

22 October 2024

The Foxtel Group's submission to the ACMA's Consultation "Implementing Australia's TV prominence framework"

The Foxtel Group welcomes the opportunity to make a submission in response to the AMCA's consultation paper "Implementing Australia's TV prominence framework".

1. Introduction

- 1.1 The Foxtel Group is one of Australia's most progressive and dynamic media companies reaching more than 4.7 million Australian homes overall via our different services¹. Our services include:
- i. a premium subscription television broadcast ("**STB**") service which has approximately 1.2 million residential subscribers and which is available over satellite and internet, via our proprietary set top boxes known as the iQ;
 - ii. the subscription streaming services Kayo Sports (1.6 million subscribers), Binge (1.5 million subscribers), Flash and Foxtel Now; and
 - iii. the Hubbl puck and television which was launched in Australia in March 2024.
- 1.2 The Foxtel Group has a long history of supporting access to free-to-air ("**FTA**")² services through our STBs, first through the retransmission of linear FTA television broadcasting services and most recently via access to both FTA linear and broadcast video on demand ("**BVOD**") services on our IP connected STBs. Without any regulatory mandate to do so, the Foxtel Group has:
- i. provided the primary linear FTA television broadcasting services EPG prominence on Foxtel's STBs for many years;
 - ii. supported easy access to the FTA BVOD services via our IP connected STBs, including a FTA BVOD sign-up as part of the guided set up of the STB; and
 - iii. integrated linear FTA television broadcasting content and FTA BVOD content into our search and recommendation engine feature, as a core feature of our IP connected STBs.
- 1.3 The Foxtel Group notes the following guidance provided in the Revised Explanatory Memorandum to the *Communications Legislation (Prominence and Anti-siphoning) Act 2024* (Cth) ("**Act**"):
- in relation to section 130ZZL Primary User Interface: This definition is intended to be broad and flexible enough to apply to a large range of potential interface

¹ Foxtel Group Fiscal 2024 Fourth Quarter and Full Year Earnings, <https://foxtelgroup.com.au/newsroom/foxtel-group-fiscal-2024-fourth-quarter-and-full-year-earnings>

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

designs. This is necessary because each type and brand of device typically has its own interface design.”³; and

- “a prominence framework must be carefully calibrated to avoid imposing unreasonable or unintended burdens on the manufacturers of TV devices. In the extreme, an onerous or overly prescriptive framework could increase the cost of TV devices, or limit the functionality or number of models available to Australian consumers.”⁴

1.4 Foxtel Group submits that the above supports the ACMA not taking an overly prescriptive approach to the determination of guidelines or instruments in relation to the application of these provisions.

1.5 In addition, the evidence supports the fact that Australian viewers do not currently have any difficulties with locating the FTA BVOD Services:

- The Social Research Centre found that, when asked whether it was easy or difficult to navigate to FTA services on TVs (including smart TVs), 76% of respondents said it was “easy” or “very easy” to navigate to linear FTA television broadcasting services and 62% of respondents said it was “easy” or “very easy” to navigate to FTA BVOD services.⁵ The main reasons that respondents gave for finding it difficult to navigate to FTA services (either linear or BVOD) were that they had problems with signing in, passwords, or creating accounts⁶;
- in February 2023, the ACMA reported that the number of Australian adults who reported watching any FTA TV (linear and BVOD) in a given week increased from 64% in 2021 to 70% in 2022 – that includes 56% who viewed linear FTA television broadcasts and 38% who viewed FTA BVOD services⁷;
- Australia’s viewership of FTA BVOD services in the 7 days to June 2023 was 43%, up from 18% from June 2017⁸;
- Australians spent more time in 2023 watching FTA services than any other service. Australians on average spent a total of 7.7 hours a week watching FTA services (linear and BVOD) in 2023; this is compared to an average of 5.8 hours a week spent watching paid subscription streaming services⁹; and

³ Revised Explanatory Memorandum to the Act, p 21.

⁴ Ibid, p 58.

