INTELLECTUAL PROPERTY ARRANGEMENTS

FOXTEL RESPONSE TO PRODUCTIVITY COMMISSION DRAFT REPORT

JUNE 2016

1. INTRODUCTION

Foxtel is pleased to respond to the Productivity Commission's April 2016 Draft Report on Intellectual Property Arrangements (the **Draft Report**).

Foxtel creates and acquires original Australian productions and aggregates the best of international content here in Australia. We distribute linear channels and on-demand programming to 2.9 million Australian households in both regional and metropolitan areas—bringing unparalleled coverage of local and international news, current affairs, sport and entertainment programming.

Unlike some of our international competitors like Netflix we directly employ around 2,800 Australians, including in major offices in three states. We also support a large number of jobs and entities across the independent production sector, as well as at third party channel and content distributors operating in Australia. Together we make a significant contribution to the Australian economy.[1]

The Productivity Commission has been asked to provide advice on intellectual property settings which improve the overall wellbeing of Australian society. In our view, overall wellbeing will be improved when intellectual property arrangements support our ability to make a contribution to Australia through investments in:

- **Jobs**—through direct employment and by supporting production and other Australian partners.
- **Local and national economies**—including the communities in which our Australian programs are made.
- **Australian culture**—when we tell Australian stories we reflect Australian culture back to our audiences in a way that overseas content aggregators cannot.

Our priority is ensuring that intellectual property settings enable us to sustain our Australian-based business model, and maximise return on our investment in content—so that we can continue to make these contributions.

2. EXECUTIVE SUMMARY

This submission includes Foxtel's views on the following matters:

- **Territorial licensing and geoblocking**—where we argue that territorial licensing enables us to maximise returns when we export Australian content, and enables us to secure local rights to programs in order to sustain a viable Australian-based distribution business.
- **Copyright exceptions**—where we support clarity and certainty and oppose open-ended exceptions that will increase litigation and could enable others to free ride on our investments.
- **Copyright term**—where we explain the life cycle of content and that movies and television programs have a significantly longer life than the Commission's draft finding suggests.
- **Enforcement**—where we submit that well-targeted enforcement powers continue to have an important role to play, while acknowledging that content availability and competitive prices are also very important in reducing piracy.
- **Safe harbour**—where, in light of the current Australian legal position on authorisation liability, we question the rationale for expanding existing safe harbour provisions.

[1] The Australian Subscription Television and Radio Association (**ASTRA**), reports that, in 2014–15, the subscription television (**STV**) industry—of which Foxtel is a key part—invested more than $796 million in local television production, creating 8370 jobs and adding $2.083 billion to the Australian economy. See the ASTRA website at http://www.astra.org.au/industry/investment-and-jobs.

3. TERRITORIAL LICENSING AND GEOBLOCKING

Draft Report	Foxtel response
Draft recommendation 5.1 The Australian Government should implement the recommendation made in the House of Representatives Committee report *At What Cost? IT pricing and the Australia tax* to amend the *Copyright Act 1968* (Cth) to make clear that it is not an infringement for consumers to circumvent geoblocking technology. The Australian Government should seek to avoid any international agreements that would prevent or ban consumers from circumventing geoblocking technology.	Foxtel strongly opposes this recommendation. Geoblocking and technological protection measures are of critical importance to the sustainability of the Australian media industry. They enable creators to obtain a fair return on their investment and any attempt to assist or encourage Australians to circumvent geoblocks will irreparably damage creative Australia and Australian media businesses. If this recommendation was implemented the Government would effectively be encouraging Australian citizens to expose themselves to civil legal risks, as it would likely result in Australians breaching the terms and conditions on which international services are provided. This is not an appropriate function of government.

It is asserted in the Draft Report that:

> *Geoblocking results in Australians paying higher prices (often for a lesser or later service) than consumers overseas. Consumer rights to circumvent geoblocks should be enshrined in the Copyright Act 1968.*[2]

We dispute the first two assertions and oppose the recommended legislative amendment. It appears that the Commission has taken a very short-term approach to this issue which over-emphasises the assumed benefits of consumer access to overseas content, without properly considering the very serious ramifications this recommendation will have for Australia's production industry and Australia's creative life and culture. Nor does the Commission appear to have paid appropriate regard to content creators' right to determine how their content is distributed and monetised, or to have understood the significant countervailing power that international producers of film and television content, such as the major Hollywood studios, hold.

