

**FOXTEL RESPONSE TO THE MEDIA REFORM GREEN PAPER – MODERNISING  
TELEVISION REGULATION IN AUSTRALIA**

**31 MAY 2021**

## **INTRODUCTION**

Foxtel welcomes the opportunity to make a submission in response to the Australian Government discussion paper, Media Reform Green Paper – Modernising television regulation in Australia (the **Green Paper**), dated November 2020.

The Foxtel Group is one of Australia's most progressive and dynamic media companies, directly employing around 1,800 people and delivering a diverse subscription television (**STV**) service to both regional and metropolitan areas over cable and satellite, as well as providing a range of internet delivered services including Foxtel Go, Foxtel Now, and the Kayo Sports and Binge streaming services.

Foxtel's submission is structured as follows:

1. The **Executive Summary** outlines Foxtel's key submissions.
2. **Part A** sets out Foxtel's approach to the Green Paper.
3. **Part B** sets out STV's contribution to the Australian economy.
4. **Part C** sets out sector specific regulation faced by STV.
5. **Part D** outlines the regulatory reforms Foxtel argues are required for STV to effectively compete in the modern media landscape.

## **EXECUTIVE SUMMARY**

This submission includes Foxtel's views on the following matters:

- **The Green Paper's focus on FTA television** – the Green Paper recognises that the business model for television broadcasting in Australia is increasingly challenged and this is largely due to the intense competition from the large international companies. The Green Paper also recognises that the current media regulatory environment is outdated. However, the Green Paper is focused on a potential plan for reform of the media regulatory framework for the free-to-air (**FTA**) television sector only, to the exclusion of STV, a key player in Australian television broadcasting. Clearly, our industry must be considered at the same time.
- **STV contribution to the Australian Economy** – Foxtel is a quintessentially Australian company that makes a substantial contribution to the Australian economy and media landscape as a critical player in the local production and dissemination of Australian stories, news and sports. As such it is important that we have the means to compete equitably in the modern media landscape.
- **The Current Regulatory Environment for STV** – this section outlines sector specific regulation borne by the STV industry. Such regulation includes onerous captioning legislation, anti-siphoning rules and Australian content obligations.
- **Reform Measures** – last, we outline reforms which we argue are required to directly address the regulatory imbalance. Removing unnecessary regulation is the best option for providing a level playing field, offering 'traditional' broadcasters including Foxtel the opportunity to further innovate and modernise as flexibly and independently as possible.
- Current STV broadcasting regulation is an anachronism and is in urgent need of reform. Foxtel argues that reforms are required to STV captioning, NEDE spend, anti-siphoning and electoral advertising blackout laws, as well as greater support for STV satellite transmission.

## **PART A: FOXTEL'S APPROACH TO THE GREEN PAPER**

Foxtel is disappointed that the Green Paper only contemplates relief for the FTA sector, missing a key opportunity to conduct a much needed holistic review of the television broadcasting industry.

The Green Paper recognises that a vibrant media industry is essential for the economic and cultural health of the nation and that a competitive and robust media sector is also essential for a fully functioning democracy. It also recognises that the media industry in Australia is increasingly challenged by falling audience numbers and advertising revenue, and that this is largely due to the intense competition from large international companies including Google (YouTube), Netflix, Disney, Apple TV, Amazon Prime.

The Green Paper is focussed on a potential plan for reform of the media regulatory framework. The paper recognises that the need for reform has been reinforced by the declining revenues and rising costs of the traditional media sector which together with burdensome regulation, challenges the ability of the traditional media sector to respond to changing competitive conditions.

However the Green Paper only contemplates relief for the FTA television sector, when these issues are not unique to the FTAs, and should not be considered in isolation. The STV sector is the most disrupted sector within the Australian media industry and remains heavily regulated compared to its competitors.

As noted in the ACCC's DPI report and the Australian Stories discussion paper:

*... continuing to heavily regulate a sector under pressure while allowing a booming sector to remain unregulated does not represent a level-playing field. Urgent consideration should therefore be given to updating government support measures and regulatory interventions to appropriately reflect the contemporary context.<sup>1</sup>*

### **Why holistic regulatory reform**

We argue that considering FTA and STV regulation separately only perpetuates the problems identified with sector specific regulation identified in the Final Report of the Digital Platforms Inquiry (**Final Report**), as it encourages further discrepancies in regulation to continue.

The Final Report recommended that the Australian Government implement and develop a platform-neutral regulatory framework, noting that:

*... the current, sector-specific approach to media regulation in Australia has not adapted well to digitalisation and media convergence, including not readily capturing new media providers such as digital platforms. This reduces the overall effectiveness of the current media regulatory framework.<sup>2</sup>*

Foxtel argues that considering FTA regulation in isolation only perpetuates this core problem with disparity in media regulation, and that the Government cannot consider "television broadcasting regulation reform" without considering the STV industry alongside FTA television.

Whilst Foxtel is subject to a number of licence conditions that are also common to the commercial FTAs, we are also subject to a number of sector specific conditions including the new eligible drama obligation; anti-siphoning; and a detailed captioning regime that applies to close to 100 channels.

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<sup>1</sup> *Supporting Australian stories on our screens* (Options Paper, 15 April 2020) 36.

