same level of examination as internet services. In particular, many of the secondary channels of FTA broadcasters that often broadcast listed events are only broadcast in HD and are not accessible for people with TV sets purchased before 2009 that do not support HD signals. The Proposals Paper has not examined the percentage of those people who have not taken up either a fixed or mobile internet service that can actually receive FTA broadcasts of listed events.
48. The benefit in terms of accessibility of FTA broadcasts is further overstated because many Australians that have not taken up either a fixed or mobile internet service will have no interest in watching listed events. The Proposals Paper refers to evidence that around one-third of the population has not watched any sport in the preceding six months.<sup>22</sup>
49. In summary, it is possible that, after accounting for (i) the many households that rely on mobile services for their internet services at home (including for transmissions of listed events), (ii) the further households that cannot access FTA broadcasts of listed events, and (iii) people with no interest in viewing listed events, the (potential) benefit of FTA broadcasts being more widely available than internet transmissions may be in relation to only a very small percentage of the population (closer to 1-2% than to 7%).

#### 4.2.3. The Proposals Paper's CBA

50. For each model, the Proposals Paper includes sections that compare the model with the Current Scheme and with the other models, a "preliminary assessment" section and a section that set out the Government's position. However, when considering Model 2, the "preliminary assessment" section compares Model 2 with the Current Scheme, rather than

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19 Proposals Paper, page 34.

20 Proposals Paper, pages 33-34.

21 Adults without home internet connections are just as prevalent among young people as older people: according to ACMA data, 11% of Australians aged 25-34 reported no home internet access, matching the percentage among Australians aged 75 and over: ACMA, *Communications and media in Australia: How we use the internet*, December 2022, data file.

22 Proposals Paper, page 16.

with Model 1, and the “Government position” section is flawed and does not include any careful CBA.

*The “preliminary assessment” section compares Model 2 to an irrelevant counterfactual*

51. The “preliminary assessment” section of the Proposals Paper in relation to Model 2 acknowledges that Model 2 would “exacerbate a number of the acknowledged concerns and risks with the current scheme” including broadening the restriction on the commercial freedom of sports bodies to negotiate with content service providers to maximise revenues for their sports and invest in their sports, and extend the commercial advantages afforded to FTA broadcasters.<sup>23</sup> It then argues that “while these adverse impacts are likely to be material, they need to be balanced against the costs and risks associated with the status quo where online rights to iconic events are not regulated in any way”.<sup>24</sup>
52. In my view, in a context in which there are other reform models being contemplated to address the “regulatory gap” in relation to online rights, the material adverse impacts of Model 2 should be balanced against the benefits of Model 2 (if any) compared to Model 1. Model 1 would address the “gap” by regulating online rights to listed events. By only comparing Model 2 to the status quo, the Proposals Paper creates a false impression of benefits for Model 2 that outweigh the material adverse impacts of Model 2.

*The “Government position” section is flawed and does not include any careful CBA*

53. The “Government position” section of the Proposals Paper in relation to Model 2 acknowledges the adverse impacts of Model 2 on sports bodies “and a broader set of media entities”, but does not acknowledge the adverse impacts on athletes and the general public from reduced investment in sports. It also incorrectly suggests that Model 2 would provide no advantage to FTA broadcasters in relation to the acquisition of non-broadcasting (online) rights (see paragraph 32 above). It then quickly concludes that “on balance” Model 2 is the Government’s preferred model for reform, without any careful cost-benefit weighing of the adverse impacts and potential benefits compared to Model 1.

#### 4.2.4. Conclusion

54. In my opinion, the costs of Model 2 compared to Model 1 are significant and are likely to outweigh the benefits. I therefore consider that Model 1 should be preferred to Model 2. While Model 1 may not deliver free access to listed events for *all* Australians, it will *ensure* free access to *all* listed events for the vast majority, whereas Model 2 is likely to result in some listed events not being freely available to *any* Australian. Moreover, Model 2 restricts the commercial freedom of sports bodies and competition for rights to sports events (even more so than the Current Scheme), with adverse effects on sports, athletes and the general public as a result of reduced revenues and investments that can be made in the sports.
55. The Proposals Paper has not attempted to balance the costs and benefits of Model 2 compared to Model 1 in a careful way. Instead, primacy appears to have been given to the potential for Model 2 to realise free access for a slightly larger proportion of the population.