We fully acknowledge the importance of competitive prices and timely delivery of content in driving consumer satisfaction and overall wellbeing. These are also important factors when considering how to reduce online copyright infringement—and we deal with them in section 6 below, in the context of our views on powers to enforce intellectual property rights.

We also acknowledge that the rise of the digital economy and the empowerment of consumers to import generic goods and services from a broad range of international suppliers can increase consumer choice, competition and therefore consumer benefit.

However, it is important to look at territorial licensing and geoblocking of audio-visual content from the perspective of Australian content creation and consumption, rather than just from the perspective of Australian consumers importing international content.

It must be recognised that territorial licensing arrangements, and the intellectual property framework that supports them, have a critical role to play in improving consumer welfare by helping to sustain the Australian creative sector that must exist in order to keep creating and distributing Australian content and contributing to Australian cultural life.

[2] Draft Report, page 121.

It is useful to consider the role of geoblocking and international price discrimination in the production and distribution of content.

The role of geoblocking in the production and distribution of content

The Draft Report notes that '*Geoblocking is a technology that restricts a consumer's access to websites and digital goods and services to within their 'home market'. The practice enables rights holders and intermediaries to segment the Internet into different markets and charge different prices (or other different services) to consumers based on their location'*[3]*.*

The Draft Report is focussed on cases where Australians allegedly pay more for digital goods and services due to international price discrimination. However, the Draft Report fails to take into account the effects of geoblocking on the production of content. It also does not recognise that Australian consumers benefit from geoblocking where their willingness to pay for digital goods and services is lower than the willingness to pay of consumers in other territories.

From the perspective of content producers, geoblocking enables international price discrimination, whereby producers can charge different prices in different territories based on the willingness to pay of customers in that territory. By charging different prices in different territories, producers are able to capture more of the value of content they create compared to charging a uniform price.

By capturing more value, it follows that international price discrimination is good for the production of content and, as explained further below, is likely to have increased the amount of content produced in Australia. International price discrimination therefore has important implications for how much content is produced in Australia.

Territorial licensing supports Australian content production

Premium Australian television content, which is a hallmark of Foxtel's service, is extremely expensive to make. For example, as previously submitted to the Commission, Screen Australia statistics show that in 2013–14:

- a mini-series cost, on average, $1.28 million *per hour* of broadcast material to make; and
- telemovies cost, on average, $2.04 million *per hour* of broadcast material to make.[4]

Screen Australia has also recently published a report on its 'Screen Blog' which suggests that these investment costs are rarely, if ever, recouped. The report examined 16 successful drama programs that Screen Australia has invested in and found that the 16 productions had a total production cost of $145 million, which was more than 3 times the total gross revenue accumulated by the productions to date of $43 million.[5]

Foxtel believes that in order to attempt to recoup these costs content owners must have the flexibility to licence their content how they see fit in order to maximise return on their investment.

Territorial licensing enables Foxtel and its co-producers in premium programs like *Wentworth*, and the upcoming political drama *Secret City*, to determine the territories in which their programs are licensed for distribution and the terms (including price) on which they are distributed.[6] If a content owner can

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[3] Draft Report, page 126.

[4] Screen Australia reports the average cost per hour of Australian productions in different genres on its website at https://www.screenaustralia.gov.au/research/statistics/dramatvdramahoursxformat.aspx.

[5] S George and B Rheinberger, *The Screen Blog,* 'When do TV sales translate into profit' – available at http://thescreenblog.com/screenintel/when-do-tv-sales-translate-into-profit/

[6] The producer of *Secret City*, Joanna Werner, has recently spoken about the positive international response to this Foxtel program, and export potential, based on its unique Australian qualities. Ms Werner noted that *"I promised when we went there we'd make Canberra look sexy, and we absolutely did...But not only that, it looks sinister and chilling, intelligent and*

engage in international price discrimination, the returns from investing in that content will increase and is likely to lead to further investment in quality Australian productions. On the other hand, constraining the producers of Australian content from engaging in international price discrimination (by forcing them to charge a uniform price) will reduce the returns that Australian content creators can obtain from the sale of their content. It is useful to consider these points by reference to other examples of programs Foxtel and our partners have recently exported.

