

22 January 2024

The Foxtel Group’s submission to the Environment and Communications Legislation Committee’s inquiry into the *Communications Legislation Amendment (Prominence and Anti-siphoning) Bill 2023*

The Foxtel Group welcomes the opportunity to make a submission in response to the Environment and Communications Legislation Committee’s (the “**Committee**”) inquiry into the *Communications Legislation Amendment (Prominence and Anti-siphoning) Bill 2023* (the “**Bill**”).

1. Introduction

1.1 The Foxtel Group is one of Australia’s most progressive and dynamic media companies reaching more than 4.6 million Australian homes overall via our different services¹. Our services include:

- i. a premium subscription television broadcast (“**STB**”) service which has approximately 1.3 million subscribers and which is available over satellite and internet, via our proprietary set top boxes known as the iQ;
- ii. the subscription streaming services Kayo Sports (1.4 million subscribers), Binge (1.5 million subscribers), Flash and Foxtel Now; and
- iii. the Hubbl puck and television which will be released/launched in Australia in early 2024.

1.2 The Foxtel Group has a long history of supporting access to free-to-air (“**FTA**”)² services through our STBs, first through the retransmission of linear FTA television broadcasting services and most recently via access to both FTA linear and broadcaster video on demand (“**BVOD**”) services on our IP connected set top boxes. Without any regulatory mandate to do so, the Foxtel Group has:

- i. provided the primary linear FTA television broadcasting services EPG prominence on Foxtel’s set top boxes for many years;
- ii. supported easy access to the FTA BVOD services (via our IP connected set top boxes); and
- iii. integrated linear FTA television broadcasting content and FTA BVOD content into our search and recommendation engine feature (via our IP connected set top boxes).

Prominence

2. Executive summary

2.1 The Foxtel Group submits that the Government’s policy objectives are best achieved by a prominence framework that:

- i. does not extend to FTA BVOD services;
- ii. does not regulate or affect the search results of a device;

¹ Foxtel Group Fiscal 2024 First Quarter Earnings, <https://foxtelgroup.com.au/newsroom/foxtel-group-fiscal-2024-first-quarter-earnings>

² Including both the national broadcasters and commercial television broadcasting licensees, together “FTA”.

- iii. does not require device manufacturers to present linear FTA television broadcasting services in logical channel number (“LCN”) order in the electronic program guide (“EPG”) if the device provides appropriate **access** to the linear FTA television broadcasting services in the EPG;
 - iv. does not constrain the capacity of the device manufacturers to promote, preference or recommend particular content or services to users, including their own-brand content and services;
 - v. does not prescribe the exact position of tiles, tabs or links on the primary UI nor prevent them from occupying a different position on the UI from time to time;
 - vi. does not affect the existing contractual obligations of manufacturers of devices; and
 - vii. applies to devices at least 18 months after the commencement of the framework.
- 2.2 The above recommended framework would ensure that the regulatory response meets the Government’s policy objective of ensuring that Australian audiences can easily find and access the FTA broadcasting services on regulated devices, while also minimising the impact on consumers, the cost and impact on industry, and the potential for market distortion. We recommend that the Bill is amended to the extent necessary to align with the above.
- 2.3 If the Bill is to remain in its current form and include the FTA BVOD services, then it is critical that the Bill addresses the following:
- i. clarify it is limited to one FTA BVOD service per FTA broadcaster;
 - ii. there must be a requirement that the FTA BVOD service is related to the linear FTA broadcast services made available by the relevant FTA broadcaster (e.g. 50% of the content on the FTA BVOD service must be content made available on the linear channels); and
 - iii. the FTA BVOD service must meet at least some of the safeguards the linear FTA channels must meet to justify benefitting from the framework.

3. Application of the framework to FTA BVOD services

Extension of the scheme to the FTA BVOD services further distorts the regulatory playing field

- 3.1 The Foxtel Group has argued that if the policy objective is to ensure that “*local TV services, which broadcast the Australian content, sports, news and emergency broadcasting Australians rely on, are easy to find on connected TV platforms*”³ then any prominence framework should be limited to the primary linear FTA television broadcasting services only. There is no policy basis for extending the framework to the FTA BVOD services.
- 3.2 The FTA broadcasters currently benefit from significant regulatory assistance including via the anti-siphoning regime, a legislated ban on competition, minimal captioning obligations on their multi-channels and, most recently, a significant reduction on their spectrum fees and more flexible content quotas. The Australian media sector is very competitive, and the

³ Labor Party Media Release (7 May 2022), “Labor will support local TV & free sport in the streaming age” <https://anthonyalbanese.com.au/media-centre/labor-will-support-local-tv-free-sport-in-the-streaming-age>

FTAs are established and effective competitors in that sector. The services the FTAs offer directly compete with the services of other media businesses including SVOD service providers and subscription TV operators such as Foxtel. Revising the Bill to limit its application to primary linear FTA television broadcasting services, will allow the Government to deliver on its specific policy objective while also aligning with the Government's policy objective of creating a level playing field for Australian media businesses in which they can compete effectively.⁴

