



3 February 2017

Parliamentary Joint Committee on Intelligence and Security  
Parliament House  
Canberra ACT 2600

## **Submission to the Review of the Telecommunications and Other Legislation Amendment Bill 2016**

Foxtel appreciates the opportunity to comment on the *Telecommunications and Other Legislation Amendment Bill 2016* (the Bill) introduced to Parliament on 9 November 2016 and referred to the Parliamentary Joint Committee on Intelligence and Security for consideration. This submission is not confidential.

### **Introduction**

Foxtel delivers a diverse subscription television service over Hybrid Fibre Coaxial (HFC) cable, satellite and broadband distribution platforms to around 2.9 million subscribing homes.

Foxtel offers new and inspiring programming across all genres, the world's most popular channel brands, and invests in high quality local content. As constant champions of innovation we have brought customers the iQ personal digital recorder, Australia's largest HD offering, the Foxtel Go App for tablets and mobile devices, and the on-demand/streaming service, Foxtel Play.

Foxtel is a Carriage Service Provider (CSP), supplying residential broadband and telephony services bundled with its subscription television service. Foxtel is not a carrier as defined in the *Telecommunications Act 1997* and does not possess a carrier licence.

Foxtel supplies its broadband and telephony services using underlying network infrastructure owned and operated by other telecommunications carriers, the legacy copper network and the **nbn** fixed line network. Foxtel supplies an end-user gateway device and also operates points of presence when supplying its broadband/telephony services.

Foxtel's subscription television service is delivered over HFC cable, satellite and IP distribution platforms. Foxtel owns and operates broadcasting equipment and facilities (including, for example, satellite broadcast equipment for transmission and receiving, head-end equipment and end-user set-top box equipment) to deliver its broadcasting and content services via network infrastructure owned and operated by

**Foxtel Management Pty Ltd**  
ABN 65 068 671 983

5 Thomas Holt Drive  
North Ryde NSW 2113 Australia  
GPO Box 99 Sydney NSW 2001

T: +61 2 9813 6000  
[foxtel.com.au](http://foxtel.com.au)

other companies. This underlying network infrastructure, such as, the HFC cable network, can also be used by other companies for providing telecommunications services.

### **Unclear scope and application of section 313(1A) and 314(1A)**

Foxtel remains concerned that the scope of the proposed reforms is broad and unclear in relation to their application to infrastructure and facilities used to supply broadcasting and content services.

The proposed protection obligation in section 313(1A) requires that a carrier/CSP do their “best to protect telecommunications networks and facilities owned, operated or used by the carrier or provider from unauthorised interference or unauthorised access” to ensure that communications and information carried and contained on the telecommunications networks/facilities are confidential and to ensure the availability and integrity of telecommunications networks and facilities.

In considering the application and interpretation of this proposed section, we note that the definitions of ‘telecommunications network’, ‘communications’ and ‘carriage service’ are not limited or described in any way by reference to the supply of telephony or internet access services and could cover infrastructure and facilities used to supply broadcasting and content services (even where this is the sole or principal use of the infrastructure or facilities).

For example, ‘telecommunications network’ is defined as “a system, or series of systems, that carries, or is capable of carrying, communications by means of guided and/or unguided electromagnetic energy”.<sup>1</sup> ‘Communications’ includes any communication whether between “persons and persons, things and things or persons and things” in the form of “speech, music or other sounds”, “data”, “text”, “visual images (animated or otherwise)”, “signals” or “any other form” or “combination of forms”.<sup>2</sup> ‘Carriage service’ means “a service for carrying communications by means of guided and/or unguided electromagnetic energy”.<sup>3</sup>

The Explanatory Memorandum and draft administrative guidelines provide limited guidance on the application of the proposed reforms to infrastructure and facilities used to supply broadcasting and content services and primarily focus on the application of the framework for the ICT sector. The Explanatory Memorandum and draft administrative guidelines note that exemptions from the notification requirements are available and could be granted for parts of a business (such as, for subscription television services).<sup>4</sup> While this suggests it is not the intention for the proposed reforms to apply to infrastructure and facilities used to supply broadcasting and content services, there is no other detail in these documents that clarifies this further.

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<sup>1</sup> Section 7, *Telecommunications Act 1997*.

<sup>2</sup> Section 7, *Telecommunications Act 1997*.

<sup>3</sup> Section 7, *Telecommunications Act 1997*.

<sup>4</sup> *Telecommunications and Other Legislation Amendment Bill 2016 Explanatory Memorandum*, p. 29; *Telecommunications Security Sector Guidelines*, Draft version, November 2015, p. 25.

While there is provision for the Communications Access Coordinator to grant exemptions from the notification requirements in section 314(1A), Foxtel notes there is no detailed legislative framework around this process, for example, there are no criteria that may be considered in exercising this power or timeframe specified in which an exemption decision must be made. In addition, there is no detailed legislative framework or criteria if the Minister wishes to declare a CSP is a 'Nominated CSP' under section 197(4) of the *Telecommunications (Interception and Access) Act 1979*, which triggers the notification requirements in section 314(1A). This does not provide sufficient certainty regarding the future application of the proposed reforms.

There are also circumstances where certain broadcasting services are excluded from regulation applying to CSPs or telephony and internet access services, because of the broadcasting services exemption in section 93(1).<sup>5</sup> However, while this exemption may be available to other broadcasters, it is not available to Foxtel as Foxtel's broadcasting services are excluded from the exemption by section 93(1)(b).

Such exemption measures for broadcasting services recognise the difference in the nature and use (and related regulation) of broadcasting and content services as compared with traditional telephony or internet access services. While broadcasting and content services can play an important role in informing the community – both in relation to issues of public interest and in times of emergency – they can also be characterised as discretionary entertainment services. Broadcasting services do not perform key functions noted in the Explanatory Memorandum as support for introducing these proposed reforms; that is, to protect infrastructure and facilities that carry sensitive information about lawful intercept systems and law enforcement activities and are vital to the delivery and support of critical services, such as, power, water and health.<sup>6</sup>

If Foxtel's facilities used to supply broadcasting and content services are subject to these provisions, and other broadcasters (including free-to-air television providers who have near ubiquitous penetration and larger audiences than Foxtel) have the benefit of an exemption under section 93(1), this would create a regulatory imbalance within the Australian broadcasting industry. Foxtel has a clear business incentive to protect its broadcasting and content infrastructure and facilities without these facilities being subject to this additional regulatory burden.

Foxtel considers it should be clarified that where infrastructure and facilities are used solely or principally for the supply of broadcasting services it is not subject to the proposed reforms. Without further clarification in the Explanatory Memorandum and administrative guidelines there may be future confusion and uncertainty about the infrastructure, facilities and services intended to be subject to the proposed reforms and uneven regulatory burdens in the broadcasting industry.

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<sup>5</sup> *Telecommunications Act 1997*.

<sup>6</sup> *Telecommunications and Other Legislation Amendment Bill 2016 Explanatory Memorandum*, p. 2.

For these reasons, Foxtel requests the Committee recommend there be further clarification in the Bill's Explanatory Memorandum and the administrative guidelines being developed by the Attorney General's Department about the purpose and application of the proposed protection obligation in section 313(1A) and notification requirements in section 314(1A), in particular, to clarify that infrastructure and facilities used solely or principally for broadcasting or content services are not intended to be subject to this additional regulation.

This would provide certainty in relation to the application of the regulatory framework in future.

Yours sincerely,

Bruce Meagher  
Group Director, Corporate Affairs