Exporting Foxtel programming to the world

Foxtel has always invested in high-end Australian productions that present nuanced stories and reflections of Australian culture—for example, dramas like *Love My Way, Tangle* and *Tim Winton's Cloudstreet*. In the factual genre, Foxtel programs like *River Cottage Australia*, *The Memorial* and *Grand Designs Australia* showcase Australian landscapes, talents and history.

As demand for premium quality television of this nature has increased globally (fuelling the so-called golden-age of television), so too has demand increased for Foxtel's original content overseas.

Wentworth, Foxtel's critically acclaimed contemporary reimagining of the iconic *Prisoner* series (now in its fourth season), has been sold in numerous territories, and indeed remade in other languages. Notably, in a recent deal, Netflix has bought seasons 1–4 for its international services including the US and Canada. Central to that arrangement is the ability of Netflix to limit access only to its international customers, allowing Foxtel and the program producers to preserve the program for Foxtel customers in Australia. In this way Foxtel can earn revenue directly from Australian subscribers, while also earning significant revenue from the overseas Netflix deal.

Other examples include:

- *Coast Australia*, which highlights the archaeology and history of the Australian coastline—this program has been sold in 24 countries with some of the most lucrative deals having been made with platforms in the United Kingdom, Canada and New Zealand; and
- the upcoming drama *The Kettering Incident* (an otherworldly mystery thriller set in Tasmania), the video-on-demand rights to which have already been sold to the Amazon service in the US and the Lightbox service in New Zealand.

In each of these cases the service providers have required comfort that those titles will remain exclusive in their respective territories. Our ability to restrict access to the program on Foxtel to Australians is central to their willingness to pay for exclusivity.

Furthermore, in the absence of a local platform to market and distribute these programs it is much less likely that international audiences would learn about our original content, meaning that it would not be acquired or viewed internationally.

Indeed, the economics of the content business depend on licensing rights in different windows on different services and at different prices in different territories (including taking into account the willingness of local consumers to pay). Content owners might also licence content by reference to factors such as language, platform and amount of usage.[7]

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interesting. I think it's remarkable...We know from the response we've had from our international partners, NBC Universal, that people are finding it incredibly unique that there's this amazingly high-tech, high-powered city in the middle of this bush wilderness. It doesn't look like anywhere else in the world" – 'New mini-series Secret City puts Canberra on the world stage', *The Age*, 23 May 2016 – available at http://www.theage.com.au/act-news/canberra-life/new-miniseries-secret-city-puts-canberra-on-the-world-stage-20160523-gp1h6o.html#ixzz49WqapgzP.

[7] For example, producers might pre-license rights directly to a commissioning broadcaster for a defined initial period of time and/or number of runs specific to their platform(s). They may then further license program rights (often through distributors) to a succession of other broadcasters in defined markets, languages, platforms, and periods of time and/or numbers of runs.

Territorial licensing supports Australian content business models

Australian content businesses, including free-to-air television services, local subscription video on demand services and subscription television businesses like Foxtel, rely on being able to acquire relatively inexpensive content from international suppliers (for example, US studios which primarily monetise content in their home market and often offer it at lower prices to international markets). This enables content services to offer a comprehensive catalogue of content in an economic way and helps generate enough revenue to invest in Australian content which, as noted above, is costly. It also allows us to develop here in Australia the product and service innovations for which Foxtel is renowned.

If territorial licensing is undermined—including because consumers are encouraged to circumvent geoblocking—rights holders are likely to sell rights on a pan-continental or global basis, which will undoubtedly increase the cost of acquiring those rights. As pointed out in relation to recent proposals from the European Commission to combine European territories into a common market for digital goods:

> *…there is a risk that only the largest media organisations would be able to afford to purchase the relevant rights, which may lead to a small number of global players exercising significant market power, at the expense of national media groups or independent organisations.*[8]

In addition, it is unlikely that Australian content businesses will have the resources to acquire global distribution rights to international content, as Australia is a relatively small player in the international market and there are significantly larger distribution companies internationally that operate on either a global or a multi-territory basis. This may lead to the elimination of local services and in turn, a dramatic reduction in the production of local Australian television content, given that such content is unlikely to be commissioned on a regular basis by international distributors.