There is no risk to the sustainability of the FTAs

- 3.3 The commercial television broadcasters have stated that “*locally relevant, licenced and regulated FTA services are becoming difficult for Australians to find*”⁵ and that a prominence regime that includes both the linear FTA television broadcasting services and the FTA BVOD services is critical to ensuring the “*long-term commercial viability of commercial TV services*”.⁶
- 3.4 The commercial television broadcasters have not provided any evidence to support these statements and these statements appear contrary to the following:
- i. the Social Research Centre found that, when asked whether it was easy or difficult to navigate to FTA services on TVs (including smart TVs), 76% of respondents said it was “easy” or “very easy” to navigate to linear FTA television broadcasting services and 62% of respondents said it was “easy” or “very easy” to navigate to FTA BVOD services.⁷ The main reasons that respondents gave for finding it difficult to navigate to FTA services (either linear or BVOD) were that they had problems with signing in, passwords, or creating accounts⁸;
 - ii. in February 2023, the ACMA reported that the number of Australian adults who reported watching any FTA TV (linear and BVOD) in a given week increased from 64% in 2021 to 70% in 2022 – that includes 56% who viewed linear FTA television broadcasts and 38% who viewed FTA BVOD services⁹ ;
 - iii. Australia’s viewership of FTA BVOD services in the 7 days to June 2023 was 43%, up from 18% from June 2017¹⁰;
 - iv. Australians spent more time in 2023 watching FTA services than any other service. Australians on average spent a total of 7.7 hours a week watching FTA services

⁴ Minister for Communications (14 November 2022), [Media Policy: Priorities for a New Government Seminar Communications and Media Law Association \(CAMLA\) and International Institute of Communications \(IIC\) Australian Chapter | Ministers for the Department of Infrastructure](#)

⁵ Free TV Australia submission (February 2023), “Prominence framework for connected TV devices”, <https://www.freetv.com.au/wp-content/uploads/2023/02/Free-TV-Submission-Prominence-framework-for-connected-TV-devices.pdf>, p. 9.

⁶ Ibid, p. 11.

⁷ The Social Research Centre (February 2023), “The 2022 Television Consumer Survey – Summary Report” prepared for the Department of Infrastructure, Transport, Regional Development, Communications and the Arts, https://www.infrastructure.gov.au/sites/default/files/documents/tv_consumer_survey_2022_final_report_0.pdf, p.p 46-47.

⁸ Ibid, p. 43.

⁹ ACMA report (February 2023), “How we watch and listen to content” <https://www.acma.gov.au/articles/2023-02/overall-free-air-tv-audience-increases-first-time-five-years>

¹⁰ ACMA report (December 2023), “How we watch and listen to content” <https://www.acma.gov.au/publications/2023-12/report/communications-and-media-australia-how-we-watch-and-listen-content>.

(linear and BVOD) in 2023; this is compared to an average of 5.8 hours a week spent watching paid subscription streaming services¹¹; and

- v. FTAs also remain a popular choice when it comes to the consumption of news with FTA TV being the main source of news in 2022.¹²

3.5 Accordingly, these arguments made by the FTAs should not be taken into account when considering the scope of the framework as set out in the Bill.

Linear FTA television broadcasting services are regulated whereas FTA BVOD services are largely unregulated

3.6 The primary commercial television broadcasting services are regulated services that meet the policy objectives and basic safeguards set out in the *Broadcasting Services Act 1992* (Cth) (the “**BSA**”) including the conditions of their commercial broadcasting licences and the Commercial Television Industry Code of Practice (“**FTA Codes**”) by:

- i. complying with minimum Australian content quotas;
- ii. adhering to limitations on advertising (frequency, content, and classification), particularly during children’s programming;
- iii. complying with various political/election advertising restrictions and requirements;
- iv. meeting certain requirements for news and current affairs programs in respect to accuracy, fairness, destressing material, impartiality and privacy; and
- v. meeting program classification obligations, including classification time-zone requirements.

3.7 The national television broadcasting services, are also regulated to meet certain public policy outcomes set out in their respective Acts. For example, the ABC is required to “*provide...comprehensive broadcasting services of a high standard...[and] broadcasting programs that contribute to a sense of national identity and inform and entertain, and reflect the cultural diversity of, the Australian community.*”¹³

3.8 The FTA BVOD services are not subject to the basic safeguards that reflect contemporary community standards. In particular, FTA BVOD services have no obligation to:

- i. comply with minimum Australian content quotas;
- ii. comply with minimum captioning quotas;
- iii. adhere to the specific limitations on advertising relating to frequency, content, and classification as set out in the FTA Codes;
- iv. comply with political/election advertising blackout periods;
- v. meet certain requirements for news and current affairs programs in respect to accuracy, fairness, destressing material, impartiality and privacy; or

¹¹ Ibid.

¹² See n 9 above.

¹³ Section 6(1)(a), *Australian Broadcasting Corporation Act 1983* (Cth).

vi. adhere to classification time-zone requirements.

3.9 The Bill as drafted, does not impose any obligation on the FTA BVOD services to meet the basic safeguards that the primary linear FTA television broadcasting services must meet. The Bill also does not require that these services have any connection to the content made available on the linear FTA television broadcasting services made available by the relevant FTA broadcaster. Accordingly, the FTA BVOD services should be removed from the Bill or the Bill should be amended to require that the FTA BVOD services have a connection to the content included in the relevant linear FTA broadcast services (e.g. 50% of the content on the FTA BVOD service must be content made available on the linear channels) and meet at least some of the safeguards those services must meet to justify benefitting from the framework.