<sup>2</sup> Australian Competition and Consumer Commission, *Digital Platforms Inquiry – Final Report* (Final Report, June 2019) 166.

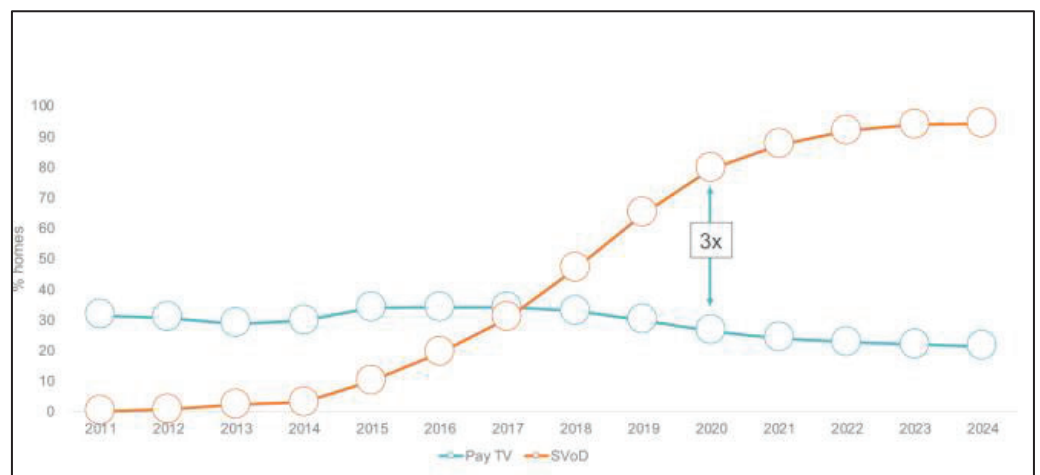
If the FTA networks were to elect to move to the new model, they would then pay no licence fees and be relieved of the transmission quotas that currently apply to their multi-channels. In addition, the captioning obligations that apply to the commercial television licensees will continue to only attach to the primary channel even though most of their multi-channels have higher audience numbers than our channels.

There is therefore a clear lack of symmetry in the Green Paper’s approach to the modernisation of television regulation in Australia. The proposed reform measures set out in the Green Paper:

- discriminate against the STV industry;
- are not competitively neutral; and
- demonstrate a fundamental misunderstanding of our industry dynamics.

Digital technology has led to the emergence of aggressive unregulated international competitors including Netflix, Amazon Prime, AppleTV+ and Disney+. PwC argues that an increase in availability of digital platforms and the onset of COVID-19 has driven the acceleration of digital adoption resulted in strong uptake in subscriptions.<sup>3</sup>

According to the Deloitte Annual Media Consumer Survey 2020, 55% of respondents have at least one paid video streaming service in their household. This shift to subscription streaming services is illustrated in the following graph which shows that the Australian subscription video on demand (**SVoD**) user base increasing rapidly, such that in 2020 it was three times the size of the subscription television user base.

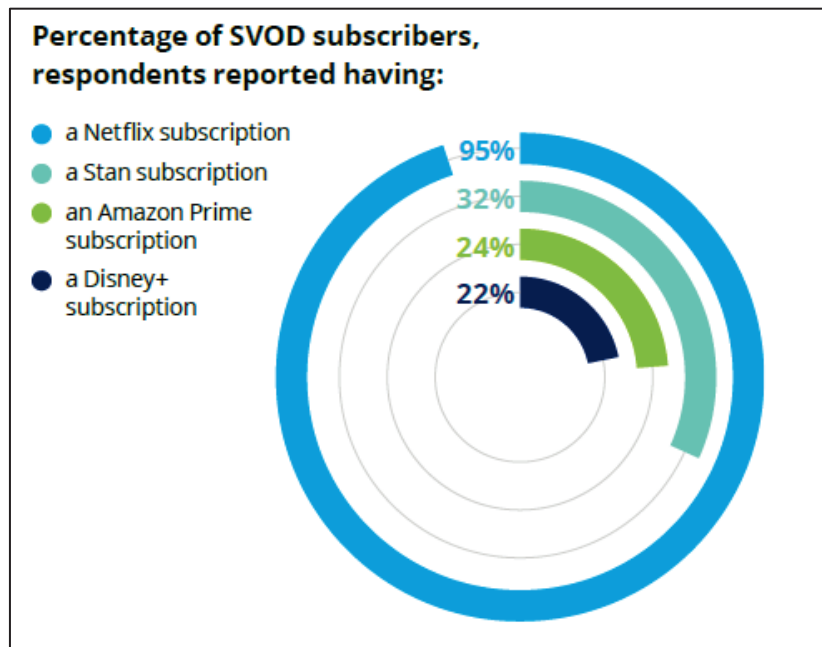


Source: Explanatory Memorandum, Broadcasting Legislation Amendment (2021 Measures No. 1) Bill 2021, 10.

The Deloitte Annual Media Consumer Survey 2020 recognised a continuing growth in streaming service subscription rates from 32% in 2017, to 43% in 2018 and 53% in 2019. Of those 55% of respondents with at least one paid video streaming service in their household, 95% are active paying Netflix subscribers.<sup>4</sup>

<sup>3</sup> PwC Australia, *Australian Entertainment & Media Outlook 2020-2024*, 4.

