



**Submission by
Free TV Australia Limited**

to Australian Government Productivity
Commission

Draft Research Report Annual Review of
Regulatory Burdens on Business:
*Social and Economic Infrastructure
Services*

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1 Executive Summary

- Free TV opposes any amendment to the anti siphoning list. The switch from analogue to digital does not change the basic policy objective that Australians should be able to watch major sporting events for free on television. The anti siphoning list is working as intended. It allows the two-thirds of Australians who rely solely on free to air television to continue to watch key sporting events for free.
- The Productivity Commission is wrong to conclude that free to air broadcasters have a greater ability to pay for premium sporting events and therefore events will remain on free to air television even if they are delisted. International experience demonstrates that the pay television industry has greater capacity to pay for premium sporting events compared with free to air television and that once events are delisted they inevitably migrate to pay television.
- The characterisation of rights deals in the Draft Report is over-simplified. In practice, there are many factors which influence the value and terms of rights deals. Further, pay television related companies such as Fox Sports frequently participate in rights negotiations from the outset.
- Sport is very popular on free to air television. 17.2 million Australians watched all or part of the coverage of the 2008 Olympics – the largest in Australian history. An average of 11.6 million Australians tuned into the coverage on commercial free to air every day.
- Reports by the Australian Communications and Media Authority (ACMA) show that free to air broadcasters do not hoard sports. Broadcasters show all the events to which they have acquired rights and everything else is available to pay TV.
- Sport will migrate to pay TV if it is delisted and viewers will be forced to pay for sport which they are currently receiving free of charge.
- It is not correct to conclude that delisting sport will drive digital take-up. Australians would be encouraged to migrate to digital if free to air broadcasters were permitted to show listed sports on their digital multi channels.
- Free to air television remains the most heavily regulated of all media. Free TV is not opposed to regulation provided it is balanced and it achieves stated social, cultural and economic outcomes. Free TV disagrees with the Productivity Commission that the regulatory imbalances are justified.
- Free TV supports the Productivity Commission's recommendation that the HD quota reporting requirement be abolished as it imposes a significant and unnecessary regulatory burden on broadcasters.
- Free TV also supports the recommendation that the Department of Broadband, Communications and the Digital Economy (DBCDE) review the regulation of captioning with the aim of regulating the provision of captioning services under a single piece of legislation.
- Free TV also supports the Productivity Commission's comments that the ACMA's role in the development and enforcement of industry regulation could be enhanced to provide greater business certainty that is consistent with the objects of the Broadcasting Services Act.

Introduction

Free TV Australia is the peak industry body representing all commercial television stations licensed to broadcast throughout Australian under the *Broadcasting Services Act 1992 (BSA)*.

Free TV Australia welcomes the opportunity to provide this submission to the Productivity Commission's Draft Report on the Review of Regulatory Burdens on Business: *Social and Economic Infrastructure Services* (the "Draft Report").

Commercial free to air television is subject to an extensive range of regulatory measures which impose significant costs which do not apply to other platforms. There is an imbalance between the regulation of the free to air and the pay TV platform. In particular free to air broadcasters are subject to stringent quotas in relation to Australian content and children's programming. Free TV is also subject to time zone restrictions unlike pay TV.

Free TV is not opposed to regulation provided it is balanced and it achieves stated social, cultural and economic outcomes.

Free TV supports the continuation of the anti siphoning list in its current form. The anti siphoning list continues to be an important means of ensuring that Australians do not have to pay to see key sporting events. It is working well and as intended and should not be amended. It is as relevant in a digital environment as it is in analogue.

The public interest in free access to coverage of major sporting events continues to outweigh the claimed impact of the anti-siphoning rules on Foxtel and Fox Sports.

Free TV considers that the role of the regulator in the development and enforcement of industry regulation could be further improved for the benefit of industry and the viewing public.

This submission addresses the following topics:

Section 3 presents arguments which support the retention of the anti siphoning list. Information about pay TV's capacity to compete for sport and the resulting migration of delisted events from free TV to pay is included along with evidence of the overseas experience of the migration of sport to pay when events have been delisted.