The Bill must be amended to clarify that the minimum prominence obligations only apply to one FTA BVOD Service

3.10 If the Bill will continue to apply to the FTA BVOD services then it should be amended to clarify that the minimum prominence obligations only apply to one FTA BVOD service per national broadcaster and one FTA BVOD service per commercial television broadcasting licensee only.

3.11 With the streaming era in its relative infancy, at present each FTA has only one FTA BVOD service. However, this may change as the shift to online media consumption continues.

4. Search functions and the promotion of other content and services

4.1 The Bill must not be amended to regulate or affect the search or customisation functions of a device or to constrain the capacity of the device manufacturers to promote, preference or recommend particular content or services to users, including their own-brand content and services.¹⁴

4.2 The Foxtel Group is both a local subscription content service provider and a platform operator who has invested significantly in its own proprietary devices that customers can use to access Foxtel Group services. One example is the Foxtel iQ4 and iQ5 set top boxes that are distributed to customers to receive the Foxtel STB service (the “**Foxtel Set Top Box**”).

4.3 It would be contrary to the Government’s media policy of ensuring a level playing field for Australian media businesses to be required to prioritise third-party content ahead of their own content in search and recommendation systems on their own devices. For example, it would be unreasonable for Foxtel to be mandated to prioritise another broadcaster’s transmission of an AFL match ahead of its own Fox Sports transmission to a paying Foxtel sports customer where the customer has clearly made the decision to subscribe to Fox Sports and is accessing content via one of our proprietary devices.

4.4 The Foxtel Group’s services are based on a subscription content model. When customers are paying the Foxtel Group for a subscription content service; there is an expectation from the

¹⁴ Explanatory Memorandum, *Communications Legislation Amendment (Prominence and Anti-siphoning) Bill 2023*, p. 27 and the Minister for Communications Media Release (29 November 2023) “Modernising Australia’s media laws – for all Australians” <https://minister.infrastructure.gov.au/rowland/media-release/modernising-australias-media-laws-all-australians>

- individual that Foxtel Group content is prominently displayed, and readily accessible and discoverable.
- 4.5 The search function on Foxtel’s Set Top Box is designed to operate in a fair and non-discriminatory way, with the key objective to return the highest metadata match relevant to the viewer’s search criteria. In some cases (e.g. for a reality TV show), a search query is designed to default to the first episode of the latest season of a program available via Foxtel’s proprietary device. An example of this customer experience is set out at Annexure A. However, in other cases, where the best customer experience would be achieved by directing consumers to view the narrative arc in chronological order (for example for a drama program) the search query is designed to direct a customer to the first episode of season 1 of the program, rather than the latest season. These defaults are driven by the best customer experience, they are not influenced by the provider of the content (i.e., whether it is provided by Foxtel or a third party or whether it is free or paid).
 - 4.6 If the content returned in the search query on the Foxtel Set Top Box is provided by both Foxtel and a third party app provider, and the customer already subscribes to the Foxtel service, the customer would be directed to view the content through the Foxtel service they are already paying for.
 - 4.7 Alternatively, if the content returned in the search query is provided by both Foxtel and a third party app provider on the Foxtel Set Top Box, and the customer does not already subscribe to the Foxtel service, the customer is directed to view the content on the other content service provider’s platform first; with the option for the customer to upgrade their Foxtel package to view the content via the Foxtel service provided secondary. An example of this customer experience is set out in Annexure B. Annexure B also includes an example of how search queries are presented if the content is provided by multiple third party app providers and not Foxtel.
 - 4.8 The Foxtel Group submits that the search function on the Foxtel Set Top Box is delivering what consumers expect by returning the result that is most relevant to the viewer.
 - 4.9 A regime that mandates the positive discrimination of content ultimately (and most importantly) diminishes the viewers’ experience, results in frustration and inhibits consumer choice.
 - 4.10 Similarly, the prominence framework as set out in the Bill should not constrain the capacity of the device manufacturers to promote, preference or recommend particular content or services to users, including their own-brand content, provided the minimum prominence obligations have been met.
 - 4.11 This ensures that it is the market, not regulators, who determine how content and services are best prioritised on the primary UI beyond the minimum prominence requirements and does *“not impede other television services from being displayed or accessed.”*¹⁵

¹⁵ Explanatory Memorandum, *Communications Legislation Amendment (Prominence and Anti-siphoning) Bill 2023*, p. 7.

5. Linear EPG obligations

- 5.1 The second reading of the Bill indicates that it is the Government’s intention that the regulations prescribe that device manufacturers must present linear FTA television broadcasting services in LCN order on the EPG of devices where the device contains a radiofrequency tuner and includes an EPG for linear broadcasting services.¹⁶
- 5.2 Any requirement to present all linear FTA television broadcasting services (primary and multi-channels) in LCN order will require significant rearrangement of the EPG on the Foxtel Set Top Box.
- 5.3 As such, the regulations need to recognise that devices that provide appropriate access to linear FTA television broadcasting services in their EPG will satisfy the Government’s policy intention without the need to present them in LCN order.