Undermining the sustainability of Australian-based distribution platforms will also have impacts for governments where, for example, forgone company and payroll taxes will impact overall tax receipts and so the nation's ability to invest in services for Australians (instead revenues will flow to international entities which do not pay these taxes in Australia). Lower levels of employment in the Australian content and distribution industry may also result in workers' own consumption of goods and services falling, with broader impacts on the economy.

Consumer impacts and international agreements

For consumers, fewer platforms may lead to less competition, higher prices and the loss of local content (where it is assumed that large multi-national providers will not, for smaller populations like Australia, produce local content for each territory in which its service is consumed). It is also likely that international operators will not offer a bespoke service for Australia, as is currently the case for Netflix.[9] Therefore, the price paid by Australian consumers for these international services will fluctuate with the rise and fall of the Australia dollar.

By circumventing geoblocks consumers may also expose themselves to civil legal risks. By asserting that they are based in the overseas jurisdiction in which the service is based, when they are not in fact in that jurisdiction, they are likely to be breaching the terms and conditions on which the international service is provided.

In relation to international trade agreements, Foxtel submits that it is highly unrealistic to expect that Australia would be able to change the way in which intellectual property rights are managed globally just by changing its negotiation position.

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[8] See analysis from international law firm Bird & Brid at http://www.twobirds.com/en/news/articles/2015/global/digital-single-market-consequences-of-banning-unjustified-geoblocking.

[9] Flow-on effects could include the loss of consumer safeguards tailored to Australian audiences—for example, well-known program classifications and consumer advice.

The IT pricing inquiry and the evidence for draft recommendation 5.1

Finally, Foxtel is concerned that it appears that the Commission has simply adopted some of the recommendations of the IT pricing inquiry without interrogating the 2013 *At what cost? IT pricing and the Australia tax* report, or the evidence on which its findings were based.

The Draft Report acknowledges that the IT pricing inquiry was '*hampered by a lack of comprehensive data'* and that the findings of that inquiry were based on survey analysis submitted by participants to the inquiry.[10] Critically however, that survey evidence related to software and digital downloads, music, games and e-books.[11] The IT pricing inquiry did not make any findings in relation to film and television content. It must also be acknowledged that even if the IT pricing inquiry had made findings in relation to film and television content, they would now be out of date given a range of new film and television content services have launched in Australia since the conclusion of the IT pricing inquiry (including Netflix, Stan and Presto), and the fact that Foxtel has significantly changed its pricing model (including by reducing the price of our entry level tier by half).

As detailed below, the Draft Report's reference to "later or lesser" service is also incorrect. For the last few years Foxtel has broadcast its most popular international programs "Express", within hours or a few days of their global premiers. In the case of *Game of Thrones* broadcast occurs simultaneously with the east coast of the US. Subscription video on demand (**SVOD**) services such as Presto and Netflix generally release major new content 'day and date' with their international release.

The suggestion that Australians receive a lesser service is also superficial and fails to understand the market. The fact that Foxtel aggregates a very large amount of international content from multiple providers means that, for many consumers, they can get a more comprehensive range of what they want, often at a lower cost, than they could if they lived, for example, in the US.

In the absence of current and comprehensive evidence that Australian consumers' are subject to international price discrimination with respect to film and television content, and given the very serious ramifications for the Australian content industry that are likely to result from implementing draft recommendation 5.1, we urge the Commission to refrain from including this recommendation in its final report.

4. COPYRIGHT EXCEPTIONS

Draft Report	Foxtel response
Draft recommendation 5.3 The Australian Government should amend the *Copyright Act 1968* (Cth) to replace the current fair dealing exceptions with a broad exception for fair use.	Foxtel strongly opposes the recommendation. Fair use will introduce significant uncertainty into Australian law. The parameters of the defence will require continual testing through the Courts, at rights holders' expense. Fair use will benefit unlicensed third parties (eg search engines) at the expense of rights holders and will have a negative impact on creative output.

Fair use

The Draft Report states that '*a new user right of 'fair use' should be implemented to balance the excessive term and scope of copyright protection with user rights*'.[12]

[10] Draft Report, page 127.

[11] Draft Report, page 127; House of Representatives Standing Committee on Infrastructure and Communications, *At what cost? IT pricing and the Australia tax,* pages 64–73.