<sup>4</sup> Deloitte, *Media Consumer Survey 2020*, 17.



Source: Deloitte Media Consumer Survey 2020, 17.

International unregulated competitors including Netflix and Disney+ are subscription TV services which are directly substitutable for Foxtel. Unlike the former Hollywood studio system which made its content available to Foxtel (and others), these large international companies are vertically integrated and do not sell their original content that is produced for these services.

This vast structural change is causing major shifts in traditional media value chains, with value flowing from local free and subscription television businesses to global SVoD providers (like Netflix) and digital platforms (like Facebook).

Foxtel therefore supports a holistic approach to media reform, as also supported and recommended by the Final Report. For effective reform to occur, it is crucial that any regulatory reform considers the interests of all industry participants and is aimed at attempting to level the playing field, minimise regulatory burden and facilitate competition. For these reasons, the Government must recognise that it cannot make changes that advantage one sector of the media without ensuring that other sectors also benefit from reform.

The Green Paper invites industry participants to put forward proposals that will contribute to the objective of a sustainable Australian broadcast television sector. We set out in this submission the areas of regulatory reform which are required to ensure this.

## **PART B: FOXTEL CONTRIBUTION TO THE AUSTRALIAN ECONOMY**

Foxtel is a quintessentially Australian company, and in our 25 year existence, we have consistently demonstrated that we are also one of Australia's most innovative and dynamic media companies.

Foxtel and the STV industry contribute significantly to the Australian economy and national identity and provide a platform for diverse voices. Foxtel is a critical player in the production and dissemination of Australian stories, news and sports, and by way of example contributed 857,000 hours of content in 2019 was distributed by subscription media members.<sup>5</sup>

In addition to its cultural contributions, the subscription television industry makes substantial economic contributions. We are a significant investor in Australia's content economy spending hundreds of millions of dollars each year on local news, sports rights and production, and production of local television.

Deloitte Access Economics recently found that the total economic contribution of Foxtel and STV industry to the Australian economy in 2019 was just over \$3 billion.<sup>6</sup> It is worth noting that this contribution is significantly larger than that of the commercial free to air television sector in 2019 (\$2.3B).<sup>7</sup>

### **Australian Sports**

Foxtel invests hundreds of millions of dollars each year in Australian sporting organisations including the AFL, the NRL, Cricket Australia and Supercars, underpinning these culturally significant sports and grass root participation. In addition, with the support of the Commonwealth Government's Women's, Niche and Emerging Sports Grant, we also provide coverage of 75% of all women's and niche sports available on Australian TV.

Foxtel's support for under-represented and Australian women's sports is only increasing, with Kayo sports making certain events free to watch for non-subscribers via 'Kayo Freebies'. Coverage which will be placed in front of the paywall via Kayo Freebies includes live and on-demand games from the AFLW, WBBL, W-League, WNBL, surfing including the Women's Championship Tour, Rugby Sevens, hockey, baseball, croquet, fencing, lawn bowls, ultimate frisbee and dragon boating.<sup>8</sup>

As the country's largest producer of sports content, we also invest hundreds of millions of dollars in the television production sector and support hundreds of local jobs.

### **Australian News**

Foxtel also invests significantly in Australian news production via our contractual arrangement with Sky News, supporting public interest journalism and Australian stories. Sky News Live was the top rating subscription television channel for 2020 with Sky News responding to the COVID crisis by launching a dedicated COVID 19 channel in March 2020 to provide Australians with up to the minute information as the crisis unfolded. Foxtel also employs local journalists who cover our local sporting competitions.

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<sup>5</sup> Deloitte Access Economics, *Economic contribution of Australian Subscription Television and Radio Association members* (May 2021) 9.

<sup>6</sup> Ibid.

<sup>7</sup> Deloitte Access Economics, *Everybody gets it – the economic and social benefits of commercial television in Australia* (2021) 3.

<sup>8</sup> Foxtel Group, 'Foxtel Group doubles-down on women's sport to mark International Women's Day' (Media Release, 8 March 2021).

## Australian Stories

Foxtel invests tens of millions of dollars each year in local television production including via our showpiece Australian dramas (for example, the long running *Wentworth* - voted best Australian TV show of the decade by TV Tonight) as well as hundreds of hours of local lifestyle programming, documentaries, together with around 1,500 hours of live sports production. As of June 2020, there were 235 unique Australian titles available on Foxtel. Comparatively only 132 Australian titles were available on Netflix.<sup>9</sup>

Foxtel works with a wide range of external independent production companies to produce its local content, and in doing so supports creative experts who also work across the Australian film and television industry.

Foxtel has a track-record of telling Australian award-winning stories across drama, factual, lifestyle and entertainment. In 2020, three of the top five rating shows on Foxtel were Foxtel Originals (*Selling Houses Australia*, *GoggleBox* and *Wentworth*). Foxtel was the recipient of three 2020 AACTA Awards *Gogglebox Australia* - Best Factual Entertainment Program and *Upright* winning two awards, for Best Comedy Series and Tim Minchin for Best Lead Actor in a Comedy Series.

We have also brought these award-winning Australia stories to the world stage with highly acclaimed international exports. *Wentworth* and *Secret City* were both sold to Netflix outside of Australia while *Picnic at Hanging Rock* was sold to Amazon.

