FOXTEL Group

5 Thomas Holt Drive
North Ryde, NSW 2113
Australia

T +61 2 9813 6000

GPO Box 151
North Ryde, NSW 1670

foxtel.com.au

Foxtel Submission to the Senate Environment and Communications Legislation Committee

Inquiry into The Broadcasting Legislation Amendment (2021 Measures No.1) Bill 2021

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INTRODUCTION

Foxtel welcomes the opportunity to provide a submission to the Senate Environment and Communications References Committee Inquiry into the Broadcasting Legislation Amendment (2021 Measures No.1) Bill 2021 (the **Bill**).

The Foxtel Group is one of Australia's most progressive and dynamic media companies, directly employing around 1800 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.

EXECUTIVE SUMMARY

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

- Foxtel's strong support for the Bill. We argue that this Bill must be passed as a matter of urgency as it:
    1. is part of a broader package of reforms for the local production and broadcasting sector which were announced by the Government in September 2020.[1] These reforms include support measures for the local production sector including additional funding for Screen Australia and the Australian Children's Television Foundation (**ACTF**) and amendments to the Australian Screen Production Incentive. They also include changes announced for the FTA sector which have already been implemented;
    2. assists to move media regulation towards platform neutral regulation. STV is subject to onerous sector specific regulation including the new eligible drama expenditure scheme (**NEDE scheme**) and captioning rules and the Bill takes important steps to address this inequity; and
    3. will assist Foxtel to compete closer to a level playing field with both local and international subscription services that are currently unregulated.
- In addition to being part of a broader reform package, at their core these reforms directly address the regulatory imbalance between the STV industry and international streaming services/digital platforms. We argue that this inequity provides a structural disadvantage to the local subscription television sector which must be addressed to ensure that Australian businesses such as Foxtel are able to continue to compete.
- The removal of unnecessary and redundant regulation is an important step towards ensuring a level playing field on which content services compete, offering 'traditional' broadcasters including Foxtel the opportunity to further invest in Australian content and innovations.
- We also highlight that the Bill includes a transitional provision that means that we are unable to carry forward our expected surplus spend of many millions of dollars from FY21 to FY22 which is a change in the way the scheme currently operates. This represents a significant benefit for the production industry.

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1 https://www.paulfletcher.com.au/sites/default/files/attachments/New%20funding%20in%20Budget%20to%20deliver%20Australian%20screen%20content.pdf; https://www.communications.gov.au/what-we-do/television/modernising-australian-screen-content-settings/qa

Foxtel's submission is structured as follows:

PART A: Overview of the current competitive and regulatory environment

PART B: Outline of the STV Provisions of the Bill

PART C: Why Foxtel strongly supports the Bill

PART A: CURRENT COMPETITIVE AND REGULATORY ENVIRONMENT

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. 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.

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.

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.

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.

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.

However, like all local broadcasters and content producers our industry has been substantially impacted by increased competition from unregulated streaming services and structural shifts in the Australian subscription streaming sector.

In 2020 the Deloitte Annual Media Consumer Survey 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.[2]

New entrants have created increased competition and led to audience fragmentation. In 2020 77% of Australian internet users had a subscription and/or pay-per-view service in their household and this increased from 70% in 2019. The below graph demonstrates the range of subscription streaming services now available to Australians.

[2] Deloitte Media Consumer Survey 2020, page 17.