6. The position of tiles, tabs or links on the primary UI

- 6.1 When it comes to the order of apps presented on their smart TVs, 94% of Australians don’t want the government controlling the order and layout of the apps on their TV, with as many as 1 in 2 Australians (50%) with a smart TV not knowing how to change the layout and order of their apps.¹⁷
- 6.2 The Foxtel Group supports the Government’s statement in the second reading of the Bill that the regulations setting out the minimum prominence requirements “*would not prescribe the exact position of tiles, tabs or links on the primary user interface nor prevent them from occupying a different position on the primary user interface from time to time.*”¹⁸ We also note that the prominence framework is not intended to “*require regulated television services to be promoted above or ahead of...other services.*”¹⁹
- 6.3 However, section 130ZZ0 of the Bill provides for the regulations setting out the minimum prominence requirements to prescribe requirements in respect of:
 - (b) “*the display, location or positioning on the device or the primary user interface of the device of:*
 - (i) *regulated television services; or*
 - (ii) *applications, covered by subsection 130ZZJ(5), that are used to access regulated television services; or*
 - (iii) *any other thing used to access regulated television services.*”
- 6.4 Therefore, the Bill should be amended to align with the intention set out in both the Explanatory Memorandum and the second reading speech.

¹⁶ Second Reading, *Communications Legislation Amendment (Prominence and Anti-siphoning) Bill 2023*.

¹⁷ Based on a nationally representative YouGov survey of 1,043 Australians, aged 18+ who have a smart TV at home, commissioned by the Foxtel Group, unpublished.

¹⁸ See n 16 above.

¹⁹ See n 15 above.

7. Existing contractual obligations

- 7.1 The Bill does not account for the fact that device manufacturers may have pre-existing contractual obligations with third party content and app providers that may be inconsistent with the obligations contained within the proposed prominence framework.
- 7.2 Accordingly, the Bill should be amended to ensure that a manufacturer cannot be found to have contravened Part 9E of the BSA if, at the time the Bill receives royal assent, the manufacturer had pre-existing contractual obligations that would conflict with its obligation as set out in proposed Part 9E of the BSA.

8. Application of amendments

- 8.1 The Foxtel Group submits that the application of the amendments made by Schedule 1 of the Bill need to apply to devices manufactured **at least** 18 months after the commencement of the Bill.
- 8.2 The prominence framework will impose complex design, development and manufacturing burdens on device manufactures, so a transitional period of **at least** 18 months is needed in order to allow manufacturers to make changes to the operation of their device interfaces to comply with the framework.

Anti-siphoning

9. Executive summary

- 9.1 The Foxtel Group has consistently advocated that any reform of the anti-siphoning scheme (the "**Scheme**") and the Broadcasting Services (Events) Notice 2023 (the "**List**") (collectively, the "**Anti-Siphoning Regime**") must reduce the negative impacts of the existing regime while also enabling it to better meet the policy objective of ensuring that Australians have "*free access*" to "*events of national importance and cultural significance*".
- 9.2 The Bill and the draft Broadcasting Services (Anti-Siphoning List) (the "**Revised List**") do neither. They:
- do not support the Anti-Siphoning Regime achieving its objective, or advance the objectives of the BSA more broadly; and
 - exacerbate the current problems with the legislation rather than solve them.
- 9.3 This outcome would be detrimental to the public, to sporting bodies and to a competitive market for sports media rights.
- 9.4 The Foxtel Group maintains that the most appropriate course of reform is represented by Model 1 for reforming the Scheme and Option 1 for amending the List as set out in the Department of Infrastructure, Transport, Regional Development, Communications and the Arts' 'Anti-siphoning review – Proposals paper' dated August 2023 (the "**Proposals Paper**"). Foxtel's only proposed amendment to Model 1 would be to restrict the coverage obligation to the first acquirers of rights capable of showing a listed event live and in full.

10. Issues with the Bill

The Bill does not facilitate the development of a broadcasting industry in Australia that is efficient, competitive and responsive to audience and user needs. Rather it:

- a. exacerbates the anti-competitive nature of the Scheme; and
- b. is contradictory to modern technology and viewing trends.

10.1 Section 3(1)(b) of the BSA outlines that an objective of the BSA is to "...provide a regulatory environment that will facilitate the development of a broadcasting industry in Australia that is *efficient, competitive and responsive to audience needs*". The Bill, as it is drafted currently, does not promote the broadcasting industry to be any of those things.

10.2 First, the Bill will make the broadcasting industry in respect of sporting rights less efficient and less competitive. Consistently, the Productivity Commission has concluded that the Scheme is anti-competitive.²⁰ By formally granting FTAs the opportunity to negotiate with sporting bodies for listed events before any media content service providers, the new section 146W for the BSA proposed by the Bill entrenches the unfair competitive advantage of FTAs to acquire broadcasting rights to both listed and unlisted events as well as increasing the already substantial advantage FTAs possess in relation to the acquisition of other kinds of coverage rights, notably streaming rights.²¹ FTAs are afforded an advantage to acquire the rights to unlisted events and non-broadcasting coverage rights in addition to broadcasting rights to listed events because it is common for sporting bodies to bundle their broadcast rights and streaming rights together, often for both listed and unlisted events, to secure the highest cumulative price for those rights.²²

