



**Submission to Senate Environment, Communications,  
Information Technology and the Arts Committee  
Inquiry into Broadcasting Services Amendment (Media  
Ownership) Bills and related bills**

**25 September 2006**

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## Introduction

FOXTEL welcomes the opportunity to provide a submission to the Senate's Environment, Communications, Information Technology and the Arts Committee's (the Committee) *Inquiry into Broadcasting Services Amendment (Media Ownership) Bill 2006 and related bills*.

FOXTEL's submission to the Committee is structured as follows.

Section 1 provides FOXTEL's views on the *Broadcasting Legislation Amendment (Digital Television) Bill 2006*.

Section 2 provides FOXTEL's views on the *Communications Legislation Amendment (Enforcement Powers) Bill 2006*.

Section 3 provides FOXTEL's views on the *Television Licence Fee Amendment Bill 2006*.

Section 4 provides FOXTEL's comments on the *Broadcasting Services Amendment (Media Ownership) Bill 2006*.

## Executive Summary

- FOXTEL appreciates that the Government has decided on an approach of deregulation in the provision of digital television with the aim of stimulating digital television take-up in Australia.
- FOXTEL supports deregulation in principle because it will spur competition and benefits will naturally flow to industry and consumers.
- However, FOXTEL supports “balanced deregulation” that does not favour one competitor over another.
- Unfortunately, the overall approach to deregulation in digital television is “unbalanced” and continues to be dangerously and unfairly weighted in favour of commercial television. This approach creates the high risk of having a neutral or negative impact on digital television investment by the industry at large and on service take-up by consumers.

This is because the commercial networks have a track-record of taking and manipulating regulatory favour while seeking to smother competition. In relation to digital television, the networks have accepted the policy favours of gifted public spectrum at no charge to convert to digital, and the regional commercial networks were additionally given Government financial subsidies. The networks have returned the favour to the Australian public with a snails-pace digital conversion that will take from 2001 to 2010-2012 under the Government’s new policy target. The networks originally committed to full digital conversion by 2008.

By contrast, subscription television which received no Government favour will complete its full digital conversion by early 2007, just three years after its digital launch.

In addition, the free-to-air networks have misused the benefit of being given the world's most restrictive sports broadcasting regime, the so-called "anti-siphoning" list, by hoarding and abusing the sporting events set aside for them. They broadcast live an average of 16% of the hours of sport set aside for them each year (source ASTRA research).

- FOXTEL believes the planned amendments to the digital broadcasting legislation can go some way towards balanced deregulation if the issues of restrictive sports broadcasting laws, commercial network multi-channelling, and new uses for datacasting spectrum are considered as part of the following linked media policy framework.
- There are five core, linked policy issues that must be recognised in the current media reform process: cross and foreign media ownership; restrictive sports broadcasting regulation; commercial television network multi-channelling; a 4<sup>th</sup> commercial television licence; and uses of spare terrestrial television spectrum, or "datacasting spectrum".
- Each of these issues are interdependent, a decision in one policy area will have a knock-on effect to all the others and impact all industry participants and consumers.
- The key imbalance in the proposed reforms is that subscription television is being offered minor reform of restrictive sports broadcasting regulation, through the introduction of a "Use it or Lose it" modification, and the possibility of participating in mobile television with all-comers on the terrestrial datacasting spectrum.
- By contrast, the three, privately-owned commercial networks have the existing protection from a fourth commercial network extended until at least 2012; they are to be given a major extension of the timeframe in which they must fully convert to digital services until 2010-2012; and they are to be given scope to offer new services through multi-

channelling on publicly-owned spectrum for which they pay no market based costs. They will also continue to receive the protection of core sports “anti-siphoning” regulation that gives them control over the sports codes and subscription television alike. And the networks have the opportunity to add to the publicly-owned spectrum, which they already get to use at non-market rates, to own and control the last remaining terrestrial spectrum, or datacasting spectrum, for mobile television services and to undermine new entry.

- The financial benefits that the commercial networks derive from this sort of protectionist approach is clear.
- The Allen Consulting Group report to DCITA, September 2004, titled “The Removal of Restrictions on Digital Multichanneling by Commercial Television Broadcasters”, said: “...the FTA television industry is currently earning above-normal (ie. excess) returns” based on their regulatory protection.
- FOXTEL’s analysis of the EBIT (earnings before interest and tax) margins of the Australian commercial television networks shows they are earning margins that are two to three times higher than their commercial network counterparts in the US, UK and NZ. The key reason is their regulatory protection.

**FOXTEL makes the following specific digital television reform recommendations:**

**Sports broadcasting law reform**

- Most of FOXTEL's comments cover the Broadcasting Legislation Amendment (Digital Television) Bill 2006 (the Bill).
- A system of "Use it or Lose it" should be introduced to modernise the decade-old Australian "anti-siphoning" list of more than 1300 events. Research by the subscription TV industry body, ASTRA, has shown that the free-to-air TV networks broadcast on average each year only 16% of the hours of live sport that is set aside for their monopoly first access.
- The remedy is a Use it or Lose it scheme. Under a Use it or Lose it scheme only those events that the FTA's have not shown will fall off the list. Therefore, all events currently shown on FTA television will remain on the anti-siphoning list and only those events not currently shown by the FTA's would fall off the list.
- Sport on the anti-siphoning list is hoarded (i.e. FTA TV purchases rights using the list, deny subscription the right to broadcast it, and then they do not broadcast it themselves) or the sport is broadcast late at night and hours after the match has been played (e.g. Friday night AFL in NSW and Queensland).
- What the free-to-air networks don't show live, nationally and in full should be released from the anti-siphoning list so that the relevant sports code can deal directly with free-to-air TV and subscription tv to put the sport on television.

- The size and scope of the Australian anti-siphoning list makes it the most restrictive such list in the world. The US and New Zealand have no listed events at all.
- The Productivity Commission said in its “Broadcasting” report in 2000: ““An extensive investigation by the US Federal Communications Commission in 1994 revealed that no significant migration of sporting events from free to air to subscription broadcasting was apparent in the United States. This occurred in the absence of any anti-siphoning measures comparable in scope to those in Australia or even the United Kingdom”.
- FOXTEL is of the considered view that a Use it or Lose it scheme must be incorporated into legislation (as described in the body of this submission) so that there is clarity and certainty for all affected parties.
- Not to have the certainty of legislation would leave the Use it or Lose it system open to the same type of manipulation that has enabled the free-to-air TV networks to broadcast live only a fraction of the hours of sport that is set aside for them while denying others the ability to show it.
- In addition to the introduction of the Use it or Lose it scheme FOXTEL supports the review into the restrictive sports rights regime contained in the Bill, which is to occur once the Use it or Lose it scheme has been introduced.

### **Commercial Network Multi-channelling**

- The privately-owned commercial networks were originally allocated additional, taxpayer-owned terrestrial spectrum at no additional charge in order to provide free-to-air digital TV services.