Between 2014/2015 and 2018/2019, Foxtel and the subscription television sector spent **\$218 million** on Australian drama programs alone.<sup>10</sup> This investment directly supports Australian stories on television and flows through to the Australian film and television production sector.

## Local employment and tax

Foxtel and the broader STV industry directly support over 3,800 jobs in Australia, many of which are highly skilled occupations. The Foxtel Group directly employs over 1,800 people in addition to over a 1,000 more through our affiliate partners across journalism, television production, installations, and sports broadcasting.

Foxtel also pays millions of dollars in tax each year including income tax, GST and payroll tax, unlike many of our large international digital competitors. For example, Netflix Australia only paid around \$500,000 in local tax for the 2020 calendar year, despite earning an estimated revenue of between 700 million and \$1.4 billion from its 5.6 million Australian subscribers.<sup>11</sup>

## Foxtel's streaming services and product development

Foxtel has invested heavily in response to international streaming competition, improving its broadcast product and device technology and creating new digital streaming products (*Kayo Sports* and *Binge*). We also implemented an extensive cost transformation programme, whilst continuing to invest in our product and recently launched voice control on our remote control and will roll-out our new hybrid satellite/IP iQ5 box.

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<sup>9</sup> Deloitte Access Economics (n 5) 15.

<sup>10</sup> ACMA, *Spending and targets* (5 June 2020) <<https://www.acma.gov.au/spending-and-targets-0>>.

<sup>11</sup> Miranda Ward, 'Netflix reveals Australian tax bill for 2020' *The Australian Financial Review* (online, 3 May 2021) <<https://www.afr.com/companies/media-and-marketing/netflix-reveals-australian-tax-bill-for-2020-20210502-p57o5v>>.

## **PART C: CURRENT REGULATORY ENVIRONMENT**

Foxtel remains encumbered with out of date and disparate regulation carried over from when we were one of the few participants in subscription media. This regulation no longer reflects the current media landscape and inhibits Foxtel's ability to effectively compete on an even playing field. The most pronounced of these costly and anti-competitive regulatory requirements are noted below.

### **Anti-siphoning**

The anti-siphoning scheme was introduced in 1992 to ensure that events of national importance and cultural significance were made available to the public free of charge. Foxtel is the only STV broadcaster caught by the scheme in Australia and the current effect of the scheme is to unfairly protect the ability of the commercial FTAs to bid for sports rights. The anti-siphoning scheme does not meet its purpose of making culturally significant events free to the public.

Under the scheme:

- The Minister can list events that the minister believes should be made available free to the general public. This list of events is known as the anti-siphoning list.
- A subscription television licensee is prohibited from acquiring the right to televise an event that is on the anti-siphoning list unless:
  - (i) a national broadcaster has the right to televise the event on its broadcasting service; or
  - (ii) a commercial television broadcasting licensee has the right to televise the event and its service area covers a total of more than 50% of the Australian population.

On 22 March 2021, the Australian Government announced a two-year extension on the expiration of the current anti-siphoning List. In that announcement the Government also flagged that they will review the list over the next two years as part of its reforms to support broadcasters and enhance the quality of services and content available to all Australians, noting that stakeholders are encouraged to comment on the release of the Green Paper.<sup>12</sup>

### **Captioning**

The captioning rules for STV are very onerous and complex. The rules were introduced in 2012 and were reflective of industry conditions at the time, before the impact of increased competition from international SVoD players and the major digital platforms was felt.

In brief:

- Foxtel's captioning obligations increase across the Foxtel platform each financial year, both in terms of the number of channels required to caption and level at which those channels have to caption.
- Our captioning targets are particularly stringent and increase at a uniform rate of 5% per annum across each channel until they reach 100%.

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<sup>12</sup> The Hon Paul Fletcher MP, 'Current anti-siphoning list to continue to 2023' (Media Release, 22 March 2021) <<https://minister.infrastructure.gov.au/fletcher/media-release/current-anti-siphoning-list-continue-2023>>.



- By 2022 (FY23) all channels will be required to caption, subject to any individual exemptions (in FY20 more than 90 channels on the Foxtel platform were required to caption).
- By comparison, the FTAs will only have to caption 75% of their main channel (100% of 6am to midnight) with no meaningful obligation on their multi-channels (other than a requirement to caption news and current affairs programs and repeats of previously captioned programs).

The Australian Government recently introduced legislation to move the subscription television captioning rules from the *Broadcasting Services Act 1992 (BSA)* into a disallowable Ministerial instrument. If passed, this will allow the Government more flexibility in making captioning rules for subscription television and potentially alleviate their regulatory burden on subscription broadcasters.

However, the Bill does not amend the current captioning obligations faced by Foxtel and any changes will remain subject to further consultation.

### **Australian content**

Unlike the commercial FTA broadcasters, Foxtel has no quotas for the broadcast of local content.

Instead STV licensees are subject to a condition that at least 10% of the total programming expenditure on a drama service must be spent on new eligible drama programmes. This obligation is known as the NEDE scheme and the STV Australian content obligation currently applies to over 20 channels offered on the Foxtel platform. In 2018/2019 the STV sector spent \$24.67 million on Australian drama programs to comply with its obligations under the NEDE scheme.<sup>13</sup>

Foxtel supports the work being done by the Government following the Supporting Australian Stories consultation conducted in 2020 to adjust the Australian content regulatory settings, and the Bill<sup>14</sup> recently introduced to reduce the STV NEDE spend obligation from 10% to 5%.