[12] Draft Report, page 121.

As outlined in section 5 of this submission, Foxtel strongly disputes the assertion that term and scope of copyright protection in Australia are excessive. Notwithstanding this, Foxtel continues to be strongly opposed to the introduction of fair use in Australia.

As Foxtel outlined in its submission in response to the Issues Paper, our main concerns in respect of a fair use defence are listed below:

- Fair use will introduce significant and unnecessary uncertainty into Australian law. A fair use exception would be wide, vague and uncertain, while at the same time it would significantly erode the scope of copyright protection which is so critical in protecting investment in Australia's cultural industries. Foxtel acknowledges that the uncertainty of introducing fair use is recognised in the Draft Report.

- The parameters of fair use will need to be tested through the Courts, which will be expensive and will result in the Courts making policy decisions rather than the Parliament. It will take many years to develop new precedents and the scope of fair use in Australia will need to be developed at rights holders' expense. Copyright owners should not have to incur significant litigation costs to protect their investments and to set the boundaries of new and uncertain law.

- The introduction of fair use will weaken copyright protections and allow unlicensed third parties to benefit at the expense of rights holders, at a time when there is clear evidence of unauthorised use of copyright materials by a significant proportion of the Australian population.

- Fair use will have negative economic consequences and have a significant impact on creative output due to the associated uncertainties. Foxtel strongly believes that this type of reform will have a significant impact on creative outputs due to the uncertainties it will create.

We don't agree that fair use is a pre-condition to innovation (we believe that Foxtel is a good example of an innovative Australian company) and we continue to believe that both the Commission and the ALRC Inquiry have not given sufficient weight to finding of the UK Hargreaves Review of Intellectual Property that '*the economic benefits imputed to the availability of Fair Use in the US have sometimes been over stated*'.[13]

"Out of commerce works"

Foxtel was surprised to see that the Commission has gone beyond the ALRC's recommendation and suggested that the ALRC's recommendation represents '*the minimum level of change the Australian Government should pursue*'.[14] In particular, the Commission is of the view that fair use should also apply to orphan works and, alarmingly, so called "out-of commerce" works.

In our view, the Commission's comments in relation to "out-of commerce" works are misguided and do not appear to take into account the fact that a rights holder may elect for a copyright work to be "out-of commerce" for a period of time, as a legitimate distribution strategy and as a means of maximising its return on the investment.

For example, it is common practice for content like movies to be distributed using a "windowing" strategy, which may mean that the tittle is not available to consumers for a limited period of time—for example, the time between the conclusion of the theatrical window and the commencement of home entertainment distribution (eg DVD, or electronic rental or sell-through).

By way of further example, a television program may be held back by a distributor for a period of time after the initial broadcast of a season of a television program, until close to the broadcast of the subsequent season of the program, so as to encourage consumers' excitement and anticipation for the subsequent season and in turn, generate additional sales for the program. However, the Draft

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[13] I Hargreaves (2011), *Digital Opportunity: A Review of Intellectual Property and Growth* (the **2011 Hargreaves Paper**), page 45.

[14] Draft Report, page 153.

Report asserts that *'if a work is not being supplied to the market, concerns about copying and 'free riding' are moot*'.[15] This is entirely incorrect.

As the Draft Report acknowledges, '*[f]ew countries have tried to solve the problem of out-of-commerce works…[m]overover, the solutions proposed appear only to address those works held in libraries or cultural institutions, rather than any work that is commercially unavailable…'*.[16] It would be hugely out of step with Australia's international counterparts for the Commission to make a recommendation that would severely limit rights holders' ability to deal with their copyright interests as they see fit, and Foxtel strongly urges the Commission to refrain from making any such recommendation.

The proposed objective of the fair use exception

Finally, Foxtel is alarmed by the draft recommendation that '*the new [fair use] exception should contain a clause outlining that the objective of the exception is to ensure Australia's copyright system targets only those circumstances where infringement would undermine the ordinary exploitation of a work at the time of the infringement*'.[17]

We do not fully understand what this means and how the inclusion of such of clause is intended to operate in a legal sense; is the Commission's intention to put the onus of proving that a use is not fair on rights holders, rather than requiring the user to prove that the use is fair? Such a proposal would be strongly resisted by Foxtel.