10.3 Second, the Bill does not take into account the current viewing habits of Australians and emerging trends in technology. The intention of the new Part 10A of the BSA proposed by the Bill is to entrench FTA TV as the place where Australians can access events of national importance and cultural significance. This is despite the fact that since 2021, the ACMA has reported that Australians are more likely to have watched content on a SVOD service in the past week than via live FTA television.²³

10.4 In the Proposals Paper,²⁴ the Government justified its rejection of Model 1 for reforming the Scheme on the basis that online services capable of streaming sports, in the near-to-medium-term, are not likely to be accessible to "...all Australians, regardless of their financial means, location or other factors.". However, the Foxtel Group reiterates that this conclusion is wrong for the following reasons:

- the internet services capable of streaming sports are already accessible to the vast majority of Australians. As at September 2020, 99.3 per cent of premises could

²⁰ Australian Government Productivity Commission (March 2000) , '[Broadcasting Inquiry Report](#)', pp. 443 – 445 and Australian Government Productivity Commission (2009), '[Annual Review of Regulatory Burdens on Business: Social and Economic Infrastructure Services](#)', pp. 154 - 163.

²¹ Foxtel Group (20 September 2023), '[Foxtel Group: Submission in response to the review of the anti-siphoning scheme – Proposals Paper](#)', p. 4.

²² Ibid.

²³ See n 10 above.

²⁴ Anti-siphoning Review Proposals Paper (August 2023), <https://www.infrastructure.gov.au/sites/default/files/documents/anti-siphoning-review-proposals-paper.pdf>, p. 36.

connect to the National Broadband Network (the "NBN") and 99.4 per cent of the population are currently able to access Telstra's 4G services.²⁵ By contrast, the new section 146W(2) of the BSA proposed by the Bill carves out commercial television broadcasting licensees whose services cover only 50% or more of the population from the prohibition of media content service providers acquiring the rights to provide coverage of listed events;

- uptake of internet services is strong and the use of the internet to consume content already exceeds live FTA television;²⁶ and
- the affordability of internet services is strong across Australia.²⁷

10.5 In comparison to the Bill, Model 1:

- would promote more competition: By allowing rights to listed events to be acquired by any content service provider so long as they provide free access via any broadly available technology platform, thereby implementing a level-playing field for all content service providers, Model 1 would result in increased competition. This increased competition would in turn enable sporting bodies to maximise revenue for their rights and allow those bodies to engage in greater investment in the type of competitions which the Government has added in the Revised List; and
- align with the current viewing habits of Australians and emerging trends in technology: For the reasons set out above, Model 1 conforms with the growing trends of Australians viewing content via the internet and the increasing accessibility and affordability of internet services capable of supporting the viewing of sporting events.

The Bill does not ensure that Australians have free access to events of national importance and cultural significance.

10.6 The Bill as drafted:

- Would facilitate the FTAs monopolising the coverage of listed events by enabling them to more easily acquire both the broadcast and streaming rights to listed and unlisted events;²⁸ and
- does not impose any obligation on FTAs to make the listed events in respect of which they acquire broadcast rights freely available to the Australian public, either at all or on a national broadly available basis.

10.7 The Bill therefore leaves open the possibility that FTAs could siphon events behind paywalls of one of their subscription platforms within their respective corporate groups to maximise their return on the coverage rights they acquire.²⁹ It therefore entirely fails to meet the principal objective of the policy.

²⁵ Telstra, 'Our network'.

²⁶ See n 21 above, p. 6.

²⁷ Ibid.

²⁸ See sections [10.1] – [10.5] above.

²⁹ For example, Nine's digital platform Stan (2015) and Network Ten's Paramount+ (2021).

- 10.8 The Explanatory Memorandum to the Bill outlines that the new section 146W for the BSA set out in the Bill ensures that a broadcasting television licensee, and not a related body corporate, would need to be the party to acquire a right to televise listed events under the protection of the Scheme. However, there is nothing in the Bill that protects against a commercial television broadcasting licensee acquiring the broadcasting and streaming rights to a listed event, then transferring the streaming rights to a subscription platform owned and operated by separate, but related, corporate entity, and/or the commercial television broadcasting licensee electing not to provide free broadcast coverage of the relevant listed event.
- 10.9 The Bill also allows the continuation of the present position in which many listed events are not broadcast to all Australians on a national basis. They are instead televised only in particular States and Territories.
- 10.10 By contrast, revising the Bill to reform the Scheme in line with Model 1 would ensure that more Australians are able to enjoy live and full coverage of listed events for free by imposing a coverage obligation on the first acquirers of rights capable of showing a listed event live and in full. This represents a better outcome for Australian consumers.

11. Issues with the Revised List

- 11.1 The Foxtel Group notes that the Revised List has not been referred to the Committee for consideration. Nevertheless, the Foxtel Group encourages the Committee to consider the Revised List in conjunction with the Bill. As noted in the Proposals Paper, the models for reforming the Scheme and the options for reforming the List considered in the Proposals Paper have been designed to operate in conjunction with each other and therefore are inextricably linked.³⁰
- 11.2 The Foxtel Group submits the Revised List as currently drafted is inappropriate for the following reasons.