- The networks must continue to be required to provide “free-to-air” multi-channelling, if multi-channelling is to happen. There is no public benefit or public policy justification for enabling them to hijack that “free” television system and turn it into a pay TV system.
- In particular, the commercial networks must not be allowed to exploit their legislative advantage over sport – an advantage given to them in order to maintain free-to-air TV coverage of sport – to start making pay TV revenues on the publicly-owned spectrum that is meant to deliver free TV. The Bill does not permit the FTAs to charge a subscription fee for their multi-channel which FOXTEL supports.
- Commercial networks must not be allowed to push the live broadcast of sporting events listed on the anti-siphoning list onto their digital multi-channels. The rationale of the anti-siphoning regime is to ensure all Australians can see major sporting events on free to air television. With only 17% of Australian households currently owning digital set top boxes and therefore able to access these digital multi-channels, this rationale must apply to the digital multi-channels. Further, permitting the FTAs to multi-channel and put live sport that is on the anti-siphoning list on the multi-channel would, as the Explanatory Memorandum points out, “have an adverse impact on the subscription television industry’s capacity to provide sports programming.”<sup>1</sup>
- Government policy does not permit the FTAs to put live sport that is on the anti-siphoning list on the FTA multi-channels. FOXTEL supports this position, although FOXTEL believes that there need to be some important drafting amendments to ensure that the policy intent is not undermined (see further details below).

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<sup>1</sup> Explanatory Memorandum, Broadcasting Legislation Amendment (Digital Television) Bill 2006, page 5

## **Other points – HDTV/multi-channel obligations/switch off**

- The Bill does not give sufficient emphasis to HDTV as a driver for digital take up because it does not specify an internationally accepted HDTV standard and therefore ensures that one of the commercial broadcasters will continue to broadcast in a substandard HDTV standard. FOXTEL believes that the Bill should specify an internationally accepted HDTV standard (i.e. 720p or 1080i).
- The Bill tips the regulatory balance even further in favour of the FTAs by – along with all the other regulatory protections – releasing them from Australian content, captioning and children's content obligations. FOXTEL believes that such obligations should apply to the multi-channels.
- The Bill currently contemplates that the analogue switch off date (and end of the simulcast period) will be set via regulation. Setting a clear switch off date is important to ensuring that all parties have a clear date and incentive to work towards switch off. FOXTEL therefore believes that the switch off date should be specified in the Bill.

## **Summary of recommended changes**

Therefore, FOXTEL submits that the following nine amendments or changes of approach should be made to the *Broadcasting Legislation Amendment (Digital Television) Bill 2006*.

1. The use it or lose it scheme should be incorporated into legislation. Specifically, both the concept of use it or lose it and the criteria for 'use' should be incorporated into s. 115 of the BSA. The Minister retains discretion over the anti-siphoning list.

2. Some of the drafting that specifies the (limited) circumstances in which the FTAs are permitted to put sport on their multi-channels must be tightened to ensure that the FTAs are not able to put live sport on the multi-channel which is also on the anti-siphoning list. Indeed, FOXTEL has grave concerns that the drafting will allow the FTAs to circumvent Government policy and put live sporting events on their multi-channels. The body of this submission provides details on these drafting points.
3. The Bill should clearly specify an analogue switch off date rather than leaving it to regulation to specify this date at a later time.
4. The amendments to the BSA must include the Government's policy on datacasting which the Minister announced on 12 September. On the basis of competitive neutrality, FOXTEL supports the Government's policy of a prohibition on the datacasting spectrum being used for subscription television. FOXTEL also supports Channel B being used for new services. This policy is not yet incorporated into the Bill.
5. The FTAs should not be permitted to bid for the Channel B licence. The regulatory regime is already tipped considerably in favour of the FTAs. The reversal of the Government's previous position on this matter – which prohibited the FTAs for bidding for datacasting spectrum – tips the balance even further in the FTA's favour.
6. A condition of the purchase of the Channel B licence should be that the purchaser of this spectrum should carry the FTA's primary signal. This will ensure that the FTA's primary signal is carried over this spectrum.
7. The definition of open narrowcasting (which is permitted on Channel A) must be sufficiently tight to prohibit look-alike subscription television. ACMA will review this definition over coming months.

8. Competitive parity requires the FTAs should have the same Australian content, captioning and children's content obligations in relation to their multi-channel as exists in relation to their primary channel.
9. The Bill should specify that content broadcast in HDTV (for the purpose of meeting the HDTV quota) must comply with United States and European HDTV standards (i.e. 720 p and 1080i). The current Australian standard is an orphan standard and ensures that Australians see a substandard HDTV signal on one of the commercial networks.

FOXTEL recommends that the following changes be made to the *Communications Legislation Amendment (Enforcement Powers) Bill*. This bill should be amended slightly to ensure that there is greater balance between the treatment of the FTAs and the subscription television sector. The relatively modest amendments that FOXTEL proposes are contained in the body of this submission at Section 2.

FOXTEL is not proposing any amendments to the *Television Licence Fee Amendment Bill* or the *Broadcasting Service Amendment (Media Ownership) Bill*.

## **Introduction to FOXTEL**

FOXTEL is Australia's leading subscription television provider.

It commenced distributing its services on cable with 20 channels in 1995, expanding to 31 channels and satellite distribution in 1999 and increased its offering to 45 channels in 2002 following the completion of the FOXTEL-Optus Content Supply Agreement (CSA).<sup>2</sup>

FOXTEL is available to more than 70% of Australian homes, with around 1.3 m homes currently connected to the FOXTEL service directly or by receipt of services provided on a wholesale basis to other providers such as Optus.

In March 2004 FOXTEL launched its FOXTEL Digital service, giving Australian viewers the choice of more than 100 digital channels. These channels are provided by 50 different Australian and international media and communication companies, 20 of which are Australian-owned or Australian-based.

Following its launch, FOXTEL Digital continued to extend its innovations by adding a raft of new channels and interactive features including additional news, sports and weather applications, as well as a Personal Digital Recorder called the FOXTEL iQ.

In May 2006, FOXTEL made its product even more accessible to subscribers with a new low entry level price of \$36.95 and a range of new packages that allow subscribers more choice and flexibility than ever before.

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<sup>2</sup> [Content Supply Agreement executed by FOXTEL Management Pty Limited, Singapore Telecommunications Limited et al on 5 March 2002.](#)

In addition, independent channel providers are able to access the FOXTEL analogue and digital distribution networks, and through them access the FOXTEL subscriber base independently of the FOXTEL service, through FOXTEL's digital and analogue access regimes, which have been accepted by the ACCC.

FOXTEL directly employs over 1800 people and a further 1400 people are indirectly engaged by FOXTEL in sales and installation services nationally.

FOXTEL has built a new state of the art Television Centre at North Ryde in Sydney, which is the headquarters of FOXTEL's national subscription television operations, housing television studios, broadcast operations and cable and satellite transmission facilities for FOXTEL and a range of independent channels. FOXTEL operates a newly built national Customer Solutions Centre based at Moonee Ponds in Melbourne, as well as studio facilities in Melbourne used primarily by the FOX Footy Channel.

FOXTEL is jointly owned by Telstra Corporation Limited (50% equity), The News Corporation Limited (25% equity) and Publishing and Broadcasting Limited (25% equity).

## **Section 1**

### **Broadcasting Legislation Amendment (Digital Television) Bill**

#### **Introduction**

Section 1 provides FOXTEL's submission on the *Broadcasting Legislation Amendment (Digital Television) Bill* (the Bill).

This section is broken into three parts as follows.

- Part 1 - provides FOXTEL's overall position on the Bill and policy principles it believes should be followed in approaching reform.
- Part 2 – provides FOXTEL's position on clarifications that should be made to media policy settings in light of its overall policy position.
- Part 3 – provides specific drafting amendments that FOXTEL submits should be made to the Bill.