Importantly, the EM to this Bill notes:

***Current regulatory settings are no longer creating the conditions necessary to maximise the many cultural and economic benefits of Australian content. The settings are outdated and burdensome, and no longer result in the protection and promotion of quality Australian screen content. Current regulatory settings impose burdens that risk damaging the industry permanently, leading to a reduction in Australian content.***<sup>15</sup>

The EM also notes that:

***As audiences migrate to different, unregulated platforms, the impact of regulation has reduced, and the strain on the regulated domestic sector has increased.***<sup>16</sup>

We argue that the proposed reduction of the NEDE spend obligation will afford Foxtel greater flexibility to invest in high quality local content and should ensure that such investment does not also impact the future of STV.

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<sup>13</sup> Explanatory Memorandum, Broadcasting Legislation Amendment (2021 Measures No. 1) Bill 2021, 21.

<sup>14</sup> Broadcasting Legislation Amendment (2021 Measures No.1) Bill 2021.

<sup>15</sup> Explanatory Memorandum, Broadcasting Legislation Amendment (2021 Measures No. 1) Bill 2021, 5.

<sup>16</sup> Ibid, 3.

## **PART D: REFORM MEASURES**

We note the Government's recently introduced legislation which proposes to move the STV captioning rules from the BSA into a disallowable Ministerial instrument and to reduce the NEDE spend obligation from 10% to 5%.

However, in view of the high level of regulation borne by subscription television in Australia, Foxtel argues that an expanded reform and harmonisation package which incorporates the following measures should be implemented.

These measures will address the regulatory inequity issues specific to subscription television.

### **1. Captioning Reform**

Foxtel is committed to supporting hearing impaired customers, however the current captioning rules are very complex and out of sync with the requirements imposed on other television industry players.

#### STV captioning requirements vs other industry participants

The STV industry bears the brunt of captioning obligations compared to the obligations held by the commercial FTA channels and streaming services. In FY20 close to 550,000 hours across close to 100 channels were captioned on the Foxtel platform.

Whilst Foxtel is required to eventually caption 100% of its content across 100% of its channels:

- FTA broadcasters are only obliged to caption their main channel for 18 hours a day and News and Current Affairs programmes and repeat programming that has previously been aired with captions, that may appear on their multi-channels; and
- Streaming services are not subject to specific captioning regulation.

The effect of this inequity is that FTA multi-channels escape substantive captioning obligations while STV channels are regulated for the same genres and in many cases with much lower audience shares.

For example, in FY2019 STV channels such as Arena were required to caption 75% of their content, despite their audience being approximately one sixth the size of comparable channel 9Go! who was ostensibly exempt from captioning. Similarly, Premiere Movies was required to caption 95% of its content in FY19, despite having an audience approximately one third the size of comparable channel 7Flix who was (other than repeats) exempt from captioning. This is a poor public policy outcome.

#### Impact of captioning errors

Captioning is also a subscription television licence condition under the BSA, meaning that if Foxtel does not meet its captioning requirements for any given year, it is in breach of one of its licence conditions. This is in direct contrast to platforms such as Netflix which while providing some captioning, face no regulatory consequences for any lapses or errors.

Foxtel has now reached the point where some channels are required to caption at 100% over a 24 hour day, making technical compliance exceedingly difficult and costly. This enormous technical and compliance burden will increase year-on-year as more channels reach a 100% quota.

We are therefore seeking the below modest reforms to the current STV captioning rules which ensure that we remain committing to captioning but also provides relief from ongoing increases. These reforms will mean we will still be the main providers of

captioned television services, albeit with regulatory requirements more in step with the commercial FTA services.

The urgency of these reforms has reached a critical level as our channel number exemptions end in FY22 which means all channels will need to caption irrespective of audience size and technical difficulties associated with this.

We note the current Government Bill anticipates reform to STV captioning rules, but the form of that reform is yet to be determined. By way of example, we think that the following modest reforms are the minimum required changes and should be urgently implemented even if the Bill is not passed:

- **A genre cap** – a total cap on each genre’s captioning target, rather than the current ultimate 100% requirement. This core change would involve a freeze across all genres at the FY21 captioning levels. This would still provide an extremely high level of captions on STV that will require continued substantial investment and will well exceed the level of captions on the commercial FTAs.
- **An audience share exemption** to apply where viewership of a channel is below a defined percentage. Where viewership for a channel is at or below 0.15% of the average annual national audience share (across both free to air and subscription television in all homes), we propose the introduction of the right for an automatic channel exemption. This is based on a similar exemption in the UK legislation.

A 0.15% threshold is appropriate in the Australian context and it is reasonable and appropriate that captioning obligations should be targeted to the channels with a reasonable level of viewers.

## **2. Satellite tax rebate/offset to support satellite transmission for Australians**

Foxtel is concerned by proposals in the Green Paper which further perpetuate the ‘special access’ FTA broadcasters have to spectrum, without similar concessions being granted to the subscription television sector.

