

26 August 2022

The Foxtel Group National Cultural Policy Submission

Foxtel welcomes the opportunity to make a submission to the Federal Government's consultation on the development of the new National Cultural Policy.

The Foxtel Group is a leading Australian media group that directly employs around 1,800 people; with a further 3.7 people employed in the wider community associated with our operations for every person we employ. We deliver a diverse range of Australian and international movies, entertainment, lifestyle, documentaries, news, and sport through a range of broadcast and streaming services to suit the needs of every Australian. The Foxtel Group makes a substantial contribution to the Australian economy and media landscape, including as a significant player in the local production and dissemination of high-quality Australian stories through its Foxtel and BINGE Originals.

Foxtel should not be subject to duplicative obligations

We understand that the Government intends to introduce an Australian content obligation for subscription video on demand (SVOD) services in the new National Cultural Policy and that this obligation is likely to sit under the 'Reaching the Audience' pillar.

Foxtel notes the policy objective in requiring multi-national SVOD providers, who are not currently obliged or incentivised to invest in new Australian content, to spend a minimum amount of their Australian revenue on new Australian content. However, as the Foxtel Group is already subject to an Australian content obligation, we ask that the Foxtel Group is excluded from any new Australian content regime so as to ensure that we are not subject to a duplication of regulation.

Unlike other local SVOD providers who also provide a broadcast service, Foxtel does not purchase additional content for its SVOD Services. Our model consists of acquiring content once and including the same content across different products within the Foxtel Group, via different delivery methods and at different price points, and the Foxtel STB Service is already subject to an existing Australian content obligation.

Duplication would pose considerable challenges for our business model which involves making Australian content investments once for the Foxtel Group for audiences of the traditional Foxtel broadcast service, Foxtel Now and the BINGE streaming service.

This is expanded further below.

1. The Foxtel Group Business Model

The Foxtel Group provides a range of subscription television services to Australians, delivered under different brands and via different technology including cable, satellite and IP, while using the same entertainment, news, and sports content.

We deliver a local premium subscription television broadcast service (**STB Service**), Foxtel, to over 1.5 million active subscribers in regional and metropolitan areas of Australia over cable, satellite and IP. In addition, select content from our premium STB Service is also made available to Australian consumers via our internet delivered streaming services Foxtel Now, Kayo Sports (1.3 million subscribers), BINGE (1.3 million subscribers) and FLASH at a lower price point.

Our two general entertainment streaming services are Foxtel Now and BINGE (our **SVOD Services** for the purposes of this submission). Foxtel Now is essentially a version of Foxtel's STB Service available via IP. Likewise, BINGE is a general entertainment product available by IP that also uses content otherwise available on Foxtel's STB Service.

Unlike other local SVOD providers who also provide a broadcast service, Foxtel does not purchase additional content for its SVOD Services. Instead, our model consists of acquiring paid content once and using the same paid content across different products under different brands within the Foxtel Group, via different delivery methods and at different price points.

This business model not only allows us to scale our business efficiently, now reaching 4.5 million total subscribers as at 30 June 2022, up 13% on the prior year, it allows us to manage our continued investment in high quality local and international productions while subscribers for our traditional Foxtel STB Service are in slow decline (down 10% in the year ending 30 June 2022).

Accordingly, Foxtel submits that it should not be subject to an Australian content obligation on its SVOD Services when its SVOD Services transmit content otherwise available on the Foxtel STB Service, and the Foxtel STB Service is already subject to an existing Australian content obligation.

2. The Foxtel Group is already subject to an Australian content obligation, and we already make a significant contribution to Australian culture, the economic landscape and the creation of Australian stories

Foxtel's STB Service is already subject to an Australian content obligation under the New Eligible Drama Expenditure (**NEDE**) scheme where 10% of all spending on Foxtel's drama channels is required to be on new local dramas. The NEDE requirement is unique to the Foxtel Group, already placing a significant regulatory burden on the company and creating an uneven playing field as we compete with unregulated existing and new competitors in streaming. Between FY16-FY21, Foxtel invested \$172million on programs that qualify as NEDE. Our Australian drama productions are renowned with our most recent successes being, *Upright*, *Love Me* and *The Twelve*.