## **Part 1**

### **Overall Comment**

FOXTEL's overall position on the Bill is as follows. The FTAs have enjoyed over 50 years of protectionism and as a consequence have some of the highest FTA margins in the English-speaking world. The best way of approaching media reform would have been to adopt a free and open competitive model. Such a model would have allowed the market to determine the media winners – rather than having such winners anointed by legislation. Importantly, this approach would encourage efficient investment, provide better services for consumers and drive digital television take up.

Rather than adopting a model that supports free and open competition, the approach contained in the Bill continues Australia's 50 year old tradition of protection of the FTA networks. In light of this continued protectionism and the fact that key media policy settings are linked, it is important that the significant benefits provided to the FTAs in this legislation are balanced with some compensatory changes to legislation that currently undermines the subscription television sector. Such changes are necessary to ensure that there is competitive balance between operators in the media landscape, that incentives to invest are maintained and that subscription television is able to continue to provide innovative services to consumers.

Part 2 of this section outlines the changes that FOXTEL is seeking to the approach, some of which have already been agreed by the Government but are not yet incorporated in the Bill. Each of these points is discussed in more detail below.

#### 50 year old history of protection of the free to air networks

In assessing the *Broadcasting Legislation Amendment (Digital Television) Bill 2006* it is important to understand that it sits within, and extends, a 50 year old 'tradition' of protecting the free to air (FTA) networks.

The Productivity Commission agreed when it said, 'The problem with media regulation is that it reflects a history of political, technical, industry, economic and social compromise. The legacy of *quid pro quos* has created a policy framework that is inward looking, anti-competitive and restrictive.'<sup>3</sup>

The protectionism of the FTAs is continued and enhanced in this Bill – as is explained in further detail below.

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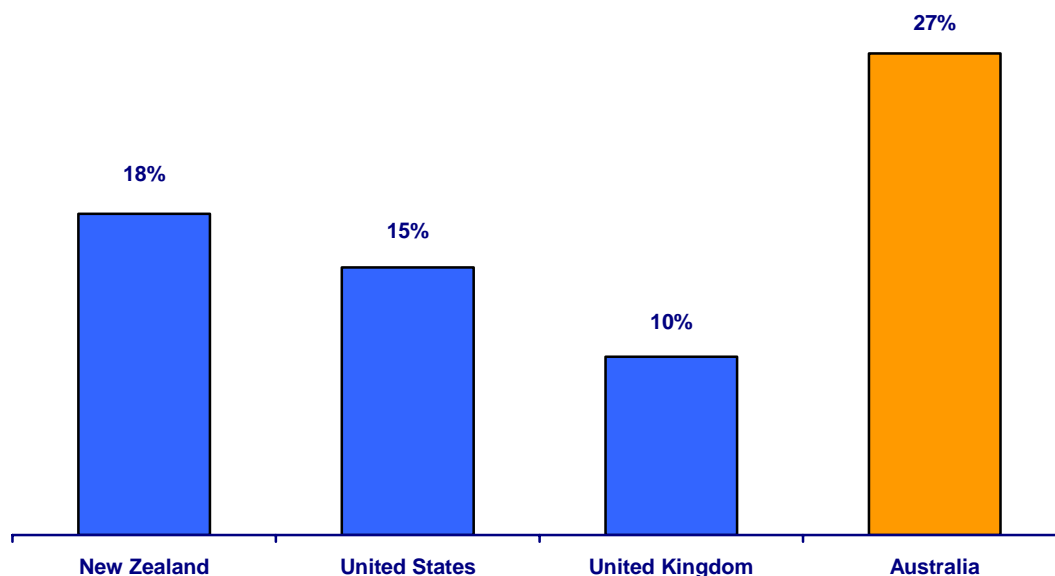
<sup>3</sup> Productivity Commission, *Broadcasting Inquiry Report*, March 2000, page 10



### High protectionism means high FTA margins

The protectionism afforded to the FTAs means they have some of the highest margins in the English-speaking world. FOXTEL's analysis of the FTA network margins – based on independent analysts reports – demonstrates that the average EBIT margin for Australian FTA networks is almost double the margins of FTA networks in the US and UK and around 50% greater than New Zealand.<sup>4</sup>

#### **FTA – Highest Margins in English-Speaking world**



Other analysts have also noted that the margins of the FTAs are very high. For instance, the Allen Consulting Group – in a report commissioned by DCITA for the current Government - compared the return that the FTAs made compared with the returns of other companies that are listed on the Australian stock exchange. The Allen Consulting Group concluded that,

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<sup>4</sup> Comparing EBIT (as opposed to EBITDA) margins is the best way of getting an 'apples with apples' comparison of the profitability of different networks across different jurisdictions. This is because EBIT (as opposed to EBITDA) excludes financing costs (which vary depending on financing structures) and taxation rates (which also vary across jurisdictions). The EBIT margins above are the EBIT margins of the FTA divisions in cases where the holding company has a number of media.

*Using either standard historical accounting measures ....or a forward-looking economic finance measure ... indicates that the FTA television industry is currently earning above-normal (i.e. excess) returns.<sup>5</sup>*

Allen Consulting Group concluded the FTA networks enjoyed rates of return in excess of a risk adjusted, normal rate of return of \$435m per annum.<sup>6</sup>

The Productivity Commission came to a similar conclusion that the FTAs – because of their protected status – earn above normal profits. It said,

*The high licence adjusted rates of return provides prima facie evidence of economic rents above normal profits in the television industry...<sup>7</sup>*

#### Media policy settings are linked

FOXTEL has pointed out in previous submissions to Government that any reform of media policy must recognise that all key media policy settings are linked. It is, therefore, not possible to amend one setting to favour one sector of the market, or competitor, without having a detrimental impact on other sectors, or competitors, in the television entertainment market.

The Productivity Commission, among others, has recognised the linkage between key policy settings. In particular it recognised the linkage between multi-channelling policy (i.e. allowing the FTAs to offer another channel on their gifted spectrum) and anti-siphoning. It pointed out that it would be unfair to subscription television, anti-competitive and undermine consumer welfare, if the FTAs preserved their monopoly first right of access to sports events and were also allowed to multi-channel. The Productivity Commission said:

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<sup>5</sup> The Allen Consulting Group, Report to the Department of Communications, Information Technology and the Arts, September 2004 , page 107

<sup>6</sup> The Allen Consulting Group, *The Removal of Restrictions on Digital Multi-channelling by Commercial Television Broadcasters*, 2004, page 96

<sup>7</sup> Productivity Commission, Broadcasting Inquiry Report, March 2004, page 99

*The Commission finds that the anti-siphoning rules are anti-competitive and that the costs of the current scheme to sporting organisations, the broadcasting industry and the community as a whole exceed their benefits. These anti-competitive effects will be even greater if the free to air stations are to be allowed to multi-channel on digital television as recommended in this report. As currently constituted the anti-siphoning provisions of the BSA contravene the Competition Principles Agreement<sup>8</sup>.*

This finding by the Productivity Commission makes two things clear. First, that there is a clear link between the anti-siphoning regime and multi-channelling and, second, that permitting multi-channelling without also substantially reforming the anti-siphoning list would be anti-competitive.

#### FOXTEL's preferred policy position

In light, therefore, of the historic protection of the FTAs, the linked nature of media policy settings and the need to encourage investment, innovation and new services for consumers, FOXTEL has argued that Government should adopt a regulatory model that promotes free and open competition.