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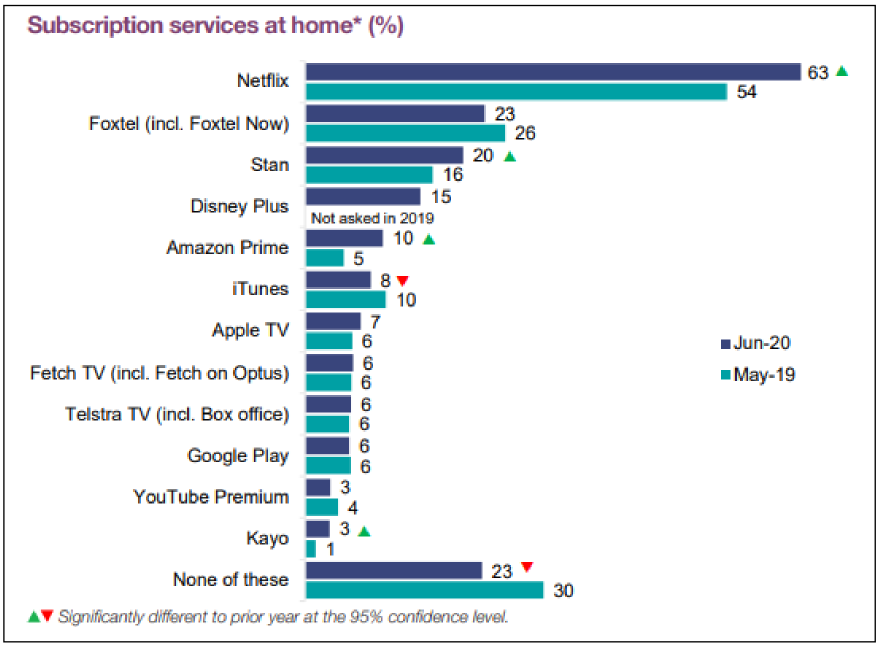

Source: ACMA Consumer Survey https://www.acma.gov.au/sites/default/files/2020-11/Trends-in-viewing-and-listening-behaviour_ACMA-consumer-survey-2020.pdf

These impacts have been compounded by regulation which has remained unchanged since first introduced which means it fails to recognise the changing sector conditions which then impacts our ability to adapt to the changing conditions and compete on an even playing field with our direct competitors.

These regulations have been reviewed at length in multiple consultations and most recently they were addressed in the Final Report to the *Digital Platforms Inquiry* recommendations and the *Supporting Australian Stories on our Screens* options paper and consultation process.

The impact of this ongoing regulation of businesses such as Foxtel has also been recognised by the EM to the Bill which notes the impact of inaction on the local production sector:

> ***As audiences migrate to different, unregulated platforms, the impact of regulation has reduced, and the strain on the regulated domestic sector has increased.***[3]
>
> ....
>
> ***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.***[4]

In response to increasing competition from unregulated streaming services, Foxtel has invested heavily in innovations of its broadcast product and device technology, launched new digital streaming products (Kayo Sports in 2018 and Binge in 2020). We have also undertaken an extensive cost transformation programme, whilst continuing to

[3] Explanatory Memorandum, Broadcasting Legislation Amendment (2021 Measures No. 1) Bill 2021, 3.
[4] Explanatory Memorandum, Broadcasting Legislation Amendment (2021 Measures No. 1) Bill 2021, 5.

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invest in our product and recently launched voice control on our remote control and will roll-out our new hybrid satellite/IP box.

However, Foxtel remains subject to regulation which, in some instances, was introduced over 25 years ago in a very different competitive environment. This regulation no longer reflects the current media landscape and must be amended to better align with the current conditions.

This submission outlines how the provisions in the Bill which relate to subscription television go some way towards remedying these deficiencies in media regulation and why they should be passed.

PART B: STV PROVISIONS OF THE BILL

The Bill contemplates two key regulatory changes for the STV sector: a reduction in the NEDE spend obligation from 10% to 5%, and the relocation of the subscription television captioning rules from the BSA into a disallowable Ministerial instrument.

NEDE Spend

Unlike the commercial FTA broadcasters, Foxtel does not have 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 nearly 30 individual channels offered on the Foxtel platform. Between 2014/2015 and 2018/2019 the subscription television sector spent **$218 million** on Australian drama programs to comply with its obligations under the NEDE scheme.[5]

The NEDE scheme is one of the most restrictive pieces of regulation for Australian subscription television broadcasting licensees and channel providers and in addition to requiring a specific figure is spent on content, it also specifies a narrow genre of content on which it is required to be spent as well as containing extremely strict eligibility conditions as to what qualifies as an Australian drama program.

The Bill proposes to reduce the NEDE spend obligation from 10% to 5%.

Captioning

Foxtel is committed to supporting hearing impaired customers, however the captioning rules that apply to subscription television are onerous and very complex and place a disproportionate burden on subscription television compared to the requirements faced by the free-to-air channels and OTT players.