It is also worth pointing out that the inclusion of such an objects clause is likely to distinguish an Australian fair use defence from the US version of the defence that the Commission is keen to adopt. This may mean that the US case law cannot be considered in Australian cases. While we do not support the introduction of fair use, we believe it will be in the interests of all parties that US case law is able to be considered in Australian cases in the event that Australia moves to a fair use regime.

5. COPYRIGHT TERM

Draft Report	Foxtel response
Draft finding 4.2 The copyright term is too long. While hard to pinpoint an optimal copyright term, a more reasonable estimate would be closer to 15 to 25 years after creation; considerably less than 70 years after death.	Foxtel disputes this finding.

In the Draft Report, the Commission sets out its belief that the current copyright term is excessive. While acknowledging that Australia has limited capacity to unilaterally reduce the term of copyright protection due to its international obligations, the Commission estimates that the optimal copyright term would be closer to 15 to 25 years after creation.

The Commission also asserts that most works have a commercial life less than 5 years.[18] Foxtel strongly disputes that this is the case when it comes to professional film and television content.

While Foxtel offers its customers a dedicated movie channel showing the latest Australian and international films (the 'Foxtel Movies Premiere' channel), Foxtel also offers its customers eight genre themed "library" movie channels. The vast majority of films broadcast on these genre-based channels are more than 5 years old, and many would be in the 15 to 25 category, if not older.

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[15] Draft Report, page 156.

[16] Draft Report, page 158.

[17] Draft recommendation 5.3.

[18] Draft Report, page 17 and page 93.

It is also the case that some of the popular television programs licensed by Foxtel for its general entertainment channels are far older than 5 years. An example that exceeds the maximum copyright term proposed by the Commission is *The Simpsons.* The first season of *The Simpsons* was broadcast on the Fox Network in the United States in 1989, more than 25 years ago. However, *The Simpsons* continues to be one of the most popular and highest rating programs broadcast on Foxtel's FOX8 general entertainment channel, which is primarily targeted at the 16–39 age group.

Moreover, for the local productions that Foxtel commissions, in many cases Foxtel continues to earn royalties on these programs for far longer than 5 years. For example, Foxtel continues to earn royalties in relation to drama programs like *Love My Way* (2004–2007) and *Satisfaction* (2007–2009), and expects to do so for many years to come. But it is not just our premium drama programs that have a long commercial life—we have recently licensed *Crime Investigation Australia* (2005–2006) to an Australian free-to-air television broadcaster and there are many more examples.

Based on this evidence, Foxtel encourages the Commission to refrain from including draft finding 4.2 in the Commission's final report.

6. ENFORCEMENT

Draft Report	Foxtel response
Draft finding 18.1 The evidence suggests timely and cost-effective access to copyright-protected works is the most efficient and effective way to reduce online copyright infringement.	Foxtel questions this finding. Foxtel makes content available in a timely and cost-effective manner but piracy continues to be a major problem in Australia. The overseas evidence demonstrates site blocking is an extremely effective way to reduce online copyright infringement.

Foxtel acknowledges that everyone has a part to play in reducing the incidence of piracy. We have and will continue to provide ways to access content quickly, conveniently and at reasonable prices. However, as set out below—and in addition to well-targeted education programs, which reinforce the value of copyright to the Australian economy and culture—it is our view that appropriate enforcement action remains an important part of the response to piracy.

The need for a holistic approach to piracy is demonstrated by reference to the current season of *Game of Thrones*. Despite airing on Foxtel at the same time as in the US, and despite special pricing for Foxtel Play customers,[19] reports indicate that Australians again led the world in accessing pirated version of the first episode.[20]

Price and availability

Foxtel makes a wide range of content available on tablets, mobile phones and other popular devices—as well as through our leading set-top-boxes, the iQ and MyStar:

- Set-top-box viewing includes linear channels and Anytime (on-demand) viewing;
- Foxtel Play, our internet TV service, streams TV, news, sports and movies over the internet—both live and on-demand. Subscriptions are available on a month-to-month basis, with no lock-in contract;

[19] During a special offer period leading up to and just after the premiere of the first episode of season 6 of *Game of Thrones* (between 18 and 29 April 2016), Foxtel Play offered a discounted subscription to the Premium Movie & Drama pick, which includes *Game of Thrones* and a range of other premium programming available on Foxtel's' showcase channel.