The elements of this free and open competitive model are as follows.

- Significant reform of the anti-siphoning list which is the world's longest (1300 events)<sup>9</sup> and most restrictive sports rights regime;
- Permit the FTAs to offer free multi-channels on their gifted spectrum, so long as the anti-competitive sports rights regime is fully reformed.
- Allocate the datacasting spectrum via a market-based allocation mechanism without restrictions on its use.

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<sup>8</sup> Productivity Commission, *Broadcasting Inquiry Report*, March 2004, page 442

<sup>9</sup> Minister Coonan, *Media: Unpacking the Package* speech, 4 August 2006

The benefits of this approach are it would ensure a level playing field, new channels and services, efficient investment and that consumers benefited from a significant number of new channels and services. This approach would ensure a speedy take up of digital television.

#### The Bill favours the FTA networks

The approach to media reform enshrined in the Bill, however, does not promote a free and open competitive model. Rather the Bill continues the long tradition of protectionism and favouritism of the FTA networks.

This protectionism and favouritism is extended in the following ways.

- The FTA networks are protected from further competition in their core revenue streams by the extension of the prohibition on a new FTA network in the BSB spectrum likely until 2012.
- The FTAs are provided greater flexibility and revenue opportunities to provide an SDTV multi-channel on gifted spectrum from 2009.
- The FTAs are provided greater flexibility and revenue opportunities to provide an HDTV multi-channel on gifted spectrum, based on a substandard, Australian-only HDTV standard that does not comply with any accepted American or European HDTV standard.
- The FTAs retain the 'industry' protection of the anti-siphoning list, which is the most restrictive such regime in the world.
- The FTAs continue to be able to use gifted spectrum for which they have not paid a market-based fee.

In addition, the Government has indicated that – contrary to its earlier position – it will allow the FTAs to bid for Channel B datacasting spectrum<sup>10</sup>.

Therefore, in its current form the provisions in the Bill amount to discriminatory regulation which can only be somewhat ameliorated by changes to the BSA around anti-siphoning and the use of the datacasting spectrum.

Some of the changes that FOXTEL is seeking have been broadly supported by the Government, but are not contained in the current amendments to the BSA.

## **Part 2**

### **Changes/clarifications to media reform approach**

In light of the significant benefits that the FTA networks are afforded under the current Bill and the fact that each of the media policy settings are linked, FOXTEL believes that there must be compensatory regulatory changes to provide at least a semblance of balance in the media policy settings.

The need for such ‘compensatory’ changes to better ensure some balance in the regulatory regime is not just a matter of ‘fairness’ but of ensuring efficient investment and consumer benefits. As Frontier Economics has said,

*The broad thrust of pro-competitive micro-economic reform over the past two decades has drawn many lessons on how competition can be fostered. One of the principle lessons from this broader experience is that competition must occur on a level playing field (which means): unnecessary regulatory barriers must be reduced and uncoded, Government-conferred benefits should be*

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<sup>10</sup> Press Release, *New Digital Television Services for Australians*, 12 September 2006.

*removed. Otherwise resources are likely to be misallocated throughout the economy and overall social welfare will be reduced.*<sup>11</sup>

The changes FOXTEL recommends are designed to level the regulatory playing field slightly (which will have the broad benefits outlined above), and ensure that HDTV is better utilised as a driver of digital television take up. Some of the proposed changes also aim to ensure that the drafting in the legislation more clearly gives effect to Government policy.

The changes that FOXTEL submits are necessary as are follows.

- ***Use it or lose it covering the so called anti-siphoning scheme*** - The Use it or Lose it scheme covering the anti-siphoning list, that the Government has said it will introduce, must have teeth<sup>12</sup>. FOXTEL believes that this scheme should be incorporated into legislation. The Government has already indicated it will introduce this scheme – however it has not yet sought to include it in legislation.
- ***Allocate datacasting spectrum for new and innovative services not more subscription television*** - The Government should allocate the datacasting spectrum for mobile television and in-home datacasting and open narrowcasting services. The Government has indicated that its policy is in fact to ensure that this spectrum is not used for subscription television but is used for new and innovative services.<sup>13</sup> These provisions are not yet incorporated in the Bill.
- ***Prohibit the FTAs from purchasing Channel B*** – FOXTEL believes that there should be a prohibition on the FTAs buying Channel B. This is necessary to ensure greater competitive neutrality in settings. To

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<sup>11</sup> Frontier Economic Submission to *Inquiry into the provision of services other than simulcasting by free to air broadcasters on digital spectrum* p 64

<sup>12</sup> Minister Coonan, *Media: Unpacking the Package* speech, 4 August 2006

<sup>13</sup> Minister Coonan, Media Release, *New Digital Services for Australians*, 12 September 2006

ensure that the FTA's primary signal is carried, the purchaser of Channel B should be obligated to carry the FTA's primary signals.

- ***Ensure Australian content, captioning and children's content obligations apply to the FTA multi-channel*** – FOXTEL believes that the current content, captioning and Australian children programming and other such obligations which apply to the primary FTA channel, should also apply to the FTA multi-channel. Currently, the Bill says that the FTAs multi-channel will not be subject to such obligations.
- ***Set internationally accepted HDTV standard to ensure HDTV drives take up*** - The Bill should set an internationally recognised standard for HDTV to ensure that Australia is not saddled with the current sub-standard, unique Australian HDTV standard. This will better ensure that HDTV is of the highest quality, that Australia avoids becoming an HDTV backwater and digital television take up occurs.
- ***Various drafting changes*** - FOXTEL believes there need to be some drafting changes to make it clearer the very limited circumstances in which the FTAs are permitted to show 'snippets' of live sports content on their multi-channels which are also on the anti-siphoning list.

More importantly, however, FOXTEL has grave concerns that due to what appears to be a technical oversight the drafting will allow the FTAs to circumvent Government policy and put live sporting events on their multi-channel which also remains on the anti-siphoning list.

FOXTEL also believes there should be greater clarity – incorporated into the Bill – on the exact date that the simulcast period will end.

Each of these points is discussed in more detail below.

Amendments to the anti-siphoning regime – Use it or Lose it

The case for reform of the anti-siphoning list is overwhelming. It gives the FTAs a monopoly first right of access to over 1300 sporting events. It is the most restrictive such regime in the world and covers many more events than the FTAs broadcast. The FTAs abuse the system and buy sports which they never intend to show and which, in some cases, they do not permit other to show. It has therefore had the perverse effect of delivering less sport on television rather than more. The remedy to these problems is a “Use it or Lose it” scheme, which will mean more sport on television rather than less. Sporting events currently on FTA television would remain on FTA television but subscription television would be more able to broadcast sports the FTAs do not show. These points are discussed in more detail immediately below.

#### Current Australian anti-siphoning list – most restrictive in the world

The current anti-siphoning list is the most restrictive such list in the world. In New Zealand and the United States there is no equivalent of an anti-siphoning list where as in Australia there are more than 1300 events on the list.