In brief:

- STV's captioning obligations increase across STV 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 increase at a uniform rate of 5% per annum across each channel until they reach 100%.
- By 2022 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).

[5] https://www.acma.gov.au/spending-and-targets-0

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- By comparison, the FTAs only have to caption 75% of one channel (100% of 6am to midnight on the primary channel) with no meaningful obligation on their multi-channels (other than a requirement to caption repeats of previously captioned programs).

In FY20 close to 550,000 hours across close to 100 channels were captioned on the Foxtel platform.

It is important to note that the Bill does not amend these obligations or remove the licence condition; the Bill introduces provisions to move the subscription television captioning rules from the 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, without significantly impacting the current level of captioning provided on subscription television. We understand that any proposed STV captioning scheme will be subject to extensive public consultation before it is finalised.

PART C: FOXTEL STRONGLY SUPPORTS THE BILL

Foxtel strongly supports urgent passage of the Bill for the following reasons:

1. The Bill is part of a broader package of reforms for the local production sector which were announced by the Government in September 2020.[6]

The amendments in the Bill which relate to the reduction in NEDE spend are but one part of a broader reform package announced by the Government in September 2020 to assist the local film and television sector, following the Government's *Supporting Australian Stories on our Screens* options paper and consultation process. It would therefore be highly inequitable if the reforms contained in the Bill are not legislated.

It was anticipated that these amendments would be effective from 1 July 2021 to ensure continuity of the reduction that was implemented by the Government as part of the COVID relief package announced in April 2020.

The *Supporting Australian Stories on our Screens* consultation was a public consultation and most of the measures announced in response to that consultation have been implemented. Announced measures[7] which have already been implemented include relief for all sectors of industry except for the STV industry. These measures include

- The commercial FTA sector is no longer bound by the requirement to air at least 260 hours of children's programs and 130 hours of pre-school programs annually. The changes for the commercial FTA sector were implemented via the Broadcasting Services (Australian Content and Children's Television) Standards 2020 which provides the FTA sector with more flexibility to choose the relevant mix of Australian drama, children's and documentary content to meet their quotas.
- The production sector has received a large boost via the 2020-21 Commonwealth Government budget which allocated the additional funding of:

[6] https://www.paulfletcher.com.au/media-releases/media-release-new-funding-in-budget-to-deliver-australian-screen-content

[7] https://www.paulfletcher.com.au/sites/default/files/attachments/New%20funding%20in%20Budget%20to%20deliver%20Australian%20screen%20content.pdf; https://www.communications.gov.au/what-we-do/television/modernising-australian-screen-content-settings/qa

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- $30 million to Screen Australia over two years from 2021–22 for funding for Australian drama, documentary and children's screen content across film and television;
- $3 million to Screen Australia over three years from 2020-21 to support a Screen Writing and Script Development Fund; and
- $20 million over two years from 2021-22 to the ACTF to invest in the development, production and distribution of Australian children's content.

Further, on 21 May 2021 the proposed legislation to implement the announced changes to the Australian Screen Production Incentive was released for consultation. These changes, which provide further support for the Australian production sector, include increasing the Producer Offset rate for non-feature film productions from 20 per cent to 30 per cent and removing the 65 commercial hour episode cap for drama series. It is therefore clear that the majority of the Government's significant package of reform for the Australian film and television sector has been implemented or is highly progressed. The final reform to be implemented from the September 2020 package is the Government's commitment to a legislated reduction in the Australian content spend obligation on selected subscription television channels from ten per cent to five per cent. One of the purposes of the Bill is to ensure that this final portion of the Government's broader relief package is implemented. We therefore submit that on the basis that all other sectors of the industry have been granted their portion of announced relief or support, it would be highly inequitable to not implement the STV portion of the Government's relief package.

2. The Bill is important for regulatory parity in the broadcasting sector.

Whilst Foxtel is subject to licence conditions that are also common to the commercial broadcasters, we are also subject to several sector specific conditions including the new eligible drama obligation and a detailed captioning regime that applies to close to 100 channels. As outlined in Part A of this submission, the subscription television sector is the most disrupted sector within the Australian media industry and remains heavily regulated compared to its competitors.