[20] 'Game of Thrones season six: Australia tops world in illegal downloads', *The Guardian*, 26 April 2016 – available at https://www.theguardian.com/tv-and-radio/2016/apr/26/game-of-thrones-season-six-australia-tops-world-in-illegal-downloads.

- Foxtel Go is our companion app provided at no extra charge to residential (cable and satellite) and Foxtel Play account holders, providing both live and on-demand content—again, this is delivered via a wide range of mobile and tablet devices; and

- Presto is our standalone SVOD service, which offers TV shows and movies with subscriptions available month-to-month, with no lock-in contract.[21]

Competitive pricing is of course very important to consumers. Indeed, in 2014, Foxtel reduced the entry price for our full cable and satellite service by around half with pricing for this product now beginning at $26 per month (with access to 45 channels and a significant library of on-demand content on a 12 month plan).

Foxtel Play begins at $25 per month and Presto TV and Presto Movies packages start at $9.99 per month each (with the Presto Entertainment Bundle, which includes both TV shows and movies, starting at $14.99 per month).

Given the depth of content available via these services they represent very good value for money, especially considering our significant efforts to bring key international content to subscribers as soon as possible after its international premiere.

In addition to Foxtel's offerings, there are a range of new services that Australians can choose to subscribe to, or to access online for free. Subscription VOD services Netflix and Stan are available for a low monthly fee and offer their customers a range of film and television content, including some premiere content and content which is offered "day and date" with international services. Each of Australia's free to air broadcasters offer an online "catch-up" service, which enables Australians to watch programs online following their linear broadcast. These services (with the exception of the ABC's offering) are ad supported, but there is no direct charge to the customer to view the program online. When it comes to film and television content, Australians have never had more choice or flexibility as to how to access this content.

Express content on Foxtel

Foxtel's Express content strategy brings popular overseas television series to Australia simultaneously with, or very quickly after the overseas premiere.

The most high profile recent example is season 6 of *Game of Thrones*, episode 1 of which premiered on Foxtel's showcase channel at 11.00 am on Monday 25 April 2016, at the same time as the US. Each episode has also been given an encore screening at 7.30 pm Monday nights, and has been available to stream directly following the first Monday morning broadcast on Foxtel's Anytime service and on Foxtel Go.

There are numerous other examples, including those set out below which were broadcast on Foxtel over the last 6–12 months.

Same day as the US

- *Ray Donovan*
- *The Affair*
- *Vinyl*
- *Show Me A Hero*
- *Orange is the New Black*
- *Outlander*
- *Jane the Virgin*
- *The Flash*
- *Arrow*
- *DC's Legends of Tomorrow*
- *Inside Amy Schumer*
- *Last Week Tonight With John Oliver*
- *Jimmy Kimmel*
- *The Daily Show*
- *The Nightly Show*

[21] Presto TV is a joint venture with the Seven Network. Foxtel is a 50 per cent owner of Presto TV.

Within a week of the US premiere	
• *Girls*	• *Chicago Fire*
• *Veep*	• *Shameless*
• *The Knick*	• *Silicon Valley*
• *Into The Badlands*	• *Workaholics*
• *The Leftovers*	• *Baskets*
• *Togetherness*	• *Idiotsitter*
• *Penny Dreadful*	• *Tosh.0*

Enforcement

In our submission in response to the Commission's Issues Paper, Foxtel noted the cost and challenges of enforcing copyright, particularly in relation to torrent and streaming sites hosted overseas.

We also welcomed the introduction of "site blocking" powers under section 115A of the *Copyright Act 1968* (Cth) (the **Copyright Act**)*.* As initial proceedings under the new power, including those initiated by Foxtel and other rights holders, are still on foot, it is surprising that the Draft Report observes that *'changes to the law to encourage Internet service providers to cooperate with rights holders, as well as litigation, have only had a modest impact in reducing infringement.*'[22] Foxtel is confident that this legislative development will have a material impact on piracy in Australia and there is international precedent and strong evidence to support this.