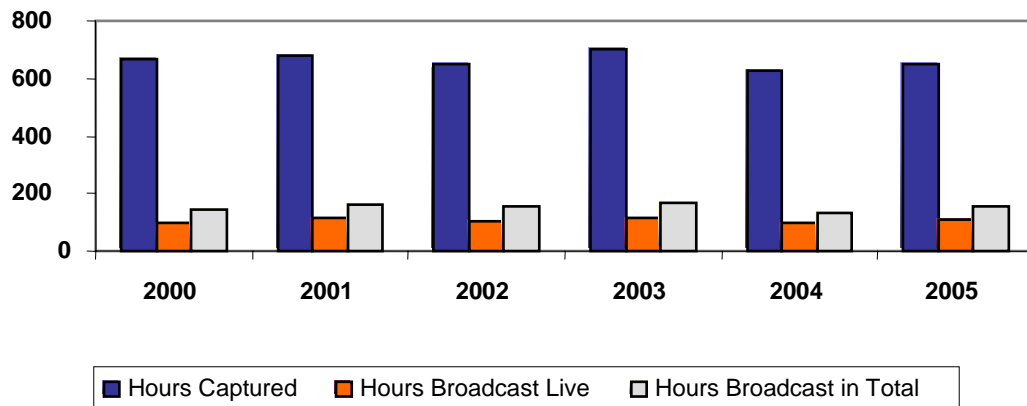
#### FTAs only show a fraction of sport on the anti-siphoning list

Monitoring by the Australian Subscription Television and Radio Association, which has been audited by Ernst Young shows that the FTAs only show a fraction of the events on the anti-siphoning list live. For instance, between 2000 and 2005 the FTAs only broadcast 16% of events on the list live.

See following page for further details.



### **FTAs only show a fraction of events on the list**



### **The FTA's abuse the anti-siphoning scheme**

The FTA's abuse the anti-siphoning scheme by regularly buying events that they do not show and in some cases do not let others show.

Some example are as follows.

- Channel Seven and Channel Ten have bought under the cover of the anti-siphoning list all matches to the AFL 2007-2011 season. This means that FOXTEL has to negotiate with two of its major competitors for the rights to the games that the FTAs do not proposed to broadcast on FTA. FOXTEL has still not been able to secure these rights.
- The FTAs have bought the rights to games on the anti-siphoning list that they do not show live but, further, they do not permit the subscription television sector to show. For example, AFL matches in the Northern States are broadcast very late at night.
- Channel Seven bought the rights to the soccer when parts of these events were on the list. It broadcast only one out of 32 matches in the last year that it held the rights. In the current legal action brought by the Seven Network in the Federal Court a piece of evidence came to

light in open court and was reported in the press where a senior executive from Seven sent an e-mail to his chairman and said the AFL was not giving Seven credit that, “We have secured the soccer rights and suffocated the sport much to the chagrin of its supporters.”<sup>14</sup>

#### The case for a Use it or Lose it scheme is overwhelming

The case then for introducing a Use it or Lose it scheme with teeth is on any reasoned analysis overwhelming.

The benefits of such a scheme are as follows:

- Australian television viewers will see more sport on television. This is because the free to airs will continue to broadcast what they currently broadcast, the FTAs will have an incentive to broadcast more events (to keep them on the list) and finally a Use it or Lose it scheme will better enable subscription television to televise sporting events. It will better able subscription television to negotiate directly with the sports codes, ensure it can broadcast matches the FTAs do not broadcast, ensure greater certainty in sports rights and enable the subscription television sector to schedule events and to promote various sporting codes via general marketing well in advance of the event schedules.
- The sports codes are better able to deal with those rights that the FTAs do not broadcast. One of the benefits of this will be that the codes are able to negotiate with both the FTA networks and subscription television for those rights that the FTAs do not broadcast, which can increase the value of their rights and funding to the code so that it is better able to fund grass roots development.

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<sup>14</sup> The Australian 11 October 2005

The major sports codes including the Australian Rugby League, Australian Football League and the Football Federation of Australia all support reform of restrictive sports rights regime (see Attachment 1)

- It levels up the regulatory playing field slightly, which moderately improves the capacity of subscription television to compete with the free to air networks and broadband operators. The benefit of a more level playing field is that one part of the media sector will not expand because of Government conferred benefits. It will encourage more efficient investment, more innovation and ensure better digital television services for consumers.
- It reduces unnecessary regulation which only protects the FTAs and does not provide any consumer benefit. As the *Rethinking Regulation Report of the Taskforce on Reducing Regulatory Burdens on Business* pointed out, the benefit of reducing needless regulations are that it reduces the costs of regulation to business including 'time', 'paper work', 'capital outlays' and the deflection of "management from core activities".<sup>15</sup> The cost to FOXTEL in terms of unnecessary time, paper work and the deflection of management from core activities that has arisen as a result of FOXTEL having to negotiate for ALF rights through its major competitors Channel Seven and Channel Ten have been significant.

It is important to note that the effect of a sport coming off the anti-siphoning list is only that the FTAs lose their monopoly first right of access to the sporting event. The FTAs are still able to bid for the event – along with subscription television and broadband operators – once it comes off the list.

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<sup>15</sup> Rethinking Regulation, Report of the Taskforce on Reducing Regulatory Burdens on Business January 2006, page ii.

### Incorporating Use it or Lose it in legislation

FOXTEL believes that there should be legislative certainty for all parties and that the Use it or Lose it scheme should be incorporated into legislation. FOXTEL, therefore, does not agree with the statement in the Explanatory Memorandum, which says “the use it or lose it scheme does not require legislation”<sup>16</sup>.

The Use it or Lose it scheme should be in legislation because:

- As a general principle the, “general precepts of good public policy (require) that it is easy to understand, transparent and equitable in its operation”<sup>17</sup>. Currently, it is unclear how the Use it or Lose it scheme will work and what criteria for ‘use’ will be applied. The approach, therefore, is inconsistent with this general precept for good public policy.
- Subscription television’s major competitors the FTA networks have real clarity around those legislative changes that directly effect them such as the prohibition on a 4<sup>th</sup> network and multi-channelling. Competitive balance requires that the subscription television sector should have a similar level of certainty as the FTA networks over a policy of such core importance to subscription television as the Use it or Lose it scheme.
- The subscription television industry needs certainty about how the scheme will work so that it can undertake business planning.
- The Use it or Lose it policy is an important component of the overall package signed off by the Government and Parliament should – as

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<sup>16</sup> *Broadcasting Legislation Amendment (Digital Television Bill) 2006*, Explanatory Memorandum, page 2.

<sup>17</sup> Productivity Commission, *Broadcasting Inquiry Report*, Marcyh 2000, p 58

with all other elements of the package – have a role in scrutinising the policy.

#### *FOXTEL recommendations on Use it or Lose it*

- *FOXTEL, therefore, submits that the Use it or Lose it scheme must be incorporated in legislation, with the general principle and criteria for “use” of an event incorporated into section 115 of the BSA.*

*The Minister will retain discretion over the list, as current exists in section 115 of the BSA.*

#### Competitive parity in relation to datacasting spectrum

FOXTEL mostly supports the approach to datacasting outlined by Minister Coonan on 12 September, in which there will be a prohibition on the use of the datacasting spectrum for look a like subscription television and the view that it should be used for new and innovative services like mobile television.

The reasons that FOXTEL supports the Minister's position are as follows.

The allocation and use of this spectrum cannot be looked at in isolation from the other regulatory settings. The regulatory settings are weighted in favour of the FTAs. The FTAs are protected from competition in their core revenue stream and provided the opportunity to obtain additional revenues from their multichannel. In light of this, competitive parity requires that this spectrum should not be allocated for look-a-like subscription television, otherwise the FTAs will be protected from competition in its core revenue stream while the subscription television sector would potentially be open to competition from up to 30 subscription television channels in its core revenue stream.