Commercial broadcasters have a long history of receiving competitive advantage via their protected access to broadcasting spectrum at less than market rates. The current spectrum fees were introduced after broadcasting licence fees were abolished in 2016/2017, granting the FTA sector approximately \$150 million in licence fee relief.

It is estimated that each FTA provider pays approximately \$10 million in spectrum licence fees each year and that these proposed reductions will be worth approximately \$40 million per year to the FTA sector. Foxtel submits that it is unreasonable to allow one portion of the broadcasting sector to be afforded generous incentives to use a public resource, without also affording similar relief to STV broadcasting which has invested heavily in its own distribution technology.

Foxtel argues that the Government’s proposed FTA spectrum licence incentives should therefore be matched by similar relief to the subscription broadcasting industry, via an equivalent tax offset/rebate.

### Foxtel investment in satellite transmission

Satellite television transmission is now a critical and reliable public service allowing Australians to connect with News, Entertainment and Educational programming. Approximately 1.5 million Australian households and thousands of commercial premises use satellite to access Foxtel’s channels including Sky News. Maintaining satellite transmission is now in the national interest as a reliable technology to ensure Australians have access to News and Entertainment. This is particularly important for regional Australians who may have limited access to broadband.

Unlike commercial television broadcasters who transmit using publicly owned spectrum resources, Foxtel has invested heavily to create this third transmission technology. This investment is both in capital expenditure in installing set-top-units and in operational costs paid to Optus in connection with its satellites. Whilst international subscription video players have been able to leverage cheaper broadband transmission of their content, largely via Australia's taxpayer funded NBN, Foxtel is required to maintain this higher cost technology at great expense.

In view of the public benefit provided by Foxtel in ensuring the ongoing distribution of Foxtel services via satellite, we believe the Government should provide some form of contribution to those costs in the form of a tax offset/rebate. Satellite costs for Foxtel are equivalent to commercial spectrum taxes for FTAs.

We note that there also appears to be an opportunity regarding the current VAST scheme and an overlap with the Foxtel service that could possibly be explored in view of commonalities of customer equipment and duplication of transponder capacity.

The Government recognises it needs to support the commercial FTA sector to move to a more sustainable operating model and is proposing to do this via removal of the FTA spectrum tax. A tax offset/rebate for Foxtel's satellite transmission costs will therefore ensure regulatory parity for Foxtel in relation to this aspect.

### **3. Reduce content regulation and adjust platform neutral incentives**

Foxtel welcomed the relief package that relieved Foxtel of its content obligations for 2020 and supports the Australian Government's move to reduce the current STV 10% of annual drama spend to 5%, and the Bill<sup>17</sup> currently before Parliament to make this reduction permanent.

However, we also note that on 13 May 2021, the Senate referred the provisions of the Bill to the Senate Environment and Communications Legislation Committee for inquiry and report by 17 June 2021.

Our view is that the amendments proposed by the Bill are part of a package of relief granted by the Government<sup>18</sup> and it would be inequitable if it is not passed. As part of this package the local production sector has been granted relief - including additional funding to Screen Australia and the Australian Children's Television Foundation, and the FTA sector has been granted substantial relief and are no longer bound by the requirement to air at least 260 hours of children's programs and 130 hours of pre-school programs annually. Instead the FTAs have been granted more flexibility to choose the relevant mix of Australian drama, children's and documentary content to meet their quotas.

Our position is that the Bill should be passed to ensure that the STV industry also receives their portion of comparative relief. We also argue as a general principle that removing regulation will assist in setting a more level playing field with international streaming services, offering traditional broadcasters the opportunity to further innovate and invest.

Unlike the FTAs, Foxtel has no quotas for the broadcast of local content. Instead we are mandated to spend annually on Australian drama an amount equal to 10% of what we spend in acquiring programming for the relevant drama channel.

The very nature of Foxtel is to bring content and channels from all over the world to Australia for its subscribers broadcasting a broad range of international channels and programming (from brands like BBC, Nat Geo, HBO and CNN). As Foxtel grew during

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<sup>17</sup> Broadcasting Legislation Amendment (2021 Measures No.1) Bill 2021.

<sup>18</sup> The Hon Paul Fletcher MP, 'New funding in Budget to deliver Australian screen content' (Media Release, 30 September 2020) <<https://www.paulfletcher.com.au/media-releases/media-release-new-funding-in-budget-to-deliver-australian-screen-content>>.

the 1990s and 2000's the Australian drama content spend of 10% was a simple way for the Government to mandate Foxtel to support the local drama production sector. In this respect it is effectively a tax on Foxtel which is passed through to the local film and television production industry.

Over the years we have commissioned Australian drama well beyond regulated requirements and continue to create high quality and popular local content including Wentworth, Picnic at Hanging Rock and Upright.

The reduction of the NEDE expenditure target will allow for flexibility of investment on Australian content across a variety of genres. As highlighted above, Foxtel has proven success with Australian drama and the removal of the NEDE scheme does not mean that audiences will no longer see themselves represented on our screens, it simply provides Foxtel the freedom to compete unhindered in the way and manner we see fit and in accordance with audience demand.