For example, research published by academics from Carnegie Mellon University in April 2016 regarding the effects of site blocking in the UK on consumer behaviour found that the blocking of 53 piracy websites in November 2014 led to a notable decrease in piracy, as well as an increase in visits to both paid and ad-supported legal streaming sites.[23]

Foxtel also disputes that the introduction of section 115A of the Copyright Act was *'controversial*'[24] and queries why the Commission would list some of the concerns that were raised in relation to the section 115A without listing any of the benefits.

The site blocking bill was referred to a Senate Committee for consideration. A public hearing was held and the Committee received 49 written submissions, most of which broadly supported the underlying objectives of the bill.[25] Having considered all of that evidence (which included the concerns referred to

[22] Draft Report, page 477.

[23] The study found that blocking 53 piracy websites in the UK in November 2014 resulted in:

- a 90% drop in visits to the blocked sites;
- no increase in usage of unblocked sites;
- a 22% decrease in total piracy for all users affected by the blocks (and a 16% decrease across all users overall);
- a 6% increase in visits to paid legal streaming sites like Netflix; and
- a 10% increase in videos viewed on legal ad-supported streaming sites like BBC and Channel 5.

See B. Danaher, M.D. Smith, R. Telang, *Website Blocking Revisited: The Effect of the UK November 2014 Blocks on Consumer Behavior*, 18 April 2016 – available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2766795.

[24] Draft Report, page 491.

[25] Report of the Senate Legal and Constitutional Affairs Legislation Committee, June 2015, paragraphs 1.4 and 2.1 – available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Copyright_Bill_2015/Report.

in the Draft Report), the Senate Committee nevertheless recommended that the bill be passed with some amendments (which have been incorporated into the legislation).

7. SAFE HARBOUR

Draft Report	Foxtel response
Draft recommendation 18.1 The Australian Government should expand the safe harbour scheme to cover the broader set of online service providers intended in the *Copyright Act 1968* (Cth).	Foxtel opposes this recommendation. Extension is not warranted as following the iiNet case, it is currently unlikely that online service providers can be liable for authorising copyright infringement. If the safe harbour regime is extended then the site blocking power should also be extended to all parties that have the benefit of safe harbour.

Foxtel opposes the proposed extension of the safe harbour scheme.

The Commission notes in its Draft Report that '*Australia's safe harbour scheme indemnifies ISPs from being held liable for alleged copyright infringements occurring over their networks…Without the safe harbour scheme ISPs could be found liable for the copyright infringement of their users (known as 'authorisation liability')'.*[26]

Foxtel does not agree that this is the case. In fact, under Australia law it is currently unclear whether service providers (let alone carriage service providers) can be found liable for authorisation of copyright infringement. The key case on point in relation to carriage service providers and the issue of authorisation is the High Court's decision in *Roadshow Films Pty Ltd & Ors v iiNet Ltd*[27] (the **iiNet case**). As is well known, in the iiNet case the High Court found that iiNet was not liable for authorising the infringements of its users, for reasons including that there were no reasonable steps that could have been taken by iiNet.

Notwithstanding the decision in the iiNet case, the Commission is of the view that the safe harbour regime should be extended and that '*the operation of authorisation liability and the coverage of Australia's safe harbour regime are separate issues'.*[28] This is misguided. Until Australia's copyright laws are amended to clearly provide that carriage services providers and a broader category of service providers can be liable for the infringements of users of their networks, Foxtel's view is that there is no justification for the expansion of the safe harbour regime.

If the Commission proceeds with recommendation 18.1, Foxtel submits that the Commission must also have careful regard to Australia's authorisation law and consider whether it is operating effectively following the iiNet case—and in Foxtel's view, it is not. Foxtel also submits that the Commission should recommended that that the definition of 'service provider' in any expanded safe harbour regime must not be overly broad and that only those entitles that merely facilitate communications are able to take advantage of an expanded safe harbour scheme.

Finally, Foxtel notes that if the safe harbour regime is extended to service providers, section 115A of the Copyright Act (Australia's new site blocking power) would be one of the only remaining provisions in the Copyright Act to apply only to carriage service providers. If service providers are to have the benefit of safe harbour, then Foxtel's view is that section 115A should be similarly extended, such that rights holders are able to seek orders requiring service providers to block access to websites hosted overseas which have the primary purpose of infringing copyright.

[26] Draft Report, page 486.

[27] [2012] HCA 16 (20 April 2012).

[28] Draft Report, page 490.