⁵ The Social Research Centre (February 2023), “The 2022 Television Consumer Survey – Summary Report” prepared for the Department of Infrastructure, Transport, Regional Development, Communications and the Arts, https://www.infrastructure.gov.au/sites/default/files/documents/tv_consumer_survey_2022_-_final_report_0.pdf, p.p 46-47.

⁶ Ibid, p 43.

⁷ ACMA report (February 2023), “How we watch and listen to content” <https://www.acma.gov.au/articles/2023-02/overall-free-air-tv-audience-increases-first-time-five-years>

⁸ ACMA report (December 2023), “How we watch and listen to content” <https://www.acma.gov.au/publications/2023-12/report/communications-and-media-australia-how-we-watch-and-listen-content> .

⁹ Ibid.

- i. FTAs also remain a popular choice when it comes to the consumption of news with FTA TV being the main source of news in 2022.¹⁰
- 1.6 This supports the conclusion that Australians do not have issues with locating FTA services and the greatest barrier to date has been the log in details applied by the FTAs to their own services. Foxtel Group submits this should also be taken into account by the ACMA in determining next steps.

2. ACMA Approach – timeline

Question 1

Do you have any views on the ACMA’s proposed approach?

- 1.7 Foxtel Group is supportive of the proposed approach in relation to the implementation timeline. However in view of the timelines for implementing changes, would recommend the ACMA attempt to issue the final guidelines as soon as possible within the Phase 3 window (January – March 2025).

3. Defining a Regulated Television Device

- 1.8 As noted by the ACMA, the definition of “regulated television device” is defined in subsection 130ZZI (1) of the BSA as domestic reception equipment that:
- (i) is capable of connecting to the internet and providing access to broadcasting video on demand services; and
 - (ii) is designed for the primary purpose of facilitating the viewing of audiovisual content.
- 1.9 The Revised Explanatory Memorandum to the Act (“**EM**”) notes as follows:
- “[The definition of regulated television device] is intended to exclude devices that are not, on balance, designed for viewing audiovisual content (that would include television programs). Such devices may have the capability of viewing such content, but that purpose would be ancillary or secondary to other intended purposes. Indicatively, the types of devices that are unlikely to be considered to be designed for the primary purpose of facilitating the viewing of audiovisual content would include mobile phones, tablets, video gaming consoles and laptops.”¹¹

¹⁰ See n 7 above.

¹¹ EM, p 17.

Question 2

What are your views on the proposed considerations when applying the primary purpose test? Is there anything else the ACMA should consider?

- 1.10 Foxtel Group supports the ACMA’s proposed factors to be taken into account when making a determination in relation to the “primary purpose” test and suggests that the ACMA should also have regard to the primary purpose for which consumers purchase and use the device. This is another factor that is transparent and verifiable indicator of a device’s primary purpose.
- 1.11 Foxtel Group also recommends that the ACMA produce and release a summary of devices that are currently available that would fall into each of the device types listed in Table 1 and that this list should be updated on a regular basis to provide certainty to consumers and manufacturers.

Question 3

Is there a device the ACMA has not mentioned in this paper that you think should be considered?

- 1.12 As mentioned in response to question 2, Foxtel Group submits that the ACMA should produce and release a summary of devices that are currently available that would fall into each of the device types listed in Table 1 and that this list should be updated on a regular basis to provide certainty to consumers, FTA service providers and manufacturers particularly in view of the implications for manufacturers if their device fails to comply with the minimum prominence requirements.

Question 4

Do you consider there is a need for the ACMA to clarify whether certain specific domestic reception equipment is, or is not, a regulated television device?

- 1.13 See answers to questions 2 and 3.

4. Defining a Primary User Interface

Question 5

Should the ACMA exercise its discretion to make descriptions or requirements for a device’s primary user interface? Should the descriptions or requirements refer to the primary user interface extending beyond the static landing page for access to VOD apps, to include scrolling (horizontally or vertically)? Do ribbon or row layouts require different consideration to grid layouts?