As mentioned above, Foxtel has a track-record of telling Australian award-winning stories across multiple genres including drama, factual, lifestyle and entertainment. In 2020, three of the top five rating shows on Foxtel were Foxtel Originals with two of those shows, Selling Houses Australia and GoggleBox being factual programs. Foxtel was also the recipient of three 2020 AACTA Awards including Gogglebox Australia - Best Factual Entertainment Program. The programs are being produced in response to audience tastes without any regulatory obligation to do so.

This freedom will have flow-on benefits for the local production sector as we will be able to respond more flexibly to audience tastes by developing local content with local production houses. Foxtel works with a wide range of external independent production companies to produce its local content, and in doing so supports creative experts who also work across the Australian film and television industry. Reducing restrictive regulation such as the NEDE scheme will ensure that this collaboration continues.

#### Minimum licence fees

Foxtel strongly supports the use of incentives, rather than regulation, to encourage the creation of quality local content and to bolster our broader film and television production sector.

Foxtel welcomes improvements that the Government is making to its current local content policy settings and incentives to support the creation of film and television content in response to the Supporting Australian stories on our screens consultation.

However, Foxtel argues that in conjunction with changes to the NEDE scheme, revision of the minimum licence fees for Screen Australia funding is required.

The current \$440,000 per hour licence fee requirement for drama makes sense for a traditional media structure that caters to mass audiences but does not reflect differing business models across differing platforms. A high licence fee does not make sense for subscription platforms where individual channels and services generally attract lower audiences than commercial FTA broadcasting services.

Subscription television by nature does not adhere to this format, therefore the 'one size fits all' approach by Screen Australia results in subscription television services, such as Foxtel, being unable to take advantage of this option.

The minimum licence fee requirement should also be expanded to allow broadcasters to utilise the rights on multiple platforms without having to pay additional licence fees. Particularly in the current environment, where audiences no longer delineate between 'traditional' and 'digital' across the various media, the Screen Australia funding should be actively incentivising the platform neutral exploitation of Australian content.

#### 4. Reducing Anti-Siphoning Regulation

The anti-siphoning regime is a key example of outdated regulation that is in urgent need of reform.

Despite the introduction of many new players into the media landscape in Australia, Foxtel is essentially the only player currently caught by the regime. No other platform is restricted in what sports rights it can buy, when and how. Both international and local players including Amazon, Telstra, Optus, Nine/Stan, Ten/Paramount+ and Google can all buy out any of the iconic Australian sports on the list and put them behind a paywall without repercussion.

The purpose of the anti-siphoning scheme is to ensure that events of national importance and cultural significance are made available to the public free of charge. It is not intended to ensure that FTA broadcasters have a competitive advantage in the acquisition of rights to listed events. However in practice the anti-siphoning list hands the FTA sector a competitive advantage and ensures that they are gatekeepers for access to broadcast rights to listed events.

The anti-competitive effect of the anti-siphoning scheme has recently been amplified and concentrated by the arrival of digital platforms and their participation in the contest for sports rights. These are additional competitors for subscription television who are not subject to the restrictive anti-siphoning scheme and against whom subscription television is required to compete. In seeking to respond to the competition introduced by these platforms, Foxtel is at a substantial disadvantage.

This means the anti-siphoning laws are not achieving their purpose of protecting free access to certain iconic events and are instead resulting in distortions.

The problems with the anti-siphoning scheme are extensive:

- **The anti-siphoning list is anti-competitive.**

The underlying purpose of the anti-siphoning provisions is to ensure that the FTA broadcasters have a reasonable opportunity to acquire the right to televise events of national importance and cultural significance in order to make them available to the public free of charge. The scheme was about protecting consumer access, not FTA access, and is not intended to protect the bargaining position of the FTA sector for the sake of those networks.

This is confirmed by the original Explanatory Memorandum to the Broadcasting Services Bill 1992 which defines program siphoning as (emphasis added):

*the obtaining by a satellite subscription television broadcasting licensee of the rights to broadcast events of national importance and cultural significance, such that those events **could not be received by the public free of charge.***<sup>19</sup>

Unfortunately, the scheme now operates to directly limit competition between subscription and FTA television, as STV broadcasters are unable to compete for broadcast rights to listed events without partnering with a FTA broadcaster. This competitive advantage is now exacerbated by the development of FTA owned streaming services, allowing FTAs to place listed events behind paywalls, in direct conflict with the purpose of the anti-siphoning scheme.

The anti-competitive nature of the anti-siphoning scheme has been recognised by both the Productivity Commission (**PC**) and the ACCC. In 2003

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<sup>19</sup> Revised Explanatory Memorandum, Broadcasting Services Bill 1992, 56.  
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in the ACCC's Inquiry into Emerging Market Structures in the Communications Sector the ACCC found:

***"The Commission has previously expressed some concerns about the current anti-siphoning regulations. It is concerned that by giving FTA broadcasters almost exclusive rights to the listed programming, the anti-siphoning list has substantial anti-competitive effects and is more intrusive than is necessary to achieve the policy objective of ensuring key sporting events are available to viewers on FTA television."***<sup>20</sup>

***"Potential costs of the current anti-siphoning regime include: possible reduction in the number of sports programs that may be broadcast; less consumer choice for consumers; less competition between FTA and pay TV broadcasters in both acquiring rights and at a retail level; and increased barriers to entry for pay TV operators."***<sup>21</sup>