Section 4 provides arguments against the uneven regulation of free TV and pay TV. It refutes the premise that the differing business models warrant different treatment.

Section 5 provides support for the Productivity Commission's recommendations in relation to HD quota reporting and the regulation of captioning.

Section 6 provides some additional comment on the development and enforcement of industry regulation.

2 Anti siphoning

The anti siphoning list has been supported by Governments of both persuasions to ensure that Australians continue to see major sporting events for free. It contains a limited list of sports which are determined to be of national significance.

The anti siphoning list provides that the free to air broadcasters have the first opportunity to bid for the rights for the limited number of sports on the list. Any events which are not taken up by the free to air broadcasters are delisted three months before their commencement, enabling pay television licensees to purchase them.

In practice, pay television representatives are often involved in the negotiation of rights for anti siphoning listed events from the outset. As described below, this is largely due to a loophole in the anti siphoning provisions which prevents pay television licensees but not channel owners from purchasing rights.

International experience demonstrates that when sporting events are removed from the anti siphoning list they migrate to the pay television platform. It is not correct that free to air broadcasters have a greater capacity to pay for rights and therefore events will remain on free to air television if delisted.

2.1 Sport for free is a public good.

The policy principle underpinning the anti siphoning list is that there is a public interest in ensuring that nationally significant sporting events remain available free of charge for all Australians to watch. This recognises that nationally significant sporting events play an important role in Australia's cultural and social life and that Australians should not be denied access to these events based on their inability to afford the high cost of pay television services.

While the penetration of pay TV has risen since the list was introduced, it remains relatively low with only a third of all Australians opting to pay up to \$131 per month for the subscription service. Pay TV is generally regarded as a discretionary expense for the family budget which is already stretched by increasing fuel costs and other financial pressures.

By comparison, free to air television services reach more than 99 per cent of Australians. These services are provided free of charge.

The move from analogue to digital does not change the basic premise that all Australians should be able to see major sporting events for free.

The penetration of digital free to air is ahead of the penetration of pay TV. 47% of Australians now have access to digital television, which gives them access to a range of new services free of charge.¹ Digital penetration will move toward 100% as free to air broadcasters approach analogue switch off in 2013.

By comparison, only around 30% of Australians chose to pay for their television services.

The popularity of sport on free to air television was reaffirmed during the coverage of the 2008 Olympics. 17.2 million people watched all or part of the free to air coverage. This was the largest audience in Australian history. An average of over 11.6 million

¹ Digital tracker, Report on Quarter 1 2009

people tuned in to the free to air coverage every single day of the games. Many people watched the Olympics for the first time in High Definition.

Sports programs are consistently among the top rating of all programs on Australian television. In the four weeks to 22 June 2009, sports programs were prominent in the top 40 programs. The State of Origin (1st match, pre match and post match) all rated in the top 10 programs. 3.4 million Australians saw the 1st match of the state of origin on free to air television. The AFL Grand Final is consistently one of the top-rating programs on television in any year.

The high numbers of viewers attracted to free to air broadcasts of sport provides support for proposition that sport on free to air television is highly valued by Australian viewers. The anti siphoning list continues to deliver on its policy objective of providing access to key sporting events free of charge.

2.2 Negotiation for sports rights

(1) The negotiation process is operating as intended

The anti siphoning list is designed so that the free to air broadcasters have the first opportunity to acquire rights to nationally significant sporting events before the events are available to pay TV. Through this process, Australian viewers are given the best opportunity available to see sport for free rather than being forced to pay for it.

In practice, pay television representatives are often involved in the negotiation of rights for anti siphoning listed events from the outset. This is largely due to a loophole in the anti siphoning provisions which prevents pay television licensees (e.g. Foxtel) from purchasing rights but do not prevent pay television channel owners (i.e. Premier Media, owner of the three Fox Sports channels) from purchasing rights.

For example, Fox Sports purchased rights to the 2005 Ashes series prior to any free to air broadcasters doing so and before all broadcasters had a reasonable opportunity to acquire them.

Pay television companies may also jointly bid for rights with a free to air broadcaster, as was the case when Foxtel and the Nine Network submitted a joint bid for the 2008-2012 AFL rights for \$780 million, which the Seven Network and Network Ten chose to match.