This outcome would be unfair to subscription television and economically inefficient. It would allow one part of the media sector to prosper (under enhanced protections) while another, the subscription television sector, would

be significantly undermined. This would mean less investment by the subscription television sector and the inefficient allocation of resources which would ultimately be detrimental for consumers. Subscription television would be less able to invest in innovative services such as mobile television, broadband, Australian content and enhanced and interactive services.

FOXTEL, therefore, generally supports the Minister's recent announcement that the datacasting spectrum should be used for in-home datacasting and open narrow casting services as well as for new services like mobile TV.

*FOXTEL's recommendations in relation to datacasting*

*FOXTEL has three important qualifications to this position and recommends the following amendments and changes be adopted in relation to this policy.*

- *FOXTEL does not believe that the FTAs should be permitted to bid for Channel B spectrum. The regulatory regime is already full of protections for the FTAs – including the allocation of gifted spectrum to the FTAs. FOXTEL does not believe that the regime should be tipped any further in favour of the FTAs by allowing them to bid for the Channel B datacasting spectrum.*
- *A condition of the purchase of the spectrum should be that the FTAs primary channels are carried over Channel B.*
- *The definition of open narrowcasting incorporated into the Act must be sufficiently clear and tight to give effect to the Government's policy of ensuring that this spectrum is not used for look-a-like subscription television services. FOXTEL understands that the ACMA will consult with the media sector as part of a process of developing a definition for open narrow casting services.*

FOXTEL understands that the new provisions covering the use of the datacasting spectrum are not contained in the current Bill and the

Government will prepare amendments to give effect to its policy on datacasting. FOXTEL submits the amendments should include the points outlined above.

#### High definition standard

FOXTEL is concerned that the Bill has not clarified the HDTV standard that the FTAs should comply with. The current Australian HDTV standard is an orphan standard and does not comply with any international standard. It provides lesser quality pictures than the international standard.

FOXTEL believes that the FTAs should be required to provide true HDTV broadcasts for the following two reasons.

- The FTA broadcasters were gifted 7Mhz of spectrum partly on the grounds that they would provide cinema quality pictures and sound. A failure to provide real HDTV breaches the reason, and one of the public policy intents, for FTAs being provided with 7Mhz of gifted spectrum.
- The failure of one of the FTA broadcasters to provide real HDTV undermines the appeal of the medium. The “HDTV signal” this broadcaster provides is of no discernable difference to the consumer to the SDTV signal. Therefore, permitting the broadcast of this form of pseudo HDTV undermines the appeal of the medium, is unfair to consumers who have bought HDTV receiving equipment (expecting to receive an enhanced service) and undermines digital take up.

*FOXTEL recommends*

*FOXTEL therefore recommends that the legislation specify a real HDTV standard (i.e. 720p and 1080i).*

#### Multi-channel obligations

FOXTEL does not believe that the free to air networks should be free of Australian content, childrens and captioning obligation on their multi-channel.

- The main arguments that the FTAs put forward to justify the restricted entry of new free to air operators is that it is a “trade off for obligations placed on the licensee such as the requirement to meet Australian content and children’s programming quotas”<sup>18</sup>. Given the prohibition on the entry of a fourth network has been extended well beyond the period that was originally intended, it is hard to see what the policy justification is for releasing the FTAs from these obligations on their additional channels.
- This is especially the case where the FTA are not paying a market based fee to the Government for being able to deliver additional channels. They should at least “repay” the Australian public for the additional services they are deriving from public spectrum with services that are attractive to the Australian community such as Australian content, children’s’ content and captioned content.
- Competitive parity requires that the FTAs have obligations on their new services. FOXTEL competes with the FTA networks. FOXTEL, which has lost money for almost ten years, was not release from various local content obligations on the grounds that its service was a start up service. It is not competitively neutral to provide a release from such obligations for the highly profitable free to air networks – which will be offering multi-channel services in competition with FOXTEL’s service.

#### *FOXTEL recommendation*

*FOXTEL, therefore, submits that the FTAs should have the same obligations in relation to the multi-channel as they do on their primary channel.*

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<sup>18</sup> Productivity Commission, Broadcasting Inquiry Report, March 2000, page 318



### Drafting points

FOXTEL's drafting points are outlined in more detail in part 3 below. However, FOXTEL has three significant concerns with the drafting in the Bill.

1. The drafting that permits the FTAs to put live sports on the multi-channel if it is contained in a news and current affairs program is too broad and open to manipulation by the FTAs.
2. The proposed definition for an anti-siphoning event to be included in subsection 6(1) of the BSA is inadequate as it does not take into consideration the operation of subsections 115(1AA) and 115(1B) of the BSA. The failure to recognise the effects of these sections is to allow live sport on the FTA multi-channelling (which is effectively on the anti-siphoning list) and to nullify Government's policy intent, which is to restrict the way in which multi-channelling of sports on the list can occur.
3. The analogue switch-off date is not specified in the Bill but will be set by way of regulation.

The Premier Media Group (PMG) submission provides more details on this matter. FOXTEL support the points made in the PMG submission.

### **Part 3**

#### **Comments on legislative drafting**

This section contains FOXTEL's comments on specific drafting points.

| <b>Section/Paragraph</b>  | <b>Comment</b>   |
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| <ul style="list-style-type: none"><li>• Page 11 of Explanatory Memorandum: Options: Anti-</li></ul> | Does not include a reference to the "use it or lose it" scheme referred to |

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| <p>siphoning list events on multichannels: A3 Progressive change</p>                             | <p>on page 29 of the Explanatory Memorandum. FOXTEL notes that there is no reference to the “use it or lose it” scheme in any of the Bills. FOXTEL believes the scheme should be recognised in legislation to provide certainty.</p>  |
| <ul style="list-style-type: none"> <li>Page 31 of Explanatory Memorandum:</li> </ul>             | <p>The Explanatory Memorandum states that the Government will release a Digital Action Plan to expedite full digital conversion. However, this is not recognised in the legislation.</p>  |
| <ul style="list-style-type: none"> <li>General comment in relation to anti-siphoning:</li> </ul> | <p>Clarification is required to ensure that an anti-siphoning event includes each event specified on a notice notwithstanding the fact that the event may be removed by reason of the operation of the subsection 115(1AA) and/or subsection 115(1B). For example, a free-to-air broadcaster could wait until the event has been automatically de-listed under subsection 115(1AA) and then acquire the rights to that event in order to show that particular event on its multi-channel. Similarly, a free-to-air broadcaster could acquire the rights after it has been de-listed in accordance with subsection 115(1B) and then show the event on its multi-channel.</p> <p>To fix this oversight FOXTEL</p> |

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|   | <p>proposes that it be made clear that the multi-channelling exceptions allowing the televising of sports events on the anti-siphoning list notice do not apply to events that are automatically de-listed.</p>   |
| <b>Schedule 1</b>   |   |
| <ul style="list-style-type: none"> <li>Item 18: Section 41H(3)(c) SDTV multi-channelled national television broadcasting service – restrictions on televising anti-siphoning events during the simulcast period</li> <li>See also Schedule 2 Item 86 section 41C(3)(c), 41D(3)(c) and various references in Schedule 3 amendments.</li> </ul> | <p>This paragraph provides for an exception to the restriction on televising anti-siphoning events on the SDTV multi-channel by national television broadcasters. The exception is for televising part of the event in a news or current affairs program broadcast on the SDTV multi-channel.</p> <p>The same exception is included in numerous places throughout the Bill in relation to commercial television broadcasters and the televising of anti-siphoning events.</p> <p>FOXTEL is concerned that the reference to “part” of an event is unlimited. FOXTEL notes the EM states that it is intended that this exception allows for the televising of parts of an anti-siphoning event within a sport segment. However, the exception will not cover, for example a sports highlights program which</p> |