In its major inquiry into broadcasting in 2000, the PC found that the anti-siphoning scheme directly limits competition between FTA and STV broadcasters and gives FTA broadcasters a *"competitive advantage over subscription broadcasters"*.<sup>22</sup>

In 2009 the PC's annual review of regulatory burdens on business sustained their earlier conclusions and also foreshadowed the impact that technological change would have on the anti-siphoning scheme, noting that the migration of major sporting events to internet broadcasting would be likely to decrease the effectiveness of the scheme and that growth in the reach of the STV sector *"reduces the case for maintaining the current anti-siphoning regime."*<sup>23</sup> The PC also anticipated that *"Attempts to increase the reach of anti-siphoning regulations could exacerbate the anti-competitiveness of the scheme and may prove difficult to achieve."*<sup>24</sup>

- **The anti-siphoning scheme is discriminatory** – the anti-siphoning scheme only essentially applies to Foxtel. All telecommunication providers, digital platforms, international streaming services and free-to-air broadcasters can freely bid for listed events and broadcast, or not broadcast, those events in any manner which they choose. No local regulation applies to prevent an OTT provider from acquiring exclusive rights to any event on the anti-siphoning list, and there is nothing to stop them from putting coverage behind a paywall.
- **The anti-siphoning list has a negative impact on sporting bodies**—the anti-siphoning regime has a negative impact on sporting bodies as it essentially prevents Foxtel from being able to negotiate directly and independently of a FTA broadcaster. This means that one of the major acquirers of sporting rights in Australia does not have a seat at the negotiating table.

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<sup>20</sup> Australian Competition and Consumer Commission, *Emerging Market Structures in the communications sector* (Report, June 2003) 72.

<sup>21</sup> Ibid.

<sup>22</sup> Productivity Commission, *Broadcasting Inquiry Report* (Report No. 11, 3 March 2000) 435.

<sup>23</sup> Productivity Commission, *Annual Review of Regulatory Burdens on Business: Social and Economic Infrastructure Services* (Research Report, August 2009) 156.

<sup>24</sup> Ibid, 162.

- **The anti-siphoning list has limited effectiveness**—there are a number of reasons why it could be expected that broad coverage of sporting events would be maintained in the absence of anti-siphoning regulation and that the current regime may not be necessary to ensure broad access to sports broadcasts. Chiefly:
  - **Sporting bodies desire reach** – whilst there are now several subscription sports services for whom sporting bodies may sell their rights to (or even provide a direct to consumer subscription service themselves), free availability of some or all of their content is invariably a fundamental pillar of sporting bodies’ media rights strategies, as they seek to maximise the audience for their content.
  - **Internet access is ubiquitous in Australia** – Australian audiences are online and no longer access content solely via their televisions. Internet penetration of Australian households currently sits at 89%, making online delivery now just as accessible to Australians as terrestrial broadcast.
  - **Sports subscription services are highly popular and highly competitive** – there are several new sports subscription services in Australia including Stan Sports, Optus Sport and Kayo Sports, as well as overseas examples of rights acquisitions by large international companies such as Amazon Prime (including NFL, UEFA Champions League and ATP and WTA tennis in the USA).

The competition for sports rights will only continue to get more competitive as more new entrants appear and assert themselves. Sports streaming and subscription services continue to grow in popularity drawing large audiences and are generally accompanied by low cost offerings. Stan Sports recently announced that it was nearing the 150,00 active subscribers, and our product Kayo Sports recently hit 1 million active subscribers.

- **Community participation in sports is limited by anti-siphoning** - The greater the competitive tension for the acquisition of broadcast rights, the more likely that sporting bodies will receive greater revenues and increase their investment in local communities and grass roots sporting programs.<sup>25</sup> This increase in community participation in sports will correspond with an increase in broadcast audiences.
- **The anti-siphoning list is long compared with overseas jurisdictions**—the Australian anti-siphoning list is relatively long compared with those used overseas, such as in the United Kingdom. Further, there are no such restrictions in many countries including New Zealand or the United States.

The anti-siphoning list continues to be an example of regulatory disparity which needs to be rectified for Foxtel to effectively compete for sports broadcast rights. It is critical for both the sporting bodies and for Australian consumers that the regime is removed

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<sup>25</sup> ASTRA, Submission to the Senate Environment and Communications Legislation Committee, Parliament of Australia, *Inquiry into the Broadcasting Services Amendment (Anti-siphoning) Bill 2012*, (4 April 2012) 4.  
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to enable Foxtel to acquire those rights independently and, on a level playing field with other potential players including the large international players.

#### **5. Electoral blackout laws**

Foxtel supports the removal of Clause 3A of Schedule 2 to the Broadcasting Services Act which stipulates an election advertising blackout for radio and television broadcasters.

This now redundant obligation requires that from midnight on the Wednesday prior to an election until the close of the polling booths, Foxtel channels must not broadcast any election advertisements (i.e. paid advertisements or programming sponsored by a party or candidate).

Political parties and other stakeholders now use a variety of platforms to connect with voters. The current regime simply shifts advertising expenditure from licensed broadcasters, to digital services who aren't similarly regulated.

It therefore does not make sense to have a blackout which applies only to television and radio broadcasting and does not capture online advertising media. This obligation is both out of date and futile given that it does not capture all media and should be removed from the enormous weight of regulation borne by subscription television.