Our view is that if local subscription broadcasters including Foxtel are to compete effectively in the current media landscape, the Government should remove any obsolete and restrictive regulation.

This is supported by the Digital Platforms Inquiry Final Report recommendation 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.[8]

[8] ACCC, Digital Platforms Inquiry – Final Report https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf, p 166.

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Captioning

Although amendments to the subscription television captioning rules are not specifically contemplated in this Bill, if passed, the Bill's provisions will allow the Government more flexibility in making captioning rules for subscription television and potentially alleviate their regulatory burden on subscription broadcasters.

As outlined in Part B of this submission, the STV industry is subject to very high levels of captioning obligations compared to the obligations imposed upon the commercial FTA channels and streaming services. Whilst Foxtel is required to eventually caption 100% of its content across 100% of its channels:

- Free-to-Air broadcasters who are only obliged to caption their main channel for 18 hours a day and News and Current Affairs programmes and repeat programmes that may appear on their multi-channels; and
- Streaming services are not subject to specific captioning regulation.

FTA multi-channels escape substantive captioning obligations while STV channels are regulated for the same genres and in most cases with much lower audience shares. For example, in FY2019 STV channels such as Premiere Movies was required to caption 95% of its content, despite having an audience approximately one third the size of comparable channel 7Flix who was (other than repeats) ostensibly exempt from captioning.

Further, assuming that hypothetically the FTAs move to the licence model proposed in the Media Reform Green Paper, 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.

Captioning is also a subscription television licence condition under the Broadcasting Services Act 1992 (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, faces no regulatory consequences for any lapses or errors.

This Bill is therefore a very important step in ensuring some regulatory relief is provided to STV participants, without diminishing their commitment to captioning. As mentioned above, we understand that the form of the updated captioning rules will be subject to extensive public consultation before they are finalised.

NEDE Scheme

As outlined above, the NEDE spend provisions in the Bill are part of a broader reform package for the Australian film and television sector, the bulk of which have already been implemented.

Passage of the Bill will ensure that the STV industry also receives their portion of comparative relief. If the FTA sector were to transition to the new licence model proposed by the current Media Reform Green Paper and they no longer have content quotas on their multi-channels, then this would press the case for passage of the Bill even further.

The legislated reduction of the NEDE scheme will allow STV broadcasters important flexibility as to where to best focus funding and investment efforts.

The NEDE scheme amendments proposed by the Bill are significant to the STV sector and in addition to assisting our industry respond flexibility to changing industry conditions, they will also ensure regulatory parity between commercial and subscription broadcasters with respect to local content investment requirements.

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3. The Bill will assist Foxtel to compete on closer to a level playing field with both local and international subscription services, thereby supporting local content creators.

NEDE Scheme

The legislated reduction in the STV NEDE spend obligation to 5% is an effective mechanism to improve STV's ability to compete.

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 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.

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. 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.

Further reduction of the NEDE scheme will also 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 with more freedom to compete 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 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.

We also note that the Bill includes a transitional provision that means that we are unable to carry forward our expected surplus spend of many millions of dollars from FY21 to FY22. The ability to carry forward a surplus is part of the current scheme however has been removed for FY22. This represents a significant benefit for the production industry.

Captioning

Foxtel is committed to supporting hearing impaired customers, however the ongoing increasing captioning obligation is inconsistent with requirements imposed on other television industry players. These obligations are particularly onerous on the small niche channel providers with very low audience share.

Foxtel is now reaching the point where some channels are required to caption at 100% over a 24 hour day, making technical compliance exceedingly difficult and costly. For example, in FY20 six of Foxtel's movie channels were required to caption 100% of their programming, and in the few times there is a technical incident which results in a program being aired without captions, this must be accounted for and explained to the ACMA in end of year reporting. This enormous technical and compliance burden will increase year-on-year as more channels reach 100%.

The urgency of captioning reform is now reaching a critical level particularly as in FY23 all channels will need to caption irrespective of audience size and technical difficulties associated with this.

The amendments contemplated in this Bill is the first step to allowing for some adjustment to the current regulation and will assist in supporting the move to a more sustainable operating model for the subscription television broadcasting industry.