It is anti-competitive and would disincentivise future investment in sports

- 11.3 Sporting bodies with events that are newly added to the List are likely to receive less revenue overall for their broadcasting rights because there would be less competition for rights from non-FTA content service providers. This will limit the investments those sports can make including in grassroots development and new competitions such as for women.³¹
- 11.4 Model 1, on the other hand, would enable sports to maximise their commercial revenues which can be used to help develop and support the very sports which the Government is seeking to assist by expanding the List.

No objective test appears to have been applied to determine which events should be added to or remain on the List

- 11.5 The List is supposed to represent events of national importance and cultural significance. Despite that, the Revised List proposes that a number of sporting events should be added to

³⁰ See n 24, pp. 51-53 and 57.

³¹ Coalition of Major Professional and Participation Sports (COMPPS) (6 December 2022), '[Submission of COMPPS to the review of the anti-siphoning scheme](#)', pp. 2-5.

the List, irrespective of the viewership and engagement with those events.³² Simultaneously, the Revised List retains a number of events, such as the Davis Cup, which no longer meet the test of being events of 'national importance and cultural significance' by reference to their current coverage by FTA broadcasters or by their viewing figures.³³

11.6 The Foxtel Group again notes its comments in relation to the scope of the List and in particular, with respect to the regular season matches of the domestic sporting competitions.³⁴

12. The Bill and the Revised List should be amended to conform with Model 1 and Option 1 respectively.

12.1 The Foxtel Group submits that the Bill and the Revised List should be revised in line with Model 1 and Option 1 set out in the Proposals Paper for reforming the Scheme and the List respectively. This is for the following reasons:

- Model 1 and Option 1 would reduce the current anti-competitive features of the Scheme.³⁵ As the Proposals Paper acknowledged, Model 1 to reform the Scheme would "*...avoid a number of the acknowledged concerns with the scheme, including that it imposes regulatory burdens, constrains the ability of sports bodies to freely market their content, and impairs the capacity of subscription television broadcasting licensees to bid for such rights.*"³⁶
- Model 1 and Option 1 would better serve the Scheme's policy objective of ensuring free access, on a broad national basis, to events of national importance and cultural significance and would be reflective of Australian viewers' modern technological preferences and viewing habits.³⁷ For the reasons set out in section 0, the Bill fails to ensure free access, nor would it ensure that access is provided on a truly broad, national basis.
- Model 1 and Option 1 would promote a broadcasting industry in Australia that is more efficient and competitive in line with Object 3(1)(b) of the BSA.³⁸

12.2 The Foxtel Group maintains that if the Bill were amended to conform with Model 1, it should be subject to the coverage obligation set out in the Proposals Paper being restricted only to the first acquirer of rights capable of showing a listed event live and in full.³⁹ This would stop unnecessary restrictions being placed on the commercial freedom of sports bodies and, potentially, unnecessary duplication of free transmission in situations where the sports body selling the rights would prefer one content service provider to transmit its listed events via a

³² See n 21 above, pp. 8 -9.

³³ See n 21 above, p.9.

³⁴ Foxtel Group (6 December 2022), '[Foxtel Group: Submission in response to the review of the anti-siphoning scheme -Consultation Paper](#)', p. 16 ("**Foxtel Group's Consultation Paper Submission**"), at [3.2].

³⁵ Foxtel Group's Consultation Paper Submission, at [2.2] and responses to questions 1(b), 6 and 7 of 'Review of the anti-siphoning scheme: Consultation paper' dated October 2023' ("**The Consultation Paper**").

³⁶ See n 24, p.32.

³⁷ Foxtel Group's Consultation Paper Submission, at [2.6], [3.2] - [3.3], [5.1] – [5.2] and responses to questions 2(a) and 26 - 33 of The Consultation Paper.

³⁸ See sections [10.1]-[10.5] above and Foxtel Group's Consultation Paper Submission, response to question 9 of The Consultation Paper.

³⁹ See n 21, p.10.

subscription service and another provider to transmit the event via a broadly available free platform.

12.3 The Foxtel Group submits Model 3 and Option 3 canvassed in the Proposals Paper should not be considered viable options for reforming the Scheme and the List for the following reasons:

- Model 3 would amplify the existing anti-competitive nature of the current Scheme, and of the Scheme as it is proposed to be revised under the Bill, by formally granting FTAs the opportunity to negotiate with sporting bodies and acquire both the television and online rights to listed events before any other content service providers may do so.
- This extension to capture online rights would further reduce the media rights revenue which is attainable by sporting bodies because the competition for those online rights will be negatively impacted given that no other content service provider will be able to acquire such online rights until a FTA has had the opportunity to do so. This outcome will clearly be detrimental to governing sporting bodies with events on the List, and by extension, the ability of those bodies to invest in grassroots development and new competitions, such as those for women and para-athletes, to a greater extent than if the Bill was implemented.⁴⁰ The FTAs would essentially become the gatekeepers of the single most important source of revenue for sporting organisations, being the revenue derived from the sale of media rights and it is clear that the largest sporting organisations in Australia do not support the adoption of Model 3 per their submission that *“the COMPPS members strongly reject Model 3 and the associated Expanded List”*.⁴¹
- Model 3 would increase the possibility of the hoarding of broadcast and online rights to listed events by the FTAs. Model 3 would, more so than under the Scheme proposed by the Bill, enhance the ability for the FTAs to monopolise the coverage of listed events by enabling them more easily to acquire both the broadcast rights and the online rights to listed events for their streaming businesses. This is because Model 3 does not impose any obligation on FTAs to make the listed events in respect of which they acquire broadcast and online rights freely available to the Australian public. As a result, Model 3 would allow the FTAs to acquire rights to listed events for both FTA television and online services and then not exploit the rights or only exploit the rights via one of their own subscription platforms to maximise their revenue return on the media rights they acquire. Model 3 may therefore lead to fewer Australians being able to view sporting events for free on broadcast and/or online platforms, contrary to the overall policy objective of the Scheme.