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23 Proposals Paper, page 40.

24 Proposals Paper, page 40.

## 5. COMMENTS ON THE PROPOSED LIST OPTIONS

### 5.1. Only Option 1 should be paired with Model 1

56. As I have previously explained,<sup>25</sup> Model 1 should only be introduced in conjunction with a substantial reduction in the List to only retain events currently broadcast on FTA channels on a national basis and that are viewed by a substantial proportion of the population. If the List were to retain events currently only transmitted via subscription services, or that are only transmitted on FTA television in one state, the adoption of Model 1 would impose an obligation to transmit live and for free events that are currently important drivers of subscription revenues and that are evidently not events of sufficient national importance and cultural significance, given that they are not currently transmitted via FTA television channels on a national basis.

### 5.2. Only Option 1 is consistent with the concept of “national importance and cultural significance”

57. In any event, regardless of the reform model chosen, the List should be reduced, not expanded, to genuinely reflect the concept of events of “national importance and cultural significance”.

58. The Proposals Paper states that nationally important and culturally significant events “would generally be those that have a degree of national resonance and incorporate an element which, in some way, unites the Australian community, not just those segments of the community that happen to have an interest in the particular event”.<sup>26</sup>

59. Under Options 2 and 3, more than 2,000 events would be included on the List (around 2,500 and 2,800 respectively). Putting to one side World Cups and Olympic and Paralympic games, which are not held every year, there would still be more than 1,300 listed events each year (on average, more than three events per day). Most of these events are of interest only to segments of the community that happen to have an interest in the sport. For example, most AFL, AFLW, NRL and NRLW games during the regular season are of interest mainly to fans and supporters of the teams involved and “hard core” fans of the sport. These games (most of which are between teams from the same State) cannot be said to have “national resonance” or the character of uniting the Australian community. Reflecting this, most of these events are not currently freely accessible: the rights to these events, having been acquired by FTA broadcasters, are not being exploited by them.

60. Options 2 and 3 are therefore not consistent with the natural meaning of “national importance and cultural significance”, nor the interpretation given to the term in the Proposals Paper. Only Option 1, which limits the List to around 300 events, including only finals and special holiday games of the main sporting competitions, is consistent with a regime that exists to protect events of “national importance and cultural significance”.

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<sup>25</sup> Geoff Edwards, *Australia’s Anti-Siphoning Scheme: Competition Assessment and Alternatives*, Submission to the Review of the Anti-Siphoning Scheme, 5 December 2022, paragraph 58 on page 15.

<sup>26</sup> Proposals Paper, page 15.

### 5.3. Unintended adverse consequences of listing women's sports and sports for people with disabilities

61. Expansion of the list to include women's sports and sports for people with disabilities would ensure consistent treatment. However, there will be no practical effect on the amount of these sports that is freely available, and the negative revenue impact for the sports is likely to have unintended adverse consequences for these sports and for female athletes and athletes with disabilities.

#### 5.3.1. No practical effect

62. Today, *without being listed*, women's sports are in most cases freely available to the same or a greater extent than corresponding male versions that are listed. Each week during the upcoming AFLW season, between three and five matches will be televised live on FTA channels compared to three to four games for the AFL Men's (AFLM) competition. The situation is even better in rugby league and cricket, with all matches in the current NRLW season, all women's state of origin games, and all women's international Tests, ODIs and T20 matches in Australia available on FTA.<sup>27</sup>
63. This demonstrates that there is no "free access" problem to fix in women's sports. The same is the case for sports for athletes with a disability: the 2024 Paralympic Games are to be televised live on free-to-air television on the Nine network. It is worth understanding why this is. It is because, at this early stage in the development of these sports, the sports bodies have a strong interest in ensuring broad exposure of these relatively new competitions in order to grow audiences, engagement and participation. In other words, their interests are already aligned with the Government's interest in ensuring these events are freely available to the public.
64. It follows that the inclusion on the List of women's sports and sports for people with disabilities will be symbolic at most, with no practical effect on the extent to which these sports will be freely available to the public.