The bidding process does not always secure the rights for free to air broadcasters however as rights holders may seek payments higher than the free to air operators are willing to pay. In these cases the events are also available for pay TV.

The negotiating process also allows pay TV to acquire rights to many listed events. During the last round of negotiations with the NRL, pay TV secured the rights to more matches than the Nine Network. Of the 8 games played in a round, Foxtel has acquired the rights to 5 games while Channel 9 acquired the rights to only 3 games per round.

Rights to half of the AFL games have been acquired by Foxtel and will only be available to viewers who are prepared to pay.

The broadcast of the Australian Open is a good example of how the negotiating process enables both free to air and pay television broadcasters to acquire rights.

Of the 665 matches played at the 2009 Australian Open, Tennis Australia made available only 234 matches for broadcast. Matches played on courts not covered by cameras are not available for broadcast by any broadcaster throughout the world. Of the 234 matches, Seven acquired rights to 227 of those matches. Any of the matches not broadcast by Seven were available to Foxtel. 78 of those games were broadcast

by Seven and 134 were broadcast by Foxtel. Foxtel are also able to broadcast on delay any of the matches broadcast by Seven.

While the list has been in operation, sports rights agreements have certainly risen in value. In some cases such as the AFL the increase in rights payments have been significant. The current AFL deal was a sport rights record payment and the AFL is already talking up the prospects of a substantial increase in the next rights negotiation.

(2) Capacity to pay

The Draft Report asserts that free to air operators are in a strong position to acquire the rights to broadcast sports with wide public appeal. The Draft Report claims that the free to air broadcasters would acquire the rights on the basis of their higher revenue than pay TV without the protection of the anti siphoning regime.

It is not correct to say that free TV has a greater capacity to pay than pay TV. The business models for pay TV and free TV are inherently different.

Free TV relies solely on advertising revenue to fund programs. Advertising revenue available to fund rights acquisitions by free to air broadcasters is directly linked to the likely audience for each particular program.

For the first six months of 2009, the commercial free to air networks collectively earned advertising revenue of \$1,546,675,246. Revenue for the metropolitan networks amounted to \$1,171,188,452. The metropolitan network with the greatest revenue share was the Seven network with a 38.51% share of the total metropolitan revenue pool, amounting to \$451,024,673.²

By comparison, Foxtel's total revenue for the first six months of 2009 was \$908 million, up 12.8% for the same period last year. EBITDA was 18.5% to \$192 million. The Fox Sports group of channels (Premier Media Group) recorded revenues of \$209 million, up 14.5% and EBITDA of \$81.5 million (up 37%).³ Austar's EBITDA growth has been in double digits for the past three years.⁴ For the six months to 30 June 2009, Austar reported a net profit of \$35.5 million.⁵

Pay TV has both subscriber revenue and advertising revenue to draw on to fund rights acquisitions. The Draft Report overlooks this fact and notes that the "advertising revenues for free to air stations are likely to be greater than the primarily subscription based revenues that subscription television operators could achieve."⁶

Pay TV's available revenue stream includes subscription revenue which is constant over the life of the subscriber's contract irrespective of what the viewer is watching on pay TV. The pay TV model allows operators to monetise this revenue across all channels and for all programs.

John Porter, Austar chief executive confirmed this at the release of Austar's figures for the first half of 2009.

² Free TV Media Release 21 July 2009

³ Refer to 1H09 Results for Consolidated Media Holdings - <http://www.pbl.com.au/Images/Document/CMH%20RESULTS%20PRESENTATION%201H09.pdf>.

⁴ <http://www.mediaspy.org/report/2009/05/29/austars-earnings-and-directors-pay-jumps/>

⁵ http://bigpondnews.com/articles/Technology/2009/08/02/Pay_TV_no_longer_a_luxury_358452.html

⁶ Annual Review of Regulatory Burdens on Business: Social and Economic Infrastructure Service – Draft Report June 2009, page 127.

'We're not as reliant on cyclical advertising revenues as our colleagues in the broadcast industry or in traditional media,' Mr Porter said.