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|  | <p>televised significant excerpts from previously un-televised anti-siphoning events, broken only by short commentary segments. FOXTEL would prefer to see this intention acknowledged further in the section as in our view, it is very open to manipulation.</p>  |
| <b>Schedule 2:</b>   |   |
| <ul style="list-style-type: none"> <li>Item 4: sub-section 6(1): “earliest digital television switch-over date” and</li> <li>Item 8: section 35A: reviews about the allocation of new commercial television broadcasting licences</li> </ul> | <p>This review is to occur before the earliest digital television switchover date. FOXTEL notes that the definition of earliest digital television switch over date means the earliest date on which a simulcast period (within the meaning of schedule 4) ends. As currently drafted, the legislation does not provide for an amended simulcast period, which means the review may be required to occur by 1 January 2008.</p> <p>FOXTEL is generally concerned about the failure to amend the simulcast period in this Bill. FOXTEL notes that it is anticipated that this amendment will be made through regulations made under subparagraph 6(3)(c )(ii) of Schedule 4 (see page 62 of EM). However if this amendment is not made, the simulcast period will cease on 31 Dec 2008 for metro areas. This has</p> |

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|   | implications for a number of sections within this Bill.   |
| <ul style="list-style-type: none"> <li>Item 17: New subsections 122(7)(8)(9) and (10): program standards for children's programs and Australian content.</li> </ul> | <p>The effect of these amendments is that during the simulcast periods, standards made by ACMA relating to Australian content and children's television do not apply to the television broadcasting service unless it is the core service. The EM says that the intention is that the standards will be required to be serviced by the programming provider on the simulcast or main channel, thereby ensuring the free availability of this content to the widest possible audience during the simulcast period. The EM also states that this will also provide time for multichannels to be developed and become established before they are subject to the full suite of regulatory obligations.</p> <p>Subsection 122(9) also provides that the Australian content and children's television program standards do not apply to a licence issued under section 36 (BSB services) or subsection 40(1) (non BSB services) post 1 January 2007 during the first 5 years of operation. Again this concession is supposed to be designed to ensure that new services are able to emerge and establish</p> |

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|  | <p>operations in the market before the full spread of regulatory obligations is imposed.</p> <p>FOXTEL believes these exemptions are unfair particularly in view of the fact that there were no similar exemptions provided to the emerging subscription television industry at its launch.</p>  |
| <ul style="list-style-type: none"> <li>Item 29 paragraph 7.1 (ma) of schedule 2. Conditions of commercial television broadcasting licences – obligation to provide an HDTV multichannel during simulcast period</li> </ul> | <p>FOXTEL notes that this condition applies during the simulcast period. However, the definition of “simulcast period” has not been amended in the Bill to recognise the continuance of the period until at least 2010. If the amendment is not made by regulation as contemplated by the EM, then the obligation to provide an HDTV multi-channel would only apply until the end of 2008 which is inconsistent with the policy intention.</p> |
| <ul style="list-style-type: none"> <li>Item 66. Section 35AA. National broadcasters must provide HDTV multi-channelled national television broadcasting services during simulcast period etc:</li> </ul>                   | <p>See Comment in relation to Item 29.</p>   |
| <ul style="list-style-type: none"> <li>Item 69: New section 37DA-HDTV quotas and standards</li> </ul>  | <p>Note that HDTV digital mode is defined by reference to the program or service being broadcast or transmitted in digital mode in high definition format. There is no reference to a technical standard.</p>  |

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| <ul style="list-style-type: none"> <li>Item 70: subclause 37E(2) HDTV quotas</li> </ul>                             | <p>Paragraph 37E(2)(b) provides an end date for the HDTV quota period. However, this is defined by reference to the end of the simulcast period. This has not yet been amended and could potentially only have a life of 2 years.</p> <p>The obligation to comply with the HDTV quota for new commercial television broadcasting licences issued after 1 January 2007 will not commence until 2 years from the initial start date and ends at the end of the simulcast period. Query what licences this applies to as the section 40 licences are excluded and any new section 36 licences are not intended to be allocated until after the end of the simulcast period.</p> |
| <ul style="list-style-type: none"> <li>Item 85: subclauses 38(4) and (5) also subclause 38(6) Captioning</li> </ul> | <p>Broadcasters do not need to provide captioning on the SDTV or HDTV multi-channel service during the simulcast period unless the program has been transmitted on the core/simulcast service. In addition the commercial television broadcasting licensees operating under subsection 40(1) licences do not need to provide captioning during the first 12 months of their service.</p> <p>FOXTEL submits that this is unfair</p>   |

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|  | particularly in view of the lack of regulatory parity provided to the emerging subscription television industry.  |
| <ul style="list-style-type: none"> <li>Item 88: new clause 60C – review of content and captioning rules applicable to multi-channelled commercial television broadcasting services.</li> </ul> | See our comments above in relation to the failure to amend the simulcast date as this is relevant to the date by which the review must be completed which could be 2007 if the date is not varied.  |
| <b>Schedule 3</b>  |   |
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| <ul style="list-style-type: none"> <li>Item 3: section 41B(1)(2) and Services authorised by commercial television broadcasting licences during so much of the simulcast</li> </ul>             | Paragraph(a) refers to the simulcast period for the licence area. See comments above in relation to amending the definition of simulcast period. If the amendment is not made, this section may have no work to do as it permits an SDTV multi-channel post 1 January 2009 until the end of the simulcast period which maybe 31 December 2008.  |
| <ul style="list-style-type: none"> <li>Section 41C: Services authorised by commercial television broadcasting licences after the end of the simulcast period:</li> </ul>                       | As outlined above, FOXTEL is very concerned that the simulcast period definition has not been amended in the Bill. The effect of this is most evident in relation to new section 41C. If the amendment is not made, then section 41C permits the commercial television broadcasters to provide unlimited multichannels from 1 January 2009. This is clearly inconsistent with the policy intention. |



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| <ul style="list-style-type: none"> <li>Item 13: new clause 38(4)A of schedule 4:</li> </ul>  | See comments above in relation to definition of simulcast period.  |
| <ul style="list-style-type: none"> <li>Item 14: section 41B(1) and 41D(1)</li> </ul>   | Query references to subsection 41B(2). There appears to be two sections 41B inserted by the amendments.  |
| <ul style="list-style-type: none"> <li>Item 15: Section 41G(1)(2) – Primary commercial television broadcasting service.</li> </ul> | The obligation on ACMA to determine a primary commercial television broadcasting service is not compulsory i.e. "may". FOXTEL believes this determination should be mandatory. |

## **Section 2**

### **Communications Legislation Amendment (Enforcement Powers) Bill**

FOXTEL has previously made submissions through the Australian Subscription Television and Radio Association (“ASTRA”) in response to the DCITA paper “Proposed Reforms to the Broadcasting Regulatory Powers of the Australian Communications and Media Authority”. ASTRA was strongly of the view that the current powers provided to ACMA to enforce broadcasting regulation achieved an appropriate balance. ASTRA members have demonstrated a conscientious and disciplined approach to the regulation of their services with the subscription television sector being subject to very few investigations in its ten year history.