12.4 Like Option 2, Option 3 would result in several events being added and remaining on the List which do not meet the test of being events of 'national importance and cultural significance' by reference to their current coverage by FTAs or by their viewing figures. Option 1 by

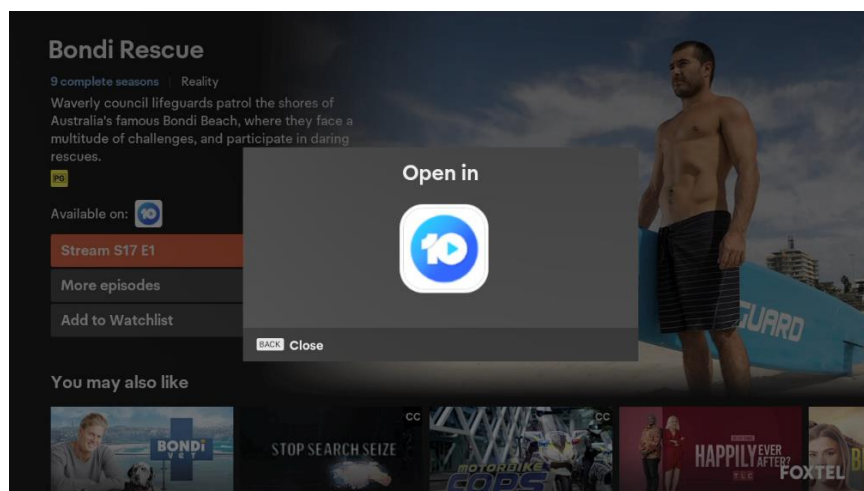
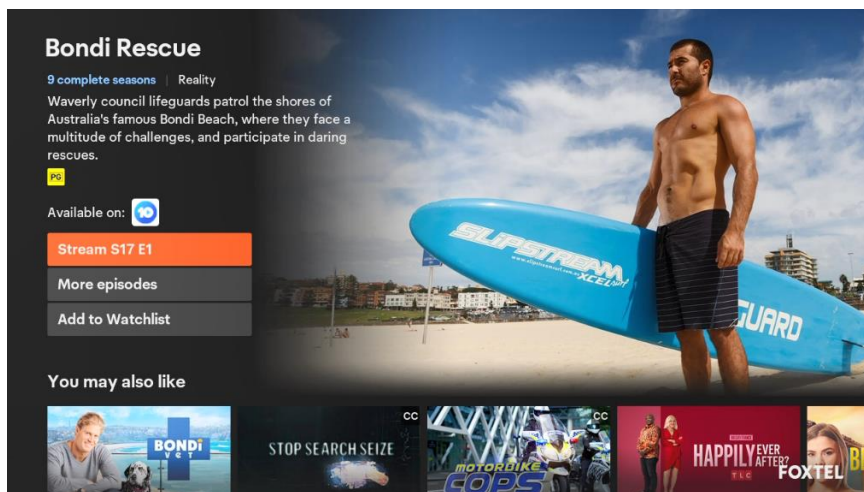
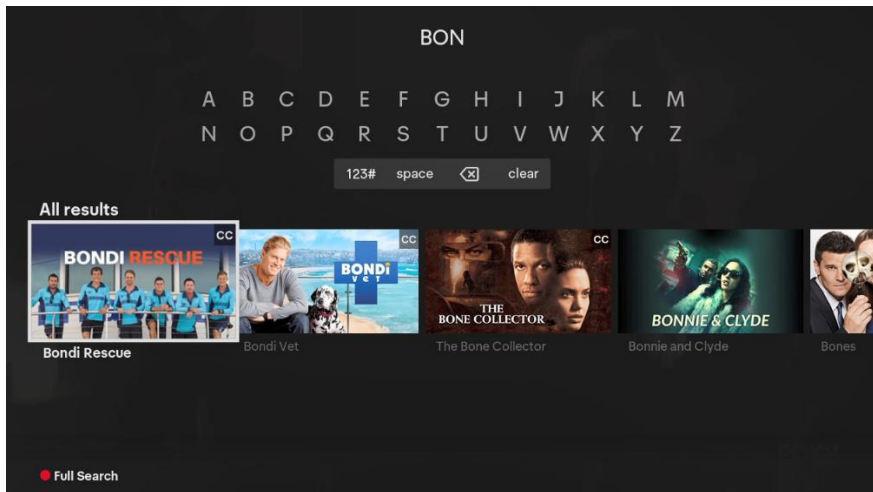
⁴⁰ As discussed in sections [11.3] – [11.4] above.

