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Blowing the final whistle on Australian TV rules

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FREE-TO-AIR television networks win twice over from an outdated and restrictive policy.

IN the chamber of horrors of Australian public life, broadcasting policy occupies a special place.

That policy has been aptly described by the Productivity Commission as reflecting "a history of political compromises [whose] legacy of quid pro quos has created a framework that is inward looking, anti-competitive and restrictive".

Central among those restrictions are the anti-siphoning rules, which give the free-to-air television operators first dibs at the broadcast rights to a long list of sports events. With the current list about to expire, the government should dismantle a policy that fails to meet its stated objective and is both harmful and unsustainable.

Start with what the anti-siphoning rules do.

Under those rules, pay-TV providers can only directly acquire rights to listed events if, 12 weeks before the events commence, the FTA operators have not done so. Even then, the Communications Minister has a discretion to prolong the pay-TV operators' exclusion, forcing owners of rights to sell them to FTA.

The stated rationale is to ensure all Australians have access to popular sporting events. However, the rules do little to increase the availability of sports on FTA while transferring substantial income to the FTA owners.

The rules only marginally affect what sport is available on FTA because they do not require the FTA channels to broadcast the listed events, much less broadcast them live and in full.

Indeed, the list's sheer length means it would be impossible for the FTA channels to do so, even if they did acquire all the rights involved.

Rather, the FTA operators are free to determine how the events for which they have rights are broadcast, including by on-selling the rights to pay TV. In other words, the FTA operator, in acquiring a broadcast right, gets the option of applying it where it is most valuable, be it FTA or pay TV.

For events with a very wide potential audience, the most valuable use of the right likely involves transmission over FTA, as that will secure large payments from advertisers.

In contrast, events catering to small, specialised audiences are likely to be of little interest to advertisers but can generate substantial payments to pay TV, so are likely to be on-sold.

And splitting events between FTA and pay TV can also be highly profitable, as it can maximise the FTAs' combined income from advertising and subscriptions.

It is this that gives rise to secondary transactions such as those that have applied to the AFL and NRL rights. Those transactions mean the rules have less effect on what is broadcast where than on the costs of getting to that outcome and on who obtains the resulting revenues.

But the owners of FTA channels do not only profit from clipping the ticket: rather, the rules also ensure FTA pays less for the rights in the first place.

This effect is obvious if Foxtel would otherwise be the highest bidder, but will occur even if the FTAs are merely uncertain as to how pay TV would bid. Faced with that uncertainty, an FTA channel, so as to achieve a given probability of winning an auction for the rights, would need to gross its bid up in line with the risk of pay TV lodging a high bid. Excluding Foxtel eliminates that risk, and so induces each FTA channel to reduce its bid.

The extent of this impact depends on the FTAs' estimates of how pay TV would have bid and on the intensity of competition between the remaining bidders. As a rough guide, however, excluding a high value bidder from an auction with four bidders reduces the expected returns to the seller by some 20 per cent; if instead the reduction is from five bidders to three (as would occur if absent the rules, Foxtel and-or Austar and Optus would bid separately), the seller's loss is closer to 25 per cent. That loss accrues to the FTA owners as additional profits.

Given that the Australian market for sport rights is currently worth some $350 million a year, with 90 per cent of that going on listed events, the annual transfer from the sports bodies to the FTA owners would be about $100m.

The adverse impact on smaller sports is likely to be even larger than these estimates suggest. This is because their rights would in any event attract fewer bidders.

The rules, therefore, could reduce the number of bidders for these rights from three to two, or even down to a single bidder. The reduction in expected revenue to the seller then becomes dramatic, with the loss in going from three bidders to two nearly double that which occurs when the number of bidders is reduced from four to three.

These lost revenues undermine the ability of sports bodies to develop their product, and increase pressures for taxpayer subsidies to sports development. To that extent, taxpayers end up funding the income transferred to the owners of FTA.

For the FTAs, this policy is therefore truly win-win, in the best sense of the term: they win twice, as the rules help them buy cheap while selling dear. And with some of the loss falling on taxpayers, the FTAs' gain is all the greater.

In the longer term, this entire edifice will collapse as internet TV eliminates the distinction between FTA and subscription TV services, with all operators deriving revenues both from advertising and from payments by viewers. Repealing the anti-siphoning rules would facilitate this transition, while removing distortions well past their use-by date.

No less important, repeal would end a regime based on virtually unfettered ministerial discretion. That discretion invites the wasteful, ultimately corrupting, investments in rent-seeking that have made broadcasting policy the blight it now is.

Despite its rhetoric, that policy has never been about consumers; rather, it has been about shuffling income around, each time losing some along the way. Repealing the anti-siphoning rules would be a great way of making a new start.

Henry Ergas has been a consultant on other matters to Telstra, which owns 50 per cent of Foxtel. The views expressed here are strictly his own.