*'We have a large base of subscription customers who are largely quite happy with our service and continue to pay us month in, month out.'*⁷

This model places the pay TV networks in a very strong bargaining position and refutes the claimed impact of the anti siphoning regime on pay TV.

Foxtel's very strong financial results of these businesses underlines the fact that the anti siphoning rules, whilst preserving a core Australian value, have not damaged Foxtel or Fox Sports financially or the growth of pay TV, which can easily operate within the confines of the rules. These results also indicate the strong bargaining position of the pay TV operators.

It was this strong bargaining position which has seen the majority of the rights to the 2009 NRL and AFL seasons being acquired by Foxtel.

2.3 Overseas comparisons

The Draft Report draws on the overseas experience and claims that the Australian anti siphoning list is relatively long compared to those used overseas such as in the United Kingdom.

The Draft Report notes that if the anti siphoning list was removed there **may** be some migration of events to subscription networks. International experience shows that events will certainly migrate to pay TV if they are delisted.

The English Cricket Board ("ECB") chose to delist the Ashes coverage on the basis that the Government's view was that the series would not migrate to pay TV. However pay TV outbid the free to air networks for the 2005 Ashes series, the first rights negotiation following delisting.

When the English and Wales Cricket Board granted exclusive rights to broadcast live test match cricket in England for 2006-2009, to pay TV operator Sky which outbid free to air broadcasters, it removed live coverage of test cricket from free to air television for the first time following the delisting of domestic test cricket from a category A listed event to a category B listed event.

For UK viewers of the 2009 home Ashes series, "not one second of live televised action has been available to anyone who has not paid a subscription to BSkyB".⁸ ITV secured the rights to only a one hour highlights package. The audience numbers have dropped considerably when compared to the 2005 coverage when the event was shown on free to air television. During the third, fourth and fifth tests in 2005, audience numbers reached 7.48m, 8.2. and 7.2m people respectively. Compare this to the 1.47m people who watched the closing minutes of the recent drawn match. These audience numbers show that the delisting of the Ashes and subsequent rights acquisition by Sky has been detrimental to UK viewers.

The English Premier League soccer is another example. Not one single Premier League soccer match has been shown live on free to air television in 17 years despite the Premier League being one of the most important sports to the British public.

⁷ http://bigpondnews.com/articles/Technology/2009/08/02/Pay_TV_no_longer_a_luxury_358452.html

⁸ Sky's limits leaves cricket's fans in the dark and grass roots cut short - <http://www.guardian.co.uk/sport/blog/2009/jul/15/test-cricket-broadcast-rights-sky/print>.

The availability of the English Premier League and the Ashes only to viewers who can afford to pay, shows that sports migrate to pay TV if there is no protection for free to air viewers.

The migration of sport in the United Kingdom was acknowledged by the Productivity Commission in its 2000 Broadcasting Inquiry.⁹

New Zealand does not have an anti siphoning list and live coverage of the All Blacks test matches is only available on pay TV. Currently 45% of New Zealand viewers get their TV through Sky Digital and 10 per cent on the digital free-to-air platform, Freeview.¹⁰ The greater penetration of pay TV in NZ (45% in 2008¹¹) is largely due to the availability of key sporting events only on pay TV.¹²

The penetration of pay TV in Australia lags behind New Zealand, Britain and the United States, where anti-siphoning laws are less stringent.

Of particular concern in New Zealand is the acquisition by Sky TV of Prime (a free to air operator) which has deep pockets and bundled programme purchases.¹³ Sky recently won the rights to the London Olympics by outbidding TVNZ (who has always covered the games). Sky's use of Prime to acquire sports is aimed at preventing the introduction of an anti siphoning list.¹⁴ The New Zealand Ministry for Culture and Heritage has found there was prima-facie evidence that Sky's position could limit New Zealander's ability to see important events.

2.4 Benefits for Rights Holders and the grass roots sports

Pay TV operators claim that the anti siphoning list also has the unintended consequence of harming sporting organisations.

This has not been the case in the UK where media consultant David Brook, said that "every sport needs free to air exposure and the ECB is missing that opportunity, for cricket to reach really large audiences at the moments of high drama".