⁴¹ Coalition of Major Professional and Participation Sports (COMPPS) (15 September 2023), [‘Submission of COMPPS to the Government’s Anti-siphoning scheme proposals paper’](#), pp. 2-3.

contrast, clearly reflects a list of events that are of 'national importance and cultural significance' to Australians.

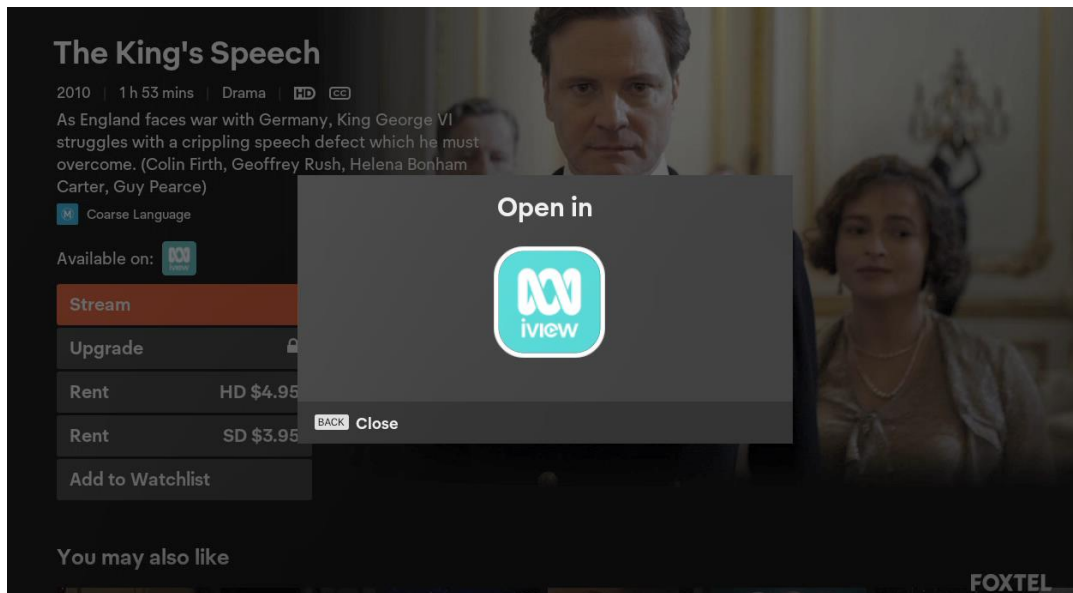
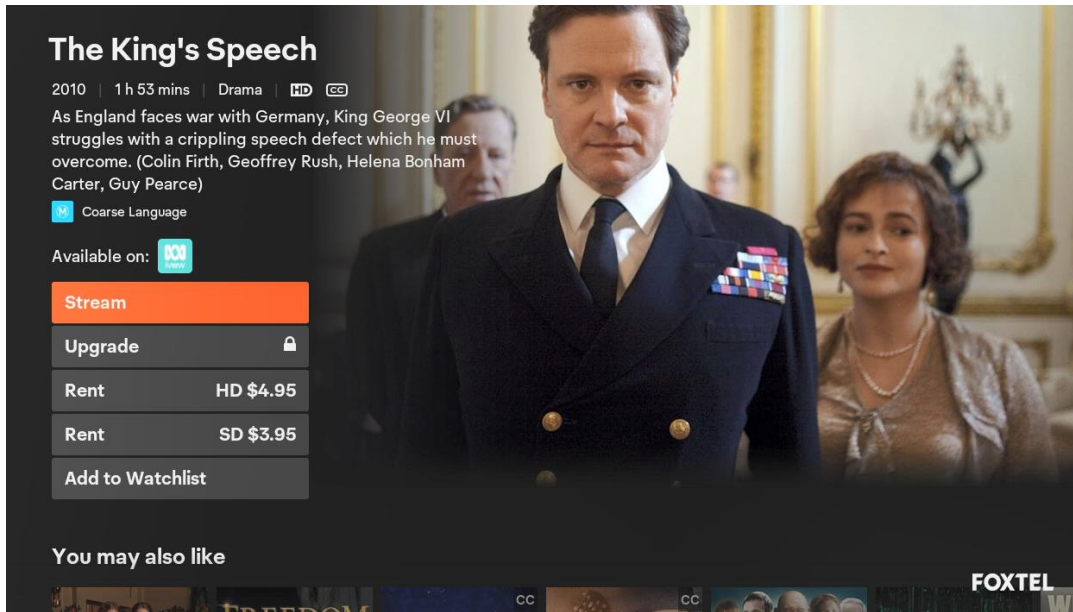
Annexure A

Search results for “Bondi Rescue” on the Foxtel Set Top Box that defaults to the first episode of the latest season. Note, Foxtel has the rights to earlier seasons of “Bondi Rescue” however in pursuit of the best customer experience, the search results direct a consumer to view the first episode of the latest season provided exclusively by 10Play.



Annexure B

Search results for the movie “The Kings Speech” that is available free on ABC iView or provided by Foxtel if the customer upgrades to the Foxtel Movies tier. If the customer does not have the Foxtel Movies tier, they are directed to view the movie via ABC iView first and presented with the option to upgrade to the Foxtel Movies tier second.



Search results for “Vampire Diaries” where the program is not provided by Foxtel but is provided by two third party app providers.