The Foxtel Group's contribution to Australian storytelling and the Australian creative sector extends beyond the production of Australian drama. We commission a range of other Australian content each year across multiple other genres including lifestyle, factual and news. In fact, in addition to the \$172million spent on drama programs between FY16-FY21 that qualify as NEDE, the Foxtel Group also spent an additional \$232million on Australian factual, lifestyle and entertainment programming during that same period. Like drama, those investments also create valuable Australian jobs in the creative industries.

Accordingly, Foxtel submits that there is no policy justification or market failure that needs to be addressed through further regulation of our services, as the Foxtel Group is already subject to regulation that sees us make a significant contribution to Australian culture, the economic

landscape, and the creation of Australian stories that engage more than one-in-two Australian homes through the Foxtel STB Service and our SVOD Services.

3. The impact of an additional Australian content obligation on the Foxtel Group

The subscription television industry in Australia has been significantly impacted by competition from unregulated global streaming services such as Netflix, Amazon Prime Video, Disney+ and Apple TV+. As noted above, the Foxtel Group has had to adapt to the shift in the competitive landscape by developing competitively priced entry-point SVOD products that utilise the content from the Foxtel STB Service.

With an increasingly competitive landscape, the Foxtel Group is also facing a number of additional challenges:

- a) direct to consumer strategies of major studios (e.g. Disney+) and global purchasing power of major streaming companies (Amazon Prime Video) which sees reduced content available to buy;
- b) rising prices for content due to increasing competition for both international and local content;
- c) global inflationary pressures affecting internal costs and consumer confidence; and
- d) declines in the traditional live TV ad market as content moves to online platforms.

The introduction of an Australian content obligation on our SVOD Services, when the Foxtel Group is already subject to existing Australian content quotas on its STB Service, is unwarranted and would further amplify the existing regulatory distortions between Foxtel as a local provider, and its international competitors.

4. The Foxtel Group should be excluded from a new SVOD Australian content regime

The scope of the scheme needs to be carefully considered so that Australian-based companies such as Foxtel, who have long been committed champions for Australian stories, are not subject to a duplication of regulation regarding local content.

As noted above, our business model consists of acquiring paid content once and including the same paid content across different products within the Foxtel Group under different brands, via different delivery methods and at different price points. Foxtel's SVOD Services are Foxtel's low entry-point products delivered via IP that utilise the paid content otherwise available on the Foxtel STB Service.

Accordingly, we submit that the Foxtel Group needs to be excluded from any new Australian content scheme for SVOD providers as Foxtel is already subject to an Australian content obligation on its STB Service.

This will ensure the SVOD Australian content regime is appropriately targeted at capturing SVOD providers who are not currently required to invest in Australian content under any other existing framework. It will also ensure that Australian-based corporate groups such as Foxtel, that are already regulated and fulfilling an obligation to Australian content creation, with the

same content being utilised across various products within the group, are not “double regulated” and placed at a further competitive disadvantage.

5. The Australia–United States Free Trade Agreement (AUSFTA) Considerations

The Government also needs to consider the AUSFTA when developing an Australian content regime for SVOD providers as there are key provisions in the AUSFTA which may restrict the Government's ability to impose formal minimum Australian content expenditure obligations on US-based SVOD providers.

The AUSFTA deals with the circumstances under which the Government can regulate 'interactive video services' in a manner that may otherwise be inconsistent with certain obligations in the AUSFTA (including Australia's obligation to not impose or enforce any requirement, commitment or undertaking to achieve a given level or percentage of domestic content).

We understand that provided certain conditions are met, the Government may rely on a key reservation under the AUSFTA to impose and enforce content expenditure obligations on interactive SVOD services that are provided by enterprises carrying on business in Australia in respect of those services (even if they are based in the US or owned by US companies).

However, in order to rely on the reservation, the Government must make a finding that Australian audio-visual content is not readily available to Australian consumers. In addition, if such a finding is made, any measure can only be applied under the reservation:

- a) to services provided by an enterprise carrying on business in Australia; and
- b) in relation to the supply of the SVOD service itself.

Conclusion

The Foxtel Group is committed to investing in Australian stories and is already regulated to fulfill this obligation as part of the NEDE scheme. To ensure the Foxtel Group does not face duplicated regulation and does not face additional competitive disadvantage, it is important that the Foxtel Group be excluded from the scope of any new SVOD Australian content scheme. This will reflect the policy intent: to ensure that large global SVOD services, that are not currently regulated, have an obligation to contribute to Australian content creation.