- 1.14 Foxtel Group submits that the ACMA should not exercise its discretion to make descriptions or requirements for devices’ primary user interfaces at this time.

Alternatively, Foxtel Group submits that any such instrument should be limited to recognising that the primary user interface extends beyond the static landing page to include scrolling, without limitation.

- 1.15 Foxtel Group notes that the EM provides that the definition of primary user interface of a device is intended to be broad and flexible enough to apply to a large range of potential interface designs. This is reflected in the definition itself which is not limited to the first screen on the home screen or the main screen and contemplates that it may include the main interface where applications are most commonly accessed.
- 1.16 For this reason, it is critical that the ACMA does not apply the limits proposed by Free TV in its submission to the Senate Standing Committee in relation to the definition of “primary user interface” i.e. that the primary user interface should be the interface first viewed on the first opening without the need for scrolling or taking any further action. This would be contrary to the clear intention of the Government which was to provide manufacturers with greater flexibility in relation to the definition and the means by which they may satisfy the minimum prominence obligations. It is also consistent with the research mentioned above which indicates that the majority of Australians currently believe it is easy to navigate to the FTA BVOD services.
- 1.17 The, Foxtel Group agrees with the ACMA that the primary user interface is a virtual space that extends beyond the bounds of the screen and that scrolling may be required. This principle clearly aligns with the intention of Government; recognises that each type and brand of device typically has its own interface design; and takes into account the guidance in the EM that the prominence framework must be carefully considered to avoid imposing unreasonable or unintended burdens on manufacturers¹². However, we strongly disagree that the scrolling should be limited to a space that is double the initial view.
- 1.18 If the ACMA is to issue guidance or make a determination on this point, then Foxtel Group recommends that this is limited to confirming that the primary user interface extends beyond the static landing page (first screen of the home page or main interface) to include scrolling, without limitation.
- 1.19 The Foxtel Group is strongly of the view that the ACMA should not be seeking to further define the extent to which a user may need to scroll to satisfy the minimum prominence obligations.
- 1.20 Finally, we note that the ACMA’s power under section 130ZZL(3) was intended by the Parliament to be used to make a determination in respect of specific devices where there may be uncertainty or a dispute, rather than broad guidelines applying to all regulated television devices. In this respect, the EM states that, *‘[t]his power [under*

¹² EM, p 58.

section 130ZZL(3)] is important as there may be contention about what precisely constitutes the primary user interface on individual devices. Allowing the ACMA to determine what constitutes an interface, or the requirements relating to an interface, will help to provide a 'circuit breaker' in these cases' (our emphasis)¹³.

Question 6

Do you support treating content aggregating interfaces differently from other regulated television devices when describing requirements for the primary user interface?

- 1.21 Foxtel Group does not support treating interfaces of regulated television devices with content aggregating interfaces in a more restricted manner than other regulated television devices. There is nothing in the Act or the EM that supports this and the clear intention of Government is that the prominence framework should avoid imposing unreasonable or unintended burdens on manufacturers.
- 1.22 The Foxtel iQ and Hubbl devices are both examples of devices where the home screen primarily aggregates content rather than apps. In the case of the Foxtel iQ, in addition to the ability for a user to scroll via the relevant home screen, the FTA apps can be accessed via one button push and in the case of the Hubbl device, 2 button pushes. This will often be faster than other regulated television devices where the user must scroll to double or more the initial view to access all FTA apps. Foxtel Group submits that the ACMA must ensure flexibility in this regard to ensure that devices with content aggregating interfaces are not disadvantaged relative to other devices that may seek to satisfy the minimum prominence obligations via the home screen or main screen.

Question 7

To what extent do existing contractual arrangements between device manufacturers (or operating systems) and content services providers (such as SVOD providers) affect the ability to provide prominence to BVOD apps on the primary user interface?