#### 5.3.2. Unintended adverse consequences

65. Being included on the anti-siphoning list is a poisoned chalice for sports and athletes. The scheme is a form of regulation, and regulation almost always has unintended consequences. As discussed above and acknowledged in the Proposals Paper, by giving FTA broadcasters priority, the scheme constrains the commercial freedom of sports bodies that run listed events and limits the revenue they can earn from rights to televise their sports. This in turn limits the investments they can make (including in grassroots development and new competitions including women's competitions) and how much they

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<sup>27</sup> An exception is the FIFA Women's World Cup in 2023 when it is compared to the men's edition in 2022, which was entirely free to view on SBS. However, the 15 matches of the women's edition that were televised on free services included each game played by Australia, some other Round of 16 games and quarter finals, both semi-finals and the final. This is many more matches than are protected under the current anti-siphoning scheme for men's World Cups (the current anti-siphoning list includes only matches involving Australia and the final).

can afford to pay players, coaches and others involved in the sport. This business reality is prominent in the submissions of the sports bodies to the Consultation Paper.<sup>28</sup>

66. At a time when women's sport is being celebrated and in the midst of a cultural shift towards equal respect for female athletes, including women's sports on the anti-siphoning list would be counterproductive, reducing the revenues and investments that can be made in those sports, and constraining the ability of female athletes to make sport their profession and realise remuneration similar to men.

### 5.3.3. No CBA in the Proposals Paper

67. The Proposals Paper contains no attempt at a cost-benefit analysis of adding women's sports and sports for people with disabilities to the List. In particular, there is no careful consideration of the effects on women's sports and sports for people with disabilities, nor of the effects on female athletes and athletes with disabilities. Indeed, there is no suggestion in the Proposals Paper that women or people with disabilities will benefit at all from including these sports on the List.
68. Without a carefully considered CBA there is a high risk that the proposed reforms to the List will harm the very groups the Government seeks to recognise. While there is an understandable urge to deliver "consistent treatment", there should be great care in the Government's deliberations for the continued development of women's sports and sports for people with disabilities, as well as the welfare of female athletes and athletes with disabilities.

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<sup>28</sup> For example, the submission of the Coalition of Major Professional and Participation Sports Inc (COMPPS) emphasised that the revenue derived from the sale of media rights is the "single most important" revenue stream for its members and "critical to [...] members being able to invest in their sport from the grassroots to the elite level", and being included on the anti-siphoning list "means that sports cannot optimise their investment in their sport, infrastructure and grass roots": COMPPS, *Submission of COMPPS to the review of the anti-siphoning scheme*, 6 December 2022, pages 2-3.

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# Economic Observations on the Anti-Siphoning Review Proposals Paper

## Addendum

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1. The Government's Anti-Siphoning Review Proposals Paper (Proposals Paper) identifies a "regulatory gap" in relation to online services (streaming services). Online service providers are currently able to acquire rights before FTA broadcasters and may take advantage of this "gap" to acquire listed events and place them behind their paywalls.
2. The Proposals Paper lays out three reform models to address this gap, including a model that would impose a technology neutral obligation on any content service provider that makes coverage of listed events available to audiences in Australia to ensure that coverage is made available to the Australian public live, in full and for free on a broadly available technology platform (Model 1), and an extension of the Current Scheme to restrict online service providers as well as subscription television (STV) licensees from acquiring rights to listed events before rights to those events have been acquired by FTA broadcasters (Model 2).
3. The Government has indicated that Model 2 is its preferred reform model. In rejecting Model 1, the Proposals Paper concludes that the accessibility of internet services is not yet sufficiently broad across the population to adopt a technology neutral approach in terms of transmission.