Pay TV's claims that the funds from rights deals flow through to investment in grass roots sports is also questionable. In the UK only 12.6% of the ECB's total income went to grass root and recreational competitions.¹⁵ William Buckland notes in "Pommies" his critical analysis of English Cricket, that the ECB's deal with Sky has removed television access for most people, and the bulk of the money goes to the counties, not the grass roots".¹⁶

2.5 Coverage of acquired events

⁹ Broadcasting Inquiry Report, Report no. 11, , Productivity Commission, 3 march 2000.
http://www.pc.gov.au/_data/assets/pdf_file/0003/26598/broadcst.pdf

¹⁰ Drinna, John Prime time for a battle over TV channels, 24 November 2008, nzherald.co.nz

¹¹ <http://www.budde.com.au/Research/New-Zealand-Broadcasting-FTA-Pay-TV-Digital-TV-Statistics-Overview.html>

¹² Television reform in New Zealand : broadcasting blues or blue sky?, Marion Jacka, page 10

¹³ Drinnan, John Media: Sky in spotlight as TV war heats up, nzherald.co.nz

¹⁴ Drinna, John Prime time for a battle over TV channels, 24 November 2008, nzherald.co.nz

¹⁵ Sky's limits leaves cricket's fans in the dark and grass roots cut short - <http://www.guardian.co.uk/sport/blog/2009/jul/15/test-cricket-broadcast-rights-sky/print>.

¹⁶ William Buckland "Pommies"

Pay TV consistently argues that the free to air networks acquire events and do not show them. This is incorrect.

There is no evidence of hoarding by the free to air networks. Free to air networks show all the games they acquire on the anti siphoning list. This was confirmed by the broadcasters twice yearly reporting to the ACMA in recent years on their acquisition and use of rights.

Due to scheduling limitations, free to air broadcasters sometimes show games on delay. (This could be overcome by allowing free to airs to broadcast listed sports on their multi channels). Foxtel often shows acquired games on delay as well. For example, on Saturdays, the third game is always played on delay. On Saturday 1 August 2009, the 7.30pm game was not broadcast until 9.30pm (after the live game had concluded).

2.6 Sport on digital multi channels

Increasing penetration of free to air digital requires a revision of the restrictions against showing listed events on free to air multi channels.

Allowing the broadcast on multi channels will allow free to air networks to acquire more events and to increase their coverage on the free to air platform.

Lifting the restriction will help drive digital take up; this is a key policy objective for Government. Channel Ten's new HD channel, ONE, was launched on 26 March 2009 and provides 24 hours of sport free of charge.

The current restriction creates the anomaly where pay TV can make greater use of rights for events on the anti siphoning list for example by running multiple channels for the Olympics whereas the free to air broadcasters can only show same events simultaneously, or replay events on multi channels.

3 Regulatory Imbalance

The Draft Report notes that the differences in the regulatory treatment of the free to air platform and the pay TV platform are due to differences in the way in which the two television platforms operate. The Draft Report says that increased regulation is justified because of the benefit derived for the free to air operators from gifted spectrum.

Free TV disagrees with the Productivity Commission's assessment of the regulatory imbalance.

3.1 Licence Fees

Free to air broadcasters pay extensive annual licence fees of up to 9% of gross revenue¹⁷. This amounted to over \$270 million in 2006/07¹⁸. In addition to the contribution to Government revenue through the payment of high licence fees, the free to air broadcasters contribute significantly through the provision of high quality Australian and overseas programming free of charge to all Australians. Australians value these services significantly.

¹⁷ Section 6 *Television Licence Fees Act 1964*

¹⁸ ACMA Broadcasting Financial Results 2006/07

Free to air broadcasters have also invested significantly in rolling out digital free to air television. To date free to air broadcasters have committed up to \$1billion to the rollout of digital transmission facilities.

3.2 Provision of programming

Australian commercial free to air broadcasters deliver high quality Australian content, local programming and premium overseas product free of charge to all Australians. Free to air broadcasters routinely exceed the annual statutory requirement for 55% Australian content. Under this requirement, broadcasters also provide minimum levels of Australian adult drama, Australian children's programming and Australian documentaries.