- 1.23 The Foxtel Group is subject to certain contractual arrangements that impose obligations on it in relation to other content service providers. However, based upon the Foxtel Group's experience, the current proposed definition of primary user interface provides enough flexibility to accommodate the requirements of other content service providers.
- 1.24 Foxtel Group is also the provider of content services via apps e.g. Kayo Sports, Binge, Lifestyle and Flash. It is critical that Foxtel is always able to promote its own services

¹³ EM p 21.

first and ahead of the FTA BVODs as customers are primarily purchasing the Hubbl device to view Foxtel Group produced content and in the case of Foxtel iQ, the device is linked to the subscription to the Foxtel services. It would be contrary to the Government's media policy of ensuring a level playing field for Australian media businesses to be required to prioritise third-party content ahead of their own content. It would also be unreasonable for Foxtel Group to incur the costs of manufacturing devices which are intended to showcase Foxtel Group content to then have to promote the FTA BVOD services first.

Call for evidence 1

The Foxtel Group has attached screen shots of its home screens for both the Hubbl and Foxtel iQ devices in Annexure 1 and 2.

5. When is a Regulated Television Service Offered.

Question 8

Should the ACMA determine circumstances in which a regulated television service is, or is not, taken to be 'offered'? Is the ordinary meaning of 'offered' adequate?

- 1.25 Foxtel Group supports a determination by the ACMA that the FTAs should be required to ensure the compatibility of their apps, and that they are capable of being offered, on all regulated television devices that are intended for sale and/or use in Australia. Foxtel Group submits that it is inconsistent with the arguments made by the FTAs in relation to the importance of prominence to then have the ability to determine the devices for which they will develop device-compatible applications. There should also be consistency of the offering (subject only to technical limitations) which means that the FTAs could not discriminate in favour of certain platforms and offer different functionality to that offered on others.
- 1.26 In addition, once a regulated television service is available on a device, the regulated television service provider must continue to invest in that application to ensure it continues to be available on that platform and offer features consistent with the app made available on similar devices. This is standard practice for all aggregation platforms available in Australia and the expectation of all app providers that are available on those platforms. If this is not the case, then the FTAs can use this as a means for requiring the device manufacturers to incur the costs associated with ensuring the ongoing availability of those apps on the platforms.

Question 9**Is there sufficient transparency about which apps are currently offered to which manufacturers?**

- 1.27 Foxtel Group currently has no issues with access to compatible versions of the FTA apps for its devices.

Question 10**What circumstances should the ACMA consider for a regulated television service to be, or not be, taken to be 'offered'?**

- 1.28 See answer to question 8.

Question 11**Under what circumstances might a manufacturer 'reject' an app that meets its quality and timeliness criteria?**

- 1.29 Foxtel Group submits that device manufacturers must be able to reject an apps that fails to meet the technical performance criteria set for a platform and that an app should not be considered to be "offered" in such circumstances.
- 1.30 A manufacturer aims to ensure consistency of experience for consumers and for that reason will typically provide app providers with detailed technical specifications and require applications to undergo testing prior to public launch. These specifications and testing procedures are standard for the platform. If the FTA app fails to meet the specification then the manufacturer must be entitled to reject it rather than offer a compromised experience to the consumer.
- 1.31 The same issue arises in relation to ongoing availability of that app as part of the device. Manufacturers must be able to suspend a regulated television service application if the application fails to meet ongoing availability and performance levels to a threshold consistent with other applications available on the device e.g. 99 % uptime assessed over a month.

Question 12**Are there different circumstances that the ACMA needs to consider for different kinds of regulated television services?**

