



21 March 2016

Ms Christine McDonald
Committee Secretary
Senate Environment and Communications Legislation Committee

By email to ec.sen@aph.gov.au

Dear Ms McDonald,

Broadcasting Legislation Amendment (Media Reform Bill) 2016

Foxtel welcomes the invitation to comment on the *Broadcasting Legislation Amendment (Media Reform) Bill 2016* (the **Bill**), which was referred to the Senate Environment and Communications Legislation Committee on 3 March 2016.

We acknowledge that the '75 per cent audience reach rule' and the '2 out of 3 rule cross media control rule'—which would be repealed by passage of the Bill—are outdated in the modern media environment. While these rules do not apply to Foxtel, we acknowledge the Government's view that it is no longer appropriate that they prevent optimisation of the scale and scope of the media companies they regulate.

However, as noted in the Explanatory Memorandum (**EM**) to the Bill, Foxtel is strongly opposed to repeal of any media control rules in isolation. Therefore, we do not support passage of the Bill at this time.

As set out below, we believe reform must be holistic and provide for de-regulation across sectors, including subscription television. In particular, Foxtel strongly submits that media ownership and control rules should only be repealed in conjunction with reform of the anti-competitive anti-siphoning regime that shackles subscription television licensees when it comes to acquisition of sporting rights. Piecemeal reform which would have the effect of conferring advantage on the already-protected free-to-air (**FTA**) sector, with no corresponding regulatory relief for our sector, must be avoided—especially as both sectors face vigorous competition from new online entrants.

Media reform is needed but should be holistic

The EM to the Bill extensively describes the disruption of the Australian media landscape by online content providers, such as Netflix—many of which originate overseas and are subject only to minimal consumer protection regulation. It correctly concludes that there is a clear need to modernise the legislative framework to provide Australian media companies with opportunities to strengthen their businesses, with flow-on benefits for consumers in the form of higher-quality services.

The EM notes that:

Increasingly, domestic businesses are placed at risk by their inability to compete on a level playing field, and regulatory

frameworks originally designed to protect diversity are now impeding the capacity of local businesses to continue to provide quality professional journalism and reporting.¹

Foxtel strongly agrees that material risk is created for Australian businesses when they cannot compete on a level playing field—both with other domestic operators, and with overseas-based competitors. While this extract refers to risk for FTA broadcasters if they remain restricted from pursuing merger and acquisition opportunities, the same argument can equally be applied to restrictions on Foxtel's acquisition of sports rights.

The anti-siphoning scheme is analogue-era regulation

The so-called anti-siphoning scheme stops subscription television broadcasters from buying the rights to events on the anti-siphoning list before FTA broadcasters have the opportunity to purchase the rights. It gives FTA broadcasters the ability to control the negotiations through which we acquire rights to broadcast the sport our subscribers love. The scheme applies only to licenced subscription broadcasters like Foxtel, and not to online content providers like Netflix or Stan or telecommunications companies like Optus.

The anti-siphoning list has traditionally been set at over 1300 events and has been the longest such list in the world, exceeding its mandate to apply only to events of national significance in Australia.

Over its life the scheme has been abused by commercial FTA broadcasters to either buy events and not broadcast them, buy events and not broadcast them live or buy events which they will not broadcast but seek to sell on to our sector. The policy has hurt consumers, sporting bodies and participants in grass-roots sports. Key problems with the scheme include:

- **The anti-siphoning list is anti-competitive**—the anti-siphoning list is inherently anti-competitive. Its provisions directly limit competition between subscription and FTA networks (while not limiting online providers).
- **The anti-siphoning list has a negative impact on sporting bodies**—the anti-siphoning regime has a negative impact on sporting bodies as a result of the substantial reduction in competition during negotiations with broadcasters.
- **The anti-siphoning list has limited effectiveness**—there are a number of reasons why it could be expected that broad FTA 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 sport.

Indeed, it is widely recognised that the current anti-siphoning legislation is analogue-era regulation, is out of date and acts as a protection mechanism for the commercial FTA networks.²

¹ Explanatory Memorandum, *Broadcasting Legislation Amendment (Media Reform) Bill 2016 (EM)*, page 14.

² For example:

- In 2000, the Productivity Commission found that the anti-siphoning rules were anti-competitive and that the costs of the scheme, as it was then, to sporting organisations, the broadcasting industry and the community as a whole, exceeded the benefits—*Productivity Commission, Broadcasting, Inquiry Report, No.11*, 3 March 2000, p 444.
- In 2009, the Productivity Commission suggested that consideration should be given in the shorter-term to reducing the list; and, in the longer-term, abolishing the list—*Productivity Commission, Annual Review of Regulatory Burdens on Business: Social and Economic Infrastructure Services*, 2009, p 163.

Nonetheless, Foxtel understands that anti-siphoning policy needs to finely balance the interests of all stakeholders. In the immediate term, an important first step will be to shorten the list to events of true national significance. Events like the AFL and NRL grand finals would remain on the list, but a number of overseas events that are not nationally significant in Australia would be removed.

Regulation should not impede competition

In relation the reforms proposed in the Bill, the EM notes that:

[w]hile there is no case for shielding incumbent media operators from competitive disruption, it is important to ensure that regulatory frameworks are not impeding their capacity to compete effectively in the global media market place against media firms that, in many instances, are not regulated to the same extent as commercial broadcasters.³

Foxtel wholeheartedly agrees that FTA broadcasters should not be shielded from competition—again, while this sentiment is expressed in the EM in the context of ownership and control rules, it is equally applicable to anti-siphoning. Furthermore, we agree that domestic businesses must not be impeded in the face of global competition in the way that Foxtel is impeded in relation to acquiring sporting rights.

Fair competition will enable Foxtel to invest more in sports

Foxtel has been a significant investor in sports rights since its inception—both directly and indirectly. Our sports coverage is comprehensive and is beautifully produced with innovative use of technology. Major codes are covered by a range of popular magazine programs that we produce and which satisfy the needs of even the most die-hard fans.

We believe that reforming the anti-siphoning scheme to give subscription television broadcasters greater certainty in negotiations will encourage further investment in sports rights. With further investment sporting codes will become even stronger and better able to serve grass-roots communities.

We would be very pleased to provide any further information that may assist the Committee in its consideration of this important policy area.

Yours sincerely,

Bruce Meagher
Group Director, Corporate Affairs

³ EM, page 16.