Regional broadcasters also provide minimum levels of locally relevant programming, including local news and information.

The cost of meeting these obligations is very high and places an uneven regulatory burden on free to air television.

Figures from the Australian Communications and Media Authority show that in 2006/07 television broadcasters spent \$790 million on Australian programming, including \$96 million on Australian drama¹⁹. By comparison, pay TV spent just \$26.4million on Australian drama²⁰.

In 2006/07 free to air broadcasters spent over \$24 million on children's programming.

Free to air broadcasters also provide many hours of local news and current affairs. In the Sydney market alone in 2008, over 4,000 hours of locally produced news and current affairs were broadcast²¹. Regional broadcasters consistently exceed their local news quota obligations and provide many hours of locally produced news.²²

Commercial free to air broadcasters are also the main contributor to Australia's film and television production industry, employing 7000 Australian directly.²³

Screen Australia's National Survey of Feature Film and TV Drama Production 2007-08 shows that, as in previous years, amongst the Australian film/TV industry the largest contribution to the combined TV drama slate (and the largest from any sector) came from the commercial free to air broadcasters.

3.3 Analogue Switch off

Analogue switch off is the subject of a separate review and extensive discussions with Government. Australian viewers have an expectation that they will continue to have the same access or better access to television services as they currently do. Over two-thirds of Australians rely exclusively on free to air for their television service.

¹⁹ ACMA Broadcasting Financial Results 2006/07

²⁰ ACMA Compliance Results

²¹ OzTAM; Sydney Metro Market; Weeks 1-52 2008 (30/12/07 - 27/12/08); Total People; 2am -2am; Australian programs only; Includes first run and repeat programs.

²² Broadcasting Services (Additional Licence Condition) Notice 7 April 2003.

²³ <http://www.abs.gov.au/ausstats/abs@.nsf/Products/8679.0-2006-07-Main+Features~Commercial+television+broadcasting?OpenDocument#PARALINK2>

4 HD Quota Reporting and Captioning

4.1 Recommendation 4.7 - Captioning

Free TV supports the Productivity Commission's recommendation for a review of the regulation of captioning. Dual regulation and processes is not desirable. Free to air broadcasters are regulated under the Broadcasting Services Act (BSA) and the Disability Discrimination Act (DDA). Free to air broadcasters prefer a single stream of regulation and are of the view that the regulation properly belongs in the BSA.

It is preferable for all broadcasting regulation to be dealt with in broadcasting legislation so that broadcasting policy objectives and impacts on broadcasters can be taken into account.

Free to air broadcasters will welcome a review as recommended by the Productivity Commission and will actively engage in the review process.

4.2 Recommendation 4.8 - Abolition of the HD Quota

Free TV supports the Productivity Commission's recommendation for the abolition of the reporting requirement for HD quotas. The reporting poses a significant administrative burden on free to air networks with no apparent benefit to viewers.

Free to air networks consistently meet or exceed the quota and this is unlikely to change as sales of HD televisions and digital receivers now outstrip sales of SD equipment and the amount of HD material is increasing.

It is not the quota itself but the reporting of compliance with the quota which free to air broadcasters would like to see abolished.

5 Development and enforcement of Regulation

Free TV notes that our relationship with the ACMA is generally constructive. The recent work on the development of EPG principles and guidelines is an example where the ACMA and industry worked together to develop a satisfactory solution.

Nevertheless, we welcome the Productivity Commission's comments in relation to the development and enforcement of industry regulation, to improve efficiency and certainty in the regulatory environment in which free to air broadcasters operate. In particular, we support the Commission's statement that "the breadth of discretion provided to ACMA could be balanced by providing more guidance in the legislation on how that discretion should be exercised."

Free to air broadcasters are concerned in relation to the development of the rules for multi channels. Digital multi channels have been launched and the slow development of appropriate rules has created an uncertain business environment for networks. Digital multi channels can be a strong driver of digital (a key policy objective of the Government) provided networks can schedule programming which is different from the main channels and attractive to viewers and advertisers.

Free TV submits that due to the small number of amendments and the need for business certainty that ACMA register the rules for digital multi-channels independently of the main Code.