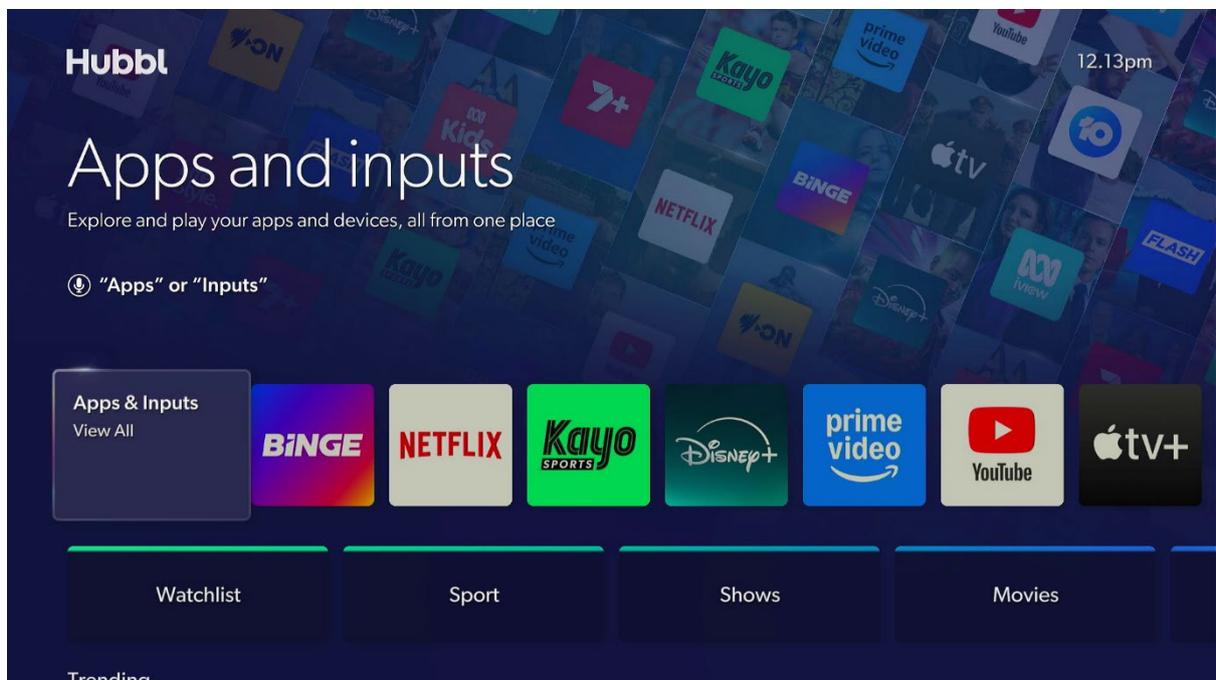
- 1.32 Foxtel Group is not aware of any different circumstances that need to be considered for different kinds of regulated television services. However, the Foxtel Group notes the comments in response to Question 11 that there must be consistency of experience across all devices on which the regulated television service application is offered.

Annexure I.

Hubbl Home Page



Hubbl Home Page – Apps & Inputs Rail is one click down



Hubbl Apps & Inputs Page (accessed through first tile in Apps & Inputs rail), two clicks from the home page



Annexure 2: Foxtel iQ

Foxtel iQ – Home Page

- The iQ Home page showcases content from all providers available through Foxtel (Foxtel owned and operated channels, FTA channels, third party linear channels; third party SVOD and FTA BVOD apps)

Foxtel iQ Home page example – showing the entire page when user scrolls down and the type of curated carousels



1 Home Hero

Editorially curated - featured programs include all Foxtel and third party content providers (incl SVOD and FTA 3PAs). Content changes multiple times per day. Circular carousel that features around 6 tiles.

2 Curated Carousels

Carousels are created based on desired editorial outcome (e.g. 'Trending Now' shows programs that are being discussed in social media and other off platform forums). These carousels highlight the breadth and depth of content available on Foxtel platform (including FTAs, third party apps etc).

3 Dedicated 3PA Carousels

Some third party app providers will have a permanent carousel (and defined vertical position) on the Home page (contractual requirements).

4 Personalised Carousels/Recommendations 3PA Carousels

Some third party app providers will have a permanent carousel (and defined vertical position) on the Home page (contractual requirements).

5 Dedicated 3PAs carousel

All third party apps are displayed in this carousel. The position of some apps are contractual obligations.

6 Linear Channel carousels

The UI has the ability to present carousels that promote linear channel content - this is particularly useful when promoting live sport events and linear channels that the household frequently view.

Foxtel iQ – Apps Menu

- All apps available through Foxtel iQ are shown here. One click from the home page.