*Technology and market conditions in Australia are not mature enough to enable the adoption of this model in the near- to medium-term. While over 99 per cent of Australians can theoretically connect to high quality internet services, take-up of these services is inconsistent across the country. Without adequate internet, audiences would not be able to access coverage of sport via online services, even without an explicit charge for those services.*

*The Government's preliminary view is that [Model 1] could be considered once online services are able to support free access to televised coverage of nationally important and culturally significant sporting events for all Australians, regardless of their financial means, location or other factors.<sup>1</sup>*

4. As I explained in a report that accompanied Foxtel's submission in response to the Proposals Paper, the costs of Model 2 compared to Model 1 are significant and likely to outweigh the benefits.<sup>2</sup>
  - a. **Cost 1: Model 2 does not ensure free access.** Model 1 will *ensure* free access to *all* listed events for the vast majority of Australians. Model 2, on the other hand, does not *ensure* any form of access and is likely to result in some listed events not being freely available to *any* Australian. Alternatively, under Model 2 some listed events may only be made available for free to *some* Australians because they are not broadcast on a national basis.
  - b. **Cost 2: Model 2 restricts competition for rights, revenues and investment in sports.** Model 2 restricts the commercial freedom of sports bodies and competition for rights to sports events (even more so than the Current Scheme), with adverse effects on sports, athletes and the general public as a result of reduced revenues and investments that can be made in the sports.

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<sup>1</sup> Proposals Paper, page 36.

<sup>2</sup> Geoff Edwards, *Economic Observations on the Anti-Siphoning Review Proposals Paper*, 18 September 2023, paragraphs 5-9, 38-49 and 54.



- c. **Limited Benefit.** Model 2's benefit compared to Model 1 is limited. The Proposals Paper argues that Model 2 offers the benefit of FTA broadcasts being more widely accessible than internet-based services. However, even if FTA broadcasts are more widely accessible under Model 2, the benefit is only a potential benefit: the benefit will not arise where FTA broadcasters acquire rights to listed events and do not broadcast those events over FTA networks, which is a possibility under Model 2, or do not broadcast those events on a national basis. The Proposals Paper also overstates the benefit.<sup>3</sup>
5. I therefore consider that, on balance, Model 1 should be preferred to Model 2.
6. Notwithstanding this, Foxtel's submission in response to the Proposals Paper proposes an "alternative transition model" that would be based on Model 1,<sup>4</sup> but with an additional obligation on the first acquirer of rights to transmit listed events live and in full to offer broadcast rights to those events to FTA broadcasters on "reasonable commercial terms", for exercise via a commercial broadcasting service or national broadcasting service, but not via a streaming service. Foxtel refers to this additional obligation as a "Broadcast Offer Obligation".
7. When comparing Model 2 with Model 1 with a Broadcast Offer Obligation, the cost-benefit calculus is unequivocally in favour of the latter.
  - a. Model 1 with a Broadcast Offer Obligation offers significant benefits compared to Model 2 in terms of both ensuring free access to listed events and enhancing competition for sports rights (and, as a result of that competition, enhancing the ability of sports bodies to invest in sports and athletes, benefiting the general public).
  - b. At the same time, Model 1 with a Broadcast Offer Obligation addresses the Government's concern with Model 1 that the accessibility of internet services is not yet sufficiently broad, by providing an opportunity for FTA broadcasters to acquire rights to broadcast listed events on reasonable commercial terms. Model 1 with a Broadcast Offer Obligation therefore has no costs compared to Model 2: both support free access to televised coverage of listed events for all Australians, regardless of their financial means, location or other factors, via FTA transmission.
8. I therefore consider that Model 1 with a Broadcast Offer Obligation should unequivocally be preferred to Model 2.

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<sup>3</sup> For a detailed explanation see Geoff Edwards, *Economic Observations on the Anti-Siphoning Review Proposals Paper*, 18 September 2023, paragraphs 8 and 45-49.

<sup>4</sup> Foxtel proposes that Model 1 apply only to the first acquirer of rights capable of showing a listed event live and in full, as recommended in my report (see Geoff Edwards, *Economic Observations on the Anti-Siphoning Review Proposals Paper*, 18 September 2023, paragraphs 35-37).