FOXTEL notes that the impetus for the reforms comes from ACMA’s concerns that its enforcement powers were inadequate to deal with the outcomes of the Australian Broadcasting Authority’s Commercial Radio enquiry in 2000 and ACMA’s response to a breach of the Commercial Television Code of Practice by the Ten Network in relation to the Big Brother program. FOXTEL believes it is unfair that the reforms have been generated by a portion of the community other than the subscription television where those broadcasters have far greater influence on the Australian community.

FOXTEL notes that the Broadcasting Services Act was seen as moving towards a more market-based, less interventionist approach to broadcasting regulation. The Explanatory Memorandum to the BSA states (in relation to section 5 and the role of the ABA):

It promotes the ABA’s role as an overseeing body akin to the TPC rather than as an interventionist agency hampered by rigid, detailed statutory procedures, and formalities and legalism as has been the experience with the ABT. It is intended that the ABA monitor the broadcasting industry’s performance against clear, established rules,

intervene only when it has real cause for concern, and has effective redressive powers to act to correct breaches.

Section 4 of the BSA sets out the regulatory policy to be pursued in the administration of the BSA. Key elements are:

- Different levels of regulatory control are to be applied across services according to the degree of influence they 'are able to exert in shaping community views' in Australia, (s 4(1)); and
- Regulation should be flexible and should aim for an appropriate balance between catering for public interest considerations and imposing unnecessary financial and administrative burdens on broadcasting service providers, s 4(2).

Set against this background, it is disappointing that the Government has decided to impose the same level of enforcement on the subscription television sector as the commercial television sector. However, FOXTEL understands that the Federal Government has determined to amend ACMA's enforcement powers as part of the new media framework and accordingly FOXTEL comments on the Bill in more detail below:

| Section/Paragraph                   | Comment   |
|-------------------------------------|---|
| 1. Item 134 – Sections 141 and 142: | <ul style="list-style-type: none"><li>• FOXTEL notes that the remedial directions provisions have been modelled on the remedial directions provisions in clause 53 of schedule 6 of the Broadcasting Services Act and the Telecommunications Act. FOXTEL notes that section 53 of schedule 6 provides that a person is not required to comply with the notice under subclause (1) until</li></ul> |

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|   | <p>the end of the period specified in the notice and that that period must be reasonable. This wording has not been included in section 141.</p> <ul style="list-style-type: none"> <li>• In addition clause 53 (4) of schedule 6 provides that the person is guilty of an offence if the person <u>intentionally</u> engages in the conduct. The word intentionally has been omitted from section 142 (1)(c).</li> </ul>                           |
| 2. Item 48 - Section 205W acceptance of undertakings:                       | <ul style="list-style-type: none"> <li>• Subsection 205W(4): this subsection provides that ACMA may by written notice given to a person cancel an enforceable undertaking. FOXTEL notes that there is no requirement on ACMA to outline the reasons for the cancellation which FOXTEL submits is unfair.</li> </ul>   |
| 3. Item 48 - Section 205Z matters to be included in an infringement notice. | <ul style="list-style-type: none"> <li>• FOXTEL has the following concerns in relation to the infringement notice provisions: <ul style="list-style-type: none"> <li>i. the issue of an infringement notice should recognise that it constitutes no more than an allegation of breach and payment does not constitute an admission for any purpose;</li> <li>ii. no public announcement should be made about the issue of an</li> </ul> </li> </ul> |

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|  | <p>infringement notice to, or the payment or non-payment of the amount by an identifiable person;</p> <p>iii. any public reporting of any infringement notices must be on an aggregate or anonymous basis. The recipient of the infringement notice should have the right to request a written copy of any information considered relevant by ACMA in making the decision to issue the infringement notice;</p> <p>iv. the recipient of the infringement notice should have the right to seek to have the infringement notice withdrawn by presenting material demonstrating that the factual basis on which the notice was issued was erroneous.</p> |
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### **Section 3**

#### **Television Licence Fee Amendment Bill 2006**

FOXTEL supports the inclusion of the revenue from the multi-channels in the calculation of the FTA licence fees, particularly in light of the fact that the FTAs have not paid any market based spectrum fee for rights to the spectrum.

## **Section 4**

### **Broadcasting Services Amendment (Media Ownership) Bill**

FOXTEL does not have any comment to make on the Broadcasting Services Amendment (Media Ownership) Bill.

## Attachment 1



21 September 2006

### **Media Release Sports Codes Unite for Sports Broadcasting Law Reform**

Major sports codes the AFL, NRL and FFA today formed a united front to support plans to reform sports anti-siphoning laws and bring more live sport to Australian fans.

Speaking at a joint media conference in Melbourne, the AFL, NRL and FFA CEO's supported the Government's proposal for a "Use it or Lose it" approach to sports broadcasting regulation. However, they said the change would only put more live sport on television if the resulting system is given "real teeth".

The sports codes said an effective Use it or Lose it scheme that enabled more live sport on TV would also increase funding opportunities and promote the interests of sports codes, fans and participants right through to families and kids at the grassroots level.

Sports broadcasting on television in Australia is governed by laws known as "anti-siphoning" rules that give free-to-air TV networks exclusive first rights over a large list of sporting events. The networks do not show all the sport that is set aside for them.

The anti-siphoning laws dictate that listed sports codes can only sell their television rights if they deal exclusively first with the free-to-air TV networks. This stops sports codes from directly managing their own television broadcasting rights which are core to the future of the sports.

A "Use it or Lose it" approach to sports broadcasting laws would see any sport not shown by the free-to-air TV networks fall off the anti-siphoning list allowing the sports codes to open those rights to competition from all broadcasters including free TV and pay TV. The result will be more live sport on television, and greater opportunity for sports codes to develop by being able to better manage their TV rights.

The CEO's of the AFL, NRL and FFA said that they supported reform of the sports broadcasting regulations because they should be in a position to decide what is in the best interests of their game, rather than any commercial interest.

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They added that they support a Use it or Lose it approach because it would protect any games that are currently shown of free to air television while allowing the sports codes to more freely deal with the rights that the free-to-air TV networks don't show.

AFL CEO Andrew Demetriou said: "The AFL supports Use it or Lose it as long as it is effective in practice. The current anti-siphoning rules restrict us in our objective to get maximum national, live coverage of the AFL. We value our television partnerships with both free-to-air TV and pay-TV and we should be able to deal directly with both partners to get the best results for the game and our fans."

NRL CEO David Gallop said: "Use it or Lose it will not take anything off free-to-air TV. A genuine Use it or Lose it reform will simply give the NRL better scope to reach and build a wider fan base nationally with additional live coverage. That would be the objective of all sports codes under a Use it or Lose it reform. This change is common sense and well overdue."

FFA CEO John O'Neill said: "The importance of a sports governing body being in control of its media rights is well-illustrated by Football's recent history. There is no question that the broadcasting arrangements which we have entered into this year with Fox Sports – arrangements which are only possible because Football is now free of previous anti-siphoning constraints – are arrangements which are in absolutely the best interests of the sport. They go a long way towards securing our future and provide a stable platform for growth and investment in areas critical for Football's continuing development – such as talent development and